Thursday, December 22.

FIRST DIVISION.

[Lord Rutherfurd Clark, Ordinary.

WHITES *v.* WILLIAM DIXON (LIMITED) AND OTHERS.

Mines and Minerals—Support—Surface Damages—Injury to Buildings.

Held, on a construction of the titles of the owner of the surface of certain property, and of the owner of the underlying minerals, both of whom had derived right from a common author, that the surface owner had not surrendered his right to require the owner of the minerals in working the same to leave sufficient support for buildings erected upon the lands.

Opinions reserved as to the rights of parties if the weight of buildings is excessive.

This was an action at the instance of John and James White, proprietors and occupants of chemical works at Shawfield, near Rutherglen, against William Dixon (Limited), the mineral tenants, concluding, *inter alia*, that it should be found and declared that the defenders are not entitled to work the minerals adjacent to and under the pursuers' lands of Shawfield Brae, Clydebank, Southcroft, and Hayfield, "in such manner as to break the surface of or injure the springs in the said lands of Shawfield Brae and Clydebank, or to cause disturbance or subsidence of the surface of any part of the pursuers' several lands foresaid, or to bring down or injure the buildings and machinery and erections upon any part of the said lands."

The pursuers' titles, so far as the minerals in question are concerned, stood as follows:—By feu-contract, dated 14th February 1799, Mr Robert Houston Rae (who was at the time proprietor both of the lands and of the minerals therein) feued the lands of Shawfield Brae, including Clydebank, extending to about 6½ acres, to Mr John Goudie, from whom the pursuers' authors acquired right, "reserving to him (the said Robert Houston Rae) and his foresaids the whole coal and other metals and minerals in the said lands, with full power and liberty to him and them, by themselves, their tacksmen or servants, to work and win the said coal, metals, and minerals so as not to break the surface of the said lands or injure the springs therein, upon paying to the said John Goudie yst. and his foresaids any damage that may be occasioned to the said lands by working of the said metals and minerals, as the same shall be ascertained by two neutral persons to be mutually chosen by the parties."

By disposition dated 9th and 14th January 1801, in terms of articles and minutes of roup dated 30th July 1800, the said Robert Houston Rae and Archibald Grahame, his trustee, sold and disponed part of the lands of Southcroft of Shawfield, which includes Hayfield, consisting of 25 acres, to James Hill, Professor Young, and Robert Graham, the predecessors of the pursuers. This deed contained a clause of reservation in the following terms:—"Reserving also to us and our successors, tacksmen, or feuars, the whole coal and ironstone in the foresaid lands and estate, with power and liberty to us and our successors, feuars, or tacksmen, or others deriving right from us, to work and take away the same, and to drive levels and drains, and do all other things necessary for the purpose of working and draining the said coal and ironstone, the persons carrying on these operations being also liable to the said James Hill, Mr John Young, and Robert Grahame, or their foresaids, for the whole damage thereby occasioned, as the same shall be ascertained by two neutral men mutually chosen; declaring always that the said James Hill, Mr John Young, and Robert Grahame, or their foresaids, shall have no claim against me, the said Archibald Grahame, or my successors in office, or my heirs and successors, for the damages occasioned by working the said coal and ironstone, or making the said pits, hills, and roads, or any other operations whatever. And further, we and our foresaids, or our tacksmen and feuars, or others deriving right from us, shall have no right to break or enter upon the surface, or to erect any houses, or make pits, or hills, or to make any other roads than that before reserved, in the lands hereby disponed, all as particularly mentioned in a disposition of the said coal and ironstone granted by , in favour of Andrew Houston of Jordanhill, and me, the said Robert Houston Rae, bearing date the , which was laid on the table at the foresaid roups, and was referred to in the said article of roups, and which is hereby referred and held as repeated; declaring that the rules and regulations and provisions contained in the said feu-right shall be the rule of proceeding and settlement between the said James Hill, Mr John Young, and Robert Grahame, and their foresaids, and the feuars of the said coal and ironstone, anything to the contrary above written notwithstanding."

The defender's title was contained in a feu-disposition, dated 26th and 28th July 1800, by which the said Robert Houston Rae, with consent of the said Archibald Grahame, his trustee, sold and disponed to himself and the said Andrew Houston, equally between them as partners, the predecessors of the defenders, the whole coal and ironstone in the whole lands of Little Govan, and in the lands of Polmadie, Shawfield, Rutherglenmuir, Benathill, and Blackfaulds, "with full power and liberty to the said Andrew Houston and Robert Houston Rae, as partners foresaid, and their foresaids, to work and win the foresaid coal and ironstone for their own benefit and advantage; and for that purpose, with full power and liberty to them to set down coal-pits, make coal-hills and mouths, drive levels, drains, erect dwelling-houses, engines, and all machinery necessary for the purpose of working or drawing the foresaid coal and ironstone: But it is hereby expressly declared that they shall not have liberty to set down any coal-pits, make any coal-hills or mouths, or erect any machinery, make any drains, levels, or break the surface of the land belonging to the said Robert Houston Rae, lying on the north side of a line delineated on a plan of the lands of Little Govan signed as relative hereto, ... with full power and liberty, however, to my said disponees to work and win the coal and ironstone of the said lands lying to the north of the said line, provided the same be done from

pits on the south side of the line, without breaking the surface of the land lying on the north side of the said line."

There was also reserved a power to make any roads to the south of the said line which should be necessary for the coal work, as also to make certain specified roads to the north of the said line, and to work and win freestone for the purpose of the works and buildings of the coal work allenarly, in any part of the lands and others specified in a tack granted by the said Robert Houston Rae to himself and his said disponees for seventy-four years from Martinmas 1880.

The damage clause was in these terms—"But for the whole damage and injury occasioned by the foresaid operations, and roads and quarries to the foresaid lands, the said Robert Houston Rae, and his heirs and successors, shall be completely paid and indemnified by his said disponees."

Further, it was declared that the disposition was granted under burden of the feu-right of 6½ acres of Shawfield Brae, granted to John Goudie youngest, merchant in Glasgow.

The pursuers pleaded—"(1) At common law, and upon a sound construction of the titles of parties, the defenders are not entitled to work the coal and other metals and minerals adjacent to and under the pursuer's lands without leaving adequate support, adjacent and subjacent, for the surface of the ground, including buildings and machinery thereon, erected by and belonging to the pursuers."

The defenders admitted that they had already worked out a small portion of the minerals under the pursuers' property, and that they intended to work the minerals subjacent to the pursuers' works.

They pleaded—"(2) The defenders' right to the minerals subjacent to the pursuer's lands being subject to no limitation at common law, or under the titles entitling the pursuers to the decrees concluded for, absolvitor should be pronounced."

The Lord Ordinary (Rutherfurd Clark), on 1st July 1881 pronounced this interlocutor:—"Finds and declares that in working the minerals on the pursuers' lands of Shawfield Brae and Clydebank the defenders are not entitled to break the surface of the said lands, or to injure the springs therein: Dismisses the further conclusion of declarator in so far as applicable to the said lands: *Quoad ultra*, assoilzies the defenders from the declaratory conclusions of the libel, and decerns; grants leave to either party to reclaim."

"*Opinion*. . . . The defenders had begun to work the minerals under the pursuers' lands, and as pursuers fear that their works may be injured they have raised this action. Both parties desired me to dispose, *ante omnia*, of the declaratory conclusions of the libel in order that their several rights as depending on the titles might be ascertained.

"The pursuers claim an absolute right of subjacent support. The defenders do not dispute that this right exists, unless the pursuers have surrendered it, or unless the buildings are beyond what may have been fairly contemplated as the origin of the right. It is, however, in regard to the first question—Whether and how far the pursuers have surrendered their right to the subjacent support?—that the pursuers desire the judgment of the Court.

"As the clauses of reservation are different they must be considered separately.

"*First*, The lands of Shawfield Brae and Clydebank.

"Power is reserved to work the minerals 'so as not to break the surface of the said lands, or to injure the springs therein, upon paying any damage that may be occasioned.' The defenders contend that they have an absolute right to work the minerals whatever may be the consequence to the surface—subject only to the condition that they are not to injure the springs, and to the obligation of paying damages. They construe the words 'break the surface' as meaning no more than they are not to execute any works on the surface; as, for instance, that they are not to sink pits or make roads. But they maintain that they are not prohibited from breaking the surface by causing subsidence.

"I cannot adopt this view. I take it to be the true meaning of the clause that the mineral owners were not in any way to break the surface. There are two conditions, both of which are, I think, attached to their power of working under ground. The one is that they are not to break the surface, and the other that they are not to injure the springs. The latter condition is plainly attached to the underground workings, and in my opinion the former must be similarly construed. They are together intended to protect the interests of the feuar on the surface and in the underground strata.

"But the pursuers seek a declarator that the defenders are not entitled to cause disturbance or subsidence of the lands, or to bring down or injure the buildings thereon. They do not rely on the condition that the mining shall be so conducted as not to break the surface, but on their common law right to subjacent support. I do not think that I can give such a decree.

"The conditions on which the defenders are entitled to work the minerals have, I think, been precisely fixed by the feu-contract, and in my opinion the pursuers have no rights except such as flow from these conditions. Any further right which they might have at common law has, I think, been surrendered. It seems to me therefore that they cannot have any declarator which is broader than the terms of the feu-contract, or any greater protection than results from the condition that the defenders shall not break the surface. It is possible to conceive that there may be subsidence or disturbance which will not break the surface. I have, however, thought it to be the best course merely to dismiss the conclusions to which I have been referring.

"*Second*, The lands of Southcroft and Hayfield.

"The coal and ironstone is reserved with power 'to work and take away the same, and to drive levels and drains, and to do all other things necessary for the purpose of working and draining the said coal and ironstone, the feuars carrying on these operations being also liable to the said James Hill, Mr John Young, and Robert Graham, or their foresaids, for the whole damage thereby occasioned." Here the right to work the minerals is very broadly reserved, with the sole condition that the mineral owners shall be liable in damages. It was urged that this meant merely that they were to be liable for such damage as might incidentally occur, and that could not be foreseen.

I do not think that this is the true construction of the clause. The damages are referred to in all the operations in connection with the mineral workings, and as there is an absolute power to work on the condition of being liable to damages, I am of opinion that all right of support has been relinquished, and that the pursuers can recover damages only.

"The parties referred to a number of cases, but I do not think it necessary to examine them, as the question came to be, Whether the pursuers had contracted themselves out of their common law rights? and this is a question which is to be determined by the titles alone. Probably the case which most nearly resembles the present is that of *Aspden*, 10 Ch. App. 394, and it is in favour of the defenders. It seems to recognise the doctrine that where there is a power to work on paying damages the right of support has been relinquished."

The pursuers reclaimed, and argued—That the surface owner had at common law a right of support which could only be surrendered by direct words in the titles, or by such plain implication that the Court could have no alternative, and that on a fair construction of these titles there had been no such surrender here. That where certain powers had been specified the defenders could not bring in from the damage clause, under interpretation of the words "foresaid operations," powers which were not specified. That even if the opposite were admitted, the obligation to compensate for damage did not confer a right to do damage.

The defenders argued—That the prohibition against breaking the surface only applied to operations from above. That where, as here, there was no absolute prohibition against entering the surface, combined with a power to work minerals, and an obligation to pay compensation for damage, the principles laid down in Aspden's case must rule.

Pursuers' authorities—*Buchanan and Henderson and Dimmack* v. *Andrew*, February 24, 1871, 9 Macph. 554—*revd.* March 10, 1872, 11 Macph. (H. of L.) 13; *Hamilton* v. *Turner*, July 19, 1867, 5 Macph. 1086; *Caledonian Railway Company* v. *Sprot*, March 4, 1856, 2 Macq. 449; *Harris* v. *Ryding*, 5 M. and W. 60; *Humphries* v. *Brogden*, 12 Ad. and E. 739; *Smart and Spearman* v. *Morton*, 5 E. and B. 30; *Davis* v. *Trehame*, L.R. 6 App. Ca. 460; *Hext* v. *Gill*, L.R. 7 Ch. App. 699; *Aspden* v. *Sedden*, L.R. 10 Ch. App. 394; *Williams* v. *Bagnall*, 15 Weekly Rep. 272; *Dunbar's Trustees* v. *British Fisheries Society*, December 19, 1877, 5 R. 350—*aff.*, July 12, 1878, 5 R. (H. of L.) 211.

Defenders' authorities—*Rowbotham* v. *Wilson*, 8 H. of L. Ca. 348; *Wakefield* v. *Duke of Buccleuch*, L.R. 4 (H. of L.) 377; *Eadon and Others* v. *Jeffcock and Others*, L.R. 7 Ex. 379; *Neill's Trustees* v. *Dixon*, March 19, 1880, 7 R. 741; *Dunlop* v. *Corbeck*, June 20, 1809, F.C.; *Smith* v. *Darby and Others*, L.R. 70 B. 716; *Bald's Trustees* v. *Alloa Colliery Company*, May 30, 1854, 16 D. 870.

At advising—

Lord President—The pursuers of this action are proprietors of two pieces of ground, one consisting of 6½ acres, and the other consisting of about 25 acres, lying contiguous to each other upon the banks of the Clyde near Glasgow, upon which they have erected large chemical works at a great cost. The defenders are proprietors of a mineral field in the same neighbourhood, of considerable extent, and part of the minerals lies below the surface of the ground which is owned by the pursuers. Hitherto there has apparently been no conflict of interest between the parties, but it is stated in the 7th article of the condescendence that the defenders have lately "threatened to carry forward their workings up to, as well as under, the pursuers' property and works, to an extent and in a manner which will deprive the pursuers' lands and works of the adjacent and subjacent support necessary for their stability, and will also destroy the springs in the said lands and cause the surface thereof to break or subside." The answer to that is substantially an admission. They say, however, that "the intention of the defenders is in the meantime only to work out a portion of the minerals under these works, leaving sufficient stoops or pillars to prevent subsidence and support buildings on the surface." But they do not dispute that their ultimate intention is to work out the whole minerals. The pursuers further aver that at the date of the titles of the lands holden by the pursuers the mode of working was universally by stoop and room, with a view to supporting the surface of the lands, and for this purpose they say a quantity of the mineral was unavoidably left undisturbed in stoops or blocks of sufficient strength and frequency to afford absolute support to the surface; but they go on to explain—what is very well known—that some half-a-century ago, about the year 1830, the late Mr William Dixon of Govan introduced a practice of working out the minerals without leaving stoops, by what then got the name of the long wall system, which has been extensively adopted, since, and the effect of which is to bring down the surface entirely; and it is not disputed on the part of the defenders that they consider themselves entitled to take out the minerals under the pursuers' subjects in that way.

Now, in these circumstances the question arises, whether the pursuers are entitled to have as much of the minerals left under their surface estate as will keep up the surface and support without injury the buildings erected upon the surface? That depends upon the titles, because at common law there is no doubt whatever that the pursuers have such a right. The right of the mineral owner in a question with the owner of the surface is to work out the minerals in such a way as to make the greatest profit for himself consistently with a due regard for the property and interests of the owner of the surface. But he is not entitled to work out his minerals in such a way as to destroy or injure the property of the owner of the surface. It is said, however, that the titles here have the effect of depriving the pursuers of that common law right, and the Lord Ordinary has in substance given effect to that contention.

Now, it must be observed in the outset that this is not a case where the owner of both surface and minerals grants a feu of the surface, reserving the minerals to himself. In such a case everything depends upon the terms of the title of the feuar or purchaser of the surface, because it is

in that title that the reserved right of the original owner of both surface and mineral is to be found. But we have not a case of that kind to deal with here. The owner of the surface and the owner of the mineral derived their right from a common author, and it is just as necessary to see what rights have been given to the owner of the mineral by that common author, as to see what is the right he has given to the present owner of the surface. Indeed, when it is admitted by the mineral owner that he is about to work out the minerals under the property of another person without any regard to his right or the stability of the buildings which he has erected upon his ground, it appears to me that the first inquiry is whether the mineral owner has got such a right in his own title; because if he has not, then he is not entitled so to injure the property of his neighbour. No doubt it is also very important to inquire how far the owner of the surface has by the terms of his title submitted to the surrender of the common law right which but for some qualification of that kind would undoubtedly belong to him. But the primary question, I think, is, whether the mineral owner is entitled to do that which he admits he has threatened to do?

I begin, therefore, with the title of the defender. The date of it is in September 1800, and it conveys, in terms of an antecedent agreement, the minerals in a very large field of about 500 acres. But the owner of the estate sets out that he has found it expedient to bring his lands of Little Govan and others to sale, and therefore it has become important, "in order to promote the sale of my said lands, that the liberty of shanking and building houses, and erecting machinery and making roads, should be further restricted;" and then he proceeds to dispone to his disponee, All and whole the coal and ironstone in the whole lands of Little Govan and in the lands of Polmadie, and so forth, "which belong to me, the said Robert Houston Rae, and which lands are delineated" on a plan; and then follow these words — "With full power and liberty to the said Andrew Houston and Robert Houston Rae, as partners foresaid, and their foresaids, to work and win the foresaid coal and ironstone for their own benefit and advantage." Now, in the argument a good deal of importance was attached to these words, "with full power and liberty to work and win." Certainly power to work and win minerals is necessarily inherent in the property of the minerals, and therefore the only meaning of these words in the dispositive clause conveying minerals is that the proprietor may exercise his right of property. It really in the ordinary case means nothing more. But the disposition proceeds—"And for that purpose, with full power and liberty to them to set down coal pits and mouths, drive levels, drains, erect dwelling-houses, engines, and all machinery necessary for the purpose of working or drawing the foresaid coal and ironstone: But it is hereby expressly declared that they shall not have liberty to set down any coal pits, make any coal hills or mouths, or erect any machinery, make any drains, levels, or break the surface of the land belonging to the said Robert Houston Rae, lying on the north side of a line delineated on a plan of the lands of Little Govan, signed as relative thereto." Now, this of course is a very important clause, because it gives effect to those restrictions which the seller of the minerals thought it expedient to impose upon his disponees in order to promote the sale of his lands of Little Govan, as is set forth in the narrative of the disposition. For this purpose he restricts his disponees to certain portions of the ground as the only places where they are to sink pits or make any operations upon the surface connected with the working and winning the coal. They are restricted to the south of a line delineated on a plan. Now, the property of the pursuers lies entirely to the north of that line. And therefore we have here a distinct provision that there are to be no coal pits or erections of any kind or any breaking up the surface upon that part of the ground which belongs to the pursuers. Then there are some other provisions which are not of importance, but a little further on these words occur, "With full power and liberty, however, to my said disponees to work and win the coal and ironstone of the said lands lying to the north of the said line, provided the same be done from pits on the south side of the line, without breaking the surface of the land lying on the north side of the said line." That only makes more clear still what is provided for in the clause that I have just read. Then follow these words—"With full power and liberty to the Coal Company and their foresaids to make such roads on the south side of the foresaid line as they shall find necessary for the coal work, and also to make the following roads 30 feet wide on the north side of the said line delineated on the foresaid plan, and the lines of all which roads are delineated in the said plan." That gives a certain very limited right to make certain fixed and defined roads upon the ground which is to the north of the line, and which includes the ground belonging to the pursuers. Then there is a further clause providing that "my said disponees shall have the right and privilege of working and winning freestone for the purpose of the works and buildings for the said coal works allenarly, in any part of the lands and others specified and contained in a tack entered into betwixt me and my said disponees for the space of seventy-four years from and after the term of Martinmas 1800, and that for and during the continuance of the said tack." And now we come to the clause which is chiefly relied on by the defenders, which provides for the damage to be paid by the disponees for any injury they may do in the course of their operations. The words are these —"But for the whole damage and injury occasioned by the foresaid operations and roads and quarries, to the foresaid lands, the said Robert Houston Rae and his heirs and successors shall be completely paid and indemnified by his said disponees, who by acceptation hereof bind and oblige themselves to pay the damage occasioned by the said operations to the said Robert Houston Rae and his foresaids, as the same shall be ascertained by two neutral persons, to be mutually chosen by the parties interested: Declaring always that these presents are granted with and under the burden of the feu-rights made and granted, or agreed to be made and granted, by Mr Houston Rae." Now, it must be observed that this clause applies, not to the portion of the mineral field which lies under the property

of the pursuers, but to the whole 500 acres, and therefore the circumstance that there is a provision for compensation being paid for injury to the surface will not infer in the slightest degree that the parties are entitled to do any injury to the surface upon the lands belonging to the pursuers which lie to the north of the line delineated on the plan. In short, it is pretty plain that this damage clause can be completely satisfied and explained in all its parts by reference to the 500 acres of mineral field without taking into account the 6½ and the 25 acres, and the other portions of the mineral field which lie to the north of the line. But it is said that damage and injury occasioned by the foresaid operations means damage and injury caused in any way whatever by the working out of the coal in any part of the coal field. I think it very difficult to give that meaning to the word "operations," but it is necessary to go back to the clauses that I have already read in order to show the reason why I think it impossible so to extend the meaning of that word. I have already said that the words in the dispositive clause, "with full power and liberty to work and win the foresaid coal and ironstone," express nothing more than the right of property in the mineral. It is just the way in which the property of minerals is to be enjoyed. There could be no enjoyment of the property of the minerals at all—no benefit resulting from possessing the property of minerals—if they could not be wrought. And, besides, it appears to me that a power to work and win minerals is not an operation. Operations are what comes to be done in the exercise of that power — sinking shafts, driving mines — these are operations. That is the exercise of a power—not the power itself. But immediately following the words that I am now referring to there comes a clause expressing very clearly the operations which are to be performed in the exercise of that power—"for that purpose, with full power and liberty to set down coal pits, and make coal hills," &c. Now, the natural construction I think of the deed is that when in the damage clause there is a provision for paying damage "occasioned by the foresaid operations," the meaning is occasioned by the operations which are expressly set out immediately after the dispositive clause—the manner in which the power of working is to be exercised. And this becomes more clear, I think, when you see that the foresaid operations are coupled with the other words "roads and quarries." These are precisely *ejusdem generis*. They are operations upon the surface, and operations therefore which will fall naturally under the operation of a damage clause. I cannot therefore read "foresaid operations" as meaning this, that whatever damage may be done in the exercise of the power of working or winning by what would be at common law illegal operations are to be compensated by damages and not to be unlawful. I think, in order to take away the common law right of the owner of the surface to subjacent support, it is necessary that the intention to deprive him of that common law right must be either expressed or clearly implied; and it appears to me that the words here used, while they certainly do not express anything of the kind, do not according to any fair construction imply it either. I think all the words which are used here are perfectly consistent with the retention by the owner of the surface of his common law right of support. It seems to be assumed always that if there is a provision that whatever damage is done by the owner of the minerals is to be compensated in the way of damages, that gives him a kind of authority or power to do any amount of damage of any kind. Now, I am not aware of any authority for such a proposition as that. I do not know any case in which the mere provision of damage in case a thing be done has by itself and without any other aid from other portions of a deed, or from the circumstances, been held to infer a right to do the damage. There have been a great many cases cited to us, but I can find none in which a mere provision of damage without anything else has been held to infer such a right. And therefore, so far as the title of the mineral owner is concerned, I come to the conclusion without much difficulty, that he was not entitled to injure the surface by his works in such a way as to deprive the surface of the subjacent support to which at common law he is entitled. If, therefore, this question arose between the disponer of the minerals and his disponee, I should hold that the case was perfectly clear, and that the disponer, notwithstanding his giving out the mineral estate by this conveyance, had a right to have the surface supported, and most clearly supported as regards that portion of it which lay to the north of the line on the plan referred to, because it is perfectly plain that his great object in drawing that line upon the plan, and protecting the ground that lay to the north of the plan, was to prevent any operations whatever producing any injurious effect upon that portion of the surface which he expected to sell off for building ground. It would be a very strange result of this title if, having protected the surface to the north of that line, for the purpose of selling it off for building purposes, and preventing any of the ordinary surface operations being made upon that ground in the way of sinking pits or making hills or so forth, or erecting machinery for the purpose of working the coal, should have left it nevertheless so unprotected that by underground operations the whole surface might be brought down with the houses erected upon it. That would be a strange and anomalous result of such a title.

So stands the case as between the disponer and the disponee under that deed. Now, how does the matter stand as regards the pursuers, who have acquired their rights from the same person who granted that conveyance of the minerals? One of their deeds is the year before the conveyance of the minerals, and the other in the year after. I begin with the conveyance of the surface, which is granted the year after this conveyance of minerals, in order to see whether anything is there contained which would justify the mineral owners—who, I have now demonstrated, I think, have no such right under their own title—in working contrary to the common law right of the proprietors of the surface as regards bringing it down. That disposition conveys 25 acres of land called Southcroft of Shawfield, and is dated the 9th of January 1801. The clauses which deal with the minerals begin in this way—"Reserving also to us and our successors, tacksmen, or feuars, the whole coal and ironstone in the foresaid lands and estate, with

power and liberty to us, and our successors, feuars, or tacksmen, or others deriving right from us, to work and take away the same, and to drive levels, and drains, and to do all other things necessary for the purpose of working and draining the said coal and ironstone, the persons carrying on these operations being also liable to the disponees for the whole damages thereby occasioned, as the same shall be ascertained by two neutral men mutually chosen—declaring always that the said James Hill, John Young, and Robert Grahame [these are the purchasers of the surface] shall have no claim against me, the said Archibald Grahame [that is, the person who is interposed as one of the disponers], for the damages occasioned by working the said coal and ironstone, or making the said pits, hills, and roads, or any other operations whatever." Now, that is a very strange clause certainly to find in this disposition, looking to the fact that this is a part of the land which the owner of the estate had designed to protect absolutely against any operations upon the surface, for under their clause, as I read it, the mineral owners would have been entitled to sink coal pits in that very land from which they were absolutely excluded by the operation of their own title. It is therefore perfectly obvious, especially from what follows, that the insertion of this clause in this disposition was a mere mistake, and accordingly we find that there is superadded to it—and I cannot help conjecturing that it would be found upon the margin of the draft of the disposition if it could be recovered—this clause—"And further, we and our foresaids, or our tacksmen and feuars, or others deriving right from us, shall have no right to break or enter upon the surface, or to erect any houses, or make pits or hills, or to make any other roads than that reserved in the lands hereby disponed, all as particularly mentioned in a disposition of the said coal and ironstone granted by me" in favour of so and so, being the disposition of the minerals which he had granted the year before—"which was laid on the table at the foresaid roup, and was referred to in the said articles of roup, and which is hereby referred and held as repeated; declaring that the rules and regulations and provisions contained in the said feu-right"—that is, the feu-right of the minerals—"shall be the rule of proceeding and settlement between the said James Hill, Mr John Young, and Robert Grahame, and their foresaids, and the feuars of the said coal and ironstone, anything to the contrary above written notwithstanding." Now, the result of all this plainly comes to be, that the question between the owners of the surface conveyed by this disposition, and the owners of the minerals conveyed by the disposition of the year before, is to be regulated entirely by the clauses contained in the disposition of the minerals. It is impossible to resist that conclusion. And therefore we are just thrown back, in so far as this conveyance is concerned, to the clauses which I have already been speaking of, and which appear to me not to favour the case of the defenders at all, but, on the contrary, to show distinctly that the great object of the owner of the undivided estate was to keep the ground which now belongs to the pursuers entirely intact, in so far as the surface was concerned, and that no operations were to be permitted which could in any way interfere with his prospects of converting that into building ground.

There only remains for consideration the title which the pursuers have to the 6½ acres, which disposition was granted the year before the disposition of the minerals. Now, undoubtedly, there is a clause there which is much more difficult to construe than any of these I have hitherto dealt with. It is very shortly expressed, and perhaps that may be the cause of what appears to me to be its obscurity. The 6½ acres are conveyed, and there are certain reservations made in favour of Mr Houston Rae, the granter, "reserving to him and his foresaids the whole coal and other metals and minerals in the said lands, with full power and liberty to him and them, by themselves, their tacksmen, or servants, to work and win the said coal, metals and minerals, so as not to break the surface of the said lands or injure the springs therein, upon paying the said John Goudie [the feuar] any damage that may be occasioned to the said lands by working of the said metals and minerals, as the same shall be ascertained by two neutral persons to be mutually chosen." Now, the prohibition is distinct enough. They are to have full power and liberty to work and win the metals and minerals, but not to break the surface of the lands or injure the springs. The words which cause the difficulty of construction are these — "Upon paying any damage that may be occasioned to the said lands by working of the said metals and minerals." This may mean any damage that may be occasioned to the surface of the lands by any operations which may be performed by the mineral owner, without inquiring or specifying what these operations may be; or it may mean, as contended for by the defenders, that it contemplates the bringing down of the surface upon condition only of paying damage. Now, keeping in view that long wall working was a thing then entirely unknown, that the bringing down of the surface in that way was therefore a thing entirely unknown, and that the surface never was injured or brought down at all except by unskilful or negligent working in the ordinary mode by stoop and room, I think it would be very difficult indeed to give that meaning to the words. But I can quite understand that the parties may have had to do what was perfectly known to all the world—that persons working minerals after the then known fashion of stoop and room did occasionally, by accident or negligence, do injury to the surface; and if that was done, it was most reasonable to stipulate that damage should be paid for it. But the providing that damage should be paid for such an injury as that is certainly not equivalent to a power to inflict the injury upon paying damage. It is, on the contrary, a provision for the paying of damage for a wrong done, and not of paying compensation for a lawful power exercised. Lawful power to bring down the surface is very difficult to understand in the face of the words that the parties are not to break the surface or injure the springs therein. It seems to me, therefore, that whatever may be said of this clause otherwise, we have certainly not here either any express words, or anything like a clear implication that the owner of the surface conveyed by this disposition had surrendered or agreed to give up his common law right of support. Nothing but a

clear implication or express words can, I think, take away such a right, and I am quite unable to find anything of the kind within the clause to which I now refer. I am therefore of opinion that the owner of this land—both the 6½ acres and the 25 acres—is entitled to his common law right of support, and that nothing contained in any of the titles interferes with that right.

But there may be a question beyond that, and the Lord Ordinary has been asked only to consider this question with which I have now dealt—there may be a case beyond that, of which I desire to say nothing in the meantime. The owner of the surface may so load the surface with superincumbent weight of buildings or other things as to render it impossible for the mineral owner to exercise his rights of working and winning in a fair way without bringing down the surface or injuring it, and a question would in that case arise whether the common law right of the owner of the surface can be pushed so far as to say, You shall not only not work minerals in such a way as to take away the support of the surface, but you shall not work them in such a way as to take away the support necessary for the great superincumbent weight which I have placed upon the surface, far beyond what could have been contemplated by any of the parties to these deeds. That is fairly raised upon this record, and may form the subject of discussion hereafter before the Lord Ordinary. All the length I go at present is to say that I think there is nothing contained in any of the titles to take away or interfere with the common law right of support belonging to the owner of the surface.

Lord Mure—I agree with your Lordship that the simple question which we have to dispose of here turns upon the terms of the titles of the parties, and it is simply this, whether the pursuer is placed by these titles in the position of a party who has contracted himself out of his common law right to have his property protected from injury through the working of the defenders' minerals underneath that property?

About the common law right of the party who is the owner of the surface to have that property protected from the operations of the underground proprietors of the minerals there is no dispute. He has two remedies. He is protected at common law, and he is entitled to damages for injury arising from the workings, and he has also this further protection, that he is entitled to interdict as against the mineral owner, if he is in the course of so working his minerals as to produce that injury, or to be likely to produce that injury. In the case of *Buchannan* v. *Andrew*, to which we were referred, the Lord Chancellor said —"There is no doubt that, generally speaking, when a man grants the surface of land, retaining the minerals, he is guilty of a tortuous act if he so uses his own right to obtain the minerals as to injure the surface or the things upon it, and he would be answerable in damages for doing so. And as the act would be wrong, and as he would be answerable in damages for it, and as prevention in such a case is a better remedy than any damages, the Court would be justified in granting, and probably would be called upon to grant, an interdict to prevent him from doing so." That is the common law. Now, then, the question is, whether the peculiar terms of the title on the point, to which your Lordship has referred, deprives him of the one-half of this common law remedy? That is the question. Has the proprietor of these 6½ acres been deprived by these words of having the remedy which the law gives to all proprietors of the surface, of calling upon the Court to interfere to protect his property from being destroyed by the underground workings of the other parties? I agree with your Lordship that nothing but the most express terms would entitle us to hold that there has been such a contract entered into on the part of the owner of the property. And while the owner reserves to himself the minerals with power to work and win them "so as not to break the surface of the said lands or injure the springs therein," on paying any damage that may be occasioned, does that mean to imply that the owner of the minerals is to work underneath in any way he chooses so as to create that damage? I cannot so read these words. I think it is simply this, that in framing that title, instead of leaving it to common law to say that they should have the damages, the framer of the title just put in these words as a precaution, to show that there was no question about it, and that if he did injure the springs he must pay damages. But I cannot read that as amounting to this, that if the owner of the minerals is doing something that will necessarily take away these springs, or bring about the very injury that was clearly intended to be prevented, the owner of the surface is to be deprived of his common law right. On that short ground I concur in the result which your Lordship has arrived at; and I may also say that I concur in the critical exposition which your Lordship has given of the true meaning of the titles.

Lord Shand—I am of the opinion which has been expressed by your Lordships, and I concur entirely in all that has been said.

The question to be determined is, whether under the title which the Court are now called on to construe the pursuers have lost their common law right of support of the surface of their lands? The defenders do not say that that right has been expressly surrendered. There is no power in these deeds given expressly to cause disturbance or subsidence of the surface. The case that is made in defence is that by implication from the terms of these deeds a power to that effect has been given to the owner of the minerals. I agree with your Lordships in thinking that in order to take away the common law right any such implication must be clearly made out. Unless the defenders are able to show that it is clearly implied by the terms of the deeds that they have a right to cause disturbance or subsidence in the surface of the pursuers' grounds, it must be held that they have no such right.

Taking the case in that view, I further agree with your Lordships in thinking that what is mainly to be looked at in this question is the title of the defenders. They have got a right to the minerals from the proprietor, but the measure of their right in a question with the surface owner is to be found in their title. If the surface owner is able, pointing to their title, to say "Your right is to some extent limited"—if he succeeds in showing that, the mineral owner

cannot have power to do that which goes beyond the limits of his own title, and so I think with your Lordship that the main title to be construed is the original conveyance of the minerals. Now, in construing that deed, it appears to me that considerable light will be obtained from looking first at its clauses on the assumption that there was no protected territory within the deed at all. Suppose that there were here simply a power to work the minerals in the whole 500 acres, and to perform all the operations which that deed authorises, and that the deed did not specify a certain line beyond which surface operations are prohibited, what is the effect of that deed in regard to the power of the mineral owner to let down the surface? Looking, then, at the deed in that aspect in the first place, what we find is this, that there is a conveyance of the minerals, and that conveyance is followed by ample power to execute what I may call surface operations. There is full power and liberty to set down coal pits, make coal hills and mouths, drive levels, erect dwelling-houses, engines, and all machinery necessary for the purpose of working or drawing the coal and ironstone. Then follows the clause of protection, which in the meantime I pass over; and next comes the clause of compensation for any damage that may be done, which is in these terms—"But for the whole damage and injury occasioned by the foresaid operations and roads and quarries to the foresaid lands, the said Robert Houston Rae, and his heirs and successors, shall be completely paid and indemnified by the said disponees, who by acceptation hereof bind and oblige themselves to pay the damage occasioned by the said operations, &c., as the same shall be ascertained by two neutral persons." Now, is there here any power given to let down the surface generally of these lands? I apprehend that it would be most difficult for the owner of the minerals to say that this deed gives him by implication any such power. There is nothing more clearly settled upon the authorities than this, that if you can satisfy the meaning of a clause of compensation as referring to compensation for any damage done by the special operations which are authorised in the previous part of the deed, you cannot by inference carry the meaning of the clause further, so as, as in this case, to imply a power—such as is here claimed—of letting down the surface. Besides the conveyance of the minerals and the power to work which is inherent in the conveyance, I find on the face of this deed a power to execute surface operations, and advancing to the clause of compensation for damages I find that it is fairly applicable to these surface operations. The whole terms and meaning of that clause are fairly satisfied and exhausted by reference to the power previously given to execute operations on the surface. The result is, that as you satisfy the compensation for damage caused in that way, and as you cannot therefore say that either expressly or by necessary implication it refers to damage from subsidence, there is no power to be implied to let down the surface at all.

The view that I have now stated is very clearly expressed in the most recent case that occurred in the House of Lords, by Lord Blackburn, in a passage in a report of the case in Law Reports, vol. vi. of the English Appeal Cases, p. 468, where he said—"But when you find it said, as it is here, that the mineowner or lessee shall do certain things underground and a great many things upon the surface, and afterwards make compensation" (as it is said in the lease) "for all damage occasioned by the exercise of the rights hereby reserved," or (as it is said in the lease) shall at the end of the lease "compensate the lessor for any damage or injury done to the surface of the said farms and lands" (that means any damage done to the surface of the said farms and lands in the exercise of the rights previously given), "and when we find that these rights do include a great many things which will necessarily damage the surface, the reasonable conclusion is that the meaning is that there is to be compensation for things done in the exercise of those rights. I cannot see that that affords any argument whatever for saying that the lessor intended that the lessee should be able to do something more and let down the surface."

Accordingly, if I am right in holding, as I do, upon the construction of this deed, that even in regard to the great block of this property—the 500 acres—the great part of that 500 acres beyond the pursuers' property in regard to which the pursuers of this action have no interest whatever—there is no power given or implied to let down the surface, it appears to me to be extremely difficult indeed for the defenders to make out that they have such a power in regard to the pursuers' property. If under the defenders' title, even in regard to that portion of the ground on which they may execute such surface operations, and on which they may make such erections as they may think necessary or expedient for the working of the minerals, they have nevertheless no power to work so as to cause subsidence, it is very difficult to suppose that they can have such a power in regard to land clearly protected against even surface operations. I find it very difficult to adopt any such view taking this deed as a whole, and I do not find, as we advance to consider the clauses, that it can bear that meaning, which would indeed be extravagant, I think, if I be right in my view as to even the unprotected territory.

Having said so much upon the deed generally, I do not mean to follow your Lordship in detail over your criticisms upon the particular clauses. I shall only say that it appears to me that the clause providing for compensation for damage was really intended to be applied by the parties to the ground to the south of the line specified in the deed, for there only were surface operations to be performed. And I agree with your Lordship in thinking that the word "operations" in the compensation clause has reference, not to the general power of working and winning the minerals throughout the whole lands, but to the special operations that were authorised. I must, however, qualify what I have said by this, that I find there is a certain limited power to execute surface operations even to the north of that line. There is a provision that the parties may "make the following roads 30 feet wide on the north side of the said line," and then certain roads are enumerated; and there is a further provision that there may be workings in a freestone quarry, the precise locality of which the parties have not informed us of, but which may be, for aught I know, to the north of that line, and accordingly I should read the clause which

deals with operations as including any surface operations which might be performed to the north of that line—indeed in its very terms it bears that for the whole injury occasioned by the foresaid operations and roads and quarries in the foresaid lands compensation shall be given. But with that exception it appears to me that this clause has no application to the mere ordinary power given to work and win the minerals—a power which the mere conveyance itself infers—and I therefore agree with your Lordship that so far as that deed is concerned the defenders do not possess the right which they claim.

In regard to the deed of January 1801, conveying the surface of the 25 acres—in which I observe it is narrated that the previous conveyance of the minerals had been laid on the table at the roup and was referred to in the articles of roup—in regard to that deed I concur generally in your Lordship's view. It cannot be doubted that it is a most confused deed in its expression, for it begins in the first place with a reservation of coal and ironstone, with power to work and take away the same, and to drive levels and drains, and do all other things necessary for working the minerals, followed by a declaration that in no possible view shall there be claims against Mr Grahame, the trust-disponee, for making pits, hills, and roads. If you take that first part of the clause, there can be no doubt that it contemplates giving full power to execute the ordinary surface operations required for the working of minerals, including the sinking of pits. But then the very next part of the deed goes on to provide exactly the opposite, because it proceeds—"And further, we and our foresaids, and our tacksmen and feuars, or others deriving right from us, shall have no right to break or enter upon the surface, or to erect any houses or make pits or hills," and so on. And having thus provided that the mineral owner may execute certain operations, and then declared that he shall not execute such operations, we come to what I think must be accepted as really the measure of the rights of the parties, in the concluding clause, to this effect—"Declaring that the rules and regulations and provisions contained in the said feu-right shall be the rule of proceeding and settlement" between the parties. That, I take it, simply provides that the rights of parties shall be determined by the mineral owner's title, and accordingly this deed throws us back to the mineral title, which I have already dealt with. I may say further, however, that if it were not so, then it appears to me that the clause, which after mentioning different operations provides that the persons carrying on these operations shall be liable to the said James Hill, &c., for the whole damages thereby occasioned, as the same shall be ascertained by neutral men, is, in my opinion, satisfied by the authority to execute surface operations. The deed in that part of it authorises surface operations, the damages clause provides that damage shall be paid in the event of such operations being performed, and therefore the full meaning of the damages or compensation clause is exhausted when it is held to refer to surface operations. And so, even upon this deed and in that view of it, I do not think there is any right by implication given to let down the surface.

The only difficulty that I have felt in the case has arisen—where your Lordship has put it—upon the earliest of these deeds, relating only to the property of 4½ acres, which is certainly not very well or clearly, but very shortly expressed. I agree with the Lord Ordinary in thinking that whatever may be said of the words "break the surface" in the other deeds as referring to surface operations, primarily, at least, here the words do refer to underground operations. There is a prohibition against injuring the springs. That plainly refers to underground operations, and coupled with that there is a prohibition against breaking the surface of the lands. But although that is the primary meaning to be attached to it, I think that it may fairly be construed to mean further that the surface is not to be broken in any way. It is quite clear that if subsidence is allowed to take place it is impossible to predicate that the letting down of the surface could be so gradually and skilfully and carefully done, or could be so done within the knowledge of the parties where the deed was granted, as that there should not be cracking and breaking of the surface. And accordingly what was intended here was to protect the owner of these 4½ acres, given to him under a building lease, from injury to the surface, caused either by underground operations or in any other way. If that be so, it seems to me not only difficult but impossible to hold that with a provision declaring that there shall be no breaking of the surface, still it is implied in the deed that the mineral owner may bring down the surface. I am rather disposed to take the view which your Lordship has presented, that the clause about damages in this deed is not a proper compensation clause, but a clause put in *ob majorem cautelam*, to the effect that if unauthorised proceedings cause injury there shall be a claim of damages for that, and that it is not a provision authorising the letting down of the surface and providing for compensation in that event. And so I agree with your Lordship generally in the view which you have taken of the case.

As regards the remaining point, I think with your Lordship that it is quite right that there should be no decision on the question. It is said—how the fact may be I do not know—that this proprietor has erected buildings of such magnitude and weight upon the surface as practically to prevent the mineral owner from getting at the minerals which he is entitled to work out, and that the surface owners propose to erect further buildings. If such buildings are on the ground, the question arises whether the owners of the surface, who have thus prevented the working of the minerals wholly or to some extent, must not make compensation for the injury that they on their part have done? I give no opinion at this moment on that subject, but certainly there is great room for the argument that if that is the state of the facts, then the mineowner is not to have his property taken away without compensation. But that is a matter which I understand your Lordship leaves entirely open, the finding of the Court now being merely to this effect, that the owner of the surface has not by the terms of these deeds lost his common law right of support.

The Court pronounced this interlocutor:—

"The Lords having heard counsel on the

reclaiming note for John and James White against Lord Rutherfurd Clark's interlocutor of 1st July 1881, Recal the said interlocutor: Find that nothing contained in the titles of the parties, pursuers and defenders, has the effect in law of taking away or derogating from the right of the pursuers to insist that the defenders in working out the minerals under the pursuers' lands shall leave sufficient supports to sustain the surface uninjured: Remit to the Lord Ordinary to proceed further in the cause as shall be just and consistent with the above finding: Find the pursuers entitled to expenses," &c.

Counsel for Pursuers—Lord Advocate (Balfour, Q.C.)—Mackintosh. Agent—F. J. Martin, W.S. Counsel for Defenders — Solicitor-General (Asher, Q.C.) — Mackay — Pearson. Agents — Melville & Lindesay, W.S.

Saturday, November 12.

OUTER HOUSE.

[Lord Rutherfurd Clark.

BARRON *v.* BARRON AND OTHERS

Liferent and Fee—Vesting—Alimentary Provisions.

A truster directed that his trustees should pay the annual income of his estate to his daughter for her "alimentary liferent use allenarly," exclusive of her husband's *jus mariti* if she should marry, and in the event of her leaving lawful children, that the estate should be divided equally among them, but if she should die unmarried or without lawful children, that then the whole estate should be conveyed over to the truster's heirs whomsoever. An application by the truster's daughter, who was his only child and heir, and was at the date of the action unmarried and fifty-two years old, for declarator that the estate was vested in her, and that she was entitled to dispone it *mortis causa* or sell or burden it during her life, *refused.*

This action was brought by Miss Margaret Barron against H. B. Dewar, S.S.C. and others, the trustees on her father's (John Barron) trust-disposition and settlement, under which she had a liferent of his estate held by the trustees, and also against certain other persons who were at the date of the action the next heirs of the truster John Barron after the pursuer, in order to have it found and declared (1) that there vested in the pursuer a right to the whole estate of the late John Barron as held by the trustees; (2) that the pursuer was entitled to sell, burden, or in any other way affect the fee of the said estate *inter vivos*; (3) that she was entitled to do so under burden of the defenders' right to hold the estate for the purpose of paying her liferent, and also that she was entitled to dispone *mortis causa* or bequeath the capital estate at her pleasure; (4) that at least she was entitled to dispone *mortis causa* or bequeath the capital estate to any persons failing her own issue.

John Barron (father of the pursuer) died on 1st November 1873, and left a trust-disposition and settlement, dated 13th February 1868, by which he conveyed his whole property, heritable and moveable, to trustees for certain purposes, the first of which was the payment of his debts &c., the second provided for the payment of certain legacies, the third gave a joint alimentary liferent use allenarly of a house and furniture in Edinburgh to the pursuer, his only child, and her aunt, a sister of the truster, who predeceased him, and to the longest liver of them. By the fourth purpose of the trust the trustees were directed to hold the whole estate for the use of the daughter of the truster, the pursuer in the present action, for her alimentary liferent use allenarly, and it was declared that as the income derived from the estate was purely alimentary it should not be affected by her debts or deeds, or attachable by the diligence of her creditors, and also that it was exclusive of the *jus mariti* of her husband if she should marry, and not affected by his debts, &c., and that her sole receipt should be a sufficient discharge. In the fifth place, the truster directed that if the pursuer should marry and have lawful children, the trustees after her death should divide the whole estate among them equally as each attained the age of twenty-one, with certain provisions as to the share of any child who had died before that age. And lastly, the truster directed that on the decease of the pursuer, and in the event of her dying unmarried and without leaving lawful issue, the trustees should convey over the whole trust estate to his heirs, executors, and assignees whomsoever. The pursuer, who was born on 6th August 1829, was the only child and heir of her deceased father, and had never been married.

Pleaded for the pursuer—"(1) There having been a failure of issue of the pursuer, she, as heir and next-of-kin of the said John Barron, has right to the fee of the residue under the trust-disposition and settlement. (2) *Separatim*, The pursuer having right to the fee of the said residue, is entitled to affect the same, subject to the provision for securing her liferent, and that in all or some of the ways sought to be declared within her right."

Pleaded for the trustees, defenders—"(2) The action is premature, and should be dismissed with expenses (1st) in respect that the pursuer may yet marry and leave lawful issue surviving her; or (2d) even in the event of her not leaving lawful issue, the person or persons who at her death shall hold the characters of heir-at-law and next-of-kin of the testator may be different persons from those defenders who are called in this action as holding these characters at present. (4) The provisions in the pursuer's favour under the third and fourth purposes of the testator's settlement being declared to be for her 'alimentary liferent use allenarly,' her rights in the residue of her father's estate, and in the house in Queen Street and furniture therein, are rights of bare liferent only.

Pleaded for the next-of-kin—"On a sound construction of the trust-disposition and settlement the pursuer is not entitled to decree as concluded for."

The Lord Ordinary issued the following interlocutor:—"The Lord Ordinary having heard parties, sustains the second plea-in-law stated for the defenders H. B. Dewar and others, and dismisses the action, and decerns."