incarcerated in the prison of Airdrie on said 8th day of March, and detained there as a prisoner till the following day by virtue of a warrant granted by the said Sheriff-Substitute, to the loss, injury, and damage of the pursuer?"

LORD DEAS—As regards the first issue I am entirely of the same opinion. What has been said against that issue merely affects the sum to be claimed under it. I understand that the only sum which can be claimed is the sum in the bill, and taking that view I entirely concur.

The next question relates to the two issues which have been stated against Tudhope. I am very clearly of opinion that he is not liable; as I took the liberty of mentioning in the course of the discussion—quoting Lord Justice-Clerk Hope—that those *fugæ* warrants are very ticklish things to deal with. I do not think for my own part, that even supposing Tudhope had known that Russell wanted to have the bill back for the mere purpose of giving out a *fugæ* warrant, that he was doing anything wrong. In place of being a reason why he should not give it back, it was rather a reason why he should. It was quite right that he should get rid of such a hazardous proceeding if he could. I cannot imagine any ground of action against Tudhope.

Then as to the second and third issues, I cannot see why they should not be one. I cannot see any interest which the pursuer has to have two issues. There are some cases in which there is wrongous apprehension merely and no imprisonment, or there may be a doubt about the one and not about the other. But to have two issues in the present case would be a mere abuse of words.

LORD MURE—I agree that the first issue is a good one, and I also think that the second and third issues should be combined. On the fourth issue, however, I have had considerable doubt. My first impression was that Tudhope had been acting in concert with Russell throughout in full knowledge of the previous proceedings, and if that had been distinctly averred I should have been of opinion that the fourth issue should be allowed. In the sixth article of the condescendence it is stated that Russell caused the pursuer to be apprehended on a *fugæ* warrant, and "in order to accomplish this the defender Tudhope gave facilities to the defender Russell by reinstating the latter in the possession of the bill which was founded on and produced in the proceedings." Then in condescendence eight it is set forth how he proceeded, after giving the bill to Russell, to get it back again and presenting it for payment. And in condescendence nine it is averred that the pursuer further believes and avers "that this was done by the said defender, and the whole of the proceedings *in meditatione fugæ* taken by Russell, most wrongously and maliciously, for the purpose of extorting money from the pursuer which he was not actually due—a circumstance known also to the other defender Tudhope, and to his law-agent, Mr Robert Muir, writer, Lanark, who also acted as agent for Russell." Finally, in condescendence eleven it is said that the "pursuer was, as the defenders well knew, or at all events as the defender Russell well knew, due nothing to them or either of them." Now, when I read these statements I was under the impression that Tudhope, though it was not very clearly averred, was throughout in the knowledge that these bills were accommodation bills. But I cannot now so read these averments. I am not prepared to differ.

On the fifth issue I have no difficulty. My objection applied only to the fourth issue.

LORD SHAND—I am clearly of opinion that there is no relevant case here against Tudhope. I assume that Russell knew that he had no right to fill up the bill and put it in the circle, but as it is not alleged here that Tudhope was not an endorsee for value, I think he was entitled to do diligence on it. But Russell was also interested in diligence being done on it, because unless it was paid he would still be debtor in the £100 to Tudhope. In these circumstances I think that it is impossible to say that there is any case against Tudhope because he gave it back to Russell in the way alleged on record.

But I go further—even if Tudhope knew perfectly well about the bill I think he would not be liable. Russell got value for it, and he must either do diligence or give back the value. The mere circumstance that Tudhope knew that Russell was going to do diligence in a wrong way would not affect my opinion. Seeing that the *fugæ* proceedings were adopted by Russell in his own name on a bill which he was entitled to have in his own possession unless he gave Tudhope credit for £100. Whether Tudhope knew or did not know that the *meditatione fugæ* proceedings were to be adopted in the name of Russell has nothing to do with the use which Russell was to make of the bill.

In regard to the first issue I should myself have preferred that words limiting the damage to the contents of the bill should be added, but if your Lordships are satisfied that the issue may go to the jury in its present form I do not press my objection.

The Court disallowed the fourth and fifth issues, and altered the second and third in terms of the opinion of the Lord President.

Counsel for Pursuer (Respondent)—Dickson. Agents—J. & A. Hastie, S.S.C.

Counsel for Defenders (Reclaimers)—Guthrie Smith—Alison. Agent—T. F. Weir, S.S.C.

Friday, February 25.

SECOND DIVISION.

[Lord Rutherfurd Clark, Ordinary.

SHOTTS IRON CO. *v.* SIR GEORGE DEAS.
LA COUR & WATSON *v.* SHOTTS IRON CO.

Landlord and Tenant—Mineral Lease—Sterility—Agreement to Terminate Lease if Mineral found not worth Expense of Working.

A mineral lease for twenty-nine years at a fixed rent of £300 a-year contained a provision that if at any time during the lease it should be "judicially found," on a report by arbiters, that the mineral, "from no fault, ne-

gligence, or irregularity on the part of the lessees," had become not worth the expense of working, the lease should come to an end at the first term of Whitsunday or Martinmas after it should be so found. The lessees obtained a finding by arbiters in terms of the clause, but the arbiters explained that in so finding they proceeded, not on any deficiency in quantity or quality of the mineral, but solely in respect of the market price of the mineral. *Held* that the finding of the arbiters warranted decree declaring that the lease was at an end, and this at Martinmas 1880, although the first term after the judicial finding of the Lord Ordinary (afterwards affirmed) would not fall until Whitsunday 1881.

By lease dated 6th and 12th January 1869 Sir George Deas let to certain trustees for behoof of the Shotts Iron Co., then (and till 1871) an unincorporated company, "but expressly excluding assignees, legal and voluntary, and also excluding sub-tenants, except on condition of the said lessees remaining liable for the rent and prestations, and implement of all the stipulations in the lease, on which footing the lessees may sub-set, but not otherwise, All and Whole the seam of gas-coal or parrot-coal situated in the lands and others after described, known in the neighbourhood by the name of the Shotts or Shottsburn gas-coal, and sometime partially wrought by George Simpson as tenant thereof, together also with what common coal and ball ironstone and musselband ironstone may be found to be associated with the said gas-coal or parrot-coal, and falling to be wrought therewith in the ordinary course of working, but no other coal, mineral, or substance whatever . . . and that for twenty-nine years from and after Whitsunday 1867." The Shotts or Shottsburn gas-coal thus let to the Shotts Iron Co. was situated in or under the lands of Hartwoodhill and others, in the county of Lanark. The gas-coal extends through the greater portion of these lands, and the workings are known as the Dykehead Colliery. The lessees bound themselves to work the said minerals and others by the long-wall system only, or other complete system of excavation, "and that in a regular, proper, and systematic manner according to the best practice, and to keep the whole mines and workings at all times in good order and repair." The fixed rent to be paid by the lessees was £300 per annum, or, in the option of the landlord, certain specified lordships, which so far as regarded the gas-coal were to be 1s. per ton for the first five years of the lease, and thereafter at the rate of one-seventh part of the price of the coal thereof for the time being, after deducting the expense of taking the same to market. During the first five years lordships at the rate of 1s. per ton were accordingly paid instead of fixed rent. The lease then further bore—"Declaring that if in the course of any year, from time to time, after the lapse of the said five years, the working of the said gas or parrot-coal shall not be to an extent sufficient to yield a lordship equal in amount to the said fixed rent, the lessees shall be entitled to make up the difference from subsequent lordships at any time during the next three years immediately following the year in which the deficiency occurs; and if at any time during this lease, inclusive of the said first period of five years, it shall be judicially found, upon a report by an arbiter or arbiters, nominated in the manner hereinafter provided for, that the said gas-coal, from no fault, negligence, or irregularity on the part of the said lessees, has become not worth the expense of working, this lease shall come to an end at the first term of Whitsunday or Martinmas after it shall be so found, without prejudice to the subsistence and effect of this lease to every effect in so far as not thus legally terminated." Then followed provisions intended to ensure the safe and careful working of the mine, and, *inter alia*, the clause quoted below in Mr Landale's separate report; also clauses relating to the restoration of the land to its former state at the termination of the lease.

By sub-lease dated in August and September 1870 the Shotts Company sub-let to La Cour, Watson, and Simpson, coal masters and coal exporters in Leith, a portion of the gas-coal and minerals associated therewith which had been let to them by Sir George Deas. Sir George Deas was no party to this sub-lease, and had not been consulted as to the granting of it or as to its terms. The sub-lease was to endure for the same period with the principal lease, and clauses had been inserted in it similar to those above quoted from the principal lease, as to recouping the shortcoming between lordships and the fixed rent of any one year from those of the next three years, and likewise as to the circumstances under which and the manner in which the sub-lease might be prematurely brought to an end.

La Cour, Watson, and Simpson entered upon the subject and wrought the coal till August 1875, when they ceased to do so, as was alleged, in consequence of its having ceased to pay the expense of working. They continued, however, to pay the stipulated lordships to the Shotts Company, and thus preserved entire their rights under their sub-lease. No communication passed between Sir George Deas and the sub-tenants, all the states of output and fixed rent rendered to him down to Whitsunday 1879 inclusive (when there ceased to be any) having been signed and certified by the Shotts Company's manager in the same manner as they would have been had the Shotts Company themselves been working the minerals.

On 9th May 1879, and again more formally on 4th June of same year, La Cour, Watson, and Simpson wrote to the Shotts Company stating "that the gas-coal, from no fault, negligence, or irregularity on their part, had become not worth the expense of working," and that they nominated Alexander Simpson, mining engineer, their arbiter in terms of the lease, and thereafter the Shotts Company gave notice in similar terms to Sir George Deas (but without nominating any arbiter) on 4th June 1879. Sir George Deas answered the notice of the Shotts Company by calling upon them to state from what cause they alleged that the gas-coal had become not worth the expense of working—whether in respect of anything, and if so from what, in the state of the mineral—as upon that it depended whether the question was one for skilled engineers or one of relevancy to be determined by the Court. The Shotts Company made a call on La Cour, Watson, and Simpson in verbatim the same terms, but to neither call was any answer returned.

La Cour & Watson proceeded to present a petition in the Bill Chamber repeating the terms of their notice of 4th May 1879 and the nomination of Mr Simpson as their arbiter, and calling upon the Shotts Company as respondents to make a similar nomination. On this petition an open record was made up, intended as information to be laid before the arbiters, and which ultimately was so. The Shotts Company followed suit by presenting a similar petition against Sir George Deas, upon which a similar record was made up between him and them. In this record he set forth, *inter alia*, that supposing the question to be one of profitable or unprofitable working, past profits would fall to be placed against subsequent loss, whether actual or prospective, and on this footing he called upon the Shotts Company to produce a state showing the profit they would have made for the years 1869 to 1878 inclusive if they had themselves wrought the gas-coal during these years, as they might have done. The Shotts Company thereupon obtained from La Cour, Watson, & Simpson a state entituled "Statement of profit and loss at Dykehead Colliery from 1869 to 1878, both inclusive." This statement showed that the sub-tenants had during the early years of the lease realised clear profits to a large amount.

From the statement in these Bill Chamber records it also appeared that the Shotts Company in the discussion between them and La Cour, Watson, & Simpson had declined to appoint an arbiter unless La Cour, Watson, & Simpson should explicitly aver that a question of deterioration in the state of the mineral field or difficulties in working it were involved, which required to be solved by men of skill, and that Sir George Deas had urged a similar objection, but averments to the effect desiderated having been thereafter made by La Cour & Watson, and repeated by the Shotts Company in their respective Bill Chamber records, Sir George Deas then named Mr David Landale, mining engineer, to be arbiter on his part, and the Shotts Company also named Mr Landale to be arbiter on their part.

The nomination of the arbiters being then sanctioned by the Lord Ordinary on the Bills, the unclosed records prepared in the Bill Chamber were laid before them by way of pleadings and information for the respective parties. The sub-tenants then moved the arbiters before proceeding, and again in the course of the procedure, to appoint an oversman who might act in case of difference of opinion, but as the clause under which alone the lease could be prematurely brought to an end required "a report by an arbiter or arbiters" without mention of an oversman, the arbiters declined to make the appointment, as being incompetent, under the authority of *Merry & Cuninghame* v. *Brown*, 15th July 1859, 21 D. 1337, and whole Court, 22 D. 1148, *aff.* House of Lords 26th March 1863, 1 Macph. (H. of L. Cases) 1.

The report of the arbiters contained, *inter alia*, the following introductory narrative:—"The arbiters having been duly appointed, accepted the office conferred upon them, appointed William Barr Crawford, writer in Glasgow, to be clerk to the arbitration, and further they ordered Messrs La Cour, Watson, & Simpson to lodge with the clerk to the arbitration, within ten days from the date of said minute, a statement in writing of the grounds on which they claimed to hold the gas-coal mentioned in the said sub-lease had become and was now not worth the expense of working, to be seen and answered by the Shotts Iron Company within ten days thereafter. In answer to the latter part of said minute Messrs La Cour, Watson, & Simpson lodged a minute in which they adopted the revised statement for them in the petition at their instance against the Shotts Iron Company depending in the Bill Chamber to be their statement of facts in said arbitration." On this narrative the arbiters on 16th July 1880, after a proof, issued their report in the following terms:—"The arbiters being now well and ripely advised in the whole matters referred to them, they hereby report, that from no fault, negligence, or irregularity on the part of the sub-tenants Messrs La Cour, Watson, & Simpson, the gas-coal let to them by said sub-lease has become not worth the expense of working. The arbiters think it right to add that the grounds on which they have arrived at this conclusion have reference solely to the state of the market for gas-coal at the time the tenants gave notice to the landlord of their intention to terminate the lease; and indeed the tenants, in the evidence laid before the arbiters, did not attempt to rest their case on any other grounds. Neither did they dispute, nor in the opinion of the arbiters could they have successfully disputed, either the existence of gas-coal in the lands let to them, other than those out of which the coal has been already wrought, or the fact that there is no physical difficulty in working the coal in said lands.

"All which is humbly reported by

"D. Landale.

"16th July 1880. "A. Simpson."

Additional Report by David Landale.

"While my co-arbiter and I have arrived at the conclusion that the gas-coal in question is not worth the expense of working in the present state of the market, it is impossible for anyone to predict that it will continue up to the end of the lease in 1896, or any specified period, as it is found whenever the better class of gas-coal gets plentiful, and comes to be sold at or under 20s. per ton, second-class coal as this cannot be sold, as is the case just now. When the prices of the better ones rise to 25s. and upwards per ton there is a demand for second-class, and they occasionally become highly remunerative. The working of such coal is therefore intermittent, and tenants in using ordinary foresight should be ready to meet the market when it is favourable to them, which the sub-tenants in this case have not done; they have not fulfilled the following clause in their lease, viz., 'And the said lessees bind themselves to work the said minerals and others by the long-wall system only, or other complete system of excavation, and that in a regular, proper, and systematic manner, according to the best practice, and to keep the whole mines and workings at all times in good order and repair, and to keep secure, upred, and patent all levels, roads, wall-faces, rooms, and air-courses of going pits or inclined planes, so far as may be necessary for the proper working thereof, and to leave the going pits and works, and the levels and air-courses, and rooms and wall-faces of the going pits, at the natural expiry, or sooner termination, partial or

total, of this lease, in good order and condition, and without any accumulation of water in the rise workings, and generally in such condition as shall enable the landlord or incoming tenant advantageously to pursue and carry on the same or other working therefrom of the minerals in his lands.' On the contrary, they have worked out the easiest-got portions of the field by the pits Nos. 1 and 2, taken out the pillars, partially dismantled the pits, let the water rise to its natural level, and left the workings inaccessible, without open roads or air-courses to any wall-faces. They have also left about six acres of coal lying in a shallow trough between the pits unwatered, and have not left the workings 'in such condition as shall enable the landlord or incoming tenant advantageously to pursue and carry on the same or other workings therefrom of the minerals on his lands,' when the state of the market permits of the coal being wrought to profit, which I consider to be all important, as by no exertion on the part of the tenants or an incoming tenant could the works be restored or got ready to produce coal, or to take advantage of a rise in the market, within half-a-year or more.

"All which is humbly reported by

"16th July 1880. "D. LANDALE."

P.S.—"I wish to explain that by nothing in the joint-report did I intend to express or to indicate an opinion as to the legal construction of the words 'owing to no fault, negligence, or irregularity on the part of the tenants,' or any other question of legal construction of the lease, all which questions I consider to belong to, and to be left for, the decision of the Court."

The arbiters having reported as above under the reference between La Cour, Watson, and Simpson and the Shotts Company, and in similar terms in the reference between the Shotts Company and Sir George Deas, La Cour, Watson, and Simpson, after calling on the Shotts Company to concur in declaring the sub-lease at an end, raised a summons of declarator against that company on 26th October 1880, concluding to have it found that, from no fault, negligence, or irregularity on the part of the pursuers, the sub-tenants, the gas-coal sub-let to them had become not worth the expense of working, and that the sub-lease "shall come to an end at the term of Martinmas 1880, or at such other date as shall be fixed by our said Lords in the course of the process to follow hereon, without prejudice to the subsistence and effect of said lease to every effect in so far as not thus legally terminated."

The Shotts Company thereupon raised a summons of declarator applicable to the principal leases against Sir George Deas on 2d November 1880, containing conclusions verbatim the same with those above quoted from the summons brought against themselves by the sub-tenants applicable to the sub-lease. A record was made up and closed in each of these actions respectively. In the record so made up in the action against the Shotts Company at the instance of the sub-tenants, the Shotts Company repeated and adopted as their own the averments and pleas which Sir George Deas had stated in the action at their instance against him.

In the action raised by the Shotts Company they averred (6) that they soon after their term of entry proceeded to explore the field, and expended a considerable amount of capital in doing so, by sinking pits and otherwise. Thereafter, by sub-lease, dated 16th and 26th August and 22d and 23d September 1870, they sub-let a considerable portion of the field to Messrs La Cour & Watson, coalmasters and coal exporters in Leith, which sub-lease contained the same clauses in every respect (except that the royalties stipulated for were slightly higher) as those contained in the lease between the pursuers and defenders, and soon after Messrs La Cour & Watson's entry to said field they expended capital to the extent of £5607, 7s. 3d. in acquiring and erecting machinery, sinking shafts, and providing plant for prosecuting the undertaking. In the course of a few years they found the seam of coal thinner, while the cost of working had increased, and the coal from its inferior quality had become unsaleable. The said gas-coal, from no fault, negligence, or irregularity on the part of the pursuers, had become, and continues to be, not worth the expense of working, and on or about 9th May 1879 the said sub-tenants gave intimation to the pursuers in terms similar to the intimation thereafter given by the pursuers to the defender of their intention to terminate the lease.

The answer to this article was generally a denial of any knowledge of the expenditure said to have been made or of the negotiations for a sub-lease. It was explained that the quality of the coal was known to the pursuers from the first, and had never varied.

The remaining articles of the condescendence need not be quoted. They merely mentioned the letters of intimation, the nomination and acceptance of the arbiters, and that they had issued a report, which was referred to for its terms.

The statement of facts for the defender was in the following terms:—

"1. By the lease in question, which is dated 6th and 12th January 1869, the defender let to the trustees therein named for the Shotts Iron Company, now incorporated by Act of Parliament, the gas-coal or parrot-coal situated in parts of the lands and others thereinafter described, as shown on a plan subscribed by the parties thereto, being part of the lands of Hartwoodhill, together with what common coal and ball ironstone and musselband ironstone might be associated therewith, and falling to be wrought along with the gas-coal in the ordinary course of working; and that for the period of twenty-nine years from and after Whitsunday 1867, which was declared the term of entry thereto. No power was reserved to the proprietor to resume possession of the minerals let, otherwise than by the tenants' voluntary act or consent, till the expiry of that full period. On the contrary, the lease was of the nature of an absolute sale to the sub-tenants of all minerals of the description specified which they might think proper to work and remove from the lands in the course of that period, and the price or consideration for them was the fixed rent of £300 a-year, payable half-yearly during the sub-lease, or certain lordships if these lordships should be in excess of the fixed rent.

"2. The lands extend to between 200 and 300 acres. The seam of gas-coal let to the pursuers extends through the greater portion of the lands. It could not possibly be wrought out in the ordinary course of working within the stipulated endur-

ance of the sub-lease. This was well known to the pursuers, and to Mr Ormiston their head manager, who is also their skilled resident engineer. . . . . He is also quite aware of the fluctuating nature of the market prices of the gas-coal known as the Shotts or Shottsburn gas-coal, and that to estimate them fairly they must be reckoned on the average of a considerable period of years.

"3. It is nowhere said in the lease that its endurance shall be dependent on the rise or fall of market prices. Neither prices nor market prices are anywhere mentioned in the lease. But by the lease the said lessees bind themselves to work the 'said minerals and others by the long-wall system only, or other complete system of excavation, and that in a regular, proper, and systematic manner, according to the best practice.' It is with reference to this obligation that the *onus* is laid on the tenants, before they can ask a judicial finding terminating the lease, to prove by the report of men of skill that the gas-coal, from no fault, negligence, or irregularity on the part of the sub-tenants, has become not worth the expense of working. The only occurrences which might eventually have that result are described as occurrences which from their nature might have been caused by fault, negligence, or irregularity on the part of the tenants, and which shall be ascertained in a specially prescribed manner not to have been so caused.

"4. The gas-coal known as the Shotts or Shottsburn gas-coal is a marketable mineral extensively found and wrought in various parts of the country, and extensively sold in the coal markets both at home and abroad at prices which are regulated by the state of supply and demand for the time being, independently of fault or merit on the part of the tenants or occupants who either directly or indirectly work and sell the same.

"5. Accordingly, the pursuers in their notices of 9th May and 4th August 1879, and again in their petition in the Bill Chamber, named Mr Alexander Simpson, mining engineer, as their arbiter under the clause in the sub-lease founded on by them, and called upon the defenders to name an arbiter on their part to act along with the said Alexander Simpson. The defender objected, both in his answers to the notices and in his answers to the petition in the Bill Chamber, that nothing specific had been averred requiring to be inquired into by skilled engineers, and called upon the pursuers to make their statements specific. The petition was followed by explanatory or supplementary statements and answers, in the course of which the defender averred upon his part, in order to bring the pursuers to the point, that no symptoms of sterility had appeared, and no obstructions had arisen to the working of the gas-coal and minerals associated therewith. This averment was denied by the pursuers, and it was only after and in consequence of that denial and relative averments made by the pursuers in article 3 of their said revised statements that the defender agreed, by article 8 of his revised statement in the Bill Chamber, 'to nominate an arbiter on his part to report along with the arbiter nominated by the petitioners (now pursuers), subject to all questions of law and relevancy which may competently arise upon the terms of the report when received.'

"7. By the said sub-lease the fixed rent payable by the sub-tenants to the pursuers is the same with the fixed rent payable by the defenders to the defender, but the lordships payable to the pursuers by the sub-tenants are somewhat higher than the lordships payable by the pursuers to the defenders under the principal lease. The period fixed upon by the arbiters, at which alone they report that the gas-coal was not worth the expense of working if the then market price was to be the rule, is the date of the pursuers' notices to the defender, viz., 3d June 1879.

"8. The pursuers' notice of 3d June 1879, and their petition to the Lord Ordinary on the Bills, proceeded on the assumption, that according to the true and sound construction of the clause in the lease which they now rely upon as entitling them to have the lease brought to an end, that clause was not applicable unless obstructions or other unforeseen difficulties of a physical nature had arisen to the working of the gas-coal. It was on this assumption also that the defender nominated an arbiter of skill to act along with the arbiter nominated by the pursuers."

This statement of facts concluded by quoting the reports of the arbiters already given.

The pleas-in-law for the pursuers were—"(1) It having been judicially found, upon a report by arbiters nominated in manner provided in said lease, that the gas-coal let to the pursuers by said lease has become not worth the expense of working, the said lease is thereby terminated as at the term of Martinmas 1880, and the pursuers are entitled to declarator as concluded for. (2) Or otherwise, the pursuers are, in respect of the terms of the report of the said arbiters, entitled to have it judicially found that the said coal, from no fault, negligence, or irregularity on the part of the pursuers, has become not worth the expense of working, and to obtain decree of declarator as concluded for."

The defender pleaded—"(1) According to a sound construction of the lease in question, it is not contracted that a fall of market prices shall in any way affect the endurance of the lease; and the defender is therefore entitled to obtain a finding to that effect, and to be assoilzied from the conclusions of the action. (2) Even assuming that a fall in market prices might in some circumstances affect or limit the endurance of the lease, it would not be held to do so where the arbiters have not affirmed the fall except at the particular date of the pursuers' notice, and there is nothing to show that the fall will continue throughout the future years of the lease."

As already noticed, the averments and pleas of Sir George Deas in this action were *mutatis mutandis* adopted by the Shotts Company in the action raised against them by La Cour, Watson, and Simpson, the pursuers' averments and pleas in that action being identical with those quoted here as made by the Shotts Company in the action raised by them.

Lord Rutherfurd Clark, after hearing counsel for the parties successively in both actions, pronounced this interlocutor in the action at the instance of the Shotts Company against Sir George Deas:—

"The Lord Ordinary having considered the cause, declares and decerns in terms of the

libel to the effect that the sub-lease libelled terminated at Martinmas 1880: Finds the defender liable in expenses," &c.

His Lordship's note was as follows:—"The chief question in this case is, Whether the pursuers are entitled to put an end to the lease on the ground that the coal has become unworkable to profit, or whether it is necessary, in order to the exercise of this right, that there should be some change in the condition of the coal, either as regards quantity, quality, or accessibility, so that thereby it 'has become not worth the expense of working?' In either form of the question it is assumed that there has been 'no fault, negligence, or irregularity on the part of the lessees.'

"The Lord Ordinary is disposed to think that the pursuers are in the right, and that the clause was inserted in the lease in order to enable them to free themselves from the obligations of the lease when the coal had from any cause not due to their fault become unworkable to profit. It appears to him that the question whether the 'coal is worth the expense of working' cannot be dissociated from any of the considerations which would determine any ordinary judgment in continuing or abstaining from working it. The expense of working necessarily introduces elements beyond the mere condition of the coal itself. In the sense of a commercial contract, nothing, it is thought, can be worth the expense of working which yields no profit, whether the absence of profit is due to the fall in value of the article or to the actual expense of working it.

"It is said that this construction of the lease gives the tenant the whole benefit of high prices, and throws on the landlord all the loss resulting from low prices. This is not true. The landlord gets the advantage of a prosperous time through the royalties which are stipulated for. On the other hand, when no profit is to be made, the landlord retains his minerals, which by a change in the market may become valuable, and the tenant merely avoids a loss in circumstances when it would be absurd to work them.

"Further, it was urged that the arbiters merely find that the coal was not worth the expense of working at the time when the pursuers gave notice of their intention to terminate the lease, and that this finding may be referred to a state of the market which might be of short duration, and which had already passed away. But in the opinion of the Lord Ordinary it is not the fair meaning of the award. He thinks that it must be read as referring to a state of the market of indefinite—not of temporary or even measurable—duration. This is the only sense in which men of intelligence could address themselves to the question which they had to decide. It is worth notice that the defender does not aver that even now there has been a change, or even an indication of change, in the condition of the market."

The interlocutor in the action at the instance of the sub-tenants was to the same effect, and his Lordship referred to his note quoted above. Both interlocutors were dated 16th December 1880.

On a reclaiming note for Sir George Deas and a reclaiming note for the Shotts Company in the sub-tenants' action against them, it was argued for Sir George Deas, and the same argument was held as repeated for the Shotts Company against the sub-tenants:—

1st, As to the effect of a fall of prices.—In a mineral lease the landlord is understood to warrant the existence of the mineral and its being physically workable. The risk of market prices is in all cases presumed to be upon the tenant. If this risk was intended in the present case to be laid upon the landlord, a stipulation so unusual would have required to be expressed in the most distinct and unmistakeable language. The *onus* of so expressing it lay on the party who was to claim benefit from it. The construction of the words used in the clause under consideration was not a question for the arbiters any more than the analagous question in *Dixon* v. *Campbell*, where, although the arbiters had found the coal was "incapable of being wrought to advantage," the Court and the House of Lords found the reverse. In the present case the import of the clause had been under the notice of the arbiters, but they rightly refrained from giving or expressing an opinion upon it. It was left for the Court to determine what the legal construction of this clause was.

2d, Under a lease and sub-lease, each binding the lessees absolutely for twenty-nine years, and having still seventeen years to run, can it be held that such a period of depression has been affirmed by the arbiters as to entitle a tenant or sub-tenant who has realised large profits to be forthwith free from his lease?—Past profits fall to be taken into view whatever be the ground upon which a mineral tenant attempts to get rid of his lease—whether it be obstructions in the mine short of absolute sterility, or coupled with a fall of prices and increased expense of working, or whatever else it may be. Lord Reston's opinion in *Dixon* v. *Campbell* (2 Shaw's App. 177). In their joint-report in the present case the arbiters say they have arrived at their conclusion with reference "solely to the state of the market for gas-coal at the time the tenants gave notice to the landlord of their intention to terminate the lease." In *Dixon's* case the fixed rent was £900 a-year, and apparently the coal during several years of the lease, which was only for nineteen years in all, had not been wrought to advantage. Still, because it might be so in future, it was ultimately held that the lessees could not abandon. It was the duty of the arbiters in the present case to have instituted a comparison between past profits and fixed rents, past and prospective, without which neither they nor the Court had the requisite *data* for considering the effect which ought to be attributed to the alleged depression, and still less for holding it conclusive. Words similar to those of the House of Lords' judgment in *Dixon's* case might not be inappropriate to the present case, viz., to find that in *hoc statu* it is not in the power of the tenants and sub-tenants to give up the lease and sub-lease.

It was argued for the pursuers in their respective actions that the words of the clause in the lease and sub-lease were too comprehensive to admit of being affected by any of the views urged for the principal tenants and the landlord. They apply to all causes, whether in the state of the mine or the state of the markets, which cannot be attributed to fault, negligence, or irregularity on the part of the lessees.

As to the length of the period of depression, it must be presumed that the arbiters were of opinion that it could not be held as merely temporary, otherwise they would have said so. And as to the argument founded on past profits the sub-tenants were entitled to these in consideration of capital expended and the risk they run in a precarious trade.

At advising—

LORD JUSTICE-CLERK—I have considered this reclaiming-note at the instance of Sir George Deas, and that at the instance of the Shotts Iron Co., with attention and anxiety, and I have found it not unattended with difficulty. It embraces some legal principles of importance to the extensive branch of commerce to which it relates. I need not recapitulate the facts—indeed there are no facts which would require recapitulation. The whole question lies in two points—first, the construction of the disputed clause in the mineral lease before us, and second, the proceedings of the arbiters.

The mineral lease between Sir George Deas as proprietor, and the Shotts Iron Co. as tenants of the mineral field embraced in it, is dated in 1867, and was intended to have a currency of twenty-nine years, terminating therefore in 1896. The fixed rent stipulated was £300 a-year, and certain royalties or lordships were also contracted for. There is nothing peculiar or distinctive in the general provisions of this lease. It was certainly intended to be of long duration, and the defined term could only be interrupted by the clause on the interpretation of which this question turns. That clause is in the following terms—"And if at any time during this lease, inclusive of the said first period of five years [a period referred to in the immediately preceding clause, and to which no importance can be attached], it shall be judicially found, upon a report by an arbiter or arbiters nominated in the manner hereinafter provided for, that the said gas-coal, from no fault, negligence, or irregularity on the part of the said lessees, has become not worth the expense of working, this lease shall come to an end at the first term of Whitsunday or Martinmas after it shall be so found, without prejudice to the subsistence and effect of this lease to every effect in so far as not thus legally terminated." It is maintained on the part of Sir George Deas that this clause was intended to provide only against one contingency, viz., the deterioration of the mineral field itself, which was the only subject of the lease, and that either by a change in the quality of the mineral which could be extracted from it by proper and skilful working, or by unknown and unforeseen obstructions in the course of its excavation. On the other hand, it is contended that the provision is quite general, and that its terms are unambiguous, and that its true as well as its popular meaning is, that if from any cause not attributable to the tenants themselves the mineral fields should prove not worth to the tenants the cost of working, taking one year with another, they should be at liberty to terminate the contract. I cannot say that I can cast the balance between these two constructions without hesitation. It is said by the landlord that his contention is supported first by the phraseology of the clause, second, by the substance of the remedy which it provides, and generally by the legal character or nature of the right conferred by it and the evil intended to be remedied. The words, it is said, refer only to the mineral itself. The clause is to take effect when the gas-coal becomes not worth the cost of working. That denotes, it is said, as a condition preliminary to the provision coming into operation, some change for the worse on the mineral itself or on the mineral field let, and is not consistent with a state of things in which the coal might be of better quality or the workings easier than they ever were. It is further contended that the provision that this result must proceed from some cause other than a fault on the part of the tenants indicates that the contemplated failure must be such as might arise from such a cause. Lastly, it is said—and this is by much the most weighty consideration in the case on that side of the question—that the true object of the clause was to apply to this mineral lease the principle of sterility which obtains in agricultural leases, and to introduce into this bargain the equitable doctrine which was found in the case of *Baird* to have no place at common law in a mineral lease. It is argued that while the landlord may be fairly held to guarantee that the subject of the lease is worth the cost year by year of cultivation so far as its productive power and quality are concerned, it is out of the question to hold him responsible for fluctuation or depreciations in the market which depend on elements and contingencies which no one can foresee or control. I have stated these views as they were argued to us, and as they occur to myself, because I think the views deserving of respect, and I am not inclined to treat them lightly. That these considerations may have occurred to the landlord in executing this lease is certainly not excluded by its terms. Nevertheless its scope, in my opinion, is too wide and its tenor too general to be so limited. It seems to me to provide, in language sufficiently precise and intelligible, for a condition of things in which it would not be reasonable to hold the tenant bound. That the tenant should be compelled year after year to expend his capital in fruitless labour, to a period which is almost co-extensive with the century, is a result not reasonable, nor is it unfair that the landlord should on such an event occurring simply resume his property, with power to turn it to any advantage which its nature or the times will permit. In regard to the structure of this clause, while the criticism on the phraseology has some grammatical force, I would remark that if it had been intended that it should only take effect when the result comtemplated arose from certain specific causes, it would have been easy, and as I think necessary, so to have expressed it. What the gas-coal was worth could only be ascertained from knowing what it would bring in the market, and the moment its worth was introduced as the test on the occurrence of which the clause was intended to operate, the state of the market would be an essential feature. The causes which might lead to depreciation are innumerable, external and internal, and it would have required stipulations much more precise to have excluded this inference from the words employed. In regard to the analogy derived from the principle of sterility in agricultural leases, I should not have been surprised, after our judgment in the case of *Baird*, to have found a corresponding clause in such a case as this; and although the terms are

materially different, the argument on this head did derive some support from the case of *Dixon & Campbell* which was referred to in the debate. I may, however, remark that that case itself did not involve any general principle which it would be altogether easy or safe to follow. But from the views expressed in that case I think it was all the more desirable that the words employed in this clause, if that was the real contemplation of the parties, should directly have expressed their intention. I am therefore constrained to read this clause according to its more apparent meaning, and the only other question is, whether the event contemplated has been found by the arbiters to have occurred. In regard to the award of the arbiters, I certainly cannot say that it is a very favourable specimen of its class. It contains some things that are perfectly clear, and other things which are exceedingly obscure—at least I have been totally unable to comprehend the note which Mr Landale after signing the award has added to the opinion which he there expressed. I can neither understand its terms nor its object. But when I come to the award itself, it is perfectly precise in the only matter that is of the slightest consequence. The question was, whether the gas-coal let by the lease had become not worth the expense of working, and the arbiters find that the gas-coal has become, and had become at the date which they fixed, not worth the expense of working, from which it necessarily follows that the lease comes to an end. It is quite true that the arbiters also say that they proceeded exclusively upon the market rate. Of course if the effect or result was produced solely and entirely by the fact that a commodity of that description no longer brought a price which would make it worth the expense of working, there was no alternative in arriving at that result but to go exclusively upon the market rate. But if I am right in my construction of the clause, that was exactly the proceeding which the arbiters were bound to follow. They have found that the gas-coal is not worth the expense of working. The mode in which they arrived at that result is not essential, provided they were entitled to arrive at it on these grounds. They have explained that they arrived at it thus—the price or the worth of the gas-coal, which must necessarily depend on the market price, had gone down to a degree which made it wholly unremunerative. It is said—and that part of the award I am not altogether satisfied with—that the arbiters should have told us how they arrived at the market rate, and whether they proceeded only on the present or on the prospective rate which was likely to rule the market one year with another. The Lord Ordinary has held however—and I entirely concur with him—that the only meaning of the expression used by the arbiters must be presumed to be, not that the market rate on the particular day would have made the coal not worth working, but that taking one year with another the prospects of the market as well as its existing condition enabled them to say that permanently, and in a chronic sense, this gas-coal is not now worth the expense of working. They necessarily were obliged to consider the market rate in any view of the meaning of the clause, and I therefore assume that the arbiters in the explanation which they give are referring to their practical knowledge as applied to the existing and past and probable rates to enable them to arrive at the only result submitted to them, viz., whether the gas-coal was worth the expense of working. And therefore I am of opinion that the Lord Ordinary's interlocutor should be adhered to, and of course the same result will follow in the corresponding reclaiming-note for the Shotts Co.

LORD YOUNG—I am of the same opinion, and, I confess, without any doubt or difficulty. The only question, as your Lordship has pointed out, is, whether or not the arbiters have misapprehended the meaning of the clause in the lease which your Lordship has read. If they have not, then their report to us is conclusive, for they report in terms that, from no fault, negligence, or irregularity on the part of the tenants, the Shotts Iron Co., the gas-coal let to them by the lease has become not worth the expense of working. But it is said that the arbiters have misapprehended the true meaning of the clause in the lease with reference to which they were to report; and the misapprehension alleged, as your Lordship has pointed out, is, that whereas according to the true meaning of the clause (as the landlord maintains) the result of becoming not worth the expense of working thereby provided for must be brought about by some change in the mineral field—exhaustion of the coal, or the occurrence of troubles which render it impossible to work it, or less easy to work it,—the arbiters have, misunderstanding the true meaning and import of the clause, thought that the same consequence under the clause would follow if the result of becoming not worth the expense of working was brought about by a fall in the market, the worth of the article when wrought and produced not being equal to the expense of working and producing it. If the latter view of the true meaning of the clause, which it sufficiently appears from the report was the view taken by the arbiters, be the right one, then the defender has no case, and I am of opinion with your Lordship that it is the right one. The clause in question was introduced for the protection of the tenant. It is in his favour and for his protection. Protection against what? Against its turning out at any time that the mineral of which he had a long lease was not worth working. He wanted to be protected against that possible future event—that he should not in that case be saddled with a lease under which he should have to pay, not lordship, because he would not work the mineral that was not worth the cost of working, but a fixed rent of £300 a-year. He desired to be protected in that possible event against paying £300 a-year for nothing. But if that event, for his protection against which the clause was introduced, occurred—that he could take nothing by his lease, because the mineral which was the subject of it was not worth the expense of working it—what could it signify to the interest which he desired to be protected how that result was brought about? The suggestion that the tenant requires protection if it is brought about from a change occurring in the mineral field, but does not require it if it is brought about in any other way, as, for example, from a rise in the cost of labour or a fall in the market price, is a suggestion which I do not understand. There is no fault in any case. It is no fault of the landlord or the tenant that a change occurs in the mineral field. It is no fault

of the landlord or the tenant that the price of labour rises or that the market price of coal falls, or that it ceases to be marketable altogether. But the protection which the tenant desired was against the possible event of his mineral lease bec oming of no worth to him—that he should not in that event have to pay the landlord £300 a-year. A change in the coal will not *per se* bring about the result without reference to something else. There are two things given to you—the one is worth, that is, worth of the article when produced, and the worth of the article when produced is just its value in the market, and the other is the cost of working it. If the latter does not exceed the former, then the thing is worth the cost of working, and otherwise not. You must have the two things before you and compare them, and see whether the one equals or exceeds the other, and which is in excess of the other, before you can answer the question whether the mineral is worth the expense of working or not. If you ask anybody, "Is that mineral field worth the expense of working it?" he would say, "I must know the price of coal in the market, and I must know the cost of producing it in this field." Without knowing these two things he could not answer you. And I take leave to say that a change in one respect may counteract a change, or the effect of a change, in another. For if the coal had became greatly exhausted, or troubles had occurred in the mineral field, the effect of that might be counteracted by a fall in the cost of labour or a rise in the market price of the article. A change in the mineral field which without any change in the price of labour or the market price of the article would lead to the result provided against by this clause may be entirely counteracted by diminished price of labour or increased market price of coal. Again, a fall in the market price of coal which *per se* would lead to the result that this mineral field was not worth working might be effectually counteracted by a fall in the price of labour or by the coal in the field becoming more abundant, affording a richer and more easily worked seam. In short, you must take account of all these things, and the prudent tenant considering whether the mineral is worth working or not has to take all these these things into account, and if taking them into account he comes to the conclusion that it is not worth the expense of working, he comes to a conclusion which in his opinion at least would bring him within the operation of this clause, and will do so if his conclusion be well founded. But the landlord very properly protects himself against the tenant hastily and upon insufficient grounds coming to that conclusion, for he requires that it shall be supported by the report of arbiters. We were told that the tenant gave up working the field some five or six years ago, because in the state of the market it was not worth working. But the market might have come round, and then the case entitling him to relief or inducing him to desire relief would have ceased to exist. But at last he desires a report of the arbiters, and they report that he is right —that the mineral is really not worth the cost of working; there is plenty of it, and physically there is no difficulty in working, but it is not worth the cost, because when worked it would not produce a price which would cover the cost. Well, the arbiters report upon that, and is not that the very case in reason and in common sense which is provided for by the clause. To say to the tenant it is quite true the coal is not worth the expense of working; it would be foolish to work it, for you would be laying out more money than you would get when you produced it, and so you must leave it unworked, but this clause is not meant to protect you in that case—is a proposition which I cannot assent to. I think it is against law, and frustrates the object which both parties had in view in agreeing to the clause. I have therefore no hesitation in concurring in the judgment of the Lord Ordinary. I assume that without the clause in question the tenants would have been held to the lease for better or worse, and so must have paid the rent while it endured, although they had and could have no return for it. But the clause, as I construe it, is a very reasonable bargain with reference to the legitimate interests of both parties, for it only stipulates that the lease shall end when ascertained by arbiters mutually chosen to be worthless—not momentarily, or only for a season the end of which can be reasonably foreseen, but indefinitely, that is, for a period which has endured for a long while, and the end of which cannot be foreseen; for I assume with the Lord Ordinary that no arbiter would terminate the lease upon a merely temporary depression of the market. It was not formally established, but nevertheless it was admitted at the bar that the mineral was not worth the cost of working, and was not in fact worked for several years before the arbiters were appealed to.

LORD LEE—I have come to the same conclusion, but I desire humbly to confess that I have felt the same difficulty with your Lordship. Your Lordships are asked by this summons to find and declare that from no fault on the part of the tenants or their workings this gas-coal has become not worth the expense of working, and your Lordships are upon that ground asked to find and declare that at a date to be fixed by the Court this lease came to an end. The action at the instance of the Shotts Iron Company (the principal tenants) is substantially a defence against the action raised by La Cour & Watson, to whom they granted a sub-lease containing a clause in the same terms as that referred to by your Lordships; and the defences stated by Sir George Deas to the action at the instance of the Shotts Iron Company appear to be in substance identical with the defence stated by the Shotts Iron Company to the original action. The pleas stated upon the construction of the lease are the same. It is necessary, however, the question having been raised, to construe the clause according to its legal import, and it is not possible to put a different construction upon it as between the parties to the original lease from that which it bears in the sub-lease to La Cour & Watson. Now, the question raised depends on the terms of the report which has been obtained from the arbiters, and the question is, Whether upon that report the Court can judicially find in terms of the conclusions of the summons? Two points have been raised by the reclaimer upon the terms of that report. A third point was raised in argument, which I think has not yet been adverted to, about the date which should be fixed, but that is a subordinate matter. The two

points which were argued were, in the first place, that the state of the market by itself cannot justify a finding that the coal has become within the meaning of this lease not worth the expense of working; and the second point was, that in any view the state of the market at the time the tenants gave notice is not sufficient to support such a finding with reference to a lease for twenty-nine years from Whitsunday 1867. Now, on the first point, my opinion is that the worth of coal in a particular field necessarily depends on the state of the market, because it depends on the market in that neighbourhood whether that coal can be brought into use at such a cost as will pay working expenses. I think this is illustrated by supposing that at the time when the lease was entered into there had been no coal of that kind in the district which could be supplied without working a mine of equal depth and difficulty, and that subsequently a similar coal of equal quality had been discovered near the surface of the ground and in the same locality. In that case it is obvious that the coal in the lease must become and be not worth the expense of working so long as the more accessible coal shall last, and that if there is enough of that coal this state of matters must endure for the remainder of the lease. Thus, without any change on the subject of the lease or in the expense of working, and simply by reason of the outside circumstance of other coal being attainable, and capable of being brought into the market without the trouble and expense of working such a mine as was required here, the coal in the lease ceases to be worth the expense of working. I think that all contingencies affecting the value of coal in the district must be held to have been in view of the parties to this lease, and that therefore it must have been contemplated as possible that the coal might come to be not worth the expense of working although everything in the way of proper working has been done and no change takes place except in the state of the market. I agree therefore with the Lord Ordinary on this point.

On the question whether the report sufficiently shows that the coal had become not worth the expense of working, I assent to the proposition contended for by the reclaimer, that the fact to be ascertained is not merely the worth of the coal with reference to the state of the market at a particular time, but that it is absolutely, so far as this lease is concerned, not worth the expense of working. But although I agree with the view which your Lordship has expressed upon the ambiguous and even apparently contradictory character of the report in some parts of it, I think the reporters in referring to the date at which the tenants gave notice cannot be held to have qualified the absolute terms of their report as made in the previous paragraph. They appear to have thought it necessary to have fixed some time at which to bring their calculation to a point; but it is not consistent with a fair construction of their report, in my view, to hold that they did not take into consideration, in arriving at the conclusion as at that date, the whole circumstances of the lease, including the length of it. I do not think that they could have reported as they have done in the second last paragraph of their joint report if they had confined their attention to a particular month or year. I concur therefore on both points, and I am of opinion that the Lord Ordinary's interlocutor should be affirmed. In my view, the case of *Dickson* v. *Campbell* is really not applicable here at all. I have examined that case with some care, and it appears to me that the clause in the lease and the report which was before the Court in that case were both different. The terms of the lease related to unforeseen accidents, occurrences, dykes, or troubles not occasioned by irregular or improper working. These expressions were construed as having reference to something within the mine, and as requiring that the Court should be able to find that from some cause arising within the mine, or at least partly from some cause arising within the mine, the coal in question had ceased to be capable of being worked to advantage. That ground does not apply here, for the lease is different. It does not refer to anything of that kind, but is quite general in its terms. Further, the view on which the case was decided was that the report showed only a temporary fluctuation in the market, and did not show a permanent change. In both of these respects, therefore, the case of *Dickson* v. *Campbell* is clearly distinguishable from the present.

With reference to the date which should be fixed by the Court as that at which this lease should be declared to be at an end, I do not see that there is any occasion to alter the Lord Ordinary's interlocutor.

The Court adhered.

Counsel for Sir George Deas—Asher—J. P. B. Robertson. Agents—H. B. & F. J. Dewar, W.S.

Counsel for Shotts Iron Co.—R. Johnstone. Agents—Hope, Mann, & Kirk, W.S.

Counsel for La Cour & Watson—D.F. Kinnear, Q.C.—Thorburn. Agents — Boyd, Macdonald, & Co., S.S.C.

Friday, March 11.

FIRST DIVISION.

[Sheriff of Lanarkshire.

ARROSPE *v.* BARR.

Ship — Charter-party — Bill of Lading — Clean Bill of Lading.

The captain of a ship and the charterer disputed as to whether liability for demurrage at the port of loading had been incurred, and also whether the ship was fully loaded. As a settlement of the dispute the charterer agreed to put additional cargo on board, and the captain to sign clean bills of lading, protesting for his alleged claim of demurrage, to be settled at the port of discharge. *Held* that the captain was not entitled to add to the bill of lading the words "and all other conditions as per charter-party."

Opinions as to the meaning of the expression "clean bill of lading."

Ship—Charter-party—Bill of Lading—To Sign Bills of Lading as Presented.

Held that a condition in a charter-party