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.

The defenders objected, and moved that they should be allowed to retain their own expenses out of the trust estate. They argued that their conduct had been reasonable, and that they had been in good faith in defending the action, more especially as a very serious attack was made upon their own character. The pursuer had withdrawn certain of the charges, and the defenders had been completely exonerated by the jury. It was a question of circumstances whether trustees who had unsuccessfully defended a trust-deed were entitled to their expenses — *Watson* v. *Watson's Trustees*, January 20, 1875, 2 R. 344.

LORD PRESIDENT—The jury have given a special verdict. On the first issue they find in general terms for the pursuer; but on the second issue they do not find for the pursuer, but "find that the deceased William Ross was of weak mind, but unanimously exonerate the defenders from all charges contained in the second issue." It seems to me that we must give at all events equal, if not greater, deference to the special finding upon the question of fact, more especially when the question is one of conduct. Now, on the assumption of the soundness of the jury's verdict, the position is that these gentlemen, the defenders, acted honestly and rightly in relation to this will, and it follows that they were right in accepting the trusteeship purported to be imposed upon them by the will. The facts are peculiar in this respect, that the charges from which these gentlemen are exonerated are exactly the charges which apply to the inception of the will, and to the accepting of the trusteeship, and we could not hold that the views of the jury were correct, and at the same time that the trustees were blameworthy, and were not entitled to be indemnified out of the estate from the consequences of this action. I must own that I have some difficulty in harmonising, or conjecturing any harmony between, the jury's finding in fact and the implications contained in their findings in favour of the pursuer on the two issues, but I am disposed to think that they may have considered there was some strain of insanity in the testator, which, though occult, none the less disabled him from executing a valid testament. I do not say that is my own view of the facts, but state the theory, because some such theory is necessary as a condition of the argument upon the question of expenses. On the other hand, my own view, as well as that of the jury, is that these gentlemen acted rightly, and accordingly I am of opinion that they are entitled to be indemnified out of the estate.

LORD M'LAREN—I am of the same opinion. It seems to me that when the character of trustees is impugned in an action of this nature, if they are honest men they are bound to defend their character. If the verdict is in their favour on the question of fraud and circumvention, I think it would not be equitable under any circumstances that the trustees should be subjected to an award of expenses. As to whether the defenders are also entitled to have their expenses paid out of the trust estate, I should be guided by the impression formed by the presiding judge as to the merits of the action. In the present case I have no hesitation in agreeing with your Lordship in the chair.

LORD ADAM and LORD KINNEAR concurred.

The Court pronounced the following interlocutor:—

> "Apply the verdict . . . and in respect of the finding upon the first issue reduce the trust-disposition and settlement: Find the defenders entitled to retain their expenses out of the trust estate, also find the pursuer entitled to his expenses out of the trust estate."

Counsel for the Pursuer—A. J. Young—Macaulay Smith. Agent—George M. Leys, Solicitor.

Counsel for the Defenders—Guthrie, Q.C. —Kennedy. Agents—Morton, Smart, & Macdonald, W.S.

Wednesday, May 25.

FIRST DIVISION.

M'INTOSH *v.* ROY.

Poor's Roll—Probabilis causa litigandi.

The Court will not entertain any application to review the decision of the reporters on *probabilis causa litigandi* unless it is alleged that there has been a gross miscarriage of justice or failure of duty upon the part of the reporters.

This was an application by Alexander M'Intosh in a petition presented by him for admission to the poor's roll. Counsel for the parties having been heard by the reporters, they found that the applicant had no *probabilis causa*. He now appeared and presented a note to the Court in which he stated that the reporters had given no grounds for their finding, and that it was erroneous. He craved the Court either to admit him to the roll or to order the reporters to give the grounds of their decision.

Counsel for the respondent maintained that the decision of the reporters was final, and that it could not be subjected to review unless there were allegations of a gross miscarriage of justice or failure of duty on the part of the reporters. He quoted in support of his argument the cases of *Currie*, January 21, 1829, 7 S. 302, and *Robson*, May 12, 1876, 13 S.L.R. 421.

LORD PRESIDENT — The decisions are conclusive on this matter. The Court will not, apart from allegations of the character of those referred to by Mr Morison, entertain the question whether the reporters on *probabilis causa litigandi* are right or