a mere evasion. The advertisement of his name in connection with the trade-name Palace Hotel would, I am satisfied, on the evidence and from the nature of the case, be understood as meaning that he was hotel-keeper in the building which had come to be known as the Palace Hotel. Such advertisement accordingly amounts to a representation injurious to the proprietary interests of the railway company. On this general ground my opinion is that the interim interdict originally granted is well founded and ought to be made perpetual.

There remains for consideration the question whether the respondent has brought himself within the qualifying words of the interdict by altering his trade-name to "Mann's Palace Hotel." In other words, is the prefixing the respondent's own name a "distinctive addition," or is it an addition which would not suggest a distinction to travellers and customers?

Now, it is part of the respondent's case that he was well-known, and had gained a reputation with the public as the person who carried on the Palace Hotel belonging in property to the railway company. On that hypothesis the name "Mann's Palace Hotel" would not convey an obvious distinction—would indeed rather suggest that he was carrying on business in the old premises. But further, it has been proved that the prefix Mann's has not in fact served the purpose of a distinctive addition; that customers intending to go to the railway company's hotel have been taken to Mann's; and that in other cases the passenger and his luggage have been taken to different hotels. This may not be the fault of Mr Mann, but the case against him is not founded on delict, but on the right of the company to be protected against effects of the representation implied in the use of their trade-name. It is therefore not a satisfactory answer to say that passengers were taken to the wrong hotel because they did not attend to the difference between the names, because this only proves that the name adopted by the respondent is not sufficiently distinctive.

I would therefore suggest that we should continue the interdict formerly pronounced, and should also grant interdict in express terms against the use of the name "Mann's Palace Hotel," on the ground that it is not sufficiently distinguishable from the name "Palace Hotel" which the complainers have been in the habit of using to describe their hotel at Aberdeen.

The LORD PRESIDENT, LORD ADAM, and LORD KINNEAR concurred.

Interdict was granted in terms of the prayer of the note.

Counsel for Complainers—D.-F. Balfour, Q.C.—Jameson—Kennedy. Agents—T. J. Gordon & Falconer, W.S.

Counsel for Respondent and Reclaimer—Dickson—Ure. Agents—Auld & Macdonald, W.S.

Friday, July 8.

FIRST DIVISION.

[Sheriff of the Lothians and Peebles.

ROBERTSON *v.* ROSS & COMPANY.

Contract — Agricultural Lease—Claim by Tenant of Farm against Mineral Tenant for Severance Damage.

In the lease of a farm the proprietor reserved full power to work the minerals, and to resume the land necessary for that purpose, subject to the condition that he should allow the tenant an abatement of rent in respect of any land resumed.

The proprietor subsequently let the minerals under the farm to tenants, to whom he assigned the rights and reservations contained in the agricultural lease, and he bound the mineral tenants to settle with the agricultural tenant for all ground taken from his farm according to the conditions of the agricultural lease. The mineral tenants having taken ground from the farm for the construction of a railway, *held* that the agricultural tenant had no claim against them for severance damage, in respect that the rate of compensation to be paid for land taken in connection with the mineral workings was fixed by his lease.

Opinion by the Lord President that a claim of severance damage is truly a claim for part of the value of the ground taken, namely, its value as an access to the adjoining lands. *Doubt* expressed on this point by Lord M'Laren.

By lease dated in 1876 the Earl of Hopetoun let to William Robertson the farm of Gateside, in the county of Linlithgow, for a period of nineteen years from Martinmas 1874. The lease contained the following clause—"Reserving always to the proprietor, his heirs and assignees, from the subjects hereby let, as follows, *videlicet*—Reserving always the whole mines, metals, minerals, and fossils, coal, marl, clay, gravel, sand, sandstone, limestone, and slate quarries on the subjects hereby let, with full power to search for, work, win, smelt, burn, and manufacture, and to carry off the same, and sink pits, form levels, make roads, railroads, canals, erect buildings and machinery, and carry on all works within the subjects hereby let which they may think proper, and to resume the land they may think necessary for these purposes: Reserving also full power at all times to take off land from any part or parts of the subjects hereby let for the purpose of planting, or for the purposes of feuing, or letting on building leases, or for making, altering, or widening roads, or for making railroads or canals, or pieces of water: Declaring that the proprietor, or his aforesaids, shall be bound always to keep enclosed properly any lands resumed for any

of these purposes, and that the said tenant shall receive for any land so resumed an abatement from the rent in the proportion that the extent of ground resumed bears to the extent of the whole subjects hereby let; and also shall receive payment of the value of any crop which may be growing on, or unexhausted manure in, the ground when resumed, as the same shall be ascertained by arbitration."

By lease dated in 1884 the Earl of Hopetoun let to James Ross & Company the minerals in parts of the estate of Hopetoun, including those lying under the farm of Gateside. This lease contained the following clauses—"And in addition to making payment of the aforesaid rent or lordships the said tenants bind and oblige themselves also to pay for all surface and other damages of every description occasioned at any time by their operations during the currency of this lease, including all damage occasioned to the crops on the lands hereby let through their workman trespassing (but declaring that such trespass damage shall only be payable by the tenants under this lease when specially approved of or directed by the said proprietor), and all other damages done by them, of whatever kind or nature soever the same may be, and whether such damages shall be due to the said proprietor or his foresaids, or to tenants of other proprietors, or to other parties, according as the value and damages shall be ascertained by arbitration as aftermentioned, with interest at 5 per centum per annum during not-payment. And also to pay and settle with the agricultural tenants of the said proprietor for all ground taken possession of from their farms, according to the conditions stipulated in the leases of their farms for ground to be resumed, and (in addition to paying the same rent per acre as they pay to the said proprietor, according to the average rent of their farms) to pay to the said agricultural tenants at the rate of £1 per acre per annum during their leases, and to pay them for all other damages which they can claim under their said leases: . . . And the proprietor hereby assigns and makes over to the tenants under this lease all rights, reservations, and conditions as to working minerals contained in the agricultural leases of the lands hereby let."

In 1889 and 1890 James Ross & Company took possession of certain portions of the farm of Gateside, upon which they made bores or pits, and they also constructed a railway across several of the fields belonging to the farm.

In October 1891 Robertson, the tenant of the farm, brought an action against Ross & Company for payment of £120, the greater part of this claim being for severance damage.

The defenders pleaded, *inter alia* — (3) That they were only liable for the amount of compensation payable under the leases.

On 27th November the Sheriff-Substitute (MELVILLE) repelled the plea-in-law for the defenders, and allowed the parties a proof of their averments, and, on an appeal by the defenders, the Sheriff (BLAIR) adhered so far as proof was allowed in regard to the claim of severance damage.

The parties thereafter lodged a joint-minute in which they agreed, without prejudice to their rights of appeal at any competent stage of the proceedings, that the sum payable to the pursuer in name of severance damage should be ascertained by remit to a man of skill, and in terms of a report so obtained the Sheriff-Substitute on 13th May 1892 decerned against the defenders for £31, 3s., and found them liable in expenses.

The defenders reclaimed, and argued—The pursuer's averments as to severance damages were irrelevant, and should not have been admitted to proof. The pursuer's rights were measured by his lease, and his lease having fixed a specified rate of compensation where land was taken for mineral workings, any claim for severance damage was excluded.

The pursuers argued—Apart from compact the pursuer had a good claim for severance damage founded on delict or *quasi* delict. His right being of a substantial nature could not be held to have been excluded by agreement, unless it were either expressly discharged or excluded by clear implication. There was no such express discharge or clearly implied exclusion of this right in his lease, and the clause fixing a rate of compensation for land resumed did not apply where the resumption was for mining purposes.

At advising—

LORD PRESIDENT—The pursuer in this case is the agricultural tenant of the farm of Gateside, in Linlithgowshire, the landlord being the Earl of Hopetoun, and he holds the farm under a nineteen years' lease from Martinmas 1874. A portion of the farm has been taken possession of by the defenders, who hold a lease from the Earl of Hopetoun of the minerals lying under the farm, and in so taking possession the defenders found their right upon their grant from Lord Hopetoun in their lease of the minerals, and on an assignation of the rights which he reserved in his lease with the pursuer. The mineral lease stipulates for a payment to the agricultural tenant of £1 per acre of resumed land which he would not have had under his own lease, and it is not disputed that he must get this. The question between the parties therefore falls to be determined by the terms of the agricultural lease primarily, because the defenders claim to have acted under the rights therein reserved to the landlord. In that lease the landlord reserved the whole mines and minerals, with full power to search for, work, win, and carry away the same, and to sink pits and make roads and railroads, "and to resume the land they may think necessary for these purposes." That is the clause of reservation now founded on, and the present question is, whether the tenant is limited to recovering such payment only as is specified in the lease as the consideration which he is to receive for any land which may be resumed, or whether the tenant is entitled, in addition

to such consideration, to a sum in name of severance damages. The answer made by the defenders—and it appears to me to be conclusive—is that the tenant is only entitled to the consideration specified in his lease, and inasmuch as the lease contains no stipulation for payment of severance damage, he cannot receive severance damage in addition thereto. Now, the view on which a claim of severance damage is based is, that in addition to the value of the land taken, something is due for the decreased value of the rest of the farm. But the scheme of the lease in question is to provide a rate of compensation for the resumption of land, and when we look at the reasons on which a claim of severance damage is based, we see that it is nothing else than a claim for the proper value of the land taken. That may be illustrated in this way—The occupant of a farm, when land is taken from him, is entitled to have the land taken valued as a part of the farm, and not as a separate subject. If the land taken is valuable not only for the crops it yields, but also as an access to the rest of the farm, then the value of such access is part of the aggregate value of that part of the farm, and is necessarily an important element in its value in addition to its agricultural value. Now, Mr Dundas said very frankly and properly, I think, that the words of the lease are substantially the same as if the stipulation was that the tenant was to receive the specified compensation for the resumption of land. That seems to me to settle the question, because the lease purports to give the whole consideration which the tenant is to receive for the land resumed, and therefore excludes any further recompense than the compensation which it provides shall be paid for the area taken.

In what I have said I have proceeded upon the assumption that the part of the clause which provides for compensation to the tenant applies to the act of resumption in question. As this was disputed, it may be right to say that I cannot accede to the suggested limitation of that part of the clause to the operations of planting, feuing, &c., and to the resumption necessary for these purposes. It appears to me to be quite clear that the clause beginning with the word "declaring" applies to resumption of land, which is incidental to mining as well as the other operations. In the first place, the language employed is of sufficient latitude to cover the operation of mining, and in the second, it is clear that the provision which binds the landlord to keep the land which may be resumed, properly enclosed, applies just as much to the case of resumption for the proposed mining, as for any of the other purposes named in the deed.

The Sheriff accordingly appears to me to have come to a wrong conclusion, and I think we should recal his interlocutor, sustain the third plea-in-law for the defenders, and give decree for the sum ascertained to represent the undisputed items as the whole amount to which the pursuer is entitled.

LORD ADAM—Under the mineral lease the landlord granted to the defenders the powers reserved by him as to working minerals in the agriculture lease. Turning to the latter lease we find that the landlord reserved the whole minerals, with full power to work the same, to make pits, roads, and railroads, and to resume the land necessary for these purposes, and it was declared that the landlord should allow the tenant an abatement on his rent in proportion to the extent of ground resumed. I agree with your Lordship that that declaration clearly applied as much to the resumption of land for mining purposes as to the other purposes mentioned. What the landlord has to pay for under the conditions of the lease is the resumption of land, and this therefore being made matter of compensation, it appears to me that all claims of damages for the consequences of such resumption are excluded. On that ground I concur with your Lordship. But this does not altogether exhaust the case, for in the mineral lease the landlord assigns to the defenders "all rights, reservations, and conditions as to working minerals contained in the agricultural leases of the lands hereby let;" that is to say, the landlord puts the mineral tenants in the same position as he had held in all questions with the agricultural tenant. Therefore, unless the agricultural tenant can show that he had a claim against his landlord, he can have no claim against the defenders. It is difficult, indeed, to see what claim could be made at common law by the pursuers against the defenders, there being no privity of contract between them, and no wrong done by the defenders. But under the mineral lease the agricultural tenant gets more than under the ordinary lease to the extent of £1 per annum for every acre of ground resumed. If it were not for that clause I do not see what claim the pursuer could have had against the defenders under his own lease.

LORD M'LAREN—I understand that the only question which we are called upon to decide is, whether the pursuer is entitled to a sum in name of severance damage in addition to the abatement on his rent, and the other compensation to which he is entitled for the land taken. I agree that the provision in the agricultural lease with regard to compensation applies to the resumption of land by the mineral tenants as well as to the case of resumption by the landlord himself for the purposes enumerated in the clause immediately preceding the clause of compensation, and that therefore the pursuer is only entitled to the compensation stipulated for under his lease, and the additional compensation which the defenders are bound to pay under their lease. I must say, however, that I have grave doubts whether a claim of severance damage should be considered as a claim for part of the value of the land taken, or whether it should not be regarded rather a claim of damages for injury done to the adjoining lands which suffer from the severance, and if the claim falls under

the latter category the tenant might have a claim on the same ground as if injury were done by bringing down the surface or in some other similar way. However, after hearing your Lordship's views, I am not prepared to differ. I think it is a perfectly admissible view that the sum to be allowed to the tenant in this case includes all claims whatever either against the landlord or his assignees the mineral tenants. It is difficult to believe that a tenant would have agreed to a railway being constructed across his farm merely on receiving an abatement on his rent, nevertheless that the tenant did so agree in this case seems to to be the fairest and truest reading of the clause. We are bound accordingly to give effect to the clause, and to consider the claim of severance damage as included in the stipulated compensation.

LORD KINNEAR concurred.

The Court recalled the interlocutors of the Sheriff and Sheriff-Substitute since the date of closing the record, sustained the defenders' third plea-in-law, and of consent decerned against them for a specified sum as the amount for which they did not dispute liability.

Counsel for Pursuer—Dundas—Salvesen. Agent—Thomas Liddle, S.S.C.

Counsel for Defenders—H. Johnston—Wilson. Agent—G. Monro Thomson, W.S.

Tuesday, July 12.

FIRST DIVISION.

[Lord Kyllachy, Ordinary.

COLLARD *v.* CARSWELL.

Ship — Charter-Party — Delay in Taking Delivery—Rescission.

By charter-party dated 3rd July 1891 the owner of a steamer, then being fitted out in the Clyde for the summer traffic, agreed to let her to a charterer till 30th September. The charter-party provided that the charterer should "pay for the use and hire of the said vessel at the rate of £425 per month, commencing the day of delivery . . . . whereof notice shall be given to the charterer . . . payment of the hire to be made in cash monthly, in advance, . . . first month's hire to be paid before the steamer leaves the Clyde. Charterer agrees to give a banker's guarantee for the due payment of the hire money."

As soon as the charter-party was signed the owner began, through his broker, to press the charterer for the bank guarantee. The charterer replied that he was not bound to give the guarantee until the vessel was ready to be handed over. The broker assented to this, but continued from 6th to 10th July to press the charterer daily to give the guarantee. The charterer made no answer to any of these communications until the 10th, when he replied that he was prepared to give the guarantee on delivery of the vessel. On 13th July the broker telegraphed that the vessel would be delivered in Glasgow on the 15th. The charterer replied that he would leave Hastings for Glasgow on the night of the 15th to take delivery, but without notifying the owner he postponed his departure for a day, and did not reach Glasgow until the morning of the 17th, when he found that the owner had chartered the vessel to someone else.

In an action by the charterer against the owner, the Court *held* (1) that the charterer had not committed a breach of contract by failing to take delivery on the day fixed; (2) that the charterer's conduct had not been such as to justify the owner in believing that he did not intend to fulfil his contract; and therefore found the charterer entitled to damages.

By charter-party dated 3rd July 1891 Morris Carswell, owner of the steamship "Victoria," then lying in the Clyde, agreed to let, and Richard R. Collard, of Hastings, agreed to hire, said steamship till September 30, 1891, "she being placed at the disposal of the charterer in the Port of Greenock or Port-Glasgow, in such berth as charterers may direct."

The charter-party further provided—"5. That charterers shall pay for the use and hire of the said vessel at the rate of £425 British sterling per calendar month, commencing the day of delivery in good order and ready for sea in the Clyde, notice whereof to be given to charterers or agents, and at and after the same rates for any part of a month; hire to continue from the time specified for commencing the charter and the vessel is placed at charterers' disposal until her re-delivery to owners at the expiry of this charter-party. . . . 5. Payment of said hire to be made in cash monthly, in advance, to owners in Glasgow without discount, first month's hire to be paid before the steamer leaves the Clyde. Charterer agrees to give banker's guarantee for the due payment of hire money, and in default of such payment or payments as herein specified, the owners or their agents shall have the faculty of withdrawing the said steamer from the service of the charterers, without prejudice to any claim they (the owners) may otherwise have on the charterers in pursuance of this charter."

The vessel was to be used for passenger service between Hastings and other ports on the south of England. No particular day for delivery was specified in the charter-party, as the vessel was at the time being fitted out for the season, and the owner did not know exactly when he would be ready to deliver her.

On Monday 13th July Carswell's brokers telegraphed to Collard that the "Victoria" would be handed over at Glasgow on