pursuers of the sum of £39, 5s. as concluded for: Find the pursuer entitled to expenses, and remit to the Auditor to tax the account thereof in this and in the Sheriff Court, and to report to the Sheriff, and remit to him to decern in terms of the above findings, with power to decern for the taxed amount of expenses."

Counsel for the Pursuers—Clyde. Agents—J. & A. Hastie, Solicitors.

Counsel for the Defender—Shaw. Agent—James Skinner, S.S.C.

Friday, June 19.

FIRST DIVISION.

[Lord Wellwood, Ordinary.

THE BANK OF SCOTLAND *v.* STEWART.

Property — Minerals — Reserved Right — Singular Successor.

In a conveyance of lands the disponer reserved the coal, except that under two portions of the land, with full power "to work, win, and carry away the said coal, provided this be done without entering upon the surface of the lands." The disponee was entitled, should it be found necessary for the support of the buildings conveyed that a larger quantity of coal should be left unworked than was contained in the two portions of land, to buy from the disponer such additional quantity of coal as was necessary for support at a specified rate per acre.

At the date of the contract the parties were aware that the coal was being worked, and would continue to be worked, by a system which exhausted the coal and must bring down the surface, and that loss to the surface could bear no comparison with the value of the coal if it became impossible that the coal should be worked.

In an action by a singular successor of the disponee to have the disponer interdicted from so working the coal as to cause disturbance or subsidence of any part of the lands—*held*, on a construction of the titles, that the defender's reservation included a right to work the coal, although the result might be that the surface would be damaged.

Prior to 1875 James Reid Stewart, iron merchant in Glasgow, was proprietor of the lands and estate of Calder Park, in the county of Lanark, including the surface and the minerals.

By disposition dated 8th and 12th July 1875 James Reid Stewart conveyed the lands to John Hendrie, coalmaster in Glasgow, reserving a portion of the minerals, and in particular the coal under part of the lands. The deed provided—"But excepting and reserving from the lands, subjects, and others hereby conveyed the whole coal under the same other than (first) the portion thereof which is delineated and shaded with brown parallel lines on the plan annexed and subscribed by me as relative hereto, containing 2·856 acres or thereby, and (second) the portion thereof which is delineated and shaded with blue parallel lines on the said plan, and containing 3·144 acres or thereby, with full power to me and my foresaids or our tenants to work, win, and carry away the said coal, provided this be done without entering upon the surface of the said lands and estate; but providing and declaring that my said disponee and his foresaids shall have right, should they find it necessary for the support of the said mansion-house and offices, or any of them, or for the support of the bridge or viaduct to be constructed on the said lands for carrying the authorised Glasgow, Bothwell, Hamilton, and Coatbridge Railway over the river Calder or the works connected with the said bridge or viaduct, that a larger quantity of coal should be left unworked than is contained in the said two portions of land, to purchase from me, or my heirs and successors, such additional quantity of coal as they shall find necessary for such supports, the price of which shall be calculated at the rate of £1000 per acre of wholly unworked coal; also declaring that it shall be lawful to me, and my successors in the mines and minerals in each side of the said portions of the lands, containing respectively 2·856 and 3·144 acres, and to my and their lessees, in working the said mines and minerals, to cut and make such and so many airways, headways, roadways, gateways, and water-levels through the mines, minerals, or strata in the said portions of land as may be requisite for ventilating, draining, or working the said mines and minerals; but no such airway, headway, roadway, gateway, or water-level shall be of greater dimensions or section than 8 feet wide and 6 feet high, nor shall the same be cut or made so as to injure the surface of the land, or the buildings, railway, or works thereon, or to impede the passage thereon."

By disposition dated 27th and 31st January 1888 the lands were conveyed by John Graham, C.A., Glasgow, trustee upon the sequestrated estates of the said John Hendrie, to the Bank of Scotland.

The title of the bank was in terms exactly similar to those in the original title to Hendrie, and the disposition contained an assignation to all claims competent to the trustee for damages occasioned to the lands conveyed by the workings of the mineral proprietors or their tenants.

In September 1890 the Bank of Scotland raised the present action against James Reid Stewart for declarator that the defender was not entitled to work the coal in such a manner as not to leave sufficient support for the pursuers' lands above and adjacent to the seams worked by him, and

that the defender in working and winning any of the said minerals was bound to do so in such a way as not to break, injure, or alter the surface of the pursuers' lands, or to cause subsidence of any part of the said lands, for interdict against his working the coal so as to bring down the surface, and for payment of £5000.

The pursuers averred that the coal seams had been and were being worked by the defender by the long-wall system, by which the whole coal was completely excavated and removed without leaving any "stoops" or pillars for the support of the lands above and adjacent to the workings, and that damage to the surface had already happened.

The defender averred that "for about seven years prior to the date when the defender conveyed to Mr Hendrie the surface of the said lands, the coal therein had been wrought by the defender by the long-wall system, or other system of complete excavation. These systems secured complete excavation of the mineral, and the plans of the colliery, as Mr Hendrie well knew, were laid out with a view to the continuance of this mode of working. And since that date the same systems have been pursued without objection till the present time, and the defender has, in the full knowledge of the said John Hendrie and the pursuers, expended large sums of money for the purpose of continuing such working. The systems of complete excavation are the systems customarily pursued in the district, and are the only systems whereby the minerals can be wrought to profit, and they were fully in view of the parties at the time when the conveyance to Mr Hendrie—who was himself a coal-master—was granted. These were the systems in use in the district, and they were in use specially throughout the Lanarkshire and Clydesdale coal basins from time immemorial. And indeed at the date of the conveyance to Mr Hendrie surface damage had, as both parties to that deed well knew, already been done to the lands conveyed in consequence of the ordinary working of the minerals." The defender also averred that there was an immense quantity of coal under the lands in question, in order to work which he had erected extensive machinery, and all the expenditure thus incurred would be useless if the workings were stopped.

The pursuers pleaded, *inter alia*—"(1) The pursuers being owners of the lands described in the summons, under exception of the coals and minerals belonging to the defender, are entitled to prevent these coals and minerals being worked in a way to cause subsidence to their lands. (4) The pursuers having suffered loss and damage to the extent sued for, are entitled to decree of payment in terms of the petitory conclusions of the summons."

The defender pleaded, *inter alia*—"(2) The defender's right to the minerals subjacent to the pursuers' lands being, under the titles of the parties, free from limitations of any kind, he ought to be assoilzied from the declaratory conclusions of the summons. (5) The defender being willing to pay for any injury he may do to the surface (so far as not paid for), the pursuers are not entitled to interdict as craved. (6) The defender having, in the full knowledge of the said John Hendrie and the pursuers, expended large sums of money for working the coals by the said customary mode of working, the pursuers are not entitled to interdict."

By interlocutor of 19th November 1890 the Lord Ordinary (WELLWOOD) before answer allowed parties a proof of their averments.

"*Opinion.*—This case raises an important question, viz., whether the defender is entitled to work out the minerals under the property of the pursuers, with the result of injuring or bringing down the surface. The defender does not dispute the general law that where the ownership of the surface and minerals is divided by reservation or separate grants, the owner of the minerals is not entitled to do this unless right to do so is given expressly in or is clearly to be implied from the title of parties. The titles in the present case do not contain any such express stipulation. The defender's contention is this—that when the pursuers' author, Hendrie, obtained his disposition in 1875 from the defender, the minerals had been worked by longwall system for seven years; that in order to protect the buildings on the ground conveyed, and certain other contemplated erections, Hendrie obtained a conveyance, not merely of the surface, but of the minerals underneath those parts of the surface on which buildings were or were about to be erected; that he also stipulated that if additional lateral support were found necessary he should be entitled to purchase such additional quantity of coal as was required at the rate of £1000 an acre; and that following on the disposition all questions of damages were regularly settled between him and his disponee, who by his actings induced him, the defender, to expend large sums in working out the minerals by the longwall system.

"Without expressing any opinion on the question arising on the titles, I think it is not desirable to decide it without a proof of the whole facts and circumstances. I have therefore allowed a proof before answer, which was the course adopted by the Second Division of the Court in the recent case of *Jardine* v. *Walker*, June 18, 1889 (not reported), which in many respects resembles the present case. I am the more disposed to adopt this course because there must be a proof in regard to the pursuers' averments of damage. They not only aver that the defender has damaged the surface at those places where the minerals were reserved, but that he has encroached on the coal under Calderpark House and grounds, which he was not entitled to touch except for the limited purpose of cutting roadways, &c. Now, these averments are denied by the defender and must be proved, and it is not desirable to split up the case."

The pursuers reclaimed, and argued—That their rights were embodied in the titles, and that it was unnecessary to go beyond these. At common law they had a right of support, and local custom could not be brought into control or affect this—*White* v. *Dixon*, December 22, 1881, 9 R. 375, and 10 R. (H. of L.) 45; *Davis* v. *Treharne*, May 1881, L.R., 6 App. Cas. 460; *Andrew* v. *Henderson*, February 24, 1871, 9 Macph. 554, and 11 Macph. (H. of L.) 15.

The respondents in support of the Lord Ordinary's interlocutor asked a proof.

LORD PRESIDENT—In a question of this kind, arising upon the construction of a contract, the Court are quite entitled to avail themselves of any light they may derive from such evidence as will place them in the same state of knowledge as was possessed by the parties at the time that the contract was entered into. There are averments upon this record which if proved will explain the position in which the parties stood to one another at the date of the contract, and may throw a great deal of light upon the question arising on the titles, and upon that ground alone I am prepared to adhere to the Lord Ordinary's interlocutor. The proof allowed is before answer, and it is not represented that it will greatly exceed in length the proof which it is admitted must be led; and I cannot help thinking that the Lord Ordinary has exercised a wise discretion in not restricting it as the reclaimer proposes, and I am not inclined to interfere with the exercise of his discretion in the conduct of the case.

LORD ADAM and LORD KINNEAR concurred.

LORD M'LAREN was absent.

A proof took place before the Lord Ordinary, the import of which, so far as it has any bearing on the present question, is contained in the opinion of Lord Adam.

On 18th February 1891 the Lord Ordinary pronounced the following interlocutor:—"Finds that it is not proved that subsequently to the defender's settlement with John Hendrie's trustee the defender has encroached upon the coal or other minerals belonging to the pursuers under their title: Finds in respect of the joint minute that damage has been caused to the surface of the pursuers' lands by the defender's workings to the extent of £250: Finds that in respect payment of the said sum of £250 has been made by the defender to the pursuers, it is unnecessary to pronounce decree therefor: *Quoad ultra* sustains the fifth and sixth pleas-in-law for the defender, and assoilzies the defender from the remaining conclusions of the summons as laid, reserving to the pursuers right to sue for damages in the event of the defender's future workings causing injury to the surface of the lands described in the summons, and for interdict in the event of the defender encroaching on the minerals to which the pursuers have right under their titles: Finds the defender entitled to expenses, subject to modification to be fixed after taxation, &c.

"*Opinion.*—Prior to the year 1875 the defender was proprietor both of the surface and of the minerals in the lands of Calder Park named in the summons. In that year, by disposition dated 8th and 12th July 1875, he conveyed the said lands to the pursuers' author John Hendrie, reserving a portion of the minerals, and in particular the coal, under part of the lands.

"1. That deed accordingly contains the contract between the defender, the mineral owner, and the disponee of the surface; and the first question to be considered is, whether in that deed the defender reserved right to work out the coal without leaving a support for the surface of the lands conveyed?

"Under the deed the defender conveyed to John Hendrie the whole of the lands in question, excepting from the lands disponed the whole minerals in and under the field and ground marked lot No 3 and coloured yellow on the Ordnance Survey Sheet of Lanarkshire No. VII., 14, together with the mansion-house on the said lands called Calder Park, and the offices connected therewith, and whole farm and other buildings on the said lands: 'But excepting and reserving from the lands, subjects, and others hereby conveyed the whole coal under the same other than (First) the portion thereof which is delineated and shaded with brown parallel lines on the plan annexed and subscribed by me as relative hereto, containing 2·856 acres or thereby, and (Second) the portion thereof which is delineated and shaded with blue parallel lines on the said plan, and containing 3·144 acres or thereby, with full power to me and my foresaids, or our tenants, to work, win, and carry away the said coal, provided this be done without entering upon the surface of the said lands and estate.'

"So much for the subjects conveyed and reserved. The result was that Hendrie got (1) the surface of the lands; (2) the whole of the minerals under the portion marked lot No. 3 (which are not in dispute in the present case); (3) the coal under that portion of the surface which was occupied by the mansion-house and offices; and (4) the coal under the portion of the ground on which a railway bridge or viaduct was about to be erected. The defender, on the other hand, reserved the rest of the coal, with full power to work, win, and carry away the coal reserved provided that could be done without entering from the surface of the lands conveyed.

"So far there is nothing in the deed which can in law be held to reserve to the defender right to work the minerals in such a way as to deprive the disponee of the surface of his right at common law to have the surface supported.

"The deed then proceeds to make provision for the disponee purchasing if necessary an additional quantity of coal to strengthen the supports underneath the mansion-house and offices and viaduct respectively: 'But providing and declaring

that my said disponee and his foresaids shall have right, should they find it necessary for the support of the said mansion-house and offices, or any of them, or for the support of the bridge or viaduct to be constructed on the said lands for carrying the authorised Glasgow, Bothwell, Hamilton, and Coatbridge Railway over the river Calder, or the works connected with the said bridge or viaduct, that a larger quantity of coal should be left unworked than is contained in the said two portions of land, to purchase from me or my heirs and successors such additional quantity of coal as they shall find necessary for such supports, the price of which shall be calculated at the rate of £1000 per acre of wholly unworked coal.' On the other hand, it is provided that the defender and his successors shall be entitled to cut airways, headways, roadways, gateways, and water-levels through the portions granted or reserved to the disponee, provided that they should not exceed certain specified dimensions, nor 'be cut or made so as to injure the surface of the lands, or the buildings, railway, or works thereon, or to impede the passage thereof.'

"Now, these are the whole material parts of the deed. The deed does not contain any express reservation of right to work out the materials so as to leave no support for the surface; the only question is whether such a right is reserved by clear implication. Having regard to the strict judicial construction of such documents in favour of the surface-owner, especially in recent cases in this Court and in the House of Lords, I am not prepared to hold that such a right is to be implied. The defender's contention is that in this deed the disponee stipulated for all the support which he desired and required for the surface, and that it therefore must be inferred that he consented to the disponer exhausting the remainder of the coal. It may be that this was the real intention of parties, and the disponee's subsequent actings give colour to that view. But the terms of the deed will not support the implication contended for. I think that the stipulations in favour of the disponee in regard to the blocks of coal to be left unworked underneath the mansion-house and offices and viaduct, which are chiefly relied on by the defender, can be reasonably explained on the footing that the disponee found it necessary to make special provision for the support of those parts of the estate which were burdened, or were about to be burdened, with heavy buildings, and thus were, or were about to be, in a non-natural state. But it does not follow that he thereby abandoned his right to insist on support for the rest of the surface. Besides, the deed does not contain any compensation clause. In this respect the defender's case is even weaker than previous cases, in which it was unsuccessfully contended that the mine-owner was entitled to work out the minerals on payment of damages. In particular, in the case of *White* v. *Dixon*, 9 R. 375, affirmed 10 R. (H. of L.) 45, the deed on the terms of which the question depended provided that the mine-owner should indemnify the owner of the surface for the whole damage and injury occasioned by the operations which he was empowered to carry on. Yet, notwithstanding this stipulation, the Court held that the obligation to pay damages did not confer right to bring down the the surface on paying damages. Again, to refer by way of contrast, to those cases in which the mine-owner was held entitled to work out the minerals without leaving support for the surface, it will be found that the deed or deeds which were held to form the contract either contained express power to do so, or stipulations of such a character that the power was necessarily to be implied. Of the former class was *Buchanan* v. *Andrew*, 11 Macph. (H. of L.) 13, reversing the decision of the Court of Session, 9 Macph. 554; and of the latter the case of *Aspden* v. *Seddon*, L.R., 10 Ch. App., 394.

"I therefore think that if regard is only to be had to the titles of the parties, the defender has not instructed a right to work out the minerals reserved without leaving support for the surface, whether he offers to pay damages or not.

"II. Parties are agreed that damage has been caused by the defender's workings, and that the amount in money shall be held to be £250. The pursuers are clearly entitled to payment of those damages.

"III. But two serious questions remain, viz.—(1) Whether the pursuers' authors did not by their actings surrender or lose the absolute right of support which they originally had; and (2) whether, even assuming that they did not do so, declarator and interdict should be granted as concluded for. As the defender is willing to pay damages if allowed to work out the minerals, it is immaterial, perhaps, to him which of these points is decided in his favour; but I shall consider them in their order.

"Although on the face of his title Hendrie was not (as I hold) deprived of, and did not surrender, his absolute right at common law to have the surface supported and to refuse to accept damages in lieu thereof, there is no doubt that at the date of the purchase he was well aware that the defender had for some years been working out the minerals on the footing of total exhaustion; and being himself a coalmaster, he knew that this mode of excavation was the only one under which seams of the thickness of those in question could be wrought to commercial profit. He also knew that that mode of working had caused, and would in future cause, a certain amount of subsidence of the surface; but he says in his evidence—'I did not apprehend that the injury to the surface would be much, as compared with the value of the coal.'

"In 1882 he showed his faith in this belief in a very practical manner by taking a lease from the defender for 11½ acres of the coal in question—'With full power to the said lessee, at his own expense, to

search for, work, win, and carry away and dispose of the coal hereby let as fully and freely as the said James Reid Stewart could do himself.' The lease provided for total excavation by the lessee, and contains this provision—'The second party (Hendrie) hereby expressly renounces and discharges all claims competent to him as proprietor of the surface of the said lands or otherwise in any manner of way against the first party (the defender) in respect of any damages which may have been or may be occasioned by his operations under this lease.'

"The lease was for the space of ten years from Martinmas 1879, that being the date apparently at which Hendrie began to work the coal let. Now, I cannot reconcile this contract and what followed on it with the view that Hendrie retained, or intended to retain, an absolute right to support for the surface *quoad* the rest of the mineral field underneath the lands of Calder Park. The terms of the lease should be closely examined. They show complete knowledge and approval on Hendrie's part of the nature and extent of the defender's workings. Hendrie stipulates for power to work the coal let as fully and freely as the defender could do himself. He then binds himself under penalties to work out the coal exhaustively; and there are even provisions in the lease to the effect that where the coal is wrought in the pillar and stall mode, the lessee should leave in the first instance pillars of sufficient dimensions to secure of its being ultimately wrought out with the least possible loss of mineral. Where possible damage to the surface is referred to, money damages are indicated as being the appropriate and only remedy.

"But the evidence of acquiescence does not stop here. In 1884 Mr Hendrie's affairs having become embarrassed, his trustee made a claim against the defender for damages in respect of injuries to the surface caused by the mineral workings, and after a protracted arbitration a sum of £1400 of damages was awarded. Now, during the ten years between 1874 and 1884, and in the course of the proceedings in the arbitration—in which the defender's working plans were, I understand, produced and examined—Hendrie and his trustee must have been well aware of the nature of the defender's operations: that he had for years been working out the coal on the footing of total exhaustion, that he intended to work out the remainder of the minerals by the same process, and that for that purpose he had incurred large expenses in the erection of machinery and sinking of shafts, driving of levels, and otherwise. The three sets of plans produced in this process show at a glance the nature and extent of the defender's operations from 1869 to 1889, which were absolutely inconsistent with the idea that the surface was to be supported, and which a practical man could not see going on without knowing perfectly what the result of the operations would be.

"Now, it seems to me that the circumstances which I have just mentioned are such as to entitle the Court to presume an agreement on the part of Hendrie and his trustee to waive the absolute right which they have under their title, and to rest content with the payment of damages for such injuries as might be caused to the surface by the defender's workings. Mr Bell in his Principles, section 946, states the effect of acquiescence thus:—'Where great cost is incurred by operations carried on under the eye of one having a right to stop them, or where under the eye and with the knowledge of him who has the adverse right something is allowed to be done which manifestly cannot be undone, the law will presume an agreement or conventional permission as a fair ground of right.' I may also refer to the Lord Chancellor, Lord Chelmsford's, opinion in the case of *The Bargaddie Coal Company* v. *Wark* (3 Macq. 467, 479, 480), in which he quotes with approval the passage from Bell's Principles which I have quoted. It has been said that the right of support cannot be lost except by express renunciation; but this is not established by authority, and although the proof of acquiescence must be full, I do not think that in this matter the right of support has any peculiar sanctity. It was once said by Lord Denman (*Hilton*, 5 Q.B. 780) that even an express renunciation of it would be unavailing. But this *dictum* is now repudiated (*Andrew* v. *Buchanan*), and I think also that now the ordinary rules of law applicable to acquiescence would be equally applied in a question as to the right of support as in the case of any other contract. I do not think that the present pursuers are in a better position than their authors. In 1880 the pursuers, who were creditors of Hendrie, obtained from his then trustee, Mr John Graham, a conveyance of the lands, the consideration named being £16,000. In the deed of conveyance Graham assigned to the bank certain claims to which he had right as Hendrie's trustee, and amongst them, (Second) All claims competent to me as trustee foresaid for damages occasioned to the said lands by the workings of the mineral proprietors, or their authors or *successors*, or their tenants, and that *whether the said damage was caused before or after the date of my said disponee's entry to the subjects hereby disponed* under these presents, but in so far only as the same have not been already paid for or compensated by the said James Reid Stewart.' The pursuers had thus full notice that their authors had been in use to accept damages for injuries caused to the surface by the defender's workings; and the words of the clause which I have underlined indicate that this practice was to continue, because the claims assigned were claims in respect of future as well as past damages.

"In *Davis* v. *Treharne*, 6 App. Ca., L.R. 460, Lord Blackburn says (p. 466)—'I think it must be taken as perfectly settled ground that as of common right the surface land has a right to be supported by subjacent strata of minerals. Although that is com-

mon right, it may be shown—the burden lying upon those who wish to show it—that the person who has got the surface obtained it either upon terms which would give him no right to support, he having accepted it and taken it upon those terms, or that before he got it the person from whom he claims, the owner of the surface, had parted with the right to support from below, in which case, of course, the owner of the surface could be in no better position than the person who sold it to him.'

"On the grounds which I have stated I am inclined to think that the burden indicated by Lord Blackburn in the latter part of the passage quoted has been discharged by the defender, and that there is sufficient evidence that the owner of the surface surrendered his right to support on condition of payment of damages.

"IV. I am further of opinion that even if the evidence falls short of complete proof of surrender of the right of support interdict should not be granted in the circumstances of the case, because the loss which would result to the defender from the stoppage of his works would be out of all proportion to any advantage which the owner of the surface would obtain. In judging whether in such cases interdict should be granted or refused, the courts of law both in this country and in England have been in use to exercise an equitable discretion; and, if they are satisfied that the loss to the person sought to be interdicted would be greatly in excess of the benefit to the other party, they are in use to refuse interdict and to compel the party seeking interdict to content himself with damages. They are the more ready to adopt this course if the party sought to be interdicted has as here been permitted or induced to continue his operations and incur large expense by the actings and apparent acquiescence of the person seeking interdict or his authors.

"Now, I think it is proved that if the defender continues to work out the minerals as he is doing some subsidence of the surface will be caused. It is also proved that seams of the thickness of those in question cannot be worked to profit except on the footing of total exhaustion. If, then, the defender were interdicted from working the minerals 'in such a manner as to break, injure, or alter the level of the surface of the pursuers' said lands, or any part thereof, or so as to endanger the said surface being injured or altered in level, or to cause the disturbance or subsidence of any part of the said lands,' he would be obliged to abandon the working of those minerals altogether, and as there are still unworked nearly three million tons of coal, including the lower seams, the loss to the defender would necessarily be very large.

"Next, as to the pursuers' interest to obtain an interdict, one object in allowing a proof was to allow the pursuers to prove the damage which they had sustained, which they estimated at £5000. It now appears that the damage actually sustained is covered by a sum of £250, as against an estimated annual loss to the defender of £4000 to £6000 if he were obliged to abandon the mine. It may be that in future damage to a greater extent may be caused; but dealing with the question of interdict on the evidence before me, I do not think that there are sufficient grounds for subjecting the defender to such a penal prohibition for disturbance of the surface. So far as can be seen or anticipated, the pursuers will be sufficiently compensated by payment of damages should further subsidence take place.

"The result is, that I am not prepared to grant decree of declarator and interdict in the terms asked, because the effect of such a decree would be to prevent the defender from working the coal at all. I shall therefore grant decree for the sum of £250 agreed upon, and *quoad ultra* assoilzie the defender from the action as laid, reserving to the pursuers their right to claim damages from the defender should the defender's workings cause injury to the surface in the future.

"I shall also reserve to the pursuers right to apply for interdict in the event of the defender encroaching upon the minerals conveyed to the pursuers under their titles. I may observe in connection with this matter that it is proved that the coal under the mansion-house has been encroached upon; but it appears from the proof and productions that this took place before the conveyance by the defender to Hendrie, and that the defender thereafter settled with Hendrie for that encroachment."

The pursuers reclaimed, and argued—On the question of interdict only (the amount of damage having been determined)—The rights of parties fell to be determined on a construction of the titles, and under them the defender had failed to instruct a right to work out the minerals reserved without leaving support for the surface either on paying damages or not—See cases cited by Lord Ordinary. The pursuer was a singular successor, and was entitled to rely on the records, and was not bound by any private arrangement between the defender and Hendrie. There was no acquiescence or *rei interventus* here, for though Hendrie might have acquiesced in and received damages for injury done in the past, such acquiescence would not have barred him from objecting in the future—*Hole* v. *Barlow*, 1858, 4 C. B. (N. S.) 334; *Bamford* v. *Turnley*, 3 Best & Smith, 62. No expensive works were erected by the defender on the faith of Hendrie's acquiescence, and nothing was done to put the present pursuers *in mala fide*. They purchased on a clear title, and were entitled to stand by it.

Argued for respondent—There was here a reserved right to the whole coal on the lands. It was within the knowledge of the contracting parties that this right could only be exercised by causing injury to the surface, and that being so a clause to this effect must be read into the deeds. The pursuers' author assented to this reading of the contract, so the bank, as their assignees, must be held to assent also. The

original contracting parties had in view the necessity for stipulation as regards certain portions of the lands, and they stipulated accordingly; the other portions must be held to be free, or these special stipulations would be of no avail—*Hilton* v. *Granville*, 1 Craig & Phipps, 283; *Moore* v. *Paterson*, December 16, 1881, 9 R. 337; *Grahame* v. *Magistrates of Kirkcaldy*, July 26, 1882, 9 R. (H. of L.) 91.

At advising—

LORD ADAM—Prior to the year 1875 the defender was proprietor of the estate of Calderpark in the parish of Old Monkland and county of Lanark. In that year he disponed the estate to Mr Hendrie, reserving the mines and minerals, and the pursuers, who are the Bank of Scotland, are now in right of Mr Hendrie, and their title exactly repeats the original title to Mr Hendrie.

Now, I do not think there is any difficulty or dispute about the law where the rights to the surface and the rights to the mines and minerals become involved. I think the principle of law that comes into operation is *sic utere tuo ut alienum non lædas*—you shall so use your own property as not to injure that of your neighbour—and in conformity with that the result is, that the proprietor of the mines and minerals cannot work them, if the result of such working would be an injury to the surface—that is to say, if it would bring down the surface or injure buildings and erections upon the surface. If that is the result of the working, the proprietor of the mines may be stopped from so working them. In other words, the proprietor of the surface is entitled to absolute security. I think that is the legal right where there is nothing peculiar, and there is a separation of the right to the surface and the right to the mines and minerals.

But then the titles of the parties have shown that the rights reserved are not exactly those that would arise from the legal relations of parties, and accordingly the question in this case is, whether or not it appears from a construction of the titles that the defender, when he reserved the rights to the mines and minerals, reserved also a right to take them, although the result of that might be that it would injure or let down the surface. The defender says that upon the construction of the titles that is the right he reserved—the right, namely, of working these minerals although the result should be to cause injury to the surface. That question then has to be solved, as it appears to me, from the construction of the disposition in favour of Mr Hendrie, or the disposition by Mr Hendrie to the Bank of Scotland, because they are both in the same terms, and in order to properly construe that title, I think we are entitled to look at the surrounding circumstances at the date of the execution of the disposition to see what the parties really had in their mind when so contracting.

Now, there is no doubt that they were contracting with reference to the sale of a mineral estate in which, in point of fact, there were unworked minerals still subsisting of great value. I think it is also perfectly clear, that at the time of the contract all the parties were aware that these mines of coal were actually being worked by pits belonging to the defender, who happened to be proprietor of the adjoining lands of Calderbank. I think it is also indisputable from the facts of the case that they were aware that the working of these minerals was, as might have been expected, to be continued. That appears clearly from the disposition in the pursuers' favour, because it makes provision for certain consequences which would be the necessary result of the continued working of the minerals. I think it is quite obvious too that the parties were aware that the coal was being worked by a system which exhausted the whole minerals under the ground, with the necessary and unavoidable result that the surface would be brought down. I think, further, it must have been quite within the purview of parties that any loss which might arise from the working of the minerals in the way I have stated—any loss or injury to the surface — was not in point of pecuniary value of any comparison with the value of the minerals, if it became impossible that these minerals should be worked. I think, as the Lord Ordinary says for a different purpose to that to which I propose to apply it, it is the fact that the damages claimed for injury to the surface amount to the small sum of £250, whereas the result of stopping the working of the minerals would be to cause a loss of many thousand pounds.

Now, such were the facts, and such was the situation and state of knowledge of the parties when this contract was entered into; and the question is, whether upon a construction of this disposition the defender, besides reserving the mines and minerals with full power to remove the minerals, reserved to himself the right to do so although it might result in injury to the surface. I quite agree that that must either be the result of direct expression in the disposition, or of clear implication to that effect. If there are clauses in the deed which clearly imply a reservation of power to that effect to the defender, I see no reason why in the construction of this disposition effect should not be given thereto just as in any other case. I do not know that any difference arises because the case is between the proprietor of the surface and the proprietor of the coal, that should lead to a different construction of the disposition, and prevent our giving effect to such an implied reservation if the intention of parties is clear; and I propose to construe this deed as I would construe any other.

Now that brings me to consider the terms of the deed itself, and it will be observed that by it Mr Stewart, the defender, for the sum of £5000 conveyed the lands in question—they are not called Calderpark—

and the mansion-house and so on under the following reservation—"But excepting and reserving from the lands, subjects, and others hereby conveyed the whole coal under the same." Then comes the exception, "Other than (first) the portion thereof which is delineated and shaded with brown . . . containing 2·856 acres or thereby, and (second) the portion thereof which is delineated and shaded with blue . . . containing 3·144 acres or thereby." The disponer in the first place excepts the coal from the grant, and then from the exception of the coal there is excepted again all the coal within two small areas of between two and three acres respectively. Then follows the power which the defender reserved—"With full power to me and my foresaids, or my tenants, to work, win, and carry away the said coal, provided this be done without entering upon the surface of the said lands and estate." A right is then provided to the purchaser, if he shall require it, to purchase part of the coal which Mr Stewart reserved to himself. The provision is in these terms—"But providing and declaring that my said disponee and his foresaids shall have right, should they find it necessary for the support of the said mansion-house and offices, or any of them, or for the support of the bridge or viaduct to be constructed on the said lands" for carrying a certain railway, "that a larger quantity of coal should be left unworked than is contained in the said two portions of land, that is, the two acres and the three acres—"to purchase from me or my heirs and successors such additional quantity of coal as they shall find necessary for such supports, the price of which shall be calculated at the rate of £1000 per acre of wholly unworked coal." Then there is a further power given to Mr Stewart—that is, that he should have power to make airways and roadways, and so on, through the coal underneath the railway viaduct and mansion-house which he had not reserved to himself, but had passed on to the pursuers as proprietors of the surface. He reserves power to make such airways, &c., with this limitation that they are not to be "made so as to injure the surface of the lands, or the buildings, railway, or works thereon." I think these are all the provisions of the contract to which I need refer.

Now, the first clause which requires some attention is the one where after reserving the coal to himself, the disponer Mr Stewart reserves this power—"With full power to me and my foresaids, and our tenants, to work, win, and carry away the said coal, provided this can be done without entering upon the surface of the said lands and estate." The first observation I have to make upon that clause is, that its terms do not express the legal right which would have been reserved to Mr Stewart as a consequence of his having reserved the coals, mines, and minerals. The legal right which he would have had as a consequence of such a reservation would have been, as is said in the later part of the deed, full power to win and carry away the said coal, provided no injury were done to the surface of the ground, and, if it had been intended merely to give expression to Mr Stewart's legal rights, the clause would have been expressed in that way. Therefore this clause does not bear that meaning, and the question arises whether the true meaning and construction is not this, that the only limitation upon Mr Stewart's right—his full power to remove the coal—is that expressed, viz., "provided this can be done without entering upon the surface of the said lands." Now, if that is the only limitation imposed on the defender, and if the clause is meant to be a full expression of the powers of the parties, it would not exclude Mr Stewart from working the minerals so as to injure the surface. This would, perhaps, be a forced construction of the deed if the clause in question stood alone, but in view of the other provisions of the deed it is less difficult to suppose that the parties really meant what this clause in terms expresses, viz., that the disponer should have full power to remove the coal, provided only that he should not do it by entering upon the surface of the estate.

In the first place, it is to be noted that the subjects which would be chiefly injured by the letting down of the surface—namely, the mansion-house and viaduct—are separately provided for, an exception of the two portions of coal underlying these two subjects being made from the reservation of the minerals in favour of the defender, and when we come to the clause following the one which I have been considering, a very strong light is thrown upon the earlier clause. This clause provides that the "disponee and his foresaids shall have right, should they find it necessary for the support of the said mansion-house and offices, or any of them, or for the support of the bridge or viaduct to be constructed on the said lands . . . that a larger quantity of coal should be left unworked than is contained in the said two portions of land, to purchase from me or my heirs and successors such additional quantity of coal as they shall find necessary for such supports, the price to be calculated at the rate of £1000 per acre of wholly unworked coal." Now, it appears to me that the exception of the coal under the mansion-house and viaduct, followed by the stipulation giving this right to purchase, clearly involves and assumes certain things as being the rights of parties. It assumes in the first place that the defender is to work the minerals, because if he did not work the minerals, if he never came nearer the reserved coal, there would be no danger of injury to the mansion-house or viaduct; and it also clearly implies that the probable or possible or expected result of his so working the minerals was the bringing down of the surface. If this had not been so, there would have been no necessity for Mr Hendrie stipulating for the right to purchase additional coal, if he should find it necessary for the support of the mansion-house or viaduct. Therefore it appears to me that this clause assumes, in the second place, that the work-

ing of the minerals will in all probability be attended with injury to the surface. It also appears to me necessarily to assume, that in so working the minerals to the injury of the surface the defender, or his disponees, were to do so as a matter of right; because it is very difficult to suppose that Mr Hendrie would have agreed that the defender should be paid at the rate of £1000 per acre for the coal, as a consequence of his having done an illegal act in working the coal so as to injure the surface. The view, however, of the pursuers in this case is that if the defender so worked the minerals as to injure the surface, and to injure the support to the surface, he was doing a wrongful act which he had no right to do; and yet upon the face of this record he is to be paid at the rate of £1000 an acre when he shall have so worked the minerals as to endanger the mansion-house. That clearly indicates to my mind that the parties knew quite well that that was a perfectly legal act on the part of Mr Stewart.

Now, let us see how such a construction would apply to the interdict which is asked. Declarator is asked in these terms—"It should be found and declared that the defender is not entitled to work . . . the coal . . . in such a manner as not to leave sufficient support for the pursuers' said lands above and adjacent to the seam or seams worked by him, and that the defender in working and winning any of the said minerals is bound to do so in such a manner as not to break, injure, or alter the level of the surface of the pursuers' said lands, or to cause disturbance or subsidence of any part of the said lands." Suppose we were to grant the interdict sought, what would be the result? The result would be, that Mr Stewart would not be paid the thousand pounds per acre which Mr Hendrie consented to pay for stopping the working of the coal. In other words, we should just be saying that the clause in the disposition in which that stipulation was made should receive no effect whatever. The contention on the other side is that Mr Stewart reserved nothing but the mere power to remove the coal, the surface being kept safe. If that be so, then the pursuers are entitled to interdict; if that be not so, and if it be clear upon the face of this deed that there was a further power reserved to Mr Stewart to work and remove the minerals although it should result in injury to the surface, then there was by this deed reserved to Mr Stewart something more than the legal consequences which result from a mere reservation of the rights to mines and minerals. And I say that the stipulation to which I have adverted clearly shows that the parties to this contract had it in view, that Mr Stewart was to have the right to remove the minerals, although the result of his exercising that right might be to bring down and injure the surface. I can put no other interpretation upon the clause in question except that it was inserted to meet that reserved power on the part of Mr Stewart.

Now, if that be so, it appears to me that the defender's right cannot be limited, as the Lord Ordinary suggests, to any part of the lands, because it is a reservation of a right and nothing else. Accordingly, the result which I have come to upon a consideration of the construction of this disposition is, that by clear implication there is a right and power reserved to Mr Stewart to work the coal reserved by him, even although the effect should be to bring down and injure the surface. The result is that at which the Lord Ordinary has arrived, namely, that the defender is entitled to be assoilzied from this action. I wish, however, to say that that is not the result of the construction of the deed which the Lord Ordinary has adopted. His Lordship has taken a different view from that which I have expressed as to the construction of this deed. But he has decided in favour of the defender upon grounds upon which, without going into them at any length, I regret to say I should not have been prepared to support the defender's case.

First, he holds that Mr Hendrie had discharged any right to support that he had, by his acts and conduct. The Lord Ordinary puts very much stress upon the fact that Mr Hendrie had himself taken a lease from Mr Stewart of a small part—some 11 acres—of the coals in question, by which he bound himself to work out the whole of that coal exhaustively, and with the necessary result of injury to the surface. But I think it would be very difficult to found on such a matter as showing acquiescence on the part of Mr Hendrie. We cannot tell how the consideration which Mr Hendrie agreed to pay, or Mr Stewart agreed to take, may have influenced them in reserving rights in that matter, and I notice that Mr Hendrie, while he discharges all claims competent to him as proprietor of the surface of the said lands, only does so "in respect of any damages which may have been or may be occasioned by his operations under this lease." How in the face of that reservation, the discharge being only of damage caused by this lease, the lease could import any discharge of the right to support with reference to the whole other parts of the lands not touched by it, I have not been able to follow the Lord Ordinary.

Then it is the fact that Mr Hendrie had allowed the defender to work the coal for some considerable period of years without interference, and had made a claim and recovered damages of considerable extent. I cannot see that because he may have had the right to stop these operations, and chose to let them go on for a considerable time, he has therefore lost the power for all future time to put a stop to that which he permitted without any loss or injury to himself, and I should not put much reliance upon that fact as being evidence that the pursuer Mr Hendrie had discharged his right. And I do not think there is any evidence of such an expenditure of money by Mr Stewart as is suggested. It is to be noticed with regard to the expense of sink-

ing the pits, that they were sunk altogether on ground with which Mr Hendrie had nothing to do, viz., on Calderbank, which was Mr Stewart's own separate property; and how Mr Hendrie could have had any right or title to interfere with these proceedings I am at a loss to see. Therefore I do not think, with deference to the Lord Ordinary, that the case would be safely rested upon these acts as implying the discharge of Mr Hendrie's rights.

There is another and quite distinct ground on which the Lord Ordinary bases his decision for the defenders; but I cannot be held as agreeing to that either. It is this—He says the pursuers are not entitled to interdict because the loss which would result to the defender by the stoppage of his works would be out of all proportion to any advantage which the owner of the surface could obtain. I confess it is new to me in the law of Scotland that a person's right, and in that view an undisputed right, is to be taken away because it would be for the pecuniary advantage of another person that he should lose it. That appears to me to be quite a novelty in the law of Scotland, and I think the Lord Ordinary has been under a little misapprehension here. These considerations are most material, not when we are considering any matter of established right, but where the question is a question of interdict before the right is established. But the assumption on which the Lord Ordinary puts the case is that the right is established, and is to be taken away, because it is more convenient for the defender, and because it will cause comparatively little pecuniary loss to the pursuers to lose their right. As I said before, I cannot agree in that ground of judgment; but upon the first ground which I have stated I adhere.

LORD KINNEAR—I am of the same opinion. I think the question depends entirely on the true construction and effect of the title now before us, and I am unable to agree with the view which appears to me to be suggested by the Lord Ordinary's observation, that that is a question which can be governed by previous decisions as to the construction of other deeds in different terms. We must ascertain for ourselves what is the true meaning and effect of this particular deed. Now, I entirely concur in the construction which Lord Adam puts upon it, and for the reasons he has given, and I think it unnecessary to repeat those reasons. I agree with Lord Adam also in thinking that, if the title bore a different construction, it would not be possible to sustain the grounds upon which the Lord Ordinary holds, that nevertheless the proprietor of the surface shall not be allowed to prohibit proceedings, which will bring down the surface contrary to the right which he holds to be established in him. I agree with Lord Adam that the ground upon which the Lord Ordinary proceeds is not satisfactory, but I think the result at which he has arrived is right.

LORD PRESIDENT—I agree with your Lordships in adhering, and that the Lord Ordinary's interlocutor shall stand. With regard to the question which his Lordship discusses under the third branch of his note, it appears to me that there is no evidence of acquiescence at all, and that the view his Lordship takes upon the authority of Professor Bell in his Principles is not at all justified by the text of the section to which he refers. I quite agree with Lord Adam that to sustain as a reason for refusing to enforce a right, that enforcement would be a great inconvenience or pecuniary loss to somebody else, is quite unknown to the law of Scotland. I am for adhering.

LORD M'LAREN was absent.

The Court adhered.

Counsel for the Pursuers—Ure—Fleming. Agents—Tods, Murray, & Jamieson, W.S.

Counsel for the Defender—Guthrie—Dickson. Agents—Drummond & Reid, W.S.

Friday, June 19.

FIRST DIVISION.

[Lord Wellwood, Ordinary.

BENNETT *v.* INVERESK PAPER COMPANY.

Principal and Agent—Sale—Foreign Trade—Title of Foreign Principal to Sue.

In an action at the instance of an Australian firm against manufacturers in this country for breach of contract, it was pleaded in defence that the contract had been entered into with commission merchants in London as principals, and that the pursuers had no title to sue.

Held that the pursuers had a title to sue on the contract, it being proved that they had appointed the commission merchants their agents in this country.

Observations in regard to the question of the title of a foreign trader to sue on contracts made on his behalf by commission merchants in this country.

A firm carrying on business as printers and publishers in Sydney, New South Wales, under the name of Samuel Bennett, sued the Inveresk Paper Company for certain claims, damages, and expenses, in respect of the defenders having failed to pack sufficiently certain consignments of paper shipped to them. The pursuers alleged that the contract under which the paper had been shipped had been entered into by Messrs Poulter & Sons of London, as agents on their behalf, with the defenders.

The defenders explained that they contracted with Messrs Poulter & Sons, who were paper merchants in London, and