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.

Wednesday, November 25.

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

the arch of the bridge, to leave an opening in the parapet southward of the proposed end of the curve for any stairs to be made, and that any stairs to be made should be confined to the area in Mr Louttit's (the defender's) property;" that the stair to which the conclusions of the present action relate could not be erected by the defender in terms of the obligation contained in the fifth head of the articles of roup consistently with the terms of the report approved by the Council as above found; and that the defender had no power, and could not be compelled by the pursuer, to proceed in the construction of the said stair against the resolution of the Town Council aforesaid—and therefore dismissed the action.

Malcolm reclaimed.

SHAND and ORR PATERSON for reclaimer.

GIFFORD and SPENS for respondent.

At Advising—

LORD PRESIDENT—My Lords, I must say that when this case was first argued to us I was not inclined to attach so much importance as the Lord Ordinary does to the proceedings of the Town Council, and now I am clearly of opinion that the interlocutor is wrong.

A person of the name of James Miller was proprietor of a piece of feuing ground which is laid down on the plan before us, and which has for two of its boundaries the river of Wick on the south, and Bridge Street and the New Bridge of Wick on the east. Miller proceeded to feu this property and to lay it out in the most convenient way, and having one of the public streets as his boundary on the east, it seems to me to be beyond dispute that he was entitled to access at every point at which his property touched. Now one part of his property being next the river on the south, he thought it would be convenient and proper to give an access between Kirk's land and Bridge Street, and accordingly his feuing plan is prepared on that principle. But to secure that there should be a thoroughfare, he laid an obligation on the parties feuing next the river, and along whose property this thoroughfare must pass, to make this thoroughfare. One part of the obligation was that a stair shall be built as set forth in the articles of roup, and the other part of the obligation was to lay and fence the pavement. Now this obligation was laid on Louttit, and the question comes to be whether the owner of this ground was entitled to lay this obligation on him, or whether the magistrates can interfere to prevent it.

As in a question between the pursuer and defender, the case is too plain for argument, and accordingly the Lord Ordinary intimates that but for the interference of the Town Council, he would have had no doubt. But it appears that the magistrates authorised Louttit to alter the parapet of the bridge so as to disable him from performing his obligation. I think the magistrates themselves could not have so altered the parapet as to interfere with Miller and his feuar having an access by that strip of ground eight feet six inches in breadth to the pavement in Bridge Street, and that is enough for the case. No doubt, if the magistrates had been of opinion that the public safety required that this obligation should not be performed, they might have come and prevented it from being done; and, there being some indication of a feeling of that kind, your Lordships thought proper to intimate to the magistrates so that they might come and let us know their opinion. They have declined to appear, and therefore I am bound to assume that they are of opinion that no public interest is involved, and therefore that there is no necessity for their appearing. I cannot believe that the magistrates of any burgh in Scotland, if they thought the public interests were being compromised, would not instantly appear. That being so, it seems to me that the case is plain, and that the defender, whatever else the magistrates may have done, is in the position of a man refusing to fulfil an obligation in his common title, and therefore judgment must be pronounced against him.

LORD DEAS—I am of the same opinion.

The subjects belonging to Malcolm and Louttit were exposed for sale by articles of roup which contained a condition that Louttit should be bound to construct that stair for which Malcolm now contends. Louttit purchased the feu, and when the feu-disposition came to be granted it proceeded on the articles of roup. It is not disputed that Malcolm is *in titulo* to enforce this obligation which was laid on Louttit, nor that Louttit is bound to fulfil that obligation if he has the power to do so without consent of the Town Council. The feuing took place in 1856, and from that time to January 1863 it is not contended that this matter was in a state to cause any difficulty as to carrying that obligation into effect. If the stair had been formed in the way undertaken before January 1863, plainly it would not have interfered with the bridge at all. But in January 1863 a vague motion was brought before the Town Council, that it was necessary to give some instructions about this matter, and the Town Council authorised an alteration to be made by a sort of addition, that is, by continuing the parapet and turning it in towards the building, so that Louttit could not fulfil his obligation without breaking through that additional bit of wall. Now the person authorised to do that was Louttit himself—with his own consent if not on his own application. The whole question comes to be, whether Louttit, by getting the Town Council to give him that authority, gets free of the obligations to make that stair as a common access? That is quite extravagant on the part of Louttit and on the part of the Town Council, so far as they support him; and the construction I am inclined to put on their non-appearance is, that they cannot show face to support what was done.

LORD ARDMILLAN and LORD KINLOCH concurred.

Agents for Pursuer—J. & A. Peddie, W.S.

Agents for Defender—Graham & Johnston, W.S.

COURT OF JUSTICIARY.

Monday-Wednesday, November 23-25.

HIGH COURT.

(Before the Lord Justice-Clerk, Lord Neaves, and Lord Jerviswoode.)

H. M. ADVOCATE *v.* WATT AND KERR.

Cruel and Barbarous Usage — Assault — Culpable Homicide — Compelling persons to leave a ship— —Relevancy. Charge of "cruel and barbarous usage by persons having authority on board a British ship" to persons on board the ship, held irrelevant. Charge of "compelling persons to leave a ship embedded in ice on the high seas, and travel towards the nearest land,