Tuesday, July 14.

SECOND DIVISION.

[Lord Low, Ordinary.

THE SHAWSRIGG FIRECLAY AND ENAMELLING COMPANY, LIMITED, *v.* THE LARKHALL COLLIERIES, LIMITED.

Mines and Minerals—Mineral Lease—Construction—Circumstances at Date of Lease—Lease of Fireclay without Reservation of Right to Work Coal—Subsequent Lease of Coal—Interdict of Coal Working.

In 1896 the proprietor of the lands of S. granted a lease in favour of a fireclay company of the whole clay and fireclay within and under these lands. The lease contained no reservation of coal or other minerals or of right to work them. In 1902 the proprietor leased to a coal company the whole of the workable seams of coal within parts of the lands of S. When the lease was granted in 1896 to the fireclay company coal was being excavated in the knowledge of the fireclay company from parts of the lands of S. by other tenants of the proprietor, but before 1902 the proprietor had reacquired the coal which had been worked by these tenants, except one portion of it to which the fireclay company had acquired right. The result of working the coal, even in accordance with approved methods, was to render it impracticable thereafter to work the subjacent strata of fireclay.

Held (*rev.* interlocutor of Lord Low and *diss.* Lord Moncreiff) that the fireclay company was entitled to interdict against the coal company excavating the coal.

In May 1902 the Shawsrigg Fireclay and Enamelling Company, Limited, Glasgow, raised an action against the Larkhall Collieries, Limited, Glasgow. The conclusions of the summons were—(1) for declarator "that the pursuers have had since the term of Martinmas 1893, and still have, the sole and exclusive right, under a lease dated 30th May and 2nd June 1896 between Henry Montgomery Macneill Hamilton, Esquire, of Raploch, Broomhill, and others, in the county of Lanark, with consent as therein mentioned, and the pursuers, to the whole clay including surface clay and fireclay, including seams of every description lying within and under the lands of Shawsburn and Harelees, conform to and as shown on the plan or sketch annexed and subscribed as relative to the said lease, and extending to 216 acres or thereby, part of the said lands of Raploch, Broomhill, and others, with full powers to the pursuers to search for, work, win, raise, manufacture, store, or carry away the whole of said clay and fireclay;" (2) for declarator "that the defenders have no right to remove or rip up the strata of fireclay lying within and under the said lands of Shawsburn, or to undermine or hole in the said strata of fireclay in their operation of removing the coal lying within and under the said lands of Shawsburn, or to carry on their operations of removing the said coal by the 'long wall' method of working, in such a way as by insufficient packing to remove the support for the superincumbent strata, and to render it impracticable for the pursuers to work the fireclay within and under the said lands of Shawsburn, or to remove the said coal by the 'stoop and room' method in such a a way as by removing the stoops without substituting sufficient artificial support for the superincumbent strata to render it impracticable for the pursuers to work the said fireclay;" and (3) for interdict against the defenders removing or ripping up the strata of fireclay or undermining or carrying on operations as above mentioned; and (4) for payment by the defenders to the pursuers of £2500 damages.

Proof was led. The following narrative of the facts and of the contentions of parties is taken from the opinion of the Lord Ordinary (Low):—"In 1896 Mr Hamilton, of Raploch and Broomhill, granted a lease in favour of the pursuers of 'the whole clay (including surface clay) and fireclay (including seams of every description) lying within and under the lands of Shawsburn and Harelees.' Although the lease is dated in 1896, the date of entry is declared to have been Martinmas 1893, and the duration of the lease is thirty-one years from the latter date. The lease contains no reservation of coal or other minerals, or of right to work them.

"In 1902 Mr Hamilton granted a lease in favour of the defenders of 'all and whole the workable seams of coal, limestone, and fireclay, so far as belonging' to him in lands embraced in the pursuers' lease.

"The pursuers have hitherto been working the fireclay in a part of the mineral field in which the defenders are not working the coal, but they aver that the fireclay in that part of the field will be exhausted in a year or two, when it will be necessary for them to obtain the fireclay which they require for their works from the area in which the defenders are working the coal. The defenders are excavating coals from seams immediately underneath which are seams of fireclay, and the effect of their operations is to render the subjacent fireclay unworkable.

"The pursuers have accordingly brought the present action to have it declared that they have the sole and exclusive right to the fireclay within the whole lands included in their lease, and that the defenders have no right to interfere with the fireclay, or to work the coal in such a way as to render it impracticable for the pursuers to work the fireclay.

"It is admitted on the one hand that the defenders' coal workings are being conducted according to customary and approved methods, and upon the other hand that the result of excavating the coal is to render it practically impossible to work the subjacent strata of fireclay. It further appears from the evidence that

if fireclay strata, which are immediately below coal, were worked out first, these coal strata could not thereafter be worked to a profit. In short, where there are adjacent seams of coal and fireclay the only way to win both is to work them together.

"The pursuers maintain that as their lease is prior in date to that of the defenders, and gives them absolute right to the whole seams of fireclay of every description, without any reservation of other minerals, they are entitled to have the working of the coal stopped in so far as it would render unworkable fireclay which they might require during the currency of the lease. They further maintain that the evidence shows that they will in a short time require the fireclay under the seams of coal which the defenders are working.

"The defenders upon the other hand argued that in the circumstances the pursuers' lease must be construed as giving them right to the fireclay only in so far as that was consistent with the working out of the coal, and that the lease to the defenders could not therefore, so far as the coal was concerned, be regarded as derogating from the grant which had previously been made to the pursuers. That argument was founded chiefly upon the fact that the coal in the whole of the area had, prior to the pursuers' lease, been at different times let to tenants by whom it had been worked, and that part of the coal was actually being worked when the pursuers' lease was granted.

"The defenders further contended that as matter of fact the pursuers did not require seams of fireclay which lie underneath coal strata, because there are fireclay strata, which are not connected with coal strata, which contain more clay than the pursuers could possibly work during their lease, and which would not be in any way interfered with by working the coal.

"In order to appreciate the position of matters it is necessary to see what is the nature and history of the mineral field.

"The lands of Shawsburn and Harelees, the clay in which was let to the pursuers, are 216 acres in extent. The area may be regarded as being divided into three sections. There is first the northern section, which embraces the portion lying to the north of a fault which runs across the lands from east to west, and which is spoken of in the evidence as the forty fathom fault. The plan shows very distinctly the lands and the sections into which they are divided. The forty fathom fault is shown by a red line running across the lands close to Shawsburn Pit No. 2. The next section is the middle section, which includes the land lying between the forty fathom fault and the Stonehouse branch of the Caledonian Railway, which is also shown on the plan. The remaining section is all the land lying to the south of the railway.

"The coal seems to have been worked to a small extent from an early period—perhaps seventy or eighty years ago—but the first working of which there is any definite information was that carried on by one Spencer prior to 1875. He appears to have worked to a considerable extent in the ell, main, and splint seams, and as these seams only appear in the northern section of the field his workings must have been confined to that section.

"Between 1875 and 1880 no coal was worked, but in the latter year the Swinehill Coal Company obtained permission from the proprietor (without any lease) to work the coal in the southern section. They then worked the Kiltongue and Virtuewell seams (which are the uppermost seams in that section) and to a very trifling extent the lower Drumgray seam. The Swinehill Company's workings continued until 1899, although after 1893 they appear to have been of small extent. In 1899 that company attempted to assign their right to the coal to the Darngavel Coal Company, but the landlord objected that the Swinehill Company had worked only by permission, and had no right which they could assign, and accordingly the Darngavel Company was not allowed to work the coal.

"By lease dated the 18th December 1900 Mr Hamilton let to George Burt and Hugh Train, for a period of twenty-five years from Whitsunday 1900, 'All and whole the workable seams of coal, limestone, and fireclay, so far as belonging to the first party' (the lessor), lying to the south of the Stonehouse branch of the Caledonian Railway—that is, the area which had previously been held by the Swinehill Company.

"The lease granted to Burt and Train appears to have been subsequently acquired by the defenders, although I do not know the precise date of the transaction. That completes the history of the southern section of the field, and I shall now turn to the other sections.

"By lease dated in June and August 1890 Mr Hamilton let to D. & W. Sym, for a period of nineteen years, 'the whole coal so far as unwrought down to and including the lower Drumgray seam' in the area lying to the north of the branch railway—that is, in what I have called the middle and northern sections of the mineral field. The lessor reserved all other minerals, 'including fireclay,' with full power to work the same 'at pleasure.'

"The Messrs Sym worked the ell, main, splint, and Virtuewell seams, but never to a greater extent than from 5000 to 7000 tons a-year.

"By lease dated in December 1890 the Messrs Sym sublet the coal in the northern section of the field to the Stonehouse Coal Company. In 1895 the pursuers obtained an assignation from the Stonehouse Company of their sub-lease. The pursuers are accordingly in right of and are working both the coal and the fireclay in the northern section.

"In the beginning of 1901 Mr Hamilton purchased from D. & W. Sym their rights under their lease, and granted to them a letter undertaking to indemnify them for anything which they had done in working the coal.

"The only remaining lease which I require to mention is that in favour of the

defenders, which is dated 13th and 14th November 1902. The subjects let are described as 'All and whole the workable seams of coal, limestone, and fireclay so far as belonging to the first party, lying in and under all and whole the lands of Shaws, so far as not already let to the lessees, all as more particularly shown' upon the plan.

"I take it that the words 'so far as not already let to the lessees' refer to the fact that the defenders had acquired right to the lease granted to Burt and Train of the southern section of the field. The plan annexed to the lease represents the middle and northern sections. As I have already said, however, the pursuers had acquired right to the sub-lease of coal in the northern section under which they are actually working the coal. For practical purposes therefore the defenders' lease of 1902 may be regarded as including only the middle section, but as I have said they had already acquired right to the coal in the southern section from Burt and Train.

"The position of matters therefore is this —In 1896 the pursuers obtained an unqualified right to the seams of fireclay of every description in the whole lands, while in 1900 the defenders (through Burt and Train) obtained a lease of the coal in the southern section, and in 1902 of the coal in the middle section. I mention coal only, because the defenders do not now maintain that they have any right, in a question with the pursuers, to the fireclay."

The pursuers' lease contained a clause of warrandice at all hands.

On 17th January 1903 the Lord Ordinary pronounced the following interlocutor:— "Finds it unnecessary to dispose of the first declaratory conclusion of the summons: Therefore dismisses the cause and decerns: And *quoad* the remaining conclusion assoilzies the defenders therefrom, and decerns."

Opinion.— . . . . . . "The pursuers' case rests upon the fact that their lease is prior in date to the leases to which the defenders have right. Now, if the coal had never been let, or if it had been unlet and under the control of the landlord when the pursuers' lease was granted, I think they would have been entitled to succeed, because in that case neither the landlord nor anyone taking from him could have worked the coal so as to render ineffectual the prior grant of the fireclay to the pursuers. But that was not the position of matters. On the contrary, when the pursuers' lease was granted the whole coal in the mineral field was let to tenants, by whom it was being worked, and the pursuers knew that that was the case. The pursuers founded upon the fact that the workings were of small extent. I do not think that that circumstance is material. The important matter is that the coal was in fact let for the purpose of being worked, and that the pursuers took their lease in the knowledge that that was so.

"It is true that before the defenders' leases were granted the landlord had reacquired the coal, and thereby had it in his power to give full effect thereafter to the pursuers' right to the fireclay. I do not understand the pursuers to contend that they were entitled to object to the coal being worked under the leases which were current when their lease was granted, and the question is whether when the former leases terminated the landlord was barred from again letting the coal, or at all events from letting it without such restrictions as would have prevented interference with workable seams of fireclay?

"In order to test that question, take, in the first place, the case of the Swinehill Coal Company. As I have already said, they had no lease, but were working by permission or licence, which I suppose was renewed from year to year. Now, suppose that in 1899 the Swinehill Coal Company had been desirous to continue to work the coal in the southern section, and the landlord had been willing to continue permission to them to do so, I do not think that the pursuers could have objected. Again, take the case of the Messrs Sym. They had a lease under which they would have been entitled to work the coal in the middle section until 1909. If the landlord, instead of buying out the Messrs Sym, had allowed their lease to run on to its natural termination, the pursuers could not have objected, nor do I think that they could have objected to the Messrs Sym being allowed to sit on by tacit relocation, nor to a renewal of the lease being granted to them.

"If, then, the landlord could not have been prevented from continuing the tenancies of the coal which existed when the pursuers' lease was granted, was he not entitled to grant new leases of the coal to new tenants when the old leases terminated? I think that he was, provided that the new leases did not put the pursuers in a worse position as regarded working the fireclay than they were in under the old leases. I take that view because the subject in reference to which the pursuers' lease was entered into was a mineral field in which the coal had been and was being worked, and the pursuers knew that that was the nature of the subject in reference to which they were contracting. I do not know why the pursuers' lease did not contain a reservation of the coal and power to work it. It seems to me that it ought to have done so if it was only intended to give the pursuers such a right to the fireclay as was consistent with working the coal. But on the other hand, if the meaning of the lease was that for which the pursuers contend, it was equally defective. As I have pointed out, there was a current lease of the coal (namely the Sym's lease, which included the greater part of the whole area) under which working was going on. The pursuers do not contend that they could have objected to coal being worked under that lease, but their position practically is that when the lease came to an end the landlord was debarred from working, either by himself or his tenants, any coal underneath which there was a workable seam of fireclay. If that was the contract it should have been expressed in the lease.

"I am therefore of opinion that the lease

must be construed in the light of the circumstances under which it was entered into, and in view of the nature of the subject to which it referred, namely, a mineral field in which the coal had been and was being worked. I therefore do not think that the pursuers can object to the coal being continued to be worked simply because the leases current when they obtained right to the fireclay have expired, and new leases have been granted, seeing that the new tenants (the defenders) are admittedly working the coal in a proper manner, and no powers are conferred upon them by their leases which gave them right to interfere with the fireclay to a greater extent than the tenants of the coal at the time when the pursuers obtained their lease could have done.

"I shall therefore assoilzie the defenders from all the conclusions of the summons, except the first, which it seems to me it is unnecessary to dispose of, because it simply seeks declarator of the pursuers' right to the fireclay in the terms in which their lease is expressed."

The pursuers reclaimed, and argued—It was impossible to work the coal without damaging the fireclay, and *vice versa.* The pursuers having under the prior lease an unqualified right to the fireclay were entitled to interdict the defenders from working the coal so as to damage the subject of their lease. The pursuers were entitled to demand that the terms of their contract should be carried out. The landlord could not derogate from the grant given to their author by his own actings or by the actings of others under his authority. The construction of their lease was free from ambiguity. No views of a conjectural kind connected with the circumstances as at the date of the lease could be considered in the face of the plain terms of the lease—*Buchanan* v. *Andrew,* March 10, 1873, 11 Macph. (H.L.) 13, opinion of Lord Chancellor Selborne, at p. 17, 10 S.L.R. 320 and 321. Even if the rights of the pursuers were held to be limited in 1896 by existing rights, the landlord had acquired these subsequently and could not again give them out to the prejudice of the pursuers. The fact that the pursuers' lease was prejudicial to subsequent tenants did not matter in a question as to the legal rights of parties—*Hurlet and Campsie Alum Co.* v. *Earl of Glasgow,* February 12, 1850, 12 D. 704, *aff.* June 26, 1850, 7 Bell's App. 100; *Mundy* v. *Duke of Rutland,* 1882, 23 Ch. Div. 81.

Argued for the defenders and respondents—The Lord Ordinary had arrived at a right conclusion. A mineral lease must be construed according to the circumstances existing at its date—*Anderson* v. *M'Cracken Brothers,* March 16, 1900, 2 F. 780, 37 S.L.R. 58. A lease of this kind implied that the landlord was entitled to make fair use of his property by feuing or otherwise, so long as he did not thereby make the grant to his tenant absolutely useless. No clause referring to the coal was inserted in the pursuers' lease, because all parties knew that the coal was let at the time and understood that the coal was to be worked out. They were in the same position as if there had been a reservation to work the coal inserted in the lease of the fireclay. There was room both for the working of coal and fireclay, and it would be unreasonable to stop the working of the coal whenever it interfered with fireclay that possibly would never be made use of. A prohibition against working coal was not to be inferred from the want of a clause of reservation in the fireclay lease. The rights granted to the defenders were not more extensive than those which others had at the date of the fireclay lease.

During the discussion Mr Hamilton, the landlord, lodged a minute craving to be sisted as a party defender in the case, and by interlocutor dated 17th June 1903 the Court sisted him as craved.

At advising—

Lord Trayner—I am unable to concur in the view which the Lord Ordinary has taken. The pursuers are the tenants of the defender Mr Hamilton (he has been sisted as a defender since the Lord Ordinary's interlocutor was pronounced) under a lease whereby he lets to them the whole fireclay situated in his lands of Shawsburn and Harelees, with power to work, win, and carry off the same. That lease, dated in 1896, but declared to have commenced in 1893, contains no reservation in favour of Mr Hamilton to work the coal. He has, however, by a lease dated in 1902, granted a lease of the coal in the same lands in favour of the other defenders, the Larkhall Collieries, Limited. It is admitted that the rights conferred by these two leases cannot be worked by their respective holders without the one invading or seriously obstructing and injuring the other. The coal and fireclay might perhaps be worked together under arrangement between the two lessees, but such an arrangement the parties have not been able to make. The pursuers accordingly ask declarator of their right to work the fireclay, and interdict against the defenders doing anything by working the coal or otherwise which interferes with or injures the fireclay workings. It appears that some of the seams of coal in the ground covered by the pursuers' lease were worked prior to the date of the pursuers' lease, but these workings do not appear to have been very extensive or important at the date of the pursuers' lease, and all the coal was reacquired by Mr Hamilton (except, I think, a small portion to which the pursuers had acquired right) before the defenders' lease was granted.

The Lord Ordinary says that if the whole coal in the mineral field in question had never been worked or had been under the control of Mr Hamilton when the pursuers' lease was granted, the pursuers would have been entitled to succeed in the present case. But the Lord Ordinary decides against the pursuers on the ground that the coal had been "let for the purpose of being worked," and that "the pursuers took their lease in the knowledge that that was so." Now, I am not prepared to hold that the pursuers' right can be limited by any existing fact, or their knowledge of it, at the time their

lease was granted. I look at their lease and find an unlimited unfettered right to work and win the whole fireclay in the specified area, without any reservation whatever in favour of existing or future coal workings. I think it not admissible in determining the extent of the right conferred on the pursuers by a formal deed of lease, to go outside of its express terms. But assuming that the pursuers' right to work the fireclay was limited by rights in the coal flowing from the landlord, and existing when the pursuers' lease was granted, all these rights had ceased to exist prior to November 1902, and the coal was then "under control of the landlord." It was then (in 1902) and in these circumstances that the lease to the Larkhall Collieries was granted. Could the landlord validly grant the lease? I think he could not. He could not in the circumstances have worked the coal himself so as to conflict with the right already conferred on the pursuers, and what he could not do himself he could not authorise another to do. The landlord could not work the coal himself nor authorise this to be done by another, because in so doing he would have been derogating from his own grant, and would have been committing a breach of the warrandice given by him in the pursuers' lease. I think therefore that the pursuers are entitled to decree of declarator and interdict as concluded for. Very little was said as to the pursuers' claim for damages, and upon that matter I should desire to hear further argument before pronouncing any judgment.

It is obvious that it is in the interest of all the parties that some arrangement should be made whereby the coal and fireclay may both be worked. I understand that this could be done, but that the parties are not agreed as to the terms on which it should be done. I venture to think that the landlord should aid his tenants in adjusting terms, not only because he will reap a better rent when both minerals are being worked, but because his mistake (as I think it) has led to the difficulty in which his tenants are placed.

LORD MONCREIFF—I am of opinion that the judgment of the Lord Ordinary is right. In his note he has given in great detail the history of this mineral field. I adopt his statement, and therefore in the remarks which I am about to make I do not intend to refer in much detail to the evidence.

Stated shortly, the object of the present action is to have the defenders interdicted from working the coal under the lands of Shawsburn in such a way as to interfere with the fireclay leased to the pursuers, or to render the working and winning of it more difficult. The pursuers in the summons and on the record seem to indicate that the defenders are working the coal improperly; indeed, they say in condescendence 4—"It is not necessary for the defenders to interfere with the fireclay for the proper working of the coal." But it clearly appears from the evidence, even of the pursuers' witnesses, first, that the defenders are working the coal out properly, interfering with the fireclay no more than is necessary in order to work the coal; and secondly that it is impossible to work out the coal without to a certain extent interfering with the subjacent fireclay and rendering the subsequent working of the fireclay more difficult.

It follows that if declarator and interdict were pronounced in terms of the summons the defenders would be at once prevented from working the coal under the lands of Shawsburn at all unless they chose to agree to the terms proposed by the pursuers. In short, they would be at the mercy of the pursuers, while the latter would (I presume it is maintained) be free to sink pits and work out the fireclay without regard to the coal. In the circumstances I am not prepared to agree to this powerful weapon being placed in the hands of the pursuers. I am far from saying that the proprietor or his advisers are free from blame in having failed to make provision in the leases for the regulation of the working of the coal and fireclay respectively. Much confusion and litigation would have been avoided if this had been done. But at the same time I am satisfied that when the pursuers obtained their lease of the fireclay they necessarily knew that the coal was being worked in several parts of the 216 acres by the landlord's other tenants in precisely the same way in which it is being worked now by the defenders. Indeed, the pursuers themselves were working the coal in the northern section, and must have known that the fireclay was necessarily interfered with. They could not and did not suppose that the working of the coal elsewhere would cease when they obtained right to work the fireclay, and accordingly they took their lease on that footing.

The area within which both the coal and the fireclay lie is divided into three portions, the first being south of the Stonehouse Branch of the Caledonian Railway, the second or middle portion being between the Stonehouse Branch and the 40 fathom fault, and the third or north portion lying to the north of the 40 fathom fault.

As regards the coal leases, the defenders have under lease the sole right to the coal in the south and middle portions, while the pursuers under a sub-lease obtained in 1895 from the Stonehouse Coal Company (who had obtained a sub-lease from Messers Sym) are entitled to work the coal in the northern section.

But in addition to their right to work the coal in the northern section the pursuers have, under a lease granted in 1896, unqualified right to the whole of the fireclay under 216 acres of the lands of Shawsburn and Harelees, which include the south and middle sections, and that for a space of 31 years. The pursuers' case is rested on the ground that this lease, which gave them unqualified right to work and win the whole of the fireclay let, was prior in date to the leases under which the defenders now have right to work the coal. But in 1896, when the pursuers obtained their lease of the fireclay, the coal in the mineral field, with the exception of that in the

northern section, of which they themselves had obtained a sub-lease from the Stonehouse Coal Company, was being worked by other tenants of Mr Hamilton, in particular by means of Shawsburn pit No. 2. The pursuers necessarily knew this, because in arranging in 1895 with the Stonehouse Coal Company for a sub-lease of the coal in the northern section, they must have seen or known of the principal lease in favour of Messrs Sym, and must have known that the coal in the middle section was still being worked by Messrs Sym, who in point of fact continued to work it until 1901, when Mr Hamilton acquired their rights under the lease by purchase. They must also have known of the Swinehill Coal Company's workings in the southern section.

Now, it seems to me that the Lord Ordinard is right in holding that the pursuers' right to interfere with the working of the coal by the defenders must be judged of as at the date (1896) of their obtaining right to work and win the fireclay, and as at that date they could not have interfered to prevent Mr Hamilton's other tenants from working the coal, they are in no better or worse position now when the landlord has reacquired the coal and relet it to the defenders. The working of the coal and the fireclay certainly requires regulation in the interests of both parties, and if the pursuers had applied to the Court to adjust by remit or otherwise the terms on which the coal and the fireclay should be worked out together (which is the proper course) I should have been disposed to think that it would not have been beyond the power of the Court to entertain such an action and thus extricate the rights of parties. Indeed, I think that this summons might have been amended to that effect. But the only object of the action as it stands is to prevent the defenders from working the coal at all, and as I have already indicated the pursuers by their actings and knowledge in 1896 and subsequently are barred from demanding such a drastic remedy.

The only modification that occurs to me is that dismissal and not absolvitor might be the safer form of judgment.

LORD JUSTICE-CLERK—The pursuers must I think succeed. The landlord has conferred rights on them by lease which are distinct and clear. I cannot doubt that what has been carried on under the coal lease is contrary to the rights given to the pursuers. It would be most advisable in the interests of all parties that some arrangement should be made by which the two classes of minerals should be worked. But if this cannot be accomplished, then I can see no legal answer to the pursuers' contention, first, that a distinct right to the fireclay has been conferred on them, and, second, that the work being done by the defenders substantially interferes with that right conferred by the pursuers' lease. I concur generally in the reasons stated by Lord Trayner for the judgment he proposes.

The LORD JUSTICE-CLERK intimated that Lord Young, who was present at the hearing but absent at the advising, concurred in the judgment of the Court.

The Court pronounced this interlocutor:—

"Recal the interlocutor reclaimed against: Grant decree against the defenders in terms of the declaratory conclusions, and also in terms of the conclusions for interdict: . . . *Quoad ultra* continue the cause."

Counsel for the Pursuers and Reclaimers —Salvesen, K.C.—Guy. Agents—Macpherson & Mackay, S.S.C.

Counsel for the Defenders and Respondents—Campbell, K.C.—Hunter. Agents —Ronald & Ritchie, S.S.C.

Tuesday, June 23.

FIRST DIVISION.

[Lord Low, Ordinary.

DARLING'S TRUSTEES *v.* CALEDONIAN RAILWAY COMPANY.

River—Property—Foreshore—Boundaries —Estuary of River—Method of Determining Boundaries—Foreshore Opposite Bend of River.

In a question regarding the rights to the foreshore between proprietors of lands on the south side of the estuary of the Forth, at a place where the estuary makes a bend or curve convex towards the properties on the south side, the Court, after a remit to a man of skill, *found* that the boundaries of the respective portions of foreshore effeiring to each property on the south side of the estuary in the circumstances should be determined by taking the actual *medium filum* of the estuary, and dropping perpendiculars to the *medium filum* where the actual *medium filum* was straight, or drawing *radii* to the centre of the circle formed by the curve where the *medium filum* formed a curve, from the extremities of the land boundaries of the respective properties at high-water mark.

This was an action at the instance of Alexander Nimmo of Westbank, Falkirk, and others, trustees under the antenuptial contract between Mr and Mrs Darling, and as such trustees proprietors of the lands of Candie, situated on the south shore of the Firth of Forth near Grangemouth, against the Caledonian Railway Company.

The conclusions of the action were for declarator in the following terms:—"That the pursuers, as trustees foresaid, are proprietors of the foreshore on the Firth of Forth *ex adverso* of the farm and lands of Candie, belonging to them, and situated near Grangemouth in the parish of Grangemouth (formerly the parish of Polmont) and county of Stirling . . . . (*Second*) It ought and should be found and declared by decree foresaid that the defenders the Cale-