Thursday, March 10.

FIRST DIVISION.

[Lord Fraser, Ordinary.

WHITE'S TRUSTEES *v.* DUKE OF HAMILTON AND OTHERS.

Mines and Minerals—Property—Surface Owner's Right to Support—Injury to Building.

In 1820 the surface of an estate was sold by A, who reserved the minerals, with full power to work them on condition of making compensation for all damage to the surface and buildings thereon. Thereafter A worked out the upper or splint seam of coal by the stoop-and-room system. The Carron Company bought the remaining minerals under the same conditions as to workings which were contained in the title to the surface. In 1854 they conveyed to the Duke of Hamilton a seam called the Coxroad seam, immediately beneath the worked-out splint seam, their disponee coming under the same obligation as to workings as was contained in their titles. The Duke and his lessees worked out this seam by the long-wall system. In an action by the owner of the surface against them to recover damages for injury to it and to a farm-steading on it above the seams of coal, caused, he averred, by subsidence due to the defenders' workings, the latter pleaded that they had in working the Coxroad seam left an admittedly much greater area of coal unworked around the steading than would have been necessary for its support if the workings in the splint seam had not been entered upon, and that as they had not removed the coal from the splint seam immediately under the steading they had not withdrawn the subjacent support, and were therefore not liable in damages for the injury complained of. The Court *repelled* the plea.

Observed (*per* Lord Rutherfurd Clark) that if a mineral owner works out a seam of minerals neither he nor his disponee is entitled to work a lower seam with the effect of bringing down the surface, although the result would not have happened if his working of the upper seam had not taken place.

In the year 1818 a process of ranking and sale was raised by the creditors of Thomas Livingstone of West Quarter, embracing the lands and minerals of his estate of Parkhall, Stirlingshire. The surface of Parkhall was purchased by Mr Learmonth Mackenzie in 1820 from the judicial factor, under reservation of the coal and other minerals, and of the right "of making holes and sinks, and setting down shanks, with roads and passages in and to the same, within any part of the foresaid lands, upon payment to the proprietors of the ground of what loss and damage they shall sustain thereby upon the land, according to the determination of two neutral men, one to be chosen by the proprietor of the coal and the other by the proprietor of the land." Prior to the action there had been a going colliery on the estate, the seam wrought being the splint or main seam, and the colliery was kept going during the action by the judicial factor in whose hands the estate had been placed. The workings were partly on the old stoop-and-room system and partly on the long-wall system. In 1837 the minerals in the estate were acquired from the judicial factor by the Carron Company. The whole of the splint seam had been ere then worked out. In 1854 the Duke of Hamilton entered into a contract of excambion with the Carron Company by which he exchanged certain minerals of his lying in the immediate vicinity for a seam, known as the Coxroad seam immediately under the workings in the splint seam. The contract stipulated that the owner of the surface was to be compensated for any damage done to it by the workings. In 1856 the Carron Company expede a Crown charter of the whole of their minerals in that quarter, deducing their title from the middle of last century down to the date of the contract, and they held the minerals under express provision similar to the stipulation in the contract as to workings. In November 1858 the Duke of Hamilton let the Coxroad seam to James Russell senior and James Russell junior. The late Mr J. T. Salvesen became a partner with them in 1860. In 1861 the colliery business was made over to James Russell junior and J. T. Salvesen in equal shares as representing the "Redding Colliery Company." In 1864 Mr Salvesen became sole partner of the company till his death in 1865, when his trustees carried on the business. From 1858 they worked the Coxroad seam by the long-wall system of working.

By disposition from Mr Mackenzie's trustees, dated 7th February 1863, Alexander White acquired the surface of the lands in which the workings above mentioned took place. He died in June 1870. This action was raised by his trustees against the Duke of Hamilton and the Redding Coal Company, Mr Salvesen's trustees, and the Carron Company, and in it the pursuers sought to have it declared that the defenders were "not entitled to work, win, interfere with, and carry away the coal, ironstone, and other metals and minerals in the pursuers' lands so as not to leave sufficient support for their lands above and adjacent to the seams worked by them; and that the defenders were in working and winning any of the minerals bound to do so in such a manner as not to alter either now or in any time hereafter the infall of the lands or the natural level thereof, and for that purpose were bound in working the said minerals to leave sufficient stoops, dykes, and pillars of sufficient number, size, and strength to maintain and support without injury or damage, and unaltered in level, the pursuers' lands above and adjacent to the minerals worked by them respectively." The action also concluded for interdict and for damages, laid at £5000, for alleged working so as to injure the surface, levels, and buildings.

The pursuers averred that in consequence of the underground workings of the defenders, other than the Carron Company—(1) The drainage system of a farm on their lands had been destroyed; (2) the steading on the farm (Glenend) had been shattered, and had in great measure to be rebuilt; and (3) that certain other damage had been done to the surface and buildings on it. They averred that the defenders, other than the Carron Company, had excavated the coals and minerals of the seam without leaving pillars or otherwise providing for the support of the surface, and in consequence much of the surface had subsided, and the lands had greatly deteriorated in value.

These defenders denied that any material subsidence of the surface had taken place, and explained that anything due to coal workings was largely attributable to the stoop-and-room workings in the seam above them, with which they had nothing to do, or to defective foundations of the buildings. They had left a very large area of coal unworked as they approached the splint seam with due regard to the stability of the steading. They were quite willing to pay for any damage caused by their workings a sum to be fixed by arbitration, as the pursuers' titles and their own lease contemplated. They had adopted the long-wall method of working as the only suitable and profitable one. They further stated that they had not worked under the farm-steading, but had left a great deal more coal under it than was usual in such circumstances.

As regards the Carron Company, the pursuers averred that they were owners of minerals contiguous to the pursuers' land, and had worked the coal in this property. The latter averment the Carron Company denied.

The pursuers pleaded—"(1) The pursuers being owners of the lands, under exception of the said coals and minerals, are entitled to prevent these coals and minerals being worked in a way to cause subsidence of their lands. (2) The defenders, under their titles to the coal and other minerals, or any other title, have no right to work the said coal and other minerals so as to cause subsidence of the surface. (3) The defenders (other than Carron Company) having illegally and unwarrantably worked minerals in the said lands, and carried on operations which have caused subsidence and other injuries to the pursuers' lands, are liable in damages. (4) The pursuers having suffered loss and damage to the extent sued for by the operations of the defenders (other than Carron Company), are entitled to decree against them therefor."

The defenders (the Carron Company) pleaded, *inter alia*, that the action, in so far as directed against them, was premature and unnecessary.

The other defenders pleaded—"(1) On a sound construction of the titles, the defenders' right to the minerals in question is not subject to any limitations entitling the pursuers to the decrees concluded for. (2) The defenders not being bound to work the said coal so as to prevent all subsidence of the surface, should be assoilzied from the conclusions for declarator and interdict. (4) The defenders having all along been willing to pay the pursuers for any surface damages caused by their operations, the action was unnecessary, and should be dismissed. (6) *Separatim*, the sum concluded for in name of damages is excessive. (7) The damage which exists being to a great extent due to workings by the pursuers' own authors, and not to any workings by the defenders, they are not liable in such damage as is referable to these prior workings."

After a proof the Lord Ordinary (Fraser) pronounced this interlocutor:—"(1) So far as regards the declaratory conclusions, and for interdict against the Duke of Hamilton and Salvesen's trustees, of consent of those defenders, finds, decerns, and declares against them in terms of these conclusions; (2) in regard to the petitory conclusion for damages, finds these defenders liable for damages to the pursuers to the amount of £1070, and decerns against them therefor; (3) as regards the conclusions against the Carron Company, assoilzies them from the whole of said conclusions, reserving to the pursuers all action competent to them by way of interdict, or damages, or otherwise, in the event of the said company proceeding to work out the coal in the pursuers' lands in an illegal manner, &c.

"*Note.*— . . . [*The Lord Ordinary having found that the workings of the defenders, other than the Carron Company, had injured the drainage to amount of* £200, *that their workings had by creating a 'draw' brought down in part the pillars of the old splint seam workings, and so caused cracks in the steading, for which he allowed* £200, *that damage done to crops amounted to* £200, *and damage to a certain house and brickwork to* £170—*in all the* £1070 *decerned for—proceeded thus:*] . . . An argument in point of law was submitted by the defenders against liability for damages on account of injury to the steading. The coal not having been removed by them underneath the steading, and consequently the subjacent support not being taken away, it is contended that there can be no liability for damages. It is said that injury arising from adjacent operations, and which make themselves felt by a draw, is not a ground for a claim of damage. To some extent this might be admitted if the workings which set the strata in motion were at a considerable distance and not strictly adjacent. But the Lord Ordinary knows of no authority for holding that when the workings are immediately adjacent to the shattered building liability does not exist, and accordingly he rejects this contention in point of law."

The defenders reclaimed, and argued—(1) It was not proved in point of fact that the injuries to the steading resulted from the defenders' operations. (2) Even assuming that they were, the defenders were not liable, inasmuch as they had not removed any of the support necessary in the natural condition of the ground. If the splint seam as well as the Coxroad seam had been worked by the defenders they would have been liable. But here the surface was separated from the minerals, and it was just like splitting two fields, and giving one part to one person and another part to another, amongst whom there was no conjunct and several liability—*Duke of Hamilton, &c.* v. *Graham*, July 28, 1871, 9 Macph. (H. of L.) 98. Unless the pursuers could go the length of saying that the lower proprietor was liable, the argument of joint and several liability was useless, because it was adduced to make them liable for things they had not done. It was making the owners of Coxroad satisfy the measure of support of the splint seam as well as their own, and yet they could not go to the latter at all. Whereas there was an absolute obligation to support the soil as in its natural state immediately above, this was not so in the case of buildings, which were of the nature of a positive servitude. There was no obligation to undertake an increased burden in consequence of the previous workings of others. The measure in both cases was the natural state of the ground—*Dalton* v. *Angus*, June 14, 1881, 6 L.R., App. Cas. 740 (Lord Selborne, p. 793); Rankine on Land Ownership, 409, *et seq.* The judgment in *Corporation of Birmingham* v. *Allen*, 1877, L.R., 6 Ch. Div. 284, depended on the

physical fact of neighbourhood and not on title, and was conclusive here. They were only bound to support their neighbour adjoining, and not a neighbour who was remote. The measure of damage must be the natural result of the act of withdrawal. The case of *Bald* v. *Alloa Colliery Company*, May 30, 1854, 16 D. 870, did not apply, for here nothing was taken away which in its natural condition would have afforded support. Really the obligation sought to be laid on the defenders was larger than if the splint workings had not existed. The question could not have been raised in *Bald*, because the support there withdrawn was *ex concessis* required in the natural state of the ground. The person here who had by the splint workings weakened the support had by artificial means regulated the support withdrawn. The case of *Mundy* v. *Duke of Rutland*, 1882, L.R., 23 Ch. Div. 81, did not touch this question. It was an illustration of the doctrine that when you give out a grant you are not to derogate from it. It was not a question between conterminous proprietors, whether lateral or subjacent. The case of *Brown* v. *Robins*, 1859, 4 Hurlstone & Norman's Rep. 186, was adverse to *Allen*, but there was no trace of the argument in the latter case.

The pursuers replied—The surface and minerals were separated in 1820 by a disposition of the surface reserving the minerals, which contained a clause providing for compensation for injury to the surface to be settled by arbitration. That clause, however, provided only for compensation for injury caused by workings carried on in a legal manner, and not for injury caused by illegal workings. The distinction had been clearly expressed in *Dairs* v. *Treharne*, 1881, L.R., 6 App. Cas. 460; *White* v. *Wm. Dixon (Limited)*, December 22, 1881, 9 R. 375—*aff.* March 19, 1883, 10 (H. of L.) 45. It was important to keep in view that this action was not laid on that clause, but was an action of damages for the consequences of illegal workings. It was an action *ex delicto—Hamilton* v. *Turner*, July 19, 1867, 5 Macph. 1086. It was settled law that the owners of minerals were not entitled to work so as to bring down the surface, and if they did so, or threatened to do so, they would be interdicted—*Andrew* v. *Henderson & Dimmack*, Feb. 24, 1871, 9 Macph. 554—*rev.* March 10, 1873, 11 Macph. (H. of L.) 13; *White* v. *Dixon (Limited)*, *supra*; *Proud* v. *Bates*, May 1865, 34 L.J. 406; *Hext* v. *Gill*, July 1872, L.R., 7 Ch. App. 699; *Love* v. *Bell*, March 3, 1884, L.R., 9 App. Cas. 286. The obligation of the mineral owner was to leave not only reasonable but effectual and sufficient support—*Humphries* v. *Brogden*, November 1850, L.R., Adolphus & Ellis, 11 Q.B.D. 739. Now, here the defenders' workings had been by long wall, and it was proved that the inevitable effect of such a system of working was to bring down the surface. Mineral workings by long-wall were therefore in violation of the common law rights of the owner of the surface. The question raised was as to the extent of the defenders' liability for the consequences of their wrongdoing. The only question of law was as to the injury to the steading, which was wholly disputed. The proof established that the defenders left such a space unworked around the steading as would have been sufficient had the upper seam of splint coal not been wrought, but that seam had been wrought many years before by stoop-and-room, and it appeared from the proof that when the defenders' Coxroad workings approached the steading they had acted by lateral draw on the stoops left in the splint workings, and had brought them down, and with them the surface on which the steading stood. The defenders had maintained that they were only bound to leave such a space as would have been sufficient in the natural condition of the strata, and that outside of that space they were not neighbours to the owner of the steading, and were under no obligation to afford him lateral support. But the case of *Corporation of Birmingham* v. *Allan*, *supra*, quoted by the defenders in support of that argument, differed from this materially. There the defenders' minerals were not below the property of the plaintiff nor immediately contiguous, but were separated by a space from which the minerals had been wrought by stoop-and-room. There was no room in that case for alleging that the defendants had worked wrongfully, and there was no relation between them and the owner of the intervening space. In this case the owner of the splint seam and the defenders stood in the relation of disponer and disponee. There the injury was caused first by the fall of a stoop immediately above the defenders' workings, and that had caused the fall of the stoops adjoining. It was the immediate consequence of the defenders' illegal act. In such a case damages had been held due—*Brown* v. *Robins*, *supra*. Had splint spaces been filled with water or had that been withdrawn in consequence of the defenders' illegal workings and the support of the surface affected, the defenders would have been liable—*Bald* v. *Alloa Coal Company*, *supra*. The fall of the stoops was simply analogous. In *Mundy* v. *Duke of Rutland* mineral owners had been held liable for the effect of their workings on previous workings. The owner of the whole minerals could not have wrought both minerals with the effect of bringing down the steading, and the result of working out the splint coal was necessary to restrict his right to work out the Coxroad. He could give the defenders no higher right than he had himself. It had been said that the pursuers' remedy was against the owners of the splint coal. But he had no action against them, for they had left sufficient support. Besides, even if he had, that did not effect his remedy against the defenders, because when damage was the effect of two illegal acts combined together, the authors of these acts would be liable *singuli in solidum—Duke of Buccleuch, &c.* v. *Cowan, &c.*, December 21, 1866, 5 Macph. 214.

At advising—

Lord Justice-Clerk—The property to which the question in dispute relates was really the estate of Parkhall, and the minerals below it belonged to Livingstone of West Quarter, and in 1818 a process of ranking and sale was raised by his creditors which embraced both surface and minerals. The surface was purchased by Mr Learmonth Mackenzie from the judicial factor in 1820, but the minerals continued to be worked by the judicial factor down

to 1837, when the Carron Company purchased them. At that time it appears that the whole of the upper or splint seam had been worked out chiefly by the mode of working called stoop-and-room. Here I may remark that I regret that our attention was not more specially called to the titles themselves, which throw a good deal of light on the question which arose. It appears that in 1854 the Duke of Hamilton entered into a contract of excambion with the Carron Company for an exchange of the Coxroad seam under the Carron Company's workings for certain minerals of his own lying apparently in the immediate vicinity. In 1856 the Carron Company expede a Crown charter of the whole of their minerals in that quarter, deducing their title from the middle of last century down to the date of the charter, and it appears that they held the whole of them under an express provision, which is quoted in the missives, that they should compensate the owner of the surface for any damage that the workings might effect. I should therefore think it clear in this state of the titles that the Carron Company could not, in a question with the owner of the surface, have so worked the lower seam so as to cause either vertical or lateral disturbance in a worked-out waste, and so as to create damage to the surface, and that they could not convey tot heir disponee—and I doubt greatly if they did convey to their disponee—any higher right than they themselves had, and that all the more in respect of the special stipulations in the titles. In regard to that stipulation it appears in the record that the lease which the Duke made in 1858 to the Redding Coal Company contained a clause precisely similar, which clearly indicates that the Duke's own title was so burdened. I have no doubt that stipulation in favour of the owner of the surface appears substantially in all these transactions. I am therefore prepared to hold, if it were necessary for the purposes of the case, and with the Lord Ordinary, that the defence raises no legal question if it be admitted or proved that damage to the surface has resulted from the operations of the defenders, and that there is no room in this case for the application of the principle of the case of *Birmingham Gas Company* v. *Allan*. In thinking that the Court should award damages I concur without difficulty with the Lord Ordinary, but I propose that we reduce the sum to be awarded from £1C70 to £800.

Lord Young—I concur.

Lord Craighill—I am of the same opinion.

Lord Rutherfurd Clark—I agree. The only difficulty I have felt in this case is whether the defenders are liable for injuries done to the steading. That the steading has been injured by mineral workings I hold to be proved as matter of fact. But it is equally certain that if the upper seam had been entire the steading would not have been damaged, for on that supposition it is admitted that the defenders left a sufficient quantity of coal to give all necessary support to the steading, and it was injured only because the upper seam had been previously worked. The defenders contend that they are not concerned with the previous workings in the upper seam, and that they were within their legal rights if they worked the seam belonging to them, so far as they were entitled to do, on the footing of the upper seam being intact. I was much impressed by the argument of the defenders, and by the authorities they cited, but I have come to be of opinion that their argument was not well founded. The upper seam had been worked when the whole of the minerals belonged to Mr Livingstone or the trustee for his creditors. I think he could not give a higher right to any disponee than he himself possessed. If he had continued to be sole proprietor, and continued to work as the defenders had done, I am of opinion that he would be liable to the pursuers for the damage done to the steading. It is said that this liability would have arisen from his working of the upper seam, but not from the working of the lower seam. I cannot adopt that view. It seems to me that a limitation would be put on his right to work the lower seam if he worked the upper seam to the extent indicated. And I think further that the defenders were under the same limitations. I think his disponees were under the same limitations as those by which he himself was bound.

The Court adhered, reducing the damages awarded to £800.

Counsel for Pursuers—Gloag—Low. Agents—Drummond & Reid, W.S.—John C. Brodie & Sons, W.S.

Counsel for Defenders, Duke of Hamilton, Salvesen's Trustees, and Redding Coal Company—Graham Murray—Salvesen. Agents—Tods, Murray, & Jamieson, W.S.

Counsel for Defenders, Carron Company—Pearson. Agents—John C. Brodie & Sons, W.S.

Saturday, January 8.

OUTER HOUSE.

[Lord Kinnear.

THE CLIPPENS OIL COMPANY (LIMITED) *v.* THE EDINBURGH AND DISTRICT WATER TRUSTEES.

Mines and Minerals—Mines below Waterworks—Waterworks Clauses Act 1847 (10 *and* 11 *Vict. cap.* 17), *secs.* 6, 22, *and* 25, *et seq.*

The proprietors of minerals beneath the pipe-track of a Water Company gave notice under the Waterworks Clauses Act 1847 that they intended to work the minerals beneath the pipe-track, and called upon the Water Company to inspect the mines, and to pay compensation if they objected to the proposed workings, stating that the result of the workings would be to damage the Water Company's pipes, and so to flood their own workings. The Water Company refused, on the ground that they apprehended no danger to their works from the lawful operations of the mine-owners, and were prepared to adopt such measures as would prevent damage thereby to themselves or their neighbours. The mine-owners then sought to have it declared that the minerals could not, by reason of the company's works, be wrought,