encroach on any right possessed by the respondents; and remit to the Dean of Guild to permit the proposed operations, to be duly carried out with due regard to the safety of the tenements above: Find the appellant entitled to expenses," &c.

Counsel for Appellant—Solicitor-General (Balfour)—Moncreiff. Agent—J. W. Moncreiff, W.S.

Counsel for Respondents — Kinnear — Shaw. Agent—P. Morison, S.S.C.

Friday, May 21.

SECOND DIVISION.

[Lord Curriehill, Ordinary.

STURROCK *v.* SMITH OR CARRUTHERS AND OTHERS (CARRUTHERS' TRUSTEES).

Superior and Vassal—37 *and* 38 *Vict. cap.* 94—*Composition—Mode of Calculating Composition Due in respect of Mineral Rent.*

A vassal the minerals in whose lands were let for a term of years, being called on to pay composition on the death of the last-entered vassal for the constructive entry of a singular successor, under the Conveyancing Act of 1874, claimed to have the value of the minerals capitalised and a percentage on the capital value taken as the year's rent due to the superior. *Held* (*dub.* Lord Ormidale) that where minerals are let at a fixed annual rent, without any immediate prospect of their exhaustion, that is to be taken as the amount of the composition due to the superior.

Observations on *Allan's Trustees* v. *Duke of Hamilton*, 5 R. 510.

John Sturrock, the immediate lawful superior of the lands of South Cobinshaw, raised this action against the defenders, who were the trustees acting under the trust-disposition and settlement of the Rev. William Carruthers, and had been as at 29th July 1864 infeft, by virtue of a notarial instrument recorded in the Particular Register of Sasines for the sheriffdom of Edinburgh, in the one-third *pro indiviso* share of the lands of South Cobinshaw, which had belonged to the Rev. William Carruthers. The defenders though thus infeft, did not enter with the pursuer, but, following the practice which was common previous to the passing of the Conveyancing Act of 1874, tendered for entry David Carruthers, the eldest son and heir-at-law of William Carruthers, and he was on 17th November 1864 entered with the pursuer by writ of *clare constat* duly recorded. David Carruthers thus became the vassal last entered and infeft in the lands.

David Carruthers died on 7th April 1879, and the defenders were then, in virtue of section 4, subsection 2, of the Act 37 and 38 Vict. cap. 94 (1874), duly entered with the pursuer as superior of the lands. The pursuer demanded of the trustees a composition of one year's rent of the one-third *pro indiviso* share of the lands, and this being refused by the trustees, who tendered David Carruthers' heir for entry, and contended that only the casualty of relief was exigible, Sturrock brought the present action. In estimating the amount of the casualty the pursuer claimed to include, besides the agricultural rental, a mineral rental of £600 which was being paid for the lands at the time the action was brought, under an arrangement set forth in the following joint-minute for the parties—"Prior to Martinmas 1864 there was no mineral rental of said lands; from Martinmas 1864 to Whitsunday 1873 the mineral rent of said lands, being fixed rent, was £450 per annum, under a lease in which the West Calder Oil Company (Limited) are tenants for twenty-four years from Martinmas 1864; from Whitsunday 1873 to Martinmas 1876 the fixed mineral rent was £900 per annum under said lease, and subsequent minute of agreement; from Martinmas 1876 to Martinmas 1881 the mineral rent under said lease is reduced to £600, conform to letter; and as regards the said rent of £900, one-half thereof, being £450, is subject to the tenant's power to break on giving twelve months' notice, and the remaining half, being £450, is subject to the tenant's power to break every five years from Martinmas 1866." The defenders besides denying liability as above mentioned, maintained that the value of the mineral rental fell to be ascertained by capitalising the rent actually received with reference to the state of the mineral workings, and they offered to pay interest at 4 per cent. on one-third of the value thus ascertained in name of composition. The Lord Ordinary on 15th July 1879 found the pursuer entitled to the composition of one year's rent of the lands, and on 6th November 1879 issued another interlocutor, in which, *inter alia*, he found "(4) that the gross mineral rent of the estate of Cobinshaw for 1879 amounts to the sum of £600, whereof one-third, or £200, is the share effeiring to the defenders," and decerned in favour of the pursuer for this sum, subject to a slight deduction for public burdens. He added this note:—

"*Note.*— . . . (4) The most important point argued was the amount at which the mineral rent should be taken. The minerals were unlet and unwrought prior to 1764. In that year they were let to tenants for twenty-four years, the fixed rent being £450. The minerals have never been wrought, except to a limited extent, by the sub-tenants of the principal lessees, and the fixed rent of £450 was paid from 1864 to 1873. From 1873 to 1876 the fixed rent was raised by mutual agreement to £900 per annum; but in 1876 it was reduced for five years—*i.e.* till 1881—to £600. That sum is, I think, the fair amount at which the mineral rent of 1879 should be taken. The defenders maintained that there should be inquiry into the actual value of the minerals (as was suggested in the recent case of *Allan's Trustees* v. *The Duke of Hamilton*, 5 R. 510), and that a percentage of the value should be taken as the rent. But as the minerals are not being wrought except to a trifling extent by the sub-lessees, and are not alleged to be exhausted, and as the fixed rent of £600, under deduction of public burdens, seems to be a fair average rent, I see no ground for instituting the inquiry suggested by the defenders.

Against both interlocutors the defenders reclaimed, but before the case was heard in the Second Division judgment was pronounced by the House of Lords in the case of *Lamont* v.

Rankine's Trustees, Feb. 27, 1880, *supra* 416. Thereafter, when the case was called in the Inner House, counsel for the defenders intimated that they would no longer insist in their reclaiming-note against the interlocutor of 15th July, and accordingly the only question argued was, whether the mineral rental should be capitalised as proposed by the defenders, or should be taken at £600?

Argued for defenders—Minerals being an exhaustible subject, whatever might be the annual value at a given time, the only fair method of striking a composition must be to capitalise the value and take interest thereon. Such a course was the result of the decided cases, particularly of *Wellwood's* case and *Allan's* case. The rule suggested in *Allan's* case, and followed in *Sivright's*, did not apply only where exhaustion was probable, but to all cases of mineral rent.

Authorities—*Lady Preston*, M. 8242; *Aitchison* v. *Hopkirk*, Feb. 14, 1775, M. 15,060, 2 Ross' L. C. (Land Rights) 183; *Wellwood* v. *Wellwood or Clarke*, July 12, 1848, 10 D. 1480, and Dec. 20, 1848, 11 D. 248; *Douglas* v. *Scott & Yorke*, Dec. 17, 1869, 8 Macph. 360; *Allan's Trustees* v. *Duke of Hamilton*, Jan. 12, 1878, 5 R. 510; *Sivright* v. *Straiton Estate Co.*, July 8, 1878, 6 R. 1208; *Christie* v. *Christie*, Dec. 10, 1878, 6 R. 301; 1469, cap. 36; 20 Geo. II. c. 52, sec. 13; 5 Geo. IV. c. 87 (Aberdeen Entail Act), sec. 1.

At advising—

Lord Justice-Clerk—In this case a great many points have been argued before the Lord Ordinary and have been decided by him, but I think that one simple question is alone presented to us. It must be admitted that a casualty is due, and that the vassal is bound to pay a year's mail, and the only question which now remains relates to the amount of that casualty, and especially to the amount due from the minerals. There have been many questions in former cases as to how far the value of minerals ought to be taken into account in fixing the casualty, and as the result of these cases I hold it to be now fixed that minerals do fall under a claim of this kind. The only question is therefore how they are to be valued. In this case it is admitted that "prior to Martinmas 1864 there was no mineral rental of said lands; from Martinmas 1864 to Whitsunday 1873 the mineral rent of said lands, being fixed rent, was £450 per annum, under a lease in which the West Calder Oil Company (Limited) are tenants for twenty-four years from Martinmas 1864; from Whitsunday 1873 to Martinmas 1876 the fixed mineral rent was £900 per annum under said lease and subsequent minute of agreement; from Martinmas 1876 to Martinmas 1881 the mineral rent under said lease is reduced to £600, conform to letter; and as regards the said rent of £900, one-half thereof, being £450, is subject to the tenant's power to break on giving twelve months' notice, and the remaining half, being £450, is subject to the tenant's power to break every five years from Martinmas 1866."

The real question is, whether we are to adopt the £600 a-year, for which the lands are let for five years, as of itself proof that such is the annual value of the minerals, or whether we are to remit to a man of skill to strike an average value? I am of opinion, and without difficulty, that in this case there is no ground for that circuitous mode of arriving at the yearly value, because under a lease—though when property is let for a lordship, or not let at all, in that case there being nothing to show the yearly value it is reasonable to take the course I have indicated—it is only reasonable to take the rent as showing what the value is. In this case the vassal has received £600 a-year for four years out of the five, and why that is not to be called "a year's mail" as the lands are set for the time I do not see. And so, without going back on *Allan's* case, in which I entirely concur, I think there is no need for that course in this case. The fact that £600 is paid year by year is sufficient, and I think with the Lord Ordinary that one-third of £600 is the annual value of the minerals in question.

Lord Ormidale—The only question the Court was asked to determine under the present reclaiming-note relates to the amount at which the nominal rent ought to be estimated in fixing the composition for an entry payable by the defenders to the pursuer.

That the minerals must be taken into account was settled by the case of *Allan's Trustees* v. *The Duke of Hamilton*, referred to in the note of the Lord Ordinary; and so far no dispute was raised at the debate. But while the pursuer maintained, on the one hand, that the £600 payable by the tenants of the minerals for the year of entry could alone be taken as the rent thereof in fixing the amount of composition, it was, on the other hand, maintained for the defenders that the rent of minerals being in reality payable for *partes soli*, and not for fruits or crop merely, it would not be correct or equitable to take that in fixing the amount of composition due to the superior.

A very important question is thus raised, and one which I believe has now for the first time to be determined as between superior and vassal.

I very much doubt whether in all circumstances the rent or return paid by the tenant of the minerals to his landlord should be taken as the composition payable to the superior would be right. If, for example, it had in any case been calculated between landlord and tenant, after careful examination and inquiry, that the minerals in a landed estate were worth £600 a-year of rent for ten years, on the assumption and footing that they would last that time, and be then practically exhausted, it would scarcely be fair to hold in such a case that the composition for an entry due to the superior for the tenth year should be £600. That, no doubt, may be said to be an extreme case, and essentially different from the present. But I refer to it by way of illustration, and for the purpose of showing that it may be proper before judgment that inquiry should be made as to the nature and extent of the mineral field in question, as well as for the purpose of ascertaining whether the minerals have been wrought out, for in regard to that matter there is no evidence before the Court, and indeed not even precise or satisfactory statement.

In the case of *Allan's Trustees* v. *The Duke of Hamilton*, 12th January 1878, 5 Rettie 510, where the authorities are referred to and commented on, it was thought right, as the report of the case bears, that there should be inquiry before fixing the amount of the mineral rent payable to the superior as composition far an entry.

And again, in the subsequent and very recent

case of *Sivright* v. *The Straiton Estate Company*, 8th July 1879, 6 Rettie 1208, the Court decided, that in order to fix the amount to which the superior was entitled on minerals as composition for an entry "it is equitable to adopt as the basis for calculating the casualty a sum equal to ten years' purchase of the average mineral rents payable for three years, and to calculate interest at four per cent. on the sum so obtained." It is true that in the two cases to which I have now referred there was no fixed rent so far as the minerals were concerned, as between the tenant and landlord—the rent to which the latter was entitled for the minerals being a lordship on the output. But although this may be a circumstance not to be disregarded in the future consideration of the present case, I am not quite satisfied that it is sufficient to entitle us to deal with the question just as if it related, in place of to minerals, to land rent. Neither am I satisfied that the case of *Christie* v. *Christie*, 10th December 1878, 6 Rettie 301, and others of that class which were cited at the debate, can be held as ruling the present, for in that case the statute which governed them was different, and differently expressed from the old Act which governs the present; and, besides, the objects are different—that in the case referred to being a widow's provision, while here the object is the ancient feudal casualty falling due by a vassal to his superior for an entry. This distinction appears to have been in previous cases recognised as leading to a difference in the result. For example, Lord Deas, who seems to have entered very fully into the subject in the case of *Christie* v. *Christie*, expressly says that "he should not regard any decision in this case as a precedent in a different class of cases," such, for instance, as the recent case of *Allan's Trustees* v. *The Duke of Hamilton*, between superior and vassal, as to feudal casualties.

I am therefore, for the reasons I have now stated, disposed to think that the same course should be followed in the present case as was taken in the cases of *Allan's Trustees* v. *The Duke of Hamilton* and *Sivright* v. *The Straiton Estate Company*, viz., that before fixing the amount payable as composition for an entry in respect of the minerals in question, a remit should be made, if the parties cannot otherwise arrange the matter, to a mining engineer to report, after the requisite inquiry and inspection, the number of years' purchase which the minerals in question are fairly worth, keeping in view the nature and extent of the same, and the risks and expenses attending their working. But as both your Lordships think differently, I am not so strongly impressed with my own views as to dissent from the result you have come to.

Lord Gifford—In this case a good many different points are disposed of by the interlocutor of the Lord Ordinary brought under review. The only portion of the Lord Ordinary's judgment, however, on which any argument was submitted at the bar was that in relation to the composition claimed for mineral rents received by the defenders. In all other respects the interlocutor and judgment of the Lord Ordinary was acquiesced in.

The only point now in question is, How the composition due to the superior shall be struck upon the mineral rents for the year 1879? The last vassal entered under the pursuer as superior was David Carruthers, who died on 7th April 1879, and it was upon his death that under the old law the subjects would have fallen into non-entry. It is now to be taken that the non-entry duties or the casualty of one year's rent due to the pursuers is to be calculated as the rental stood in 1879.

There is no dispute as to the agricultural rent of the lands, or as to the amount of the deductions therefrom, and the only question is as to what must be held to be the mineral rent as in a question with the superior for the year 1879.

The facts are clear. The minerals have never been wrought except to a very limited extent, but since the year 1864 a fixed rent has constantly been paid for them—a fixed rent greatly exceeding any lordship which would have arisen on any actual working. From 1864 to 1873 a fixed rent of £450 was paid each year. From 1873 to 1876 a fixed rent of £900 per annum was paid, but in 1876 this was reduced for five years—that is, from 1876 to 1881—to a fixed rent of £600 per annum, and this fixed rent was actually paid for the year in question—the year 1879. I think the Lord Ordinary is right in holding that this fixed rent of £600 is the mineral rent upon which the composition for the year 1879 ought to be struck.

The defender's contention was that there should be an inquiry into the actual amount of minerals wrought, and a computation made as to how long the working would continue at that rent, and that thus the value of the minerals should be ascertained, and no doubt when mineral rent is paid by lordships, and when the minerals are approaching exhaustion, this may require to be done, as was suggested in the case of *Allan's Trustees* v. *The Duke of Hamilton*, 5 Rettie 510. I am of opinion, however, that the case of *Allan's Trustees*, and the principle at which it points, has no application to the case where a fixed rent is paid for minerals and the minerals are not wrought at all, or wrought to so small an extent that the stipulated lordship does not nearly equal the fixed rent. In such a case the fixed rent is paid, not for the actual working of the minerals, and not according to the extent of the working, but for the mere leave or permission to work, and wherever minerals are so situated that a tenant will give a fixed rent, not for working them, but for merely holding them unwrought, or it may be to prevent their being wrought by any third party, then such fixed rent is the fair rent of the minerals in a question with the superior, and probably in most questions with all other parties. Such fixed rent is clear annual gain to the owner of the minerals, without extinction of and without materially lessening the subject let.

If, indeed, it had been averred in the present case that the minerals let were exhausted, and that the fixed rent was only being paid for five years till 1881 in virtue of the special terms of a contract which prevented the mineral tenant from pleading the exhaustion of the minerals or from renouncing the lease, there might have been equity in the plea that fixed rent paid in such circumstances was not the constant rent or the reasonably constant rent upon which a superior's casualties fell to be calculated. But there is no case of this kind before us, and I think that the principles applied in the other Division in the recent case of *Christie* v. *Christie*, 10th December 1878, 6 Rettie 301, are applicable to the present. As the

Lord Ordinary has deducted public burdens, I think he has dealt quite rightly with the mineral rent in question.

The Court adhered.

Counsel for Pursuer (Respondent)—Solicitor-General (Balfour) — Moncreiff. Agent—Daniel Turner, S.L.

Counsel for Defenders (Reclaimers)—Asher—W. C. Smith. Agents—Pringle & Dallas, W.S.

Friday, May 21.

FIRST DIVISION.

[Sheriff of Lanarkshire.

DICK & STEVENSON *v.* MACKAY.

Obligation—Contract—Failure to Implement Condition.

Where a party to a contract prevents the implement of a condition thereto, the condition is to be held as fulfilled, and he liable in terms of the contract.

A agreed to purchase a steam-navvy from B under certain conditions, one of which was that it should be capable of excavating a given quantity of specified substance in a certain time on a "properly opened-up face" at a certain railway cutting. The machine was first tried at another cutting, where it failed to excavate the required amount, and on being subsequently removed to the original cutting, to a face which appeared on proof to be not a "properly opened-up" one, it was temporarily damaged a day or two after it began to work. A thereupon refused to accept it, or to give it any further trial. *Held (diss.* Lord Deas) that though it was not clear from the evidence whether the machine could or could not have performed the work had such trial been given it, yet A having prevented this condition of the contract from being implemented, was liable in the price of the machine as concluded for.

Process—Proof—Expenses of Conjunct Probation in Sheriff Court Disallowed.

At a proof before a Sheriff-Substitute the pursuers were allowed a conjunct proof at the close of defender's evidence, notwithstanding objection thereto by defender as incompetent and unnecessary. The case having subsequently been appealed from the Sheriff to the Court of Session on the merits, and the pursuers having succeeded, the Court *disallowed* them the expenses of the conjunct proof so led.

Messrs Dick & Stevenson, engineers in Airdrie, sued John Mackay, railway contractor, for £1115, being the contract price of a patent steam-navvy or digger which they had constructed, and of which they alleged him to be the purchaser.

The terms of the contract as disclosed by the parties' correspondence was that the pursuers should supply the defender with a machine capable of digging and filling 350 cubic yards of the clay or other soft substances in a certain railway cutting which the defender was about to make at Carfin, in a day of ten hours—the machine to be erected and tested at a properly opened-up face in said cutting before February 1877, and to be removed if it did not fulfil the guarantee before the end of that month. The pursuers were to uphold it for twelve months after delivery, and the price was to be £1115. The stipulation as to the date of trial was departed from by mutual consent—the machine, on the one hand, not being ready by the time named, and the defender, on the other hand, not having begun to open up his cutting at Carfin until August 1877; the machine accordingly was not delivered till July 1877, and was then taken, not to Carfin but to Gariongill, where the defender was making another cutting. The navvy was erected and worked at Gariongill from 24th March to 22d May 1878, during which time several alterations and breakages occurred involving loss of time, these being due, according to the pursuers, to the insufficiency of the defender's rails on which the machine worked, and the carelessness of the man in charge, but as the defender alleged, to the fault of the machine itself. In the proof which was subsequently led it, appeared that on no occasion while at Gariongill did the navvy excavate the stipulated quantity of soil, though the evidence was conflicting as to the amount which it actually did succeed in excavating. On 22d May the navvy was taken to pieces, parts of it being removed to the pursuers' works at Airdrie, and was subsequently re-erected at the Carfin cutting, where it was ready for work on 9th September. The face to which it was there applied appeared from the proof (though the evidence as to its dimensions was conflicting) to fall distinctly short of a "properly opened-up" one. A day or two afterwards a serious crack was discovered in the machine—an old one according to the pursuers; a new one according to defender—whereupon the defender refused to purchase the machine or to give it any further trial, on the ground that it had failed in the stipulated conditions.

The present action was accordingly raised by Messrs Dick & Stevenson before the Sheriff-Substitute of Lanark.

The pursuers pleaded—"(1) The pursuers having supplied the defender with the machine in question at the price stated, and the same being still due and unpaid, they are entitled to decree as libelled. (2) The pursuers being, and having all along been, ready to fulfil their part of the contract libelled, and the defender refusing or failing to fulfil his part, the pursuers are entitled to decree for the stipulated price. (3) Or, alternatively, the defender is liable to the pursuers in damages on account of his breach of the contract libelled. (4) The pursuers having, in terms of their contract, supplied to the defender the machine in question at Carfin cutting, and the same being still in the possession of the defender, he is liable in payment of the price sued for."

The defender pleaded—"(2) The machine having failed on trial, the defender is not bound to accept it. (3) The sale of the machine being conditional on the trial, which has failed, the defender is not liable in the price thereof. (4) The defender not having committed any breach of contract, is not liable in damages."