The interlocutor reclaimed against therefore ought to be recalled and the defenders to be assoilzied from the conclusions of the action.

Lord Rutherfurd Clark—I am of the same opinion.

The Court pronounced this interlocutor:—

"Find that the pursuer has failed to establish the conclusions of the summons: Therefore recal the interlocutors reclaimed against: Assoilzie the defenders from the conclusions of the action."

Counsel for Pursuer — Mackintosh — Low. Agent—David Turnbull, W.S.

Counsel for Defender—R. V. Campbell—Rankine. Agents—M. Macgregor & Company, S.S.C.

Wednesday, November 25.

FIRST DIVISION.

[Lord Lee, Ordinary.

WADDELL'S TRUSTEES *v.* THE MONKLAND IRON COMPANY (LIMITED).

Lease—Mineral Lease—Abandonment—Arbiter.

A mineral lease provided that the lessees should "be entitled to put an end to the lease" in case it should be found by arbitration that the minerals could not be wrought to profit, and that this arose from no fault of the lessees. They intimated their intention to abandon, on the ground that the minerals could not be wrought to profit, but on the landlord disputing that any necessity for arbitration had arisen they took no steps to have arbiters appointed. *Held* that as they had not taken the steps necessary to entitle them to be free of the lease, they remained liable for the rent.

By lease dated 28th and 29th March 1877, James Arthur Crichton, advocate, and George M'Intosh, S.S.C., surviving trustees under a disposition and conveyance in trust executed by the deceased William Waddell, of Easter Moffat, let to the Monkland Iron and Coal Company (Limited) the whole ironstone in the lands of Easter Moffat, in the county of Lanark, for a period of nineteen years from Whitsunday 1877. The rent was £500 per annum. There were to be breaks in the lease in favour of the lessees at the end of every fifth year on giving six months' notice. The lessees bound themselves to make all practicable exertions for working and putting out the ironstone.

The lease further provided: — "And it is hereby agreed that if at any time before the natural expiry of this lease the said lessees or their foresaids shall work out and exhaust the ironstone hereby let, or in case it be proved by a mining engineer to be fixed by the parties, or by two mining engineers to be mutually chosen, or by an oversman to be named by them at the time they accept their appointment, or in case of their disagreeing, by a person to be appointed by the judge ordinary in the event of the parties not naming an arbiter or arbiters, or of their differing in opinion and not appointing an oversman, that the ironstone hereby let cannot be wrought to profit, and that this result has arisen from no fault on the part of the tenants, then the lessees or their foresaids shall be entitled to put an end to this lease, just as if it had terminated by the lapse of time."

The Monkland Iron and Coal Company (Limited) worked the ironstone from 1877 to 1881. The company then assigned the tack to the Monkland Iron Company (Limited), the defenders in the present action, who worked the ironstone and paid the rents under the lease until Martinmas 1884.

On 7th August 1884 the lessees wrote to the Easter Moffat trustees in these terms—"Dear Sirs—We beg to give you notice, in terms of our lease of Easter Moffat, that owing to the unprofitable nature of our workings we intend to cease mining operations at Martinmas first, and as this matter comes within the scope of an arbiter, we shall be glad to have this matter arranged as soon as may be convenient. Kindly own receipt of this intimation." On 12th August 1884 the trustees' agent replied—"Gentlemen,—We received your Mr Ferguson's letter of the 7th. You some time ago applied for a modification of the terms of your lease of the ironstone in this property, when our clients instructed us to request Mr Geddes, M.E., to inspect the workings and report for their information. We at once did this, but, as you will see from the annexed copy of Mr Geddes' letter to us of the 31st July, he has been unable, owing to an accident to your manager Mr M'Culloch, to examine the workings and report. In these circumstances we cannot admit your right to discontinue the workings as you propose to do, nor is there at present any occasion for entering into a reference such as you propose. So soon as Mr Geddes makes his report the matter will be considered by the Easter Moffat trustees, and we will then write you further."

The lessees abandoned the workings at Martinmas, and in December they began to dismantle the works. They took up the position that they were entitled in consequence of the unprofitable nature of the undertaking to take advantage of the clause of the lease quoted above, and that their letter of 7th August was a notice to abandon at Martinmas 1884, while the trustees maintained that the workings had not been satisfactorily conducted nor the ground properly explored for minerals, and that they were entitled to rent till the next break at Whitsunday 1887, or till the lease should be found by competent authority to be at an end.

This action was raised by the trustees for £250, the rent for the half-year from Martinmas 1884 to Whitsunday 1885.

The pursuers pleaded, *inter alia*—"(3) The alleged notice of abandonment by the defenders not being sufficient in itself, or in accordance with the provisions of the lease, the defenders are liable for the rents from Martinmas 1884 to Whitsunday 1885. (4) It not having been proved by a mining engineer or otherwise, as provided by the lease, that the ironstone let has become unworkable to profit, and the defenders not having fairly and fully worked out and explored the minerals so as to ascertain that it is unworkable to profit, the pursuers are entitled to decree in terms of the conclusions of the summons."

The defenders pleaded—"(1) The defenders having abandoned the lease at Martinmas 1884 in consequence of the unworkability to profit of the mineral, and the pursuers having refused to concede the existence of the ground of abandonment, the question falls to be determined by arbitration in terms of the lease. (2) The ironstone let having become unworkable to profit, the defenders were entitled to abandon the lease. (3) The defenders having given due notice to the pursuers of their intention to abandon the lease, and having offered to submit to arbitration, in terms of the lease, the question as to the existence of the cause of abandonment, are entitled to absolvitor, with expenses."

The Lord Ordinary (LEE) on 30th October 1885 pronounced this interlocutor: — "Sists procedure in *hoc statu* to enable the parties to have the facts relative to the questions whether the ironstone let could not be wrought to profit, and whether this result had arisen from no fault on the part of the tenants, ascertained in the manner contemplated by the lease; and reserves in the meantime all questions of expenses.

"*Opinion.*—This is an action for rent alleged to be due for the period from Martinmas 1884 to Whitsunday 1885 under a mineral lease.

"The defence is founded on the following not unusual clause—'In case it should be proved by a mining engineer, to be fixed on by the parties, or by two mining engineers to be mutually chosen, or by an oversman to be named by them at the time they should accept the appointment, or, in case of their disagreeing, by a person to be appointed by the judge ordinary in the event of the parties not naming an arbiter or arbiters, or of their differing in opinion and not naming an oversman, that the ironstone let could not be wrought to profit, and that that result had arisen from no fault on the part of the tenants, then the lessees or their foresaids should be entitled to put an end to the lease, just as if it had terminated by the lapse of time.'

"It is pleaded, in the first place, that the ironstone had ceased to be workable to profit, and that therefore the defenders were entitled to abandon the mine, as they say they did. This plea, by itself, I am of opinion is bad. Where the lessees under such a lease as the present have allowed a new term to run, or to be entered upon, without taking previously any steps to raise the question with the lessor, and to put it upon him to allow them an opportunity of having the fact ascertained, it is no defence to an action for rent to allege, and offer to prove, that the minerals have become unworkable to profit. For it was incumbent on the lessees, if desirous of taking advantage of such a clause, to initiate in some form the proceedings necessary to have their right determined before the rent was incurred. This was settled in the case of *Thomson* v. *Gordon*, 18th March 1869, 7 Macph. 687.

"But it is also pleaded that in the present case proceedings were taken before the period for which rent is claimed commenced to run, sufficient to entitle the defenders to require the landlord to concur with them in having the fact ascertained, as at Martinmas 1884, in the manner contemplated by the lease. It appears from the record and relative productions that on 7th August 1884 the defenders wrote to the agents of the landlord intimating that, owing to the unprofitable nature of their workings, they intended to cease mining operations at Martinmas, and adding, 'As this matter comes within the scope of an arbiter, we shall be glad to have this matter arranged as soon as may be convenient.'

"It is not alleged by the pursuers that the defenders continued to work or occupy the mine after Martinmas. What they say is, that they disputed at once the right of the lessees to discontinue working, or to put an end to the lease as proposed, and that the defenders were not entitled at Martinmas to proceed as they did to dismantle the mine.

"This raises a question which was not decided in *Thomson* v. *Gordon*, and is of some importance.

"In my opinion the letter of 7th August was a sufficiently distinct intimation of the defenders' claim to take advantage of the clause referred to, and which I have already read. I think that the terms of the reply which was made to it on 12th August indicate that it was so understood by the pursuers' agents. That reply was as follows:—'Easter Moffat—We received your Mr Ferguson's letter of the 7th. You some time ago applied for a modification of the terms of your lease of the ironstone in this property, when our clients instructed us to request Mr Geddes, M.E., to inspect the workings and report for their information. We at once did this, but as you will see from the annexed copy of Mr Geddes' letter to us of the 31st July, he has been unable, owing to an accident to your manager, Mr M'Culloch, to examine the workings and report. In these circumstances we cannot admit your right to discontinue the workings as you propose to do, nor is there at present any occasion for entering into a reference such as you propose. So soon as Mr Geddes makes his report, the matter will be considered by the Easter Moffat trustees, and we will then write you further.'

"But whether the notice was understood or not as referring to the clause in question, I think that it was sufficient; and the point which arises for consideration is, whether it was met by the landlord in such a way as to put upon the lessees the duty of taking some further steps before Martinmas in order to entitle them to treat the question of their right to put an end to the lease as one which was then already pending?

"It appears to me that the reply to the tenants' agents was not a refusal to entertain the defenders' notice as a claim to put an end to the lease, and to have the question of right determined in the manner contemplated by the lease. It was a temporising letter, which only refused to admit the right of the lessees in the circumstances mentioned—that is to say, pending an intended examination by Mr Geddes—and merely denied that there was 'at present' any occasion for a reference. It led the defenders to expect a further communication on the subject when Mr Geddes should have made his report, and I think that the defenders were entitled to await such further communication, and to assume that they could not be prejudiced by awaiting it. They waited accordingly, and I think that the correspondence which ensued when the defenders proceeded to act upon their notice shows that it was not their fault that the state of the facts as

to the condition of the mine was not ascertained before Martinmas.

"My opinion is, that the defenders are now entitled to have the facts ascertained, as at 11th November 1884, in the manner contemplated by the lease, and that the pursuers are not, in the circumstances, entitled to maintain that because the fact was not ascertained before 11th November the defenders are liable for the rent down to Whitsunday, and until the arbiters have found it proved.

"The principle of the decision in *Thomson* v. *Gordon* appears to me to have no application to the circumstances here disclosed.

"I shall therefore sist the process *in hoc statu* to enable the parties to have the facts ascertained in the manner contemplated by the lease. Expenses will be reserved."

The pursuers reclaimed, and argued—The rent must be paid until there was a finding that the minerals could not be profitably worked; nothing had been done by the defenders to ascertain the true state of the minerals; the lease had provided a mode of abandoning if the minerals ceased to be worked at a profit; the course laid down by the lease must be followed. *Dixon* v. *Campbell*, June 25, 1830, 8 S. 970; *Merry & Cuninghame* v. *Brown*, July 15, 1859, 21 D. 1337, and 22 D. 1148.

The respondents adopted the argument contained in the note of the Lord Ordinary.

At advising—

Lord President—I am not able to agree with the interlocutor of the Lord Ordinary in this case. The whole question is, whether the pursuers are entitled to recover rent which they allege to be due for the period from Martinmas 1884 to Whitsunday 1885 under a mineral lease.

The defence is contained in three pleas-in-law, the first of which is—"(1) The defenders having abandoned the lease at Martinmas 1884 in consequence of the unworkability to profit of the mineral, and the pursuers having refused to concede the existence of the ground of abandonment, the question falls to be determined by arbitration in terms of the lease." I do not suppose that there can be any doubt that the question raised by the defenders is one which under the terms of the lease falls to be determined by arbitration, and if this was the whole question between the parties it might be fully conceded, and yet it would not in any way answer the claim which the pursuers now make.

The next plea is, that as the ironstone let has become unworkable to profit, the defenders were entitled to abandon the lease. Now, that clearly depends upon the conditions of the lease, to which I shall refer immediately.

The third plea is—"(3) The defenders having given due notice to the pursuers of their intention to abandon the lease, and having offered to submit to arbitration, in terms of the lease, the question as to the existence of the cause of abandonment, are entitled to absolvitor, with expenses."

The defenders have abandoned the lease, and the question comes to be, whether they are entitled to do so? What actually took place in the matter is set out in the letter of 7th August 1884 by the Monkland Iron Company to Messrs Waddell & M'Intosh, and is in these terms—"Dear Sirs,—We beg to give you notice, in terms of our lease of Easter Moffat, that owing to the unprofitable nature of our workings we intend to cease mining operations at Martinmas first, and as this matter comes within the scope of an arbiter, we shall be glad to have the matter arranged as soon as may be convenient. Kindly own receipt of this intimation."

Now, while that was a perfectly good notice by the defenders that they intended to proceed to an arbitration in terms of the lease, it is clear that something more was necessary in order to enable them to abandon the lease, and not at the same time to make them liable for rent. It is evident that they must proceed with the arbitration, and that is just what was not done in the present case. In these circumstances the rights of parties must therefore turn on the construction of the clause in the lease that provides for the ironstone becoming unworkable at a profit, and upon which clause we have just had an argument submitted to us. It is in these terms—"And it is hereby agreed that if at any time before the natural expiry of this lease the said lessees or their foresaids shall work out and exhaust the ironstone hereby let, or in case it be proved by a mining engineer to be fixed by the parties, or by two mining engineers to be mutually chosen, or by an oversman to be named by them at the time they accept their appointment, or in case of their disagreeing by a person to be appointed by the judge ordinary in the event of the parties not naming an arbiter or arbiters, or of their differing in opinion and not appointing an oversman, that the ironstone hereby let cannot be wrought at a profit, and that this result has arisen from no fault on the part of the tenants, then the lessees or their foresaids shall be entitled to put an end to this lease just as if it had terminated by the lapse of time."

Now, it seems clear that before the defenders can put an end to this lease they must have fulfilled these two conditions—First, they must have proved to the satisfaction of a mining engineer or mining engineers that the ironstone could not be wrought to a profit; and second, that this had arisen from no fault of theirs.

Both these things must be proved, and the question is, has either of them been done? It is evident that they have not, and it is equally clear that until these conditions have been complied with they are not in a position to make a claim like the present.

But it has been said that the correspondence between the parties has shown the landlord to have been unreasonable in his demands. Perhaps neither he nor the defenders understood the true nature of the contract between them, nor the effect of the provisions which I have referred to, but while the contract remains between them both are bound by its terms, and what we have to consider is, whether the defenders were "entitled to put an end to this lease." If they were not, then they are liable for the rent as claimed by the pursuers. That they were not entitled so to terminate the lease is clearly proved, I think, by the circumstance that they have not satisfied the two conditions upon which alone they were entitled to bring it to an end.

I am therefore for recalling the interlocutor of the Lord Ordinary and granting decree in terms of the summons.

Lord Mure—I am quite of the same opinion. The obligation upon the defenders is quite clear and distinct; the rent is payable from the time that the tenants acquire possession of the mineral-field until the expiry of the lease. But the tenants are to be freed from their liabilities upon the following conditions—[*His Lordship here read the clause above quoted*]. Now, I think that the fair construction of such a clause is, that before the tenant can get quit of his obligation for rent he must have obtained a report of a mining engineer that the ironstone cannot be worked profitably, and that this arises from no fault of his. As neither of these conditions have been complied with I cannot see that there is any proper defence against the landlord's claim for rent.

Lord Shand—The right of the defenders under this lease is a right to bring it to a termination upon the emerging of two precedent conditions—the one being that the ironstone should no longer be able to be worked at a profit; the other, that this should arise from no fault of the defenders. The question in dispute is, whether there is not another condition adjected, namely, that these two prior conditions must be found by an arbiter to exist?

I am clearly of opinion that the right of abandonment emerges only after such a finding has been made by an arbiter.

If the contention of the defenders was correct, I think that such an arrangement would require to have been made a matter of stipulation, otherwise it would lead to great confusion.

It has been said that the landlord has barred himself from taking up his present position by the terms of his letters, which have been described as of a temporising character, and that though the letter of the lessees of 7th August might not, if it stood alone, be considered as distinct notice of abandonment, taken in connection with the lease it must be held as good notice under it, and that the reply to this letter was in substance this—"You need not go on with your arbitration, because we are willing to give you some modification of the terms of the lease." If the pursuer's attitude was not satisfactory to the defenders, what they ought to have done was to have proceeded to the nomination of an arbiter, and to have obtained from him a finding in terms of the conditions in the lease. In the absence of any procedure of this kind I do not see how the present claim of the pursuers can be resisted.

Lord Adam—The only defence in this case is, that the defenders were entitled to hold the lease at an end as at Martinmas 1884. Now, on the construction of the clause upon which this contention is based, I think it is quite clear that the defenders should have adopted certain procedure there laid down, and complied with certain conditions contained in it. It is admitted that the provisions have not been attended to, and therefore it is impossible for them to take advantage of these conditions to the effect of enabling them to abandon the lease—in other words, they have not availed themselves of the machinery provided by the lease for bringing it to a termination.

But the defenders further say that the pursuers are barred by their own actings from demanding the sum they now sue for. I cannot see anything in what the pursuers have done to support such a defence; while, on the other hand, if the ironstone is really so exhausted that it cannot, as the defenders allege, be worked at a profit, surely that is a matter which can be easily cleared up. I therefore agree with your Lordships that we should grant decree in favour of the pursuers.

The Court recalled the interlocutor of the Lord Ordinary, and granted decree in terms of the libel.

Counsel for Pursuers—Pearson—Macfarlane. Agents—Waddell & Mackintosh, W.S.

Counsel for Defenders — Moncreiff — Ure. Agents—Mackenzie, Innes, & Logan, W.S.

Wednesday, November 25.

SECOND DIVISION.

[Lord Kinnear, Ordinary.

MENZIES *v.* GIRDWOOD & FORREST AND OTHERS.

BLACKS *v.* GIRDWOOD & FORREST AND OTHERS.

Partnership—Dissolution—Notice of Withdrawal—Sufficiency of Notice—Retiring Partner's Liability.

G, a partner of a firm, retired, the business continuing to be carried on in the firm's name. *Held*, in a question with a person who had been a customer of the firm during G's connection with it and afterwards, that G was not freed from liability for its debts incurred after he had ceased to be a partner by reason of having sent to the customer a trade circular which contained the information that he was no longer a partner, but which was mainly concerned with other trade matters.

Partnership—Election—Bar.

A creditor of a sequestrated firm claimed in the sequestration, reserving in his claim his rights against G., who had, as he knew, been a partner but had retired, and not sufficiently intimated his retiral. Subsequently the claim was withdrawn without having been ranked.

Held (*aff.* judgment of Lord Kinnear) that assuming it to be the law of Scotland that a creditor must in such circumstances elect whether to enforce the liability which the retiring partner is barred from disputing, or that of the firm from which he has retired, there had been no such election by the lodging of the claim.

Opinion (*per* Lord Kinnear) that a creditor must in such circumstances make his election.

Opinions contra per Lord Justice-Clerk, Lord Young, and Lord Craighill.

These actions were the sequel to the cases between the same parties decided in the Outer House by Lord Kinnear, whose judgment, reported *ante* vol. xxii., p. 610, 20th March 1885, was acquiesced in. The facts were reported in the previous report, but may be again briefly narrated.

R. Girdwood was a woolbroker in Edinburgh, but subsequently he had a branch business in Glasgow. In 1877 he assumed into partnership in the Glasgow branch T. Forrest, the contract to last five years, and the firm to be Girdwood &