clusions for interdict. I understand that the separate pecuniary conclusions are withdrawn under reservation of the pursuers' right to raise a new action."

The pursuer reclaimed, and argued—The estates had been conveyed to him in real warrandice and security of payment of all surface damages already occasioned, or that might be hereafter occasioned, by mineral workings. This was an infeftment in real warrandice, and a valid security by the law of Scotland. It was the common law right of the owner of the surface to have the surface supported unless he had discharged that right. A reservation of minerals did not import a right to bring down the surface, nor did one coupled with a reservation of compensation—*Aspden* v. *Seddon*, March 24, 1875, L.R., 10 Ch. App. 394; *White* v. *Dixon*, December 22, 1881, 9 R. 375—10 R. (H. of L.) 45, March 19, 1883. Under the warrandice the pursuer had (1) a right to interfere with any alteration which might bring down his support; (2) he was unrestricted as regards the amount of damages. In short, there was a servitude constituted over the surface, which had not been noticed in the surface title granted in 1798 to Sligo.—Ersk. ii. 3, 28; *Blair*, November 6, 1741, M. 16,624; Bell's Prin. 894. The Statute 1696, c. 5, did not strike against the disposition as being in security of damages to be found due in the future. A debt was not future merely because it was a debt with a tract of future time.

The defenders replied—The clause in question was not proper warrandice but paction. In the deed of discharge the right of parties are regulated by paction. The proprietors of surface and minerals agreed as to the payment of all surface damages, and therefore if that was so, any claim arising did so under the terms of the obligation. When the minerals were taken, and the surface suffered damage, there was no eviction, but the state of affairs contemplated by the clause emerged. This disposed then of calling it warrandice. But even if it were, the matter could never have eventuated in interdict. The damages must be liquidated from time to time, and the subjects of the security must be adjudged—Duff on Feudal Conveyancing, 91; 1 Bell's Com., M'Laren's ed., p. 733. But (2) the security was bad under 1696, c. 5, as a future debt arising out of a subsisting obligation. A real security to be good must be for a definite sum, which this was not—*Coutts* v. *Tailors of Aberdeen*, August 3, 1840, Ross's Leading Cases, 3; Erskine, ii. 3, 50; *Newnham* v. *Stewart*, 1794, 3 Pat. App. 345. It could not be made definite by reference.

Counsel for M'Clelland adopted the argument for the other defenders.

At advising—

Lord Rutherfurd Clark delivered the opinion of the Court as follows:—The pursuer maintained that he had been evicted, and that he was entitled to have recourse against the estates conveyed by Colin Dunlop "in real warrandice and security of the payment of all surface damages already occasioned or that may hereafter be occasioned by the working of the minerals under the pursuer's lands." So long as there was a discrepancy between the title to the minerals and the title to the surface, there might be room for maintaining that the exercise of any rights within the former title but in contravention of the latter was an eviction which would give recourse on the warrandice. But I do not think it necessary to consider any such question. For the discrepancy which existed in the earlier titles was removed by the deed of 1817, and as no act was lawful under the mineral title which was not also lawful under the title to the surface, it seems to me to be impossible for the pursuer to show that he has been evicted in any sense of that word.

But the pursuer contended that under the clause which I have quoted he had a real security for the damages which he had sustained through the working of the minerals. I am of opinion the alleged security is bad, and on the simple ground that it is absolutely indefinite. Nothing can be more fixed in our law than that a real security cannot be given for an indefinite sum of money, and nothing can be more indefinite than the amount of the damage to be sustained by mineral workings. I prefer this ground of judgment to that on which the Lord Ordinary proceeded.

The Lord Justice-Clerk was absent.

The Court pronounced this interlocutor—

"Recal the interlocutor submitted to review, of new dismiss the action in so far as concerns the first and second conclusions thereof, in terms of the minute of restriction for the pursuer: Further, find that the deed of security libelled is not effectual as a security for payment of damages occasioned by the working of the minerals under the pursuer's lands: Therefore assoilzie the defender from the third declaratory conclusion for interdict and decree, reserving the right of the pursuer to bring a new action of damages against the defender for damage caused during his tenure of the mines and minerals."

Counsel for Pursuer—Mackintosh—Pearson. Agents—J. L. Hill & Co., W.S.

Counsel for Dunlop & Co.—J. P. B. Robertson—Graham Murray. Agents—Tods, Murray, & Jamieson, W.S.

Counsel for M'Clelland — Darling — Low. Agents—Thomson, Dickson, & Shaw, W.S.

Tuesday, March 17.

FIRST DIVISION.

[Lord Kinnear, Ordinary.

MALCOLM *v.* LLOYD.

Process—Jury Trial—Servitude Road—Question of Fact—Proof.

Where the issue in a case was whether the pursuer had acquired right by immemorial possession to a servitude road, the pursuer moved for a jury trial. The defender contended that there should be a proof. The Court *held* that the trial should be by jury as the question at issue was one purely of fact.

Circuit—Maiden Circuit—Court of Session Act 1868 (31 *and* 32 *Vict. cap.* 100), *sec.* 46.

Where notice was given for jury trial at a circuit town, and it appeared that there being no criminal cases to be tried, no jury had been summoned, and further, that the defender had not sufficient time to prepare for the trial, the Court, appointed the trial to proceed in the ensuing summer session before the Lord Ordinary.

John Malcolm of Poltalloch raised this action against Thomas Lloyd of Minard, to have it found and declared that he had right to a servitude road for the passage of carts, horses and cattle, and foot-passengers, from the farm of Achaleck belonging to him, over the defender's estate of Minard to the public road by the side of Loch Fyne.

The action was founded on immemorial possession, which was denied.

The Lord Ordinary allowed the parties a proof of their averments.

The pursuer reclaimed, and moved that the trial should be by jury.

The defenders contended that there should be a proof, as a question of law might arise with regard to a portion of the road which had been substituted in 1854 for the previously existing track.

At advising—

Lord President—I understand that the Court is of opinion that this case should be tried before a jury, and I am not disposed to differ from that view. I think there is a disadvantage in having a question of pure fact tried by a proof before the Lord Ordinary, where the evidence is likely to run to some length. In that event the result is that the case afterwards comes up upon a reclaiming note with a big print, which involves the expenditure of a great deal of judicial time, and necessitates considerable expense, which would otherwise be avoided. The probability is that the verdict here will put an end to the case, and that we shall hear no more about it.

Lord Mure, Lord Shand, and Lord Adam concurred.

The Court recalled the interlocutor reclaimed against, and remitted the case to the Lord Ordinary for trial before a jury.

Thereafter, issues having been adjusted, the pursuer gave notice for trial for the ensuing Circuit Court at Inverary, which was fixed to be held on 26th March, nine days after the notice. The defender objected that the notice was too short, and moved the Lord Ordinary to fix the trial to proceed before himself.

The Lord Ordinary (Kinnear) reported the cause to the First Division.

Argued for the defender—A trial at the approaching circuit would put the defender to great inconvenience on account of the exceeding shortness of time, only nine days, and would practically result in injustice, as the defender could not possibly get his case prepared at such short notice. A trial by jury at Inverary in a right-of-way case, where the road in question lay near the place of trial, was a most undesirable method of trying the rights of parties, as it would be impossible to get an unbiassed jury.

Replied for the defender—The issue between the parties was a very narrow one, and depended upon the evidence of witnesses on the spot. The evidence as to the use of the road could easily be obtained, and was not of a kind requiring great research. It was desirable in the interests of all parties that the case should be tried with the least possible delay.

It appeared in the course of the discussion that the approaching circuit at Inverary was to be a maiden circuit, and that in consequence no jury had been cited.

The Court of Session Act 1868 (31 and 32 Vict. cap. 100), sec. 46, provides—"Where a cause is appointed to be tried at any circuit town in any period of vacation or recess, and no special diet is fixed for such trial, it shall be lawful for either of the judges presiding at the sittings of the Circuit Court of Justiciary in such circuit town to try the same, . . . and where a cause is so tried, it shall not be necessary that a separate list of jurors shall be returned for the trial thereof, but the jury shall be chosen from the list of jurors summoned to attend the Circuit Court of Justiciary, who shall be bound by their citation to serve if required at the trial of all civil causes for which no special diet of trial shall have been appointed." . . .

At advising—

Lord President—The pursuer here is exercising a right under the statute, and not appealing to the discretion of the Court. Nor is he proposing it as a matter for consideration when the case should be tried. He has this right subject to the modification that if the opposite party consider himself to be prejudiced he can move the Lord Ordinary to try the case before himself, and the question then becomes one for the discretion of the Court.

The present case seems to me to be one for the interference of the Court. I am not sure how far the pursuer is entitled to have a criminal jury to try a civil case, all the more when there are no criminal causes set down for trial, and I am not by any means sure that he can have a special jury or a civil jury summoned, especially looking to the provisions of section 46 of the Act 1868. There is so much difficulty attending the whole matter that I think we ought to appoint the case to be tried before the Lord Ordinary.

The complaint of want of time for the preparation of the case which has been urged by the defender has its weight too, but too much importance must not be attached to it. If it can be shown that the circuits have been fixed to take place so soon after the rising of the Court that a reasonable time for the preparation of the case has not been provided, that would be a matter requiring consideration also. In the present case I do not say whether the time available is sufficient or not. The embarrassment offered by the circumstance of no criminal jury having been cited for the approaching circuit at Inverary makes me think that the case ought to be tried before the Lord Ordinary.

Lord Mure concurred.

Lord Shand—If the issues in this case had been adjusted four or five weeks ago, and then notice had been given for the circuit, I should not in these circumstances have been inclined to inter-

fere. But looking to what has taken place in this case, and the short notice which has been given, I agree with your Lordship in thinking that the trial ought to take place before the Lord Ordinary.

The defender's counsel says that he has no sufficient time for the proper preparation of the case, and perhaps eight or nine days is too short a time looking to the nature of the case. I am in favour of despatch in all cases, but there must be some discretion, and looking to what has been stated by the defender's counsel I think that this is a case which ought to be tried before the Lord Ordinary.

LORD ADAM concurred with the Lord President.

The Court fixed the trial to take place before the Lord Ordinary in the month of June following.

Counsel for Pursuer (Reclaimer)—J. P. B. Robertson—Graham Murray. Agents—Mitchell & Baxter, W.S.

Counsel for Defender (Respondent)—Mackintosh—Darling. Agents—Pearson, Robertson, & Finlay, W.S.

Wednesday, March 18.

SECOND DIVISION.

[Dean of Guild Court, Edinburgh.

MITCHELL *v.* GOWANS (DEAN OF GUILD OF EDINBURGH).

Burgh—Dean of Guild Court—Edinburgh Municipal and Police Act 1879 (42 *and* 43 *Vict. cap. cxxxii*), *secs.* 159 *and* 160—*Appeal—Competency.*

Held that an appeal to the Court of Session from a deliverance of the Dean of Guild, acting under secs. 159 and 160 of the Edinburgh Municipal and Police Act 1879, was competent.

Burgh—Dean of Guild—Jurisdiction—Appeal from Deliverance in regard to Ventilation and Sanitary Arrangements.

The Dean of Guild, acting under sections 159 and 160 of the Edinburgh Municipal and Police Act 1879, refused to approve plans of new houses about to be erected, because the plans did not provide sufficiently for ventilation, in respect that the water-closets were not shown thereon next to the outer wall. *Held* (*dub.* Lord Young) that the deliverance was within the powers conferred by the Act, and that cause for disturbing it had not been shown.

The Edinburgh Municipal and Police Act 1879 (42 and 43 Vict. cap. cxxxii.) provides by section 159—"Every person who proposes to erect any new house or building . . . . within the burgh, shall lodge with the Clerk of the Dean of Guild Court a petition for warrant so to do, and such petition shall set forth a description of the intended house or building . . . and shall be accompanied by a plan of the site, showing the immediately conterminous properties, and also the position and width of any street, court, foot-pavement, or footpath from which the property has access, or on which it abuts; and also plans, sections, and such detailed drawings as are necessary to show the mode of structure and arrangement of the intended house or building or alteration, and the lines of the intended drainage thereof, and the levels thereof relatively to the street, court, foot-pavement, or footpath, and to the sewer or drain with which the soil-pipes and drains of the property to be built . . . are intended to be connected; and in regard to any building erected as a place of public resort, such plans shall show the arrangements for ventilation, and the provisions intended to be made for ingress or egress." Section 160 provides—"The clerk of the Dean of Guild Court shall forthwith, on receiving such petition, give notice thereof to the burgh engineer, who shall, before such petition is heard, report to the Court whether in his opinion the plans sufficiently provide for ventilation or other sanitary objects, and the Dean of Guild may decline to grant warrant for the erection of any new house or building . . . until satisfied that the plans provide suitably for such ventilation and other sanitary objects."

This was an appeal by Alexander Mitchell, builder, 32 Dundee Terrace, Edinburgh, against a deliverance of the Dean of Guild of Edinburgh, finding that the plans of tenements which he proposed to erect on his property at the corner of Tay Street and Dundee Terrace, Edinburgh, "do not provide suitably for ventilation and other sanitary objects, in respect that the water-closets are not shown thereon next to the outside walls of the petitioner's proposed tenements," and refusing to approve of the plans.

The burgh engineer had reported to the Dean of Guild Court—"(1) The sanitary arrangements are here very skilfully planned, the only defect being that they are not located next the outer wall, but are lighted and ventilated on what might be termed the 'intersol' method; that is, light and ventilation are carried over an enclosed scullery closet which intervenes between the W.C. and bath and the outer wall. This arrangement might very justly be allowed for the corner block; as regards the others, there cannot be any practical difficulty in having these appliances next the outer wall, whereby the disadvantages of the "intersol" method would be removed."

The appellant argued—That the burgh engineer while he reported against the sanitary arrangements of the houses in question, was just acting up to the views of the present Dean of Guild, because previous to the appointment of the latter to that office he had sanctioned and approved of similar arrangements. A remit should be made to some other man of skill. The provisions as to ventilation contained in sections 159 and 160 of the Edinburgh Municipal and Police Act 1879, under which the deliverance complained of was pronounced, applied only to places of public resort, and could not be extended to private houses. —*Pitman, &c.* v. *Burnett's Trustees*, Jan. 26, 1882, 9 R. 444; *Boswell* v. *Magistrates of Edinburgh*, July 19, 1881, 8 R. 986.

Replied for respondent—The appeal was incompetent since the matter in question was en-