The defender Mr Keith became security for Kiloh by a guarantee to Dick & Son "against all loss and damage they might sustain by or through the actings or intromissions of the said William Kiloh."

Kiloh declared his insolvency in October 1868, and at that time several of his monthly acceptances were in currency. Dick & Son thereafter raised this action against Mr Keith for the full amount of the bills. Keith admitted liability so far, but resisted the action on the ground that he was entitled to credit for any outstanding accounts which might be recovered from Kiloh's customers by Messrs Dick & Son, and that the bills were not the measure of the loss and damage sustained by Dick & Son in consequence of Kiloh's actings.

The Sheriff-Substitute (THOMSON) found—"That by the letter of guarantee founded on, the defender 'with reference to the obligations undertaken' in the agreement between the pursuers and William Kiloh, and 'in terms of the said agreement,' guaranteed the pursuers against all loss and damage they might sustain 'by or through the actings or intromissions of the said William Kiloh,' to the extent of £500: That by the said agreement the said William Kiloh bound himself to settle monthly, by bill at three months, for all ales or malt liquors sent to his order by the pursuers: Finds it admitted that the pursuers supplied goods on the orders of Kiloh: That to account of the balance Kiloh granted to the pursuers his acceptances: Finds that a balance was thus due by Kiloh to the pursuers of £49, 11s. 2d.: That, on a sound construction of the above-mentioned letter of guarantee, the defender is liable to the pursuers in payment of the said balance."

In a note the Sheriff-Substitute added—"It was ably argued on behalf of the defender—(1) That Kiloh did not undertake to stand *del credere;* and (2) that if he did, the defender was then cautioner for a cautioner, that the 8th section of the Mercantile Law Amendment Act did not apply, and that the pursuers were bound to discuss the principal debtor. The Sheriff-Substitute is of opinion that a *del credere* guarantee is implied in the terms of the agreement. The goods, it is true, were invoiced directly by the pursuers, but the amount of the commission is fixed expressly with reference to a certain guarantee to be given by Kiloh. There was to be an annual 'squaring and docquetting' of accounts, but it is thought that that must refer to the pursuers' undertaking to bear half the loss on bad debts. To that extent Kiloh was entitled to credit himself in future transactions. The purchasers are spoken of throughout as Kiloh's customers, and not the pursuers. Whether an agent acting under a *del credere* commission is in the same position as a cautioner or not seems a doubtful point in our laws. Professor Bell says that in one sense he is not, as he is liable directly without the benefit of discussion; while, on the other hand, he is not merely a *delegatus debiti,* as, if the agent fail, the principal may recover from the proper debtor, if the latter have not previously paid to the agent. In England it seems to have been settled that a *del credere* agent is truly in the position of a surety—*Morris* v. *Cleasky,* 4 Maule and Selwyn, 565 E., a case which overturns many previous decisions. But the Sheriff-Substitute is of opinion that the undertaking by Kiloh to grant his acceptances monthly for all goods sent to him by the pursuers, taken along with the other clauses of the agreement which have been referred to, render him liable whether his commission was *del credere* or not. Such an undertaking is equivalent to an assuming of responsibility (subject to the 'concession' by the pursuers of a deduction in case of the debts turning out bad), because thereby he 'lulled all the suspicions of his employers, and caused them to dismiss all care about the solvency of the purchasers.'—Smith's Merc. Law, 7th ed., p. 120."

The Sheriff (JAMESON) adhered.

The defender appealed.

WATSON and JAMIESON for him.

The SOLICITOR-GENERAL (CLARK) and ASHER for the respondents.

The Court unanimously recalled the interlocutors appealed against, and dismissed the action (except with regard to the sums for which Keith admitted his liability), on the ground that Keith was only liable for the loss occasioned to Dick & Son by Kiloh's actings; that the bills were not the measure of the loss; and that before bringing the action Dick & Son should have either themselves collected or offered to assign the outstanding accounts due by the customers to whom they had sent goods through Kiloh. The relation of debtor and creditor was still subsisting between the customers and Dick & Son under the agreement with their traveller. When he became bankrupt they ought to have taken all reasonable steps to recover the debts. At all events they ought not to have raised the action until the debtors had an opportunity of paying, if they were willing to do so.

Agents for the Appellant—Stuart & Cheyne, W.S.

Agents for the Respondents—Millar, Allardice, & Robson, W.S.

Thursday, February 2.

FIRST DIVISION.

STEUART *v.* THE EARL OF SEAFIELD.

Declarator. An action of declarator *dismissed,* the conclusions being either announcements of bare facts or inconsistent with the averments.

This was an action of declarator by Mr Steuart of Auchlunkart against Lord Seafield. The conclusions of the summons were as follows:—"*First,* That the drain known as the Tachers drain is not a march ditch or a march fence between the defender's lands and the pursuer's." The second and third conclusions were in similar terms, regarding other drains or ditches. "*Fourth,* That the defender has no right, in his capacity of proprietor conterminous with the pursuer, to compel the pursuer to clean out march ditches between their respective estates, or to clean out said march ditches of his own motive, and without the pursuer's authority, and to pay for cleaning the same, and to receive one-half or any part of the expense of cleaning them out from the pursuer. *Fifth,* That the alleged march ditches aforesaid are all, or one or more of them, not march fences which the pursuer is liable to repair jointly with the defender under the Act 1661, c. 41, or the Act 1669, c. 17, or under any other Act of Parliament."

It appeared that on former occasions Lord Seafield had made claims on Mr Steuart for cleaning out certain march ditches between their respective properties, and had judicially enforced his claims in the Sheriff-court of Banffshire. It was with a

view of protecting himself from such calls that Mr Steuart raised the present declarator.

Lord Neaves (as Ordinary for Lord Barcaple) dismissed the action, as not involving any conclusions which could be the proper subject of a declarator.

Mr Steuart reclaimed.

Campbell Smith for him.

Marshall in answer.

At advising—

Lord President—An action of declarator is one, peculiar indeed to our law, but which has been universally admired. It would, however, become a source of danger if it were not confined to its proper office. Its object is to declare by judgment what are the rights of parties when they come into competition. It never can be used to declare a bare fact. This disposes of the first three conclusions. They are mere announcements of facts—"That a certain ditch is not a march fence," &c. The fourth conclusion is very peculiar, and, in my opinion, liable to many objections. If it could be sustained at all, it must be based on an averment that there are march ditches which require to be cleaned out; but if we look at the record the only allegation is that there are no march ditches. It has been suggested that the conclusion might be taken as alternative, "in case the ditches before mentioned are found to be march ditches." Even then it is liable to objection. It is not confined to the ditches mentioned before, but seeks to declare a proposition of law applicable to any march ditch between the parties. The proposition is said to mean that the defender is not entitled to clean out a march ditch at the pursuer's expense without his consent or judicial authority. But as it stands, the proposition is one which no lawyer could affirm. The fifth conclusion is liable to the same objection as the first three. I am of opinion that the action should be dismissed.

The other judges concurred, Lord Kinloch observing that he was not prepared to adopt the exact words of the Lord Ordinary's judgment, as he was of opinion that much was involved which might be the subject of a declaratory action if properly laid.

The Court accordingly dismissed the action as not competently raising any question which could be the subject of a declaratory action.

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

Agents for Defender—Mackenzie, Innes, & Logan, W.S.

Friday, February 3.

DURHAM *v.* HOOD.

Interdict—Property—Minerals—Explosions—Water.

Interdict granted, on the application of an adjoining proprietor, against the lessee of a coal-field on a higher level discharging blasts of gunpowder in a pit within his own bounds, but within 10 yards of the march, or performing any other operations which would have the effect of disturbing materials or opening cracks in the complainer's coal-field, and so increase the flow of water thereon.

This was an application for interdict by Mrs Durham, proprietrix of the Polton Coal-field, against Mr Archibald Hood, tenant of the Dalhousie Coal-field. The Dalhousie coal-field marches with that of Polton, and is on a higher level, and consequently when there is water in the Dalhousie coal-field it passes to the Polton workings, if there is any passage by which it can escape. Some years ago a coal tenant in Polton had made an encroachment on Dalhousie by working the jewel coal (the lowest seam at present worked) for a short distance across the boundary line. This encroachment is now a waste, more or less filled with rubbish. In 1870 Mr Hood, who had previously sunk two other pits in the neighbourhood, sunk a pit (referred to as No. 3) within 10 yards of the Polton march, and immediately over the encroachment—one of his objects admittedly being to let away the Dalhousie water through the encroachment into the Polton field. Reaching water in this pit, he put down a 10-inch bore to the encroachment. The water, however, did not go away, or went very slowly. Thereupon, on the 5th and 6th May, he caused two heavy blasts to be fired in the encroachment waste, consisting of 12lb. canisters of gunpowder. The effect of the blasts was that the water immediately began to subside and escape into the Polton field, in consequence, as Mrs Durham alleged, of the dislocation of the strata and reopening of silted up cracks within the Polton march produced by the explosion. This flow of water greatly increased the expense of the Polton workings. Mrs Durham in consequence presented a note of suspension and interdict, in which she prayed the Court to interdict Mr Hood from discharging blasts in or near the march, and from performing any operation whereby the strata between the respective coal-fields should be disturbed or cracks opened up.

Interim interdict having been granted, and parties being allowed a proof, a considerable body of evidence was led on both sides, particularly of skilled witnesses as to the probable effect of the blasts. Direct inspection was not possible, as the jewel waste was not accessible.

The Lord Ordinary pronounced the following interlocutor:—"Interdicts the respondent from firing off blasts of gunpowder or other explosive material in or near the pit or shaft No. 3, which has been sunk by the respondent within 10 yards or thereby of the march between Polton and Dalhousie coal-fields, and from performing any other operations whereby the strata or materials in the suspender's coal-field of Polton, within the Polton march, may be dislocated or disturbed, or cracks or fissures therein may be opened up, or the silting removed therefrom; and declares the above interdict perpetual.

"*Note.*—The questions raised by the present note of suspension and interdict are attended with nicety, and it is not without some hesitation that the Lord Ordinary has come to think that the suspender is entitled to the interdict now granted.

"In granting the interdict, the Lord Ordinary does not intend to interfere with the right of the respondent to work the whole minerals in the Dalhousie coal-field. In the words of the Lord Justice-Clerk in *Baird* v. *The Monkland Iron and Steel Company*, 18th July 1862, 24 D. 1425—'it is perfectly clear, as a general proposition in law, that a mineral proprietor or tenant is entitled to work out every ounce of the mineral in his own estate without the least reference to the interests of his neighbour.' That is perfectly true, and if the party who lies to the dip is afraid of being drowned or incommoded by the water of the mineral owner or tenant who lies to the rise, it is his business to have a barrier of his own minerals,