view of the Court. In these cases a reservation was carefully made of all the rights of the fishermen competent to them under that Act, and when the case was finally disposed of the following interlocutor was pronounced (*reads from report*). I apprehend that what we require to do here is just to insert that very careful reservation that these parties may be able to vindicate their rights in common with the other fishermen of Scotland. I particularly recommend the parties to carefully consider the judgments of the Court in these two reports. I concur in the views expressed there by Lord Justice-Clerk Inglis.

LORD NEAVES—I concur in the opinion. I think this interdict is partly right and partly wrong—partly right, in so far as to the claim for removing, because the party had no right otherwise or under the Statute to have a residence there; partly wrong, in going so far as regards future acts of interdict. To interdict a party from "returning to or squatting on, or intruding, &c," is certainly a very remarkable thing. It should be remembered, in regard to interdicts that they require to be prepared with great accuracy and precision, because breach of interdict infers punishment for contempt of Court. An interdict should both be carefully sought and carefully weighed by the Judge who grants it. This is an interdict that no judge should ever have granted in the circumstances of this case. I don't know what squatting is; it is not a *nomen juris* here whatever it may be in some of the colonies. An interdict in such broad terms would be no interdict at all, because the question of the right or the wrong of the intrusion would still remain behind. The interdict is much too wide. It looks as if it would cover even putting a foot on the ground for fishing. We must cut it down.

LORD BENHOLME absent.

Agent for Reclaimer—W. H. Muir, S.S.C.

Agents for Respondent—Adam, Kirk & Robertson, W.S.

*Saturday, November* 21.

## FIRST DIVISION.

### SPENCER *v.* CUMMING.

*Sheriff—Debts Recovery Act*, 1867—*Proof—Note of Evidence—Plea of Payment.* In cases under the Debts Recovery Act, where no note of evidence is taken under the 9th section, the parties cannot ask the Court to order the case to be reheard, and new or additional evidence taken under the 12th section.

Spencer brought an action, under the Debts Recovery Act 1867, 30 and 31 Vict., c. 96, against Cumming, for a sum of £28, as the balance of an account for goods furnished.

The defender pleaded—"1. The account libelled is erroneous. Most part of the goods therein charged for were neither ordered nor got by the defender; and the sum sued for is not due. 2. The defender frequently asked a correct account from the pursuer's traveller, as well as from the pursuer's house, but they failed to furnish it till this action was raised, and thus, in any view, no expenses can be claimed."

After a proof, neither party requesting a note of evidence to be taken, the Sheriff-substitute (CAMPBELL) pronounced this interlocutor—"Finds it proved, in point of fact, that the goods specified in the account libelled were furnished to the defender, and invoiced at the various times when they were received by him, at the prices charged for them in the account libelled: Therefore repels the defences, and decerns against the pursuer for the sum of £28, 6s. sterling, with £3, 16s. 7d. of expenses."

The Sheriff (DAVIDSON) adhered.

The defender appealed.

By section 9 of the Debts Recovery Act it is enacted that, unless required by either party, it shall not be necessary for the Sheriff to take a note of the evidence, or of the facts admitted by the parties; but upon such requisition, which shall only be competently made before any parol evidence has been heard, and not afterwards, he shall take such note, setting forth the witnesses examined, and the testimony given by each, and the documents adduced, and any evidence, whether oral or written, tendered and rejected, with the ground of such rejection, and a note of any objections taken, with admission of evidence, oral or written, allowed to be received, &c.

Section 10 enacts that, where neither party has required the Sheriff to take such note, it shall not be competent to appeal against his judgment in so far as his findings in part are concerned, and such findings in part shall be final, and not subject to review by any Court.

Section 12 enacts that, in the event of an appeal, the Court shall hear the appeal without any written pleadings; but the Court may order the case to be reheard, and the evidence taken of new, or additional evidence to be taken, by the Sheriff or Sheriff-substitute.

GLOAG, for appellant, contended that the Sheriff had wrongly refused to allow him to enter on a certain line of proof, with the view of proving payment, and that he ought now to be allowed to enter upon it.

THOMS for respondent.

The Court held (1) that the defence stated involved no plea of payment, and was necessarily so understood by the Sheriff; and (2) that the consequence of the parties having neglected or declined to ask for a note of the evidence was, that the Court could not now inquire into the grounds of the Sheriff's judgment. He might have admitted incompetent, or rejected competent evidence, but by the Statute the Court could now only look at the facts as they were found by him: new or additional evidence could not be allowed where there was no record of evidence at all.

Appeal dismissed.

Agents for Appellant—Wilson, Burn, & Gloag, W.S.

Agent for Respondent—L. Mackersy, W.S.

*Wednesday, November* 25.

### MURRAY (GALBRAITH'S TRUSTEE) *v.* EGLINTON IRON COMPANY AND BLAIR.

*Landlord and Tenant—Mineral Lease—Agreement—Road—Illegal Use—Reparation—Surface Damage—Superior.* Mineral tenants were entitled by agreement to sink a pit in a certain field, to which they were to have ish and entry by a road which led to a mansion-house, and which was the only access thereto. *Held* that the mineral tenants must not use the road for the purposes of their mineral traffic in a way inconsistent with the use of the road as an access

to the mansion-house, and therefore that they were not entitled to lay the road with iron rails. *Held*, on construction of clauses in a lease, that the proprietor was not entitled to damages from the mineral tenant for injury done to his house and garden by smoke and vapours from the mineral works.

In April 1839 William Blair of Blair granted to John Macdonald junior, writer in Glasgow, a lease of the whole minerals on his estate of Blair, to endure till Whitsunday 1920. Power was given to the lessee to raise, calcine, and carry away the minerals in the lands; "and for these ends to sink pits, or to make open casts or mines, to erect engines for drawing and draining the said metals and minerals, and water thereof; to form hills for depositing and calcining the said ironstone, or for depositing the said coal, lime, and fire and alum clay, or for making coke; as also to erect whatever works may be necessary for making fireclay bricks, with power also to make depots, roads, railways, waggon-ways, and canals;" and, generally, to do everything necessary for working the minerals conveyed.

It was provided by one clause in the lease "that the lessee and his foresaids should be liable for and bound to pay all damage that should be done to the surface, or grounds and buildings thereon, by the working of the minerals in virtue thereof." It was declared that after the end of the subsisting agricultural leases the surface damage should be fixed at 50s. per imperial acre; and, with regard to buildings, the damage to which was to be separately paid for, a special clause provides "that no damage should be payable for injury done to any buildings to be erected on the ground comprehended in this lease, after the date hereof, unless such buildings should have been placed and laid down in situations previously pointed out and approved of by a mining engineer to be appointed by the landlord and lessee."

The defenders, the Eglinton Iron Company, are now in right of this lease, as lessees in room of John Macdonald.

In December of the same year, 1839, Mr Blair granted a feu-disposition to a James Macdonald of the lands of Doggartland, now called Ryefield, part of the estate of Blair, and extending to about 40 acres imperial measure. The disposition was granted under reservation of the whole minerals in the lands, and specially under reservation of the full benefit and effect of the lease of these previously granted to John Macdonald, "the said John Macdonald junior and his foresaids paying to the said James Macdonald and his foresaids the whole surface and other damages to be sustained by the said James Macdonald and his foresaids in consequence of the operations of the said John Macdonald junior and his aforesaids, in terms of said lease." A special reference is then made to the clause limiting the surface damages to 50s. per acre, and providing that no damage to buildings afterwards to be erected should be compensated, unless the building was erected on a site approved of by a mining engineer.

The feu-duty for which the feuar became bound under this disposition was £80 per annum, with the usual duplication at the entry of each heir and singular successor.

The feu-right constituted by this deed passed in 1845 to Mr James Alison, a leading partner of the Ayrshire Iron Company, which had acquired right to the lease of the minerals. In 1847 Mr Alison built on the lands a mansion-house of considerable size (thenceforward called Ryefield House), at the cost, it is said, of upwards of £3000. Mr Alison having become bankrupt, the house and lands of Ryefield were sold under his sequestration; and after passing through some intermediate holders, they were acquired in 1853 by the late Dr Hugh Aird Galbraith, the father of John Graham Galbraith, whose trustee is pursuer of the present action. By him, and his son John Graham Galbraith, large additional sums appear to have been laid out on the house of Ryefield.

From the time that Ryefield House was built, the access to it from the turnpike road to Dalry was, and still continues to be, had by a farm or servitude road, diverging from the public road near Dalry, and running up to the point at which the avenue to Ryefield House branches off, beyond which it ran on to the statute-labour road called the Baidland Road. This road to Ryefield was by every account a narrow, irregular, ill-made farm-road. But, such as it was, it was made to serve the purpose of access to Ryefield House, there being in fact none other.

In the year 1861 the defenders, the Eglinton Iron Company, by this time in right of the mineral lease, proposed to sink a pit for raising and calcining iron in front of the house of Ryefield. Dr Galbraith, then proprietor of Ryefield, had strong and very reasonable objections to a pit being sunk at that spot; and a communing ensued between him and the defenders, which issued in an arrangement by which the pit was removed to a less offensive position. The arrangement was embodied in a deed of lease, by which Dr Galbraith let to the company a small field and some adjacent pieces of ground, amounting in all to about 2½ acres, in which the operations of the company were to be carried on. The lease is dated in April 1862, but declares its endurance to be from Whitsunday 1861 to Whitsunday 1920. The rent was to be the nominal sum of one penny yearly; but a price or grassum of £300 was stipulated for and paid as the equivalent for the rights and benefits conveyed to the company by Dr Galbraith; and what these were the lease very distinctly states.

The deed sets forth in its narrative that the Iron Company (the second party in the lease), "in carrying on their operations under the foresaid lease, lately resolved to sink a pit in the foresaid lands of Doggartland or Ryefield, with the view of working ironstone, and intimated their intention to the first party (Dr Galbraith), indicating a spot on the south side of his mansion-house of Ryefield (which has been erected since the date of the foresaid lease) as the most suitable place for sinking a pit, in order to work the ironstone to advantage: And whereas the first party conceived that it would be very injurious to the amenity of his mansion-house were a pit sunk in front or on the south side thereof, and made a proposal and offer to the second parties to the effect that if they would change the position of the pit, and sink the same in the small field after mentioned, situated on the west side of Ryefield House, and pay him £300 sterling, he would, in so far as he has the right and power so to do, allow them not only by means of the said pit to work minerals out of the neighbouring or adjoining lands, as well as minerals out of the said lands of Doggartland, but also give to the second parties full permission to use the whole of the lands contained in the said small field and adjacent portions of land, during the period after mentioned, for

working minerals, depositing rubbish, or for any purpose they might think proper, and relieve the second parties of all surface and other damages which may be done to the said field and adjacent portions of land, or become exigible under the foresaid mineral lease in regard thereto; and which proposal and offer the second parties have accepted." The deed on this narrative goes on to let the ground for the purposes specified; in return for which the company bind themselves to pay the sum of £300, and nominal yearly rent, "for the piece of ground and powers and privileges hereby let, during the whole period foresaid, and that in full of all claims competent to the said first party against the second parties, for whatever damages may be done to the said small field and adjacent portions of ground, as delineated on the said plan, by the second parties' operations.

It is added—"And farther, the second parties hereby engage and bind themselves not to sink a pit or erect machinery on any part of the said party's lands of Doggartland or Ryefield, situated in front or on the south side of the mansion-house, at any time hereafter, notwithstanding of their rights in virtue of the said mineral lease; but declaring that the rights of both parties hereto, under and in terms of the mineral lease before mentioned, in so far as not altered by these presents, and *quoad ultra*, are reserved entire."

It is expressly declared that the lease of the ground in question is granted, "with right of access to the said field at the north-east corner thereof, from the present road leading to Ryefield Mansion-house."

George Murray, C.A., trustee of John Graham Galbraith, who suceeded to Ryefield on the death of his father Dr Galbraith in 1864, now brought this action against the defenders asking declarator that they had no "right or title to lay down iron plates or rails upon the farm road leading from the public turnpike road between Dalry and Maich Bridge, through the pursuer's lands, past and forming an access to the farm-steading of Doggartland and the mansion-house of Ryefield, belonging to the pursuer the said George Murray, and other farm-steadings, to the Statute Labour Road, called the Baidland Road; nor to use the said road so as to render the same or any part thereof impassable for carts or carriages, or dangerous as an access to the pursuer's property," decerniture against the defenders to remove the "iron plates or rails already laid by them on said farm road, and to restore the said road to a proper state of repair, or to the state in which it was before it was interfered with by them;" and also claiming a sum of damages. These damages were claimed partly in consequence of the defenders having laid down and maintained rails upon the road in question, and partly in consequence of injury done to the pursuer's house and grounds by smoke and ashes proceeding from the mineral works of the defenders in the field near Ryefield.

The Lord Ordinary (KINLOCH) held, in point of law, that the act of the defenders, the Eglinton Iron Company, in laying and maintaining the said rails was a wrongful and illegal act, and ordained them forthwith to remove the same; found the defenders liable in damages to the pursuer for the injury sustained in consequence of the said proceeding, and modified the same to £97, 10s.; but found that the defenders were not liable to the pursuers for any sum in name of damages in respect of injuries occasioned by the smoke and vapours aforesaid.

His Lordship assoilzied Blair, with expenses.

In the note annexed to his interlocutor, the Lord Ordinary, after a narrative of the facts as above, said that the points at issue between the parties were substantially two—

"I. The first of these relates to certain operations performed by the defenders on the road leading to Ryefield House, access by which to their pit is granted them by the last mentioned lease of 1862. It appears that about the end of 1861 (the lease ran from Whitsunday of that year), the defenders laid down on this road, for the whole length of it down to the turnpike-road, iron rails, with a flange on one side rising above the rail, on which they ran down their waggons from the pit to the public road, along which they then ran them towards the furnace. This they still continue to do. The pursuer contends that the company had no legal right so to deal with the road; and he now asks a decree finding the proceeding wrongful, and ordaining the defenders forthwith to remove the rails. He asks also damages for the injury which he alleges has been done by their operations on the road while they lasted, to the lands and house of Ryefield.

"The Lord Ordinary is of opinion that the defenders had no legal right to lay down these rails on the road. They had given them a right to the road. But unless their title expressed something to the contrary, it appears to the Lord Ordinary that the right must be considered as limited to the use of the road as it existed, and in its normal character of a road. To lay down rails on the road seems to the Lord Ordinary an inversion of its proper use as a road, which nothing but express agreement would sanction. There cannot be a doubt that the proceeding effected a great change in the character of the road, and one which was very prejudicial to the ordinary traffic passing alongst it. The road is proved to have been so narrow that there was no room left outside the rails for a separate track for other vehicles. These could only go up or down on the line of the tramway; and when the waggons were on the rails they might be said to enjoy a monopoly of the transit. A one-horse vehicle using the rails would require to go off to let the waggons pass; and, besides the difficulty of performing the operation with a spirited horse, the act of getting the wheels over the flange was likely to injure the vehicle. With regard to a carriage and pair, the horses could only use the road by each straddling over a rail—an inconvenient and perilous mode of locomotion. In these and other particulars an essential alteration was produced on the condition and character of the road by laying rails on it—such as, in the estimation of the Lord Ordinary, could not be legitimately effected without the consent of all having right to use the road.

"It has been the subject of express decision, both in this country and England, that rails cannot legally be laid down on a public street (*Stewart* v. *Greenock Harbour Trustees*, 8th June 1864, 2 Macph. 1155). It appears to the Lord Ordinary that the principle of the decision applies equally to the case of a private road to which two or more parties have right. The ground of prohibition is in both cases an inversion of the character of the road. What was held was, that one party having right to the use of the thoroughfare, was not entitled to lay rails on it without consent of another also having right. The principle applies directly in the present case.

"It was argued by the defenders that to lay down rails on the road was, if not necessary, highly expedient for all concerned in its use; because to use the road as it originally was by heavily-loaded waggons, such as those from the pit, would so cut it up and keep it in such a state of rut and mud as would make it almost literally impassible. There was a good deal of evidence, on the other hand, leading to the inference that the enclosure by the rails of a space betwixt them, trodden always in the same line by the horses' feet, had a not dissimilar tendency. The Lord Ordinary could not give to this consideration, as presented by the defenders, the effect of legitimating what was in itself a legal wrong. The bad effect of the waggons using the original road was at best theoretical. At worst, it would only involve more frequent repairs, more substantial road-metal, and a better bottom than at present; and a question might arise, at whose cost the increased repairs would be exigible. The Lord Ordinary could not now determine incidentally how the road should be dealt with in order to make it suit the increased traffic brought on it. He can only determine that it could not be altered from its original condition at the will of one of the parties entitled to use it without the consent of the others; leaving all the questions arising out of that common right of use to be determined as they may arise.

"The defenders further contended that the circumstances disclosed in evidence imported a consent by the proprietor of Ryefield to the rails being laid, either by way of implied contract, operated by the lease of 1862, or of after acquiescence in the proceeding. The Lord Ordinary has very carefully considered the proof with reference to this argument, but he cannot find sufficient ground on which to sustain the plea. The lease merely gives "right of access to the said small field at the north-east corner thereof, from the present road leading to Ryefield Mansion-house;" and it would be simply importing words into the contract which are not there to hold this to imply a right of laying rails on the road, more particularly considering how easy is was to give this right in express terms if it was intended to be given. The defenders observed that the date of signing the formal lease was 2d April 1862, while the rails are proved to have been laid down not later than the December previous, and they argued that this very fact imported an acquiescence in the rails. But the lease had its commencement at Whitsunday 1861, and must have been arranged before the rails were laid; and it would be somewhat too strong to infer an approbation of the rails from the mere circumstance of the lease being signed in the terms arranged without any express protest. It is proved that from time to time, especially after the death of Dr Galbraith, in March 1864, complaints were made of the rails; and a circumstance, in itself almost conclusive, is that in 1865 the rails were for a certain space altered in their construction to a flange of less depth, with the view of meeting Mr Galbraith's complaints. The proceeding, as the Lord Ordinary thinks, was a tentative one, and it was not satisfactory. In considering this plea, the Lord Ordinary must assume that the laying of the rails was in itself wrongful; but was so consented to, or acquiesced in, as to bar the present challenge on the ground of illegality. The Lord Ordinary is unable to discover sufficient grounds on which to rest such a conclusion.

"The Lord Ordinary being of opinion that the laying of the rails has been a wrongful act on the part of the defenders, it necessarily follows that he must grant decree for their removal. The pursuer has also right to damages for the injury sustained by their existence for a certain period. The Lord Ordinary cannot doubt that the value of Ryefield was depreciated by the road sustaining this conversion, which in several ways altered prejudicially the character of the access to the mansion-house. The damage is best represented by the depreciation of the estimated rent recoverable by letting the mansion-house; and looking to the evidence led, the Lord Ordinary considers that this is moderately struck at £15 per annum—giving a sum of £97, 10s. as incurred down to the present date. The parties agreed that if damages were found due they should be calculated to the date of the judgment.

"II. The other point of controversy between the parties regards a claim of damages advanced by the pursuers in respect of the injury done to the house and grounds of Ryefield by the smoke and vapours emitted in the process of calcining the ironstone in the adjoining field. The Lord Ordinary can have no doubt that such injury is sustained to a greater or less extent, both in the diminished amenity of the house as a residence, and in the positive damage (however much exaggerated) sustained by the garden and plantation. He has, at the same time, a very clear opinion that this claim of damages is groundless.

"It is perhaps a summary yet conclusive answer to the claim that the pursuer (or his predecessor), having let the field for the express purpose of iron being therein raised and calcined, cannot ask damages for the consequence of what he thus expressly consented to. The iron could not be raised and calcined without these consequences following; and a proprietor who lets his field for the express purpose of iron being raised and calcined cannot legitimately complain of the consequences necessarily arising. The case falls within a well-known category. What the pursuer seeks on this branch of his case is damages for a nuisance. It is trite law that the man who comes to a nuisance cannot complain of it. How much less he who consents to, and sets up the nuisance with his own hands. An express consenter to a nuisance never can ask damages for the nuisance.

"There is a simple test which may be applied. Could the pursuer ask interdict against the defenders calcining their iron in this field? Very plainly he could not. The operation, therefore, is not wrongful, and cannot be stopped by the pursuer. It is, *quoad* him, a legal and unchallengeable operation. How then can he claim damages in respect of it? It is of the essence of a claim of damages that the act giving rise to the injury is a wrongful act.

"A case may indeed occur in which an act may be not wrongful, and yet damages may be claimed in respect of its consequences, by force of contract. There may be damages due, *ex contractu*, in respect of an act unquestionably legal. This consideration brings to its true issue this part of the case. The defenders cannot be made liable in damages for the consequences of an undoubtedly legal act, unless it can be shewn that they have bound themselves by contract to pay such damages. It appears to the Lord Ordinary that no such contract has been established. He considers it established, on the contrary, that the defenders are freed by contract from the payment of such damages. By the original lease of the minerals, granted by Mr Blair of Blair,

the lessees were unquestionably taken bound 'to pay all damage that should be done to the surface, or grounds and buildings thereon, by the working of the minerals in virtue thereof.' The question has been stirred whether this damage comprehends damage by smoke or vapour; and the point may not be altogether clear. But whatever was the damage contemplated by this contract, it is the opinion of the Lord Ordinary that the defenders were relieved from all liability on account of it by the clause in the lease of 1862, granted to them by Dr Galbraith. It is expressly set forth that, in respect of the payment of £300 thereby stipulated, Dr Galbraith and his successors were to 'relieve the second parties of all surface and other damages which may be done to the said field and adjacent portions of land, or become exigible under the foresaid mineral lease in regard thereto.' And the sum in question is accordingly declared to be received 'in full of all claims competent to the said first party against the second parties, for whatever damages may be done to the said small field and adjacent portions of ground, as delineated on the said plan, by the second parties' operations.' This is substantially a repetition of the terms employed in the original lease of the minerals by Mr Blair, whatever these terms signified; the difference simply being, that the provision is in the one case made applicable to the whole estate of Blair, in the other to this small specific part of it. The Lord Ordinary is therefore of opinion that the defenders were, by this transaction of 1862, relieved from all liability for damages contained in the original lease, so far as regarded their workings in the field then let by Dr Galbraith. This destroyed the contract operated by the original lease, so far as regarded these workings. But no other contract has been or can be shewn.

"The pursuer argued that there were *other* damages, besides those referred to in the lease of 1862, for which the defenders might be liable; and that their right to these damages must be held to have been reserved by the lease of 1862 by the clause inserted therein, 'declaring that the rights of both parties hereto, under and in terms of the mineral lease beforementioned, in so far as not altered by these presents, and *quoad ultra*, are hereby reserved entire.' It is quite possible that there were other damages besides those set forth in the lease of 1862. The Lord Ordinary has indicated his doubt whether any of the deeds in question bears special reference to damages from smoke or vapour. But what the Lord Ordinary finds, and all that he finds, is that the damages contemplated by the original lease (whatever these may be) were taken off the shoulders of the defenders by the transaction of 1862. Whatever may be said of any other damages than these, the fact is undoubted that they were not imposed on the defenders by the terms of any contract, made either by them or by any one whom they represent. They are damages which are due at common law, if due at all. But at common law damages cannot be claimed on account of a nuisance, where the nuisance has been established with the participation, or by direct consent, of the claimant.

"The defenders have contended that the claim of damages is excluded on another ground; on the ground, namely, that in the case of buildings erected after the date of the original lease, damages were only to be due where the site of the building was fixed with the approbation of the mining engineer, and that this did not happen in the case of Ryefield House. The Lord Ordinary is disposed to think that this also is a good answer to the claim; but he has not found it necessary to mature his opinion on the point, in consequence of his considering the claim sufficiently excluded on other grounds.

"It only remains to add a few sentences on the case of the other defender, the present Blair of Blair. He is called as a defender with the iron company, on the ground that, as landlord, he is equally liable with the lessees in the damages occasioned by the workings under the lease. The Lord Ordinary is clearly of opinion that he is not liable for the act of the defenders in laying the rails; for this, which the Lord Ordinary has found to have been a wrongful act, was, in that view, not an act authorised by the lease, or essential to the working thereby sanctioned. A landlord can only be liable along with his lessee where the act complained of is either directly authorised by the lease, or is a necessary accompaniment of the operations which the lease enables to be performed. In regard to the damages claimed on account of the smoke or vapour, the defenders have been found not liable; and their landlord must be equally free.

"The Lord Ordinary is of opinion that Mr Blair must be found entitled to expenses, no claim being made good against him. As to the other parties, he has found no expenses due, the success on each side being as near as may be equal."

The pursuer and the Eglinton Iron Company reclaimed.

Solicitor-General (MILLAR) and TRAYNER for Murray.

CLARK and GIFFORD for Iron Company.

J. M'LAREN for Blair.

At advising—

LORD DEAS—It appears that the proprietor of the estate of Blair let the minerals in the estate by this lease of April 1839. Then, in the end of the same year, but subsequent to the date of the lease, a feu-disposition was granted by the proprietor to Mr Macdonald of some 30 acres of land, in which that mineral lease is fully narrated. After all that, in 1862, the mineral tenant proposed to sink a pit within less than 150 yards of the dwelling-house which his feuar had in the meantime built at considerable expense. It was a question whether the clause in the mineral lease, as to putting down pits within a certain distance of buildings, applied only to buildings there existing or specially agreed to be put down, which this house was not, and consequently whether the mineral tenant might not put down that pit within 150 yards of the house. In consequence of that, it was agreed that the mineral tenants should have leave to put down their pits on ground which was within 150 yards of a farm-steading, and consequently within the restrictions which have been imposed upon them, and on that footing this deed of 1832 was entered into.

Taking the case between the proprietor of the surface and the mineral tenant, two questions are raised.

The first question relates to the road leading to the dwelling-house, and, so far as appears, the only road leading to it. The mineral tenant at the outset, even before the lease was signed, put down rails, making it a tram-road for mineral traffic; the result of which is said to be, and I think there can be no doubt is, that that road is no longer fit to be used as a road to the dwelling-house. Looking to the breadth, or rather to the narrowness of

the road, and the nature of the things done on it, it required very little evidence to satisfy anyone that vehicles can no longer be driven with safety or comfort along it, and that it could only be used for carts so long as the rails remain as they are and the road is used for traffic to and from the pit. A train of loaded waggons coming one way along that road would be quite inconsistent with carriages or people on horseback going the other way. They must necessarily stop until the train is past. It does not appear that carriages or horses can go along that narrow road and allow a train of loaded waggons to pass, unless the horses were of the kind that no one would care to drive or ride. There is no doubt that the result is to destroy that road as a road to the house, and consequently to leave the house without any way of access. Now, it is difficult to suppose that that could be the meaning of the contract, and more particularly so in 1862, after the house was there, and had been there for a considerable period. But the difficulty is, that by that lease in 1862 it is undoubtedly contemplated that the mineral tenants were to make some use or other of the road. They were to have it for access to the corner of that piece of ground. Now, it is a little difficult to construe the words "access to that corner" as meaning that they were to have ish and entry by that road for their whole mineral traffic in whatever way it was carried on. Effect cannot altogether be denied to that stipulation, but the question is, if that use by the mineral tenant is to be a use consistent with the continued use of that road as a road to the mansion-house. I think the mineral tenants were to have the use of the road in so far as not inconsistent with the use of the road to the mansion-house, it being known that it was the only road which could be so used. It may be true that if the company used it for waggons, without any plates or rails, that would destroy the road, and it might be difficult to keep it in repair for use for the mansion-house. But it does not follow that the company could use it in any way they thought right, different from the use which had formerly been made of it. I cannot hold that the fact that plates had been laid down before the contract, goes the length of the broad construction insisted on by the company. The construction of the company is, that they are entitled to make whatever use of the road they think right, whatever may be the consequences to the house. They must contend that they may use the road for locomotives as well as waggons, even although that would render the house useless, and destroy all means of access to it. I do not think that construction can be maintained. The only alternative is, that they are to have such use of the road as is not inconsistent with the continued use of it as a road to the house. Now, what they have done is, I think, inconsistent with that use, and though not so bad as steam traffic, is bad enough. It is difficult to believe that the consequences will be so serious to the company as they say. Nobody gives in any estimate of the cost of a parallel line of rails. Cutting through the bank which lines this road will probably not cost very much, and such an operation is not usually considered very formidable by mineral tenants. On the whole matter, though there is some difficulty in point of law, I think we ought to adhere.

The second question is as to the smoke. We have had many observations as to the meaning of stipulations as to damages in leases of this kind. That is always a question of circumstances depending on the particular lease. We must not take the words by themselves, but we must look to the whole stipulations, in order to ascertain the fair meaning of the parties. Here the parties have construed the words "surface damage" in such a way as to show clearly that in this case they do not comprehend damages for smoke. In the original lease the stipulation is "that, in the third place, it is hereby provided and declared that the said lessee and his foresaids shall be liable for and bound to pay all damage that shall be done to the surface, or grounds and buildings thereon, by the working of the minerals in virtue thereof." If the stipulation had stopped there, a question might have arisen whether smoke was comprehended. But it was not left on that footing, for the clause goes on, "which damage, so far as the same shall be done or occasioned during the currency of the now subsisting surface or agricultural leases, shall be paid according to the valuation of mutual referees; and from and after the expiry of these now subsisting or current surface or agricultural leases all damage done to the surface shall be, and is hereby taxed, fixed, and made payable at the average rate of 50s. sterling for each imperial acre throughout the whole estate during the continuance of such damage, over and besides paying, according to the valuation of neutral referees, all damage that shall be done to any buildings on the grounds comprehended in this lease." And so, in the fourth head, there are stipulations which go to show that the parties are enumerating all the different kinds of damage comprehended in the clause. So that even on the original lease I think it is plain that this damage is comprehended in that stipulation, and that is equally clear on the second lease, by which the grantor gets £300 for injury done to this piece of ground, and fifty shillings for the rest. But without going over the clauses, I think the fair construction is that adopted by the Lord Ordinary.

As to the question between the superior and his feuar, it is impossible to read the feu-disposition without seeing that the former reserves his rights fully, and the feuar comes into the same position *quoad* that feu as the proprietor.

On the whole matter I think the Lord Ordinary is right.

LORD KINLOCH concurred.

LORD PRESIDENT—The question raised by the reclaiming note for the Eglinton Iron Company is one of considerable difficulty, and although I do not differ from the result at which your Lordships have arrived, it is with a good deal of hesitation that I have formed a judgment on the case.

There is no doubt that the agreement of 1862 gives to the company a right of access to the small field at the north-east corner thereof, from the present road leading to Ryefield mansion-house. I think the fair construction and intent of that clause is, that they are to have by means of that present road ish and entry to the subject let, which is a field where they are to sink a pit, and by means of that bring the minerals not only from the field let but from all the underground workings on Blair, for which that pit can be made available. That is an important and very extensive use of this road; but one can easily understand that the working of this pit might become so extensive that this road would be quite insufficient for carrying away the minerals, and, keeping in view that this is apparently the only road which

the owner of the mansion-house could have as a road to his house, I think there is a key to the construction of this lease which justifies the interlocutor. The mineral tenants are to have such use of the road as is not inconsistent with its continuing to be the approach to the mansion-house, and if their use does exceed that limit they must seek some other mode of ish and entry. That is my conclusion on consideration of the whole circumstances; and applying that view to the facts as brought out in evidence, I have not much hesitation in saying that the occupation of this road by tramways with iron flanges is not consistent with the use of it as an access to the mansion-house, and so, on the first point, I agree with your Lordships.

As to the second point, I have not much difficulty. That depends entirely on a clause in the original lease which provides payment of damages by the tenant, for the clause in the lease of 1862 does not throw much light on that question. There is no doubt that the proprietor of Ryefield is not only made thoroughly aware of the existence of this mineral lease, but consents substantially to take the place of the landlord as to the subject of the feu. Therefore the question arises between the Eglinton Iron Company and the proprietor just as if they had been the original parties. Now the stipulation is, that the lessees shall pay all damages that shall be done to the surface, or grounds and buildings thereon, by the working of the minerals. I concur in holding that there are here no words of fixed technical significance. The expression "surface damage" is not used, but "damages to the surface or grounds and buildings thereon." But there is a substantial difference beween what is ordinarily called "surface damages" and damages of the nature claimed here, that is, for a nuisance to the mansion house through smoke and vapours. Now the words here in themselves might be sufficient to exclude the claim, but the matter is much clearer by consideration of the rest of the clause, for it proceeds, "which damage, so far as the same shall be done or occasioned during the currency of the now subsisting surface or agricultural leases, shall be paid according to the valuation of mutual referees; and from and after the expiry of these now subsisting or current surface or agricultural leases, all damage done to the surface shall be, and is hereby taxed, fixed, and made payable at the average rate of 50s. sterling for each imperial acre throughout the whole estate during the continuance of such damage, over and besides paying, according to the valuation of neutral referees, all damage that shall be done to any buildings on the grounds comprehended in this lease."

Here we see that there are just two grounds for a claim of damages. In the first place, there is proper surface damage, *i.e.*, damage which prevents the ordinary agricultural use of the subjects, which during the lease is to be made matter of valuation—for the agricultural tenants are not parties to this agreement—and here the damages are taxed at 50s. per acre—that is, that sum is taken to be the proper agricultural value of the subjects. That being provided for, what remains beyond the damage to buildings? Nothing more. Now by damage to buildings by operations of mineral tenants, I understand that kind of damage which arises from subsidence of the ground, or in some such way. I cannot read this clause as founding the claim which is contained in the 9th article of the pursuer's condescendence, and it must be kept in view that his claim is founded on the workings of the company being illegal, for he has distinct and separate pleas to that effect. Unfortunately, however, for the pursuer, that admits of a simple answer, for these operations being carried on in the field let by the deed of 1862, there is an express authority by the pursuer or his father to do what is now complained of.

As to the position of the landlord Mr Blair, there is no good ground of liability stated against him.

I therefore concur in thinking that we ought to adhere.

Agents for Pursuer—Marshall & Stewart, S.S.C.

Agent for Eglinton Iron Company—James Webster, S.S.C.

Agent for Blair—Thomas Strong, W.S.

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*Wednesday, November 25.*

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## MALCOLM *v.* LOUTTIT.

*Obligation—Feu-contract—Public Safety—Burgh—Magistrates.* A feuar, bound by his feu-right to construct a certain passage along his feu for behoof of neighbouring feuars, being called on to construct the same, alleged that fulfilment of his obligation was impossible without taking down part of the parapet of a public bridge, which operation the magistrates refused to sanction. Time being given for the magistrates to appear for the public interest, and they not appearing, *held* that the feuar was bound to fulfil his obligation.

In 1856 there were exposed for public sale certain lots of building ground at Bridge Street of Wick. The articles of roup contained this obligation—"and the party feuing the southmost lot shall be bound to erect and put up a stair eight feet six inches in breadth, including the parapet or iron railing, at the south-east corner of that lot, and to lay a sufficient pavement along the whole south side of said lot, and between it and the river, and to have the pavement and stair properly fenced with a parapet wall or iron railing at the side next the river, to form an access from the pavement in Bridge Street in front of the said lot to the lane called Kirk's Lane, which is to be continued to the river side, to be used as a common thoroughfare, and to be upheld and maintained in good repair in all time coming by the feuar of said lot, and his heirs and successors, at their own expense." Louttit purchased four of the lots, including the southmost, and in the feu-disposition which was granted to him there was inserted a clause of obligation in terms of the conditions in the articles of roup. The pursuer Malcolm, purchaser of an adjoining lot, now sued Louttit for fulfilment of his obligation. Louttit admitted the obligation, but pleaded that fulfilment of the same was impossible, as it would be necessary, in consequence of certain alterations which he had made on or in connection with his property, under direction of the Town Council of Wick, to make an opening in the parapet wall of the Bridge of Wick, which operation the Town Council refused to sanction.

The Lord Ordinary (JERVISWOODE) pronounced an interlocutor finding that the Town Council of the burgh of Wick passed a resolution, on the 4th February 1863, approving of a report by a committee of their number, and which report bears that the reporters "conceive that it would be dangerous to the public, and might tend to injure