occupying a Saturday forenoon and an hour on the following Tuesday—*disallowed* as excessive.

The Court in this case remitted back to the Auditor to tax the petitioner's account as between party and party.

Upon the Auditor's report coming up of new for approval, the respondent presented a note of objections thereto, taking exception to certain items allowed by the Auditor as excessive or extrajudicial.

Objection was taken, *inter alia*, to fees of eight guineas and four guineas allowed to senior counsel, and of five guineas and three guineas allowed to junior counsel, for a debate in the summar roll on the relevancy of the petition on 5th and 8th November 1897; and charges amounting to £16 for copying certain correspondence relating to the subject of a previous action between the parties and certain other correspondence were also objected to.

The respondent argued that the fees allowed to counsel were grossly excessive. The discussion on relevancy had only occupied a Saturday forenoon and one hour on the following Tuesday morning. The correspondence, for copies of which a charge had been allowed, had nothing to do with the present action. The whole account was excessive, and the simplest method of dealing with it would be for the Court to fix a lump sum which would reasonably represent that portion of the expenses of the petition to which the petitioner had been found entitled. [LORD PRESIDENT—Can you give us any authority, Mr Hunter, in support of a proposal which *prima facie* seems not unreasonable? HUNTER, for the respondent, replied that he had been unable to find any authority for his suggestion.]

Counsel for the petitioner having been heard in answer to the note of objections,

LORD PRESIDENT—There are three things which strike one on considering this discussion. The first is that this is a very large account. The allowance of expenses excluded the proof, and accordingly this sum of £132 is the expense of a summary petition for the custody of children, there being no complication in the case except these, first, the recalcitrancy of the respondent in the matter of delivering up the children in terms of Lord Moncreiff's interlocutor, and secondly, the great fulness, to say the least of it, with which the written and oral pleadings disclosed the views, feelings, and opinions of the parties, present and past.

But the next point which I observe upon is that if, passing from the aggregate sum which I say is startling, you look at the items, it does not strike one as very like an account taxed as between party and party. There are a latitude and indulgence in dealing with the items which I confess rather startle me. There stand out two items on which I think the charges are excessive in one and inadmissible in another. I have no doubt that learned counsel frequently, or at least occasionally, receive twelve guineas from their own clients on a debate on the relevancy of a petition and answers. But it certainly strikes one as clearly over the line of what can be allowed as a legitimate charge between party and party, and I have no doubt Mr Hunter was right in saying that there was no precedent for it. The other item which I think is inadmissible is where there are copies allowed of some long and stale correspondence relating to a previous litigation.

The question is, how can we deal with this account? and I own that I think the taxation is scarcely in accordance with the spirit and terms of the interlocutor. But then the Auditor has authority to deal with those subjects, and it is extremely difficult as a practical matter for the Court to tax an account over again. It seems to me, therefore, that we must do the best we can for Mr Hunter's client by striking out and modifying those items which are clearly appreciable by ourselves. I think we should strike out the allowance of those copies of the correspondence which has been in dispute, and that we should reduce the fees allowed at the debate. Your Lordships will probably have your own views as to the proper amount.

LORD ADAM and LORD KINNEAR concurred.

LORD M'LAREN was absent.

The Court sustained the objections *quoad* the fees to counsel under dates 5th and 6th November 1897, and the fees for copying correspondence, amounting in all to £26, 7s. 6d., and decerned in favour of the petitioner for £106, 3s. 5d., being the taxed amount of the petitioner's account less the above sum.

Counsel for the Petitioner—C. K. Mackenzie. Agent — Alexander Campbell, S.S.C.

Counsel for the Respondent — Hunter. Agents—Menzies, Bruce-Low, & Thomson, W.S.

Tuesday, May 24.

FIRST DIVISION.

[Sheriff of the Lothians and Peebles.

HALLPENNY *v.* DEWAR.

Mines and Minerals—Feu Contract—Reservation of Power to Superior to Sink Pits, &c., upon Payment of Surface Damages—Damage by Subsidence—Arbitration.

A feu-charter contained the following clause:—"Reserving always to me [viz., the superior] and my foresaids the whole mines, metals, minerals, fossils, coal, clay, limestone, ironstone, whinstone, freestone, and other stone, whether for ornamental or building purposes, within the piece of ground hereby disponed, and full power and liberty to me and my foresaids, or any person authorised by us, to search for,

work, win, and carry away the same, and to make bores, sink pits, erect houses and machinery, and to make aqueducts, levels, drains, quarries, roads, railways, and others necessary for all or any of these purposes, upon payment of surface damages, as the same shall be ascertained by two arbiters, one to be chosen by me or my foresaids, and the other by the said Thomas Thomson [the vassal and the pursuer's author], or his foresaids, or by an oversman to be appointed by such arbiters in case of their differing in opinion."

The superior having refused to nominate an arbiter to ascertain the surface damages sustained by the vassal's feu through subsidence caused by the underground mineral workings of the superior in virtue of his reserved power, *held* that such damages fell within the clause, and an arbiter accordingly *appointed* on the vassal's prayer, in terms of the Arbitration (Scotland) Act 1894 — *The Governors of Daniel Stewart's Hospital* v. *Waddell*, July 2, 1890, 17 R. 1077, *followed*.

Mary Hallpenny, the pursuer in this action, was the proprietor of about a quarter of an acre of ground and a house built thereon, feued from the defender Captain Dewar of Vogrie.

The feu-charter contained the following clause:—"Reserving always to me [viz., the superior] and my foresaids the whole mines, metals, minerals, fossils, coal, clay, limestone, ironstone, whinstone, freestone, and other stone, whether for ornamental or building purposes, within the piece of ground hereby disponed, and full power and liberty to me and my foresaids, or any person authorised by us, to search for, work, win, and carry away the same, and to make bores, sink pits, erect houses and machinery, and to make aqueducts, levels, drains, quarries, roads, railways, and others necessary for all or any of these purposes, upon payment of surface damages, as the same shall be ascertained by two arbiters, one to be chosen by me or my foresaids, and the other by the said Thomas Thomson [the vassal and the pursuer's author] or his foresaids, or by an oversman to be appointed by such arbiters in case of their differing in opinion."

The present action was brought under the Arbitration (Scotland) Act 1894 (57 and 58 Vict. cap. 13), secs. 3 and 6, praying the Sheriff to appoint an arbiter with all the powers of an arbiter under the feu-charter, to ascertain along with an arbiter to be chosen by the pursuer the surface damages sustained by the pursuer to her property, arising from the workings of the defender, his tenants, and others having his authority, in virtue of the powers reserved to the superior in the feu-charter.

The pursuer averred that the defender or his mineral tenants had worked the minerals within her feu in virtue of the reserved power in the feu-charter. She further averred that Lavingstrang Cottage, her property in question, had for many years past suffered considerable damage arising from the mineral workings of the defender and his tenants. "The damage to Lavingstrang Cottage has been gradually increasing, the walls are cracked, and the plaster is falling off. The pursuer has called upon the defender to settle her claim for damages to Lavingstrang Cottage, but he refuses to pay her any sum, or even to appoint an arbiter to ascertain, along with an arbiter to be named by her, in terms of the feu-charter, the damages to which she is entitled."

The defender denied that any damage had been done to the cottage by the mineral workings of himself or his tenants.

The pursuer pleaded, *inter alia*—"(2) The defences are irrelevant."

The defender pleaded, *inter alia*—"(2) In respect that the arbitration clause founded on does not cover the question of the defender's liability for damage arising from subsidence due to underground workings, the petition should be refused with expenses."

On 17th March 1898 the Sheriff-Substitute (HAMILTON) sustained the second plea-in-law for the pursuer, repelled the defences, and appointed a builder in Edinburgh as arbiter in terms of the prayer of the petition.

"*Note.*—Counsel for the defender stated only two objections to the petition, and these the Sheriff-Substitute has no difficulty in repelling. One was to the effect that the provisions of the Arbitration (Scotland) Act 1894 are not applicable. The other was merely a *réchauffé* of arguments that were rejected as untenable in the cases of *Oswald* v. *Gordon*, November 22, 1853, 16 D. 70; *Neill's Trustees* v. *Dixon*, March 19, 1880, 7 R. 741; and *Governors of Daniel Stewart's Hospital* v. *Waddell*, July 2, 1890, 17 R. 1077."

The defender reclaimed, and argued—(1) The damage here was due to subsidence arising from underground working. It was therefore not included in the arbitration clause, which dealt only with surface damage, *i.e.*, damage arising from operations on the surface, such as those enumerated in the second part of the clause, viz., to "make bores, sink pits, erect houses," &c. The power to "search for, work, win, and carry away" the minerals was not affected by the condition, "upon payment of surface damages," and was only explanatory of the reserved right to the minerals themselves — *Galbraith's Trustee* v. *Eglinton Iron Company*, November 25, 1868, 7 Macph. 167, *per* Lord Deas, 171, *per* L.-P. Inglis, 172, referred to. (2) If subsidence was the cause of the damage, the defender had been guilty not of a breach of contract but of a delict—a violation of the pursuer's common law right to support of the surface. The pursuer's remedy accordingly was not supplied by the clause in the feu-charter which gave the defender no right to let down the surface at all. *White* v. *Dixon*, December 22, 1881, 9 R. 375, *per* Lord Shand, at 390, *aff.* 10 R. (H. L.) 45, was conclusive on the point, and the same view had been taken in *Buchanan* v. *Andrew*, February 24, 1871, 9

Macph 554, *rev.* 11 Macph. (H. L.) 13; in *Davis* v. *Treharne*, 1881, L.R., 6 A.C. 460; in *Aspden* v. *Seddon*, 1875, L.R., 10 Ch. 394, *per* Mellish, L.J. 401; and in *Love* v. *Bell*, 1884, 9 A.C. 286. In the cases cited by the Sheriff the question had never been argued whether the arbitration clause applied or not. The *Governors of Daniel Stewart's Hospital* v. *Waddell*, July 2, 1890, 17 R. 1077, was undoubtedly, however, an authority in favour of the pursuer, and was distinguishable only on the ground that the question there arose between landlord and tenant, not between superior and vassal. That case was wrong decided.

Argued for the pursuer—The Sheriff-Substitute was right, and the authorities relied upon by him were conclusive. As a matter of mere grammatical construction the condition "upon payment of surface damages" affected the whole "power and liberty" reserved to the superior, and therefore applied to underground workings as well as to operations on the surface. The arbiters were to "ascertain," not merely to assess the damages; and that expression implied that it was for them to decide whether damage of the kind contemplated by the clause had been done at all. The defender had admitted that *Waddell, ut sup.*, was an authority against him; and until *Waddell* was overturned he could not prevail in his contention.

LORD ADAM—[*After recapitulating the record*]—Now, the mineral workings which the petitioner alleges have occasioned damage to her property mean—as I understand—underground workings and not workings on the surface of the ground. It is said by the respondent that on a sound construction of the clause of reservation damages caused by such working are not surface damages. I think that the judgment of the Sheriff is right, and I agree with him.

[*His Lordship quoted the clause and proceeded*]—

The question is whether the words "upon payment of surface damages" go back so as to include the whole matters specified in the clause, including the searching for, working, winning, &c., or are limited to the last part, making bores, &c. On any construction the reference back is to the whole clause, and includes the payment of damages arising from the exercise of all the powers of winning, working, &c., and not merely to those arising from the making bores, &c. If that is so, then there is no further difficulty in the case. It is quite clear on the authorities that it depends on the construction of each particular contract whether the expression "surface damages" include damages arising from subsidence of the ground occasioned by underground mineral workings, or are limited to damages arising from operations on the surface. In my opinion the words here apply to both, and the damages resulting from underground workings are just as much referred to arbiters for ascertainment as those arising from operations on the surface. I therefore think that the Sheriff is right, but I think that, if Mr Rankine wishes it, he should still have an opportunity of naming an arbiter.

LORD M'LAREN—This is an application made under that very useful statute—the Arbitration (Scotland) Act 1894—in respect of the failure of one party to a feu-charter to do his part in referring a question in dispute to arbitration. The petition is opposed on the ground that the clause in the feu-charter, which is founded on by the petitioner, only provides for the settlement by arbitration of what may be called compensation for the value of land taken, but does not provide for the determination by arbiters of claims for injuries done to buildings, &c., by subsidence, that is, for proper damages, as distinguished from compensation for the value of land taken. In order to the fair construction of the clause in question, it is not perhaps immaterial to consider the rights of a proprietor of minerals independently of stipulation. He may of course work the minerals which he has reserved, but he can only do so at a great disadvantage, because he can only do so under the condition of giving subjacent support to all buildings and other *opera manufacta* which would be injured by the withdrawal of support. It is plain that in many cases the right of working only under such conditions would be valueless. It is usual therefore, in all charters or conveyances of the surface by a proprietor who retains the minerals to reserve more ample powers than the law would give, and I think the observation just made may furnish the key to those clauses which extend the power of a proprietor of minerals so as to entitle him to work them without the liability of restraint from interdict, and substitute for the common law right to interdict a right to pactional compensation for the damage done. Now, the clause in question seems to me to be sufficiently clear and specific. It sets out with a power to do certain things, and concludes with the words "upon payment of surface damages." I think that, apart from all speculation as to the reason or motive of the clause, the grammatical construction requires that all the things enumerated between the words "full power and liberty," and the condition on which the power was given, must be taken to be subject to the condition, and that when power is reserved to search for, work, &c., that is just as much qualified as the power to make aqueducts, roads, &c. A claim for pecuniary compensation is thus reserved for injury arising from any of the acts which might but for the clause in question have founded an interdict. I have come to the conclusion, therefore, that the claim put forward for the cracking of the petitioner's cottage, if it is due to the subsidence of the ground occasioned by the working of the minerals, is a claim referred to arbiters, and that is the only matter which we are now entitled to decide. Of course when parties have joined issue before the arbiters, it will be for the arbiters to say whether damage has been done, and if

so, whether that damage is the result of new operations, or is merely the reappearance of old damage which has already been paid for and compensated. I agree with your Lordship that the Sheriff's judgment appointing an arbiter should be affirmed.

LORD KINNEAR—I agree with your Lordships. I do not think it is necessary to consider whether the clause in question confers a contractual right upon the superior to let down the surface. The judgment of the House of Lords in *White* v. *Dixon* would create a very formidable obstacle in the petitioner's way were it necessary for her to make out that proposition. But the question is whether the parties have agreed to create a tribunal of their own for the purpose of ascertaining or assessing — for I cannot think it makes the slightest difference which word is used—the damage which may be done to the feuar by mineral workings of the superior or his tenants. Now, if there had been no previous authority on the subject, that might have been a question of some difficulty, though even then I should agree that upon a consideration of the words before us such a tribunal was set up. Whatever be the purpose of the reservation to the superior of the power to search for minerals, we must assume that it had some purpose; and unless it was intended to mean that the condition under which he was to exercise his reserved power of working minerals should be the payment of surface damage to be fixed by arbitration, it could have no meaning whatever. As matter of right, it gives no additional power to the superior beyond what he had fully reserved already by reserving the property of the minerals, unless it either gave him the contractual right to let down the surface or provided a process of arbitration for ascertaining the damage if he did so. I do not consider whether the first of these hypotheses could be maintained, but the second is quite sufficient for this case. It appears to me that the case of *Waddell* is directly in point, and I concur with regard to your Lordship's proposal.

The LORD PRESIDENT was absent.

The Court adhered to the interlocutor appealed against, and of new decerned in terms thereof.

Counsel for the Pursuer—W. Campbell —Cook. Agents — Waddell & M'Intosh, W.S.

Counsel for the Defender—Rankine, Q.C. —Gloag. Agent—A. J. Napier, W.S.

Wednesday, May 25.

FIRST DIVISION.

ROSS *v.* MACPHERSON.

Expenses—Action for Reduction of Will Unsuccessfully Defended — Allegations against Character of Trustees.

An action raised for the reduction of a will contained certain allegations with reference to the impetration of the will against the character of gentlemen who were nominated as trustees thereunder. The action was defended by the trustees, unsuccessfully as regards the will, which was reduced by the verdict of a jury, but there was a special finding exonerating the trustees from the charges made against them. *Held* that they were entitled to expenses out of the trust estate.

An action was raised by Donald Ross, ploughman, North Cadboll, parish of Fearn, in the county of Ross and Cromarty, against the Rev. Lewis Macpherson, minister of the parish, and Mr John Mackenzie, town-clerk of Mackenzie, as trustees under "a pretended trust-disposition and settlement by the late William Ross," the pursuer's brother, dated 14th July 1896, and as individuals.

The summons concluded for reduction of this trust-disposition. The averments of the pursuer contained serious allegations upon the character of these defenders, to the effect that they had fraudulently impetrated the will from the deceased William Ross. Defences were lodged by Mr Macpherson and Mr Mackenzie.

The case was tried before the Lord President and a jury on March the 14th and 15th, upon the following issues—"1. Whether the trust-disposition and settlement of 14th July 1896, of which reduction is sought, is not the deed of the said deceased William Ross. 2. Whether on or about the 14th July 1896, the said deceased William Ross was weak and facile in mind and easily imposed upon; and whether the defenders Lewis Macpherson and John Mackenzie, taking advantage of the said weakness and facility, did, by fraud and circumvention, obtain or procure from the said William Ross the said trust-disposition and settlement to the lesion of the said William Ross."

The jury returned the following verdict—"Find for the pursuer by a majority of nine to three on the first issue, and by the same majority find that the deceased William Ross was of weak mind but unanimously exonerate the defenders from all charges contained in the second issue."

On the pursuer moving the Court to apply the verdict of the jury, he asked for expenses against the trustees personally, on the ground that they had been unsuccessful in defending the action, and that they had had no sufficient reasons for defending, the allegations as to their character contained in the record not having been before the jury.