that the Rostmaster-General would not consent to a deduction from Scott's pension to be paid to his trustee of more than £10 a-year.

On 9th June the Sheriff-Substitute ordered the £10 a-year to be paid to the trustee.

Scott appealed to the Court of Session, and appeared in person in support of his appeal He argued that there having been no service or intimation the procedure was incompetent, and the Sheriff's interlocutors should be recalled.

Replied for the trustee—Neither service nor other intimation was prescribed by the Bankruptcy Act under which the proceedings were taken, and they were quite regular.

At advising—

LORD JUSTICE-CLERK—I think the proceedings here are utterly indefensible. There is neither precedent nor authority for a trustee proceeding in this manner where the party is not present, and without service or something equivalent to service on him. And therefore whatever proceedings this trustee may think proper to take in the future, I think we should dismiss this petition and recal all the interlocutors in the Court below.

LORD CRAIGHILL—I am of the same opinion. I think there is no warrant for taking away a man's pension, as has been done here, because he is under sequestration, without any service or intimation to him.

LORD RUTHERFURD CLARK—I am also of the same opinion. The trustee in a sequestration ought to remember, that while he is trustee for the creditors he is at the same time trustee for the bankrupt. And I must add, that I cannot conceive how such procedure as this could have taken place in any Sheriff Court at the instance of any trustee in a sequestration.

LORD YOUNG was absent.

The Court recalled the Sheriff-Substitute's interlocutors and dismissed the petition.

Counsel for Trustee—Nevay. Agents—Richardson & Johnston, W.S.

Tuesday, December 2.

FIRST DIVISION.

[Lord Lee, Ordinary.

CONVERY *v.* THE SUMMERLEE IRON COMPANY.

Mines and Minerals—Lordships—Obligation to Work—Jus tertii.

In 1870 B. let to H. & D. a coal-field extending to 17 acres for twenty-five years from 1866, at a fixed rent of £1500, or, in the lessor's option, a lordship of 1s. 1d. per ton of one kind and 15d. per ton of another kind of coal. B. had already let in 1868 to W. & Co. a larger mineral field adjoining, one portion for twenty-seven years from 1865, the other portion for twenty-six years from 1866, with breaks in the tenant's favour in 1871 and every fifth year thereafter. By minute of alteration in 1871 it was provided that there should be yearly breaks in the tenant's favour for the period of six years from 1870 on giving six months' notice. The tenants were taken bound to pay a fixed rent, or in the option of the landlord certain lordships. W. & Co. were taken bound to work the minerals in a regular, systematic, and proper manner. In 1871, B., H. & D., and W. & Co. entered into an agreement by which H. & D., with consent of B, renounced their lease of the 17-acre field, and B. let the same to W. & Co. for the period, and (with certain exceptions) subject to the whole terms of the said lease of the adjoining field. The exceptions were, that as the coal was to be worked through pits on W. & Co.'s lands, they were to be at liberty to fill them up, and were not to be bound to leave the roads and connections in good working order. Then followed this clause, "but they are nevertheless to be bound to otherwise work out the whole of the coal hereby let in terms of the said lease and minute of alteration." The tenants bound themselves to pay to B. lordships of 10d. per ton of the one kind, and 6d. per ton of the other kind of coal. Of the same date H. & D. and W. & Co. entered into an agreement by which, on the narrative that H. & D. had renounced their lease of the 17-acre field on condition that W. & Co. should pay them certain lordships, W. & Co. bound themselves to make payment to H. & D. of 3½d. for each ton of coal output from the said ground. The lordships payable to H. & D. were to be paid at the terms on which the lordships payable to B. fell to be paid, and H. & D. were to have the same power as B. in checking output. In 1884 a person in right of H. & D. raised an action against the successors of W. & Co., to have it declared that under the terms of the two last-mentioned deeds W. & Co. were bound to work out the whole coal prior to the expiry of their lease, or at least to output as large quantities of coal as were capable of being obtained by due diligence. *Held* that there was no such obligation imposed upon them.

By lease dated 13th February 1869 and 18th June 1870, D. C. R. C. Buchanan of Drumpellier let to Henderson & Dimmack, Drumpellier Iron Works, Langloan, a coal-field extending to 17 acres, for twenty-five years from Whitsunday 1866, at the yearly fixed rent of £1500, or in the option of the lessor, a royalty of 1s. 1d. per 22½ cwts. for the Pyotshaw main and splint coal, and of 10d. per same quantity of coal raised from the other seams.

In 1868 Walter Neilson and Hugh Neilson, ironmasters, Summerlee, then carrying on business as Wilsons & Co., had obtained a lease from D. C. R. C. Buchanan of the coal and ironstone in the part of the lands of Drumpellier adjoining the 17-acre field just mentioned. One portion was let for twenty-seven years as from Whitsunday 1865, and the other for twenty-six years as from Whitsunday 1866, with breaks in favour of the tenants at Martinmas 1871 and at Martinmas in every fifth year thereafter, upon their giving six months' notice. The tenants were taken bound to pay a

fixed rent, or in the option of the landlord a lordship of 1s. 1d. for each 22½ cwt. of coal raised from the lands, with power to the landlord to check the output. There was also this clause in the lease:—"And the said second parties bind and oblige themselves and their foresaids to work the whole minerals in a regular, systematic, and proper manner, without unnecessary waste of material, either by pillar and room, chain-wall or long-wall system."

By minute of alteration in 1871 power was given to the tenants (Wilsons & Company) to break the lease at any term of Martinmas during the six years from Martinmas 1871 on giving six months' notice in writing, and that in addition to the breaks stipulated in the lease.

By minute of agreement dated 20th and 23d of November and 1st December 1871, and entered into between D. C. R. C. Buchanan of the first part, Messrs Henderson & Dimmack of the second part, and Walter Neilson and Hugh Neilson, as partners of, and as trustees for behoof of the company (Wilsons & Company), of the third part, on the narrative of the said two leases, and of the agreement of the second party, with consent of the first party, to give over to and in favour of the third parties the 17 acres previously let, the second parties (Henderson & Dimmack) renounced all right and title to the same under their lease, and were declared free of all obligations under the same; and the first party "lets the said coal to the third parties for the period, and, except as after mentioned, subject to the whole other terms of their foresaid lease from him and minute of alteration thereon, dated 10th and 28th April 1871." The third article of the agreement was:—"It is hereby conditioned and declared that in their working of said coal the third parties are not to work the coal through a pit on the lands of the first party, but they shall have right to work and raise the said coal through and by means of a pit or pits on their own adjoining lands of Summerlee, and for that purpose to cross the march and make all requisite roads and connections below ground between their pit or pits and the said coal; which pit or pits they shall be at liberty to fill up, and which roads and connections they shall not be bound to leave in good working order, but they are nevertheless to be bound to otherwise work out the whole of the coal hereby let in terms of the said lease and minute of alteration." There was no increase on the fixed rent stipulated in the original lease, but the tenants bound and obliged themselves "to pay to the said David Carrick Robert Carrick Buchanan, and his heirs and successors, the following lordships—to wit, for each ton of twenty-two and one-half hundredweights of the Kiltongue seam of coal, after being freed from dross, as stipulated and expressed in said lease, 10d.; and for each ton of the Virtuewell seam of coal of twenty-two and one-half hundredweights, freed from dross in like like manner, 6d.; and that at the term and in the proportions as conditioned and stipulated in said lease: Also with power to the said David Carrick Robert Carrick Buchanan, or those authorised by him, to enter upon the lands of Summerlee to check the output, with access to the pits and machinery thereon, to examine and survey the coal workings."

By minute of agreement dated 1st December 1871 and 10th January 1872, between Henderson & Dimmack of the first part, and Wilsons & Company of the second part, on the narrative that the first party had renounced their right to the said 17-acre field under their lease on condition that the second party should pay them certain lordships:—"The second party hereby agree, and bind themselves and their said firm, and the funds and estate, and the partners, future as well as present thereof, to make payment to the said Henderson & Dimmack, and the partners present and future of that firm, and to their assignees, of the sum of 3½d. for each ton of twenty-two and one-half hundredweight of coal output from the said ground by the second party, or those deriving right from them, under and in virtue of said agreement, screened in the usual way, and that at the terms on which the lordships payable to the said David Carrick Robert Carrick Buchanan fall to be paid, the first party having the same powers of checking output which shall belong to the said David Carrick Robert Carrick Buchanan."

The estates of Messrs Henderson & Dimmack were sequestrated, and by deed of assignation dated 9th and 10th May 1883, Mr Robert Blyth, C.A., Glasgow, the trustee thereon, assigned to David Ker Convery, land surveyor, Cuthil siding, Blackburn, all right, title, and interest competent to Messrs Henderson & Dimmack under the said deeds.

This action was raised in 1884 by Convery, as Henderson & Dimmack's assignee, against the Summerlee Iron Company, the successors of Wilsons & Company, to have it found and declared that under and in virtue of the foresaid minutes of agreement "the defenders were and are bound and obliged to work out All and Whole the workable seams of coal contained in the part of the lands of Drumpellier, consisting of 17 acres 2 poles or thereby, let by the lease first above mentioned, and assigned by the first above-mentioned minute of agreement, and that prior to the term of Whitsunday 1891, or other term of expiry fixed by the lease granted by the said David C. R. C. Buchanan to the said Walter and Hugh Neilson, dated on or about 11th August and 16th October 1868, with minute of alteration thereon, dated on or about 10th and 28th April 1871, and referred to in the second above-mentioned minute of agreement, and also to work the same as from 10th January 1872 onwards until the term of expiry foresaid, continuously and without interruption, or at least in a due and systematic course of working, without unnecessary waste of material, on some approved system of working, and according to the terms contained in the foresaid lease dated on or about 11th August and 16th October 1868, and minute of alteration thereon; and to output as large quantities of coal as are capable of being obtained therefrom by due diligence and exertion, according to the methods and practice of working prescribed by the said last-mentioned lease (so that the whole of the said seams may be worked out prior to the said term of expiry)." There were also conclusions for accounting.

The defenders averred and pleaded (1) that they had already fully accounted for all lordship due to the pursuer and his authors; (2) that they were under no obligation to the pursuer to work the whole coal in the lands in question.

The Lord Ordinary (LEE) assoilzied the defenders, except from the conclusions for accounting, with regard to which he allowed them a proof of their averments as to settlement and discharge.

"*Opinion.*—By the minute of agreement founded on by the pursuer in Cond. 3, the coal leased by the pursuer's authors, Messrs Henderson & Dimmack, was given over by them (with consent of the proprietor) in favour of Wilsons & Company (the authors of the defenders), and a new lease was granted by the proprietor to Wilsons & Company 'for the period, and, except as after mentioned, subject to the whole other terms of their foresaid lease from him, and minute of alteration thereon, dated 10th and 28th April 1871.' The lease thus referred to related to certain coal and ironstone adjoining, which was held by Wilsons & Company from the same proprietor; and it was agreed between them and the proprietor that this lease to Wilsons & Company, as modified by the minute of alteration, should be held as embracing from its commencement the coal which was included in Henderson & Dimmack's lease, and which was given up by them.

"By the agreement set forth in Cond. 4, Wilsons & Company, on a narrative that such was a condition of the renunciation of Henderson & Dimmack's lease, bound themselves to pay to Henderson & Dimmack a lordship of 3½d. per ton of coal output from the ground so acquired, payable at the terms on which the lordships payable to the lessor fell to be paid; and they agreed that Henderson & Dimmack should have the same powers of checking output as the lessor.

"In this action the pursuer, as assignee of the trustee upon the sequestrated estates of Henderson & Dimmack, not only demands an accounting by the Summerlee Coal Company, as Henderson & Dimmack's successors, for all coal output by them (a demand which is met by the allegation of discharge in answer 6), but also asserts a right to have the Summerlee Coal Company ordained to work out the whole coal included in Henderson & Dimmack's lease prior to Whitsunday 1891, and to pay the 3½d. lordship thereon, or otherwise to pay damages to him for not working out the coal in terms of their alleged obligation.

"With regard to the claim of accounting, it was conceded by the defenders that unless they should substantiate their allegation of settlement and discharge, such accounting must take place. Inquiry therefore is necessary as to this point; and I have allowed the defenders a proof of their allegations.

"But the other branch of the pursuer's claim is disputed, as altogether unsupported by the agreements libelled.

"The first plea-in-law for the defenders [no title or interest] was not maintained before me; and I am satisfied that, in a question between them and Wilsons & Company, arising under the agreement set forth in Condescendence 4, the pursuer, as Henderson & Dimmack's successor, must be held to have all the rights which that agreement imports, including a right to enforce an obligation to exhaust the coal, if such right belongs to the lessor by the terms of the original lease and minute of alteration thereon.

"But it was contended for the defenders that the pursuer could have no higher right than the lessor, and that the lessees were under no obligation to him to work out the whole coal.

"I am of opinion that this contention is well founded. It appears from the lease that there was no obligation laid upon the tenants to exhaust the coal. They were bound, so long as they held the lease, to work the coal systematically, according to one or other of the methods specified; but the fact that there was a break every five years in the tenant's favour, and that they were taken bound to leave the whole pits, levels, and workings in good working order at the termination of the lease, is inconsistent with the existence of an obligation to work out the whole coal.

"Moreover, it must be observed that before the date of the agreement founded on by the pursuer there had been an important alteration in the terms of the lease. The minute of alteration of 10th and 28th April 1871 (referred to in the agreement), empowered the tenants to give up the lease at any term of Martinmas, on giving six months' notice. Of course, this in no way prejudices any claim the pursuer has to the 3½d. lordship upon output, so long as the tenants continue to hold the lease. Nor would it prejudice a claim founded upon the allegation (had there been such) that the workings had been stopped collusively, or for the purpose of defeating the claims arising under Henderson & Dimmack's agreement with Wilsons & Company. But in the absence of any case of that kind, I think that the power of throwing up the lease shows that no obligation to work out the whole coal was in contemplation of the parties. Even the landlord himself had no right to compel the tenant to work out the coal, or even to go on working for more than a year, if the tenant chose to throw up the lease.

"The true view, in my opinion, is, that the lessees were bound to work the coal fairly and honestly, in terms of their obligation to the lessor, and that Henderson & Dimmack stipulated for nothing more than a 3½d. lordship upon the coal so output. Had they wished to stipulate for more they would not have rested content with a lordship upon output and a power of checking output the same as the landlords. They would have made it clear that whatever the landlord might do, no discontinuance of working should take place without their consent. In the absence of any stipulation to that effect, and of any allegation of *mala fides* in the discontinuance of the workings, I think that the pursuer has failed to show any sufficient ground for his claim to have the defenders ordained to go on working out the coal or to pay damages for not working it out. In my opinion, it must be presumed that the discontinuance of the workings, not having been objected to by the lessor, arose from reasonably sufficient causes, and from no breach of any obligation in the lease which could have been enforced.

"I therefore assoilzie the defenders from the conclusions of the action so far as regards this claim."

The pursuer reclaimed, and argued that under the express terms of the third head of the tripartite agreement the landlord could force the tenants to work continuously, and that he was in a position to enforce all that the landlord could. Moreover, the defenders were bound to work

reasonably, for when payment by fruits is stipulated there is also involved an obligation to produce fruits—*M'Intyre* v. *Belcher*, 32 L.J., C.P. 254; *Kinsman* v. *Jackson*, January 30, 1880, 42 Law Times, 80; *Stirling* v. *Maitland and Another*, 34 L.J., Q. B. 1; Addison on Contracts (7th ed.), 243; MacSwinney on Mines, 209. Even if the conclusion that the whole was to be worked out by 1892 were to be rejected, still he would be entitled to decree in terms of the lesser conclusion, omitting the words 'so that the whole of the seams may be worked out prior to the said term of expiry.'

The defenders replied, that in order to grant decree in terms of the declaratory conclusions of the summons it would be necessary to hold that the defenders would be bound to work out the coal, whether the working was profitable or not. It would also be necessary to hold that they were bound to work irrespective of the breaks expressly stipulated in the lease. The case of *Gowans* v. *Christie*, Feb. 8, 1871, 9 Macph. 485. was conclusive on the point that where the minerals were not workable to profit the tenant was only bound to go on until there was a break in his lease.

At advising—

Lord Mure—This case is somewhat complicated at first sight, from the variety of documents produced, but after hearing the argument which has been submitted, I am clearly of opinion that the Lord Ordinary is right.

The circumstances out of which the action arises are shortly these. About the year 1868 Buchanan of Drumpellier let certain seams of coal to the defenders' authors, under stipulations as to the mode in which the workings were to be carried on. This lease was to last until the year 1892. Shortly afterwards a smaller part of the same coalfield, consisting of about 17 acres, was let to the pursuers or their authors. This part was let to Henderson & Dimmack for twenty-five years, which would make it of about the same duration as the earlier lease, and the fixed rent was £1500, or, in the option of the lessor, a royalty of 1s. 1d. per 22½ cwt. for one kind of coal, and 10d. for coal raised from other seams. It is to be observed that this lordship is the same as that stipulated for in the lease by Buchanan to the defenders in 1868. Then after that lease there was an agreement between Buchanan, the pursuer, and the defenders, under which Buchanan allowed the present pursuer's authors to renounce their lease of the 17 acres, and at the same time agreed to let them to the present defenders on the same terms as he had already let the larger portion in 1868. This is distinctly set out in Cond. 3, which distinctly states that — "The second parties [Henderson & Dimmack] renounced all right and title to the same under their lease, and were declared free of all obligations thereunder with respect to the same; and the first party let to the third parties the said coal for the period, and subject generally to the terms of said third parties' lease, with minute of alterations thereon, as if the said coal had been originally embraced therein; and the third parties became bound to work out the whole of their coals so let in terms of their said lease with minute of alteration, and to pay certain lordships to the said first party." This statement is not disputed. Now, in the minute of agreement, executed in 1871 and 1872 by the pursuer and the defenders, there is a provision that the defenders are to pay the pursuer a lordship of so much per ton for the coal output from the 17-acre field. The minute sets forth that the pursuer had given up and renounced the lease on condition that the defenders should pay certain lordships, and that therefore, "The second party hereby agree, and bind themselves and their said firm, and the funds and estate, and the partners, future as well as present thereof, to make payment to the said Henderson & Dimmack, and the partners present and future of that firm, and to their assignees, of the sum of 3½d. for each ton of twenty-two and one-half hundredweight of coal output from the said ground by the second party, or those deriving right from them, under and in virtue of said agreement, screened in the usual way, and that at the terms on which the lordships payable to the said David Carrick Robert Carrick Buchanan fall to be paid, the first party having the same powers of checking output which shall belong to the said David Carrick Robert Carrick Buchanan."

That being the nature of the agreement, the defenders worked coal out of the 17-acre field during the period from 1872 until 1879, and paid certain sums to the pursuer, which according to his view are not so much as he was entitled to, and hence the conclusions for accounting in the summons. This working, however, came to an end in 1879, after various communications between the pursuer and the defenders, in which the former urged the latter to go on, and then the present action was brought, the conclusions of which are as follow—[*His Lordship here read the conclusions above quoted*]. These conclusions are in the broadest terms, and seek to have it declared that the defenders are under an obligation to work out the whole coal in the 17-acre field.

The question is, whether there is in the agreements founded on any such obligation?

I think it was not very seriously disputed by the pursuer that if the obligation stood upon the terms of the agreement between the three parties, its clauses could scarcely be made to substantiate his claim. The third clause is in these terms—"It is hereby conditioned and declared that in their working of said coal the third parties are not to work the coal through a pit on the lands of the first party, but they shall have right to work and raise the said coal through and by means of a pit or pits on their own adjoining lands of Summerlee, and for that purpose to cross the march and make all requisite roads and connections below ground between their pit or pits and the said coal; which pit or pits they shall be at liberty to fill up, and which roads and connections they shall not be bound to leave in good working order, but they are nevertheless to be bound to otherwise work out the whole of the coal hereby let in terms of the said lease and minute of alteration." That is a stipulation that the defenders are not to break ground on Buchanan's property, but that in working the coal in the 17-acre field they are to work it in connection with the larger field, and in the manner specified in the earlier lease and minute of alteration.

By the terms of that lease the defenders were taken bound to work the whole minerals in a

regular, systematic, and proper manner, either by pillar and room, chain wall, or long wall system, and to leave sufficient pillars of coal in each seam so as to prevent subsidence, and, generally speaking, to conduct their workings in a usual and efficient manner. Now, in a question with the landlord I do not see that there is any power by which he could force the defenders to work out the whole coal in the 17-acre field if it did not suit their general mode of working. Therefore the question is just reduced to this—Whether by the separate agreement which was made at the same time between the pursuer's authors and the defenders' authors, the pursuer could force them to work out the coal? The meaning of this agreement, to my mind, is that when the defenders were paying to the landlord the lordships stipulated in regard to the 17-acre field—viz., 10d. or 6d. per ton according to the kind of coal—they were, in addition, to pay to the pursuer's authors a lordship of 3½d. per ton, and that as a consideration for this the pursuer's authors undertook to renounce their lease of the 17-acre field. The pursuer maintains that he has a right to force the defenders to go on and work in terms of the conclusions of his summons. That is a very large and very extreme demand, and comes to this, that the defenders were bound to go on and work even though the coal was not workable to profit. If that was the object of the pursuer, I think that he should have had a distinct declaration inserted in the agreement, for it is impossible to imply such an improbable arrangement as that. I think the probability is that Henderson & Dimmack did not see their way to continue working the 17-acre field, and that they therefore arranged with the defenders that they should take it into their larger field; and then, as a consideration of their renouncing the 17-acre field, that they stipulate for a lordship of 3½d. on every ton of coal output. I think the fact that this lordship was to be paid at the same terms as the other lordships were to be paid to the landlord, shows distinctly that it was only to be paid when, under a fair mode of working, lordships were being paid to the landlord. On the whole matter, I am of opinion that the Lord Ordinary is right.

Lord Shand — The case for the reclaimer here is rested on the agreement between Henderson & Dimmack, his authors, and Wilsons & Company, entered into in 1871 and 1872, and in construing this agreement it is necessary to have in view the circumstances of the parties.

In 1870 Henderson & Dimmack had got a lease of the 17-acre field, but in December 1871 they arranged to give that lease up, and it was then agreed that the subjects should be re-let to Wilsons & Company, now represented by the Summerlee Iron Company, who were to work these 17 acres from the pits situated on their own property. That being so, the tripartite agreement should be looked to before considering the terms of the separate agreement. Apparently the effect of the tripartite agreement was that in the first place Henderson & Dimmack renounced their lease, and, on the other hand, the landlord undertook to free and relieve them of all obligations that directly affected them. In the next place, the landlord let the coal-field, the lease of which had been renounced, to Wilsons & Company, putting it under the lease of 1868, and in doing so agreed that it should be treated in the same way as the other subjects which were included in the lease of 1868. Now, it has been contended that there was a special obligation imposed upon Wilsons & Company by the minute of agreement, that as regards the 17-acre field they were to be bound to work it out entirely during the currency of the lease. I have very great doubt, supposing that were so, whether it would benefit the pursuer—that is to say, whether an agreement between the landlord and his tenants would enure to the pursuer's benefit. But I do not find any such stipulation, the only benefit they took was that they renounced the lease, and were relieved of all obligations under it. I therefore think it is *jus tertii* for one in right of Henderson & Dimmack to say that Wilsons & Company were bound to work out the minerals. I agree with the Lord Ordinary and your Lordship that the third article does not impose an obligation to work out. We have at the end of the article the expression "work out" instead of "work," but I think that refers only to the manner of the working, and does not mean that the whole coal is to be worked out. It merely means that the coal, so far as worked, shall all be worked in a certain manner. The third article runs thus—"It is hereby conditioned and declared that in their working of said coal the third parties are not to work the coal through a pit on the lands of the first party, but they shall have right to work and raise the said coal through and by means of a pit or pits on their adjoining lands of Summerlee, and for that purpose to cross the march and make all requisite roads and connections below ground between their pit or pits and the said coal; which pit or pits they shall be at liberty to fill up, and which roads and connections they shall not be bound to leave in good working order, but they are nevertheless to be bound to otherwise work out the whole of the coal hereby let in terms of the said lease and minute of alteration." The purport of that is just that in working the coal the tenants are to observe the conditions and regulations of the former lease of 1868. The word "otherwise" appears to me to be explained in this way, that while the new tenants are to be entitled to make roads and connections between their pits and the 17-acre field, which pits they might fill up, and which roads and connections they were not to be bound to leave in good working order—because they could not be of use in any further workings—yet they were in all other respects to work the coal let in the manner prescribed in the previous lease and minute of alteration.

Then we come to the consideration of the agreement between Henderson & Dimmack and Wilsons & Company, keeping in view the circumstances that these 17 acres had been placed under the lease of 1868, in so far as the landlord was concerned—that is to say, while there was no increase on the fixed rent for the subject added to their lease, the tenants were bound to pay certain lordships, and although they were bound to work in a regular manner, they were under no obligation to work out any particular part of the 17 acres, which was just in the ordinary position of a mineral field.

There is this peculiarity however, that in giving up their lease Henderson & Dimmack had stipu-

lated for this advantage, viz., that the new tenants should pay to them a lordship of 3½d. for each ton of 22½ cwt. of coal that they output from the ground. That is an obligation to pay on so much of the coal as they output, but there is no obligation to work out the coal. It is said, however, that though not expressed, such an obligation is to be implied. That I am entirely unable to assent to, for the agreement must be looked at in the light of the existing lease, and I therefore think that if no minerals were raised there would just be no lordships.

The case is entirely different from that of the sale of a practice, which obviously and necessarily implies a continuing obligation to produce profits. The tenants here had right under the minute of alteration of 1871 to renounce during the six years following Martinmas 1870 on giving six months' notice. Can it be said that they could have been forced to go on, or that they could have been obliged to work the 17-acre field even if they could not work them to a profit. Even if that field had not been brought under the existing lease, but had simply been let to the tenants for a lordship, it would have been a serious question whether the right claimed by the pursuer could have been reared up by implication. But we have here the peculiarity that there was an existing lease by the landlord, who had a larger interest in the fair working of the minerals than Henderson & Dimmack, and I think that they just took their chance of what might occur. If no lordships were being paid to the landlord, then no lordships would be payable to them either.

There might be a set of circumstances on which the pursuer could found a case, if it could be averred that the existing lease was to be renounced and a new lease entered into in order to defraud the right of the pursuer. If under that new lease the whole lordships were to be payable to the landlord, that would clearly be a violation of the agreement between Henderson & Dimmack and Wilsons & Company, for under the existing agreement it is only fair that if the landlord is getting lordships they should get lordships too. But there is no case like that suggested. If there were it would clearly be a case of *mala fides*. Another case has been figured, viz., that the surface of the 17-acre field has been feued, and that it is understood there is to be no more working of the minerals. It would be a much nicer question to decide whether that would infer liability, for if it could be shown that that had been done in order to evade the payment of lordships, the pursuer might have a case. But there is no such case as that made on record.

On the whole matter, I do not think that the pursuer can call on the defenders to go on and work. If there had been an obligation I think they could have done so, but for the reasons stated I think there was no obligation.

Lord Adam—The first document to be considered is the lease by Buchanan of Drumpellier to Wilsons & Company, which terminates in 1892, with breaks in favour of the tenant every five years, the material provisions of which are incorparated by direct reference in the tripartite agreement of 1871. The obligation on the tenants in that lease is in these terms—"The said second parties bind and oblige themselves and their foresaids to work the whole minerals in a regular, systematic, and proper manner, without unnecessary waste of material, either by pillar and room, chain-wall or long-wall system." That is the only obligation on the tenants; there is no express obligation on them to work continuously, and therefore I think it is out of the question to say there was originally any obligation to work out the minerals. Then the next document which contains clauses material to the case is the minute of alteration between the same parties, entered into about the same time as the tripartite agreement was made. By that minute the tenants were to have power to give up the lease during the six years following Martinmas 1870 on giving six months' notice, and to say, in the face of that, that there was an obligation on the original tenant to work out the whole during the currency of his lease is out of the question.

Buchanan of Drumpellier had also let the coal in the adjoining field of 17 acres to Henderson & Dimmack, who renounced their lease in favour of the defenders, because that field could evidently be more conveniently worked along with the defender's workings than with their own. That arrangement is contained in the agreement of 1871, by which the pursuers renounced their lease of the 17 acres, and the third head of that agreement is as follows—[*reads as above*]. I think it is clear that relates only to the mode in which the coal was to be worked, and was not intended to increase the obligations of the tenant. As regarded the working of the coal from their own ground, it was unnecessary to stipulate that Wilsons & Company should leave the roads open, because Colonel Buchanan would never require them for the purposes of access. The words "out" and "whole of" do not, I think, make any difference. The clause runs thus—"But they are nevertheless to be bound to otherwise work out the whole of the coal hereby let in terms of the said lease and minute of alteration." In my opinion, the word "otherwise" just means, that in other respects in working out the coal the terms of the previous lease are to be observed, and the words "work out the whole of the coal" mean the whole coal which is worked out.

Then, as regards the tripartite agreement, which is merely ancillary to the original agreement, while it was evidently the intention that the tenant was to work fairly, and that the pursuer should share to a certain extent in the lordships to be paid for the coal so worked, I think there is no obligation interposed on the tenant to work out the field.

On these grounds I think the interlocutor should be affirmed.

The Lord President was absent.

Lord Deas was absent.

The Court adhered.

Counsel for Pursuer (Reclaimer) — Gloag—Kennedy. Agent—Gregor Macgregor, S.S.C.

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