back to the 30s. which the parties had admitted was the actual wage before the accident. Now if they had been satisfied with that I should have had no more to say, but unfortunately they seem to have lost sight of the fact in their judgment, and, no doubt, then Lord Adam goes on to say as a general proposition that in all this fixing of wages it is not relevant to take into account that since the date of the accident there had been a fall in the rate of wages. That proposition, of course, will not stand with the decision in *Bevan*, and it is with the decision in *Bevan* that I agree for the reasons I have already given.

LORD ATKINSON—I entirely concur, and especially with some of the remarks which have fallen from my noble friend who has just preceded me.

It has been often laid down in this House that the Workmen's Compensation Act was designed to compensate workmen for the loss of the power to earn. Now if you separate that question from the maxima-limiting provisions nothing could be more appropriate where you have to ascertain a loss that is inflicted on a man by being deprived of the power to earn than to think of the wages he could have earned had he been all right and not been incapacitated. Therefore it seems to me on the broad question always, what is the loss which he has sustained by being deprived of the power to earn—what is the adequate compensation which should be awarded to him by reason of that deprivation — the amount of the wages which he could have earned while that incapacity continues is a most appropriate, apposite, and proper matter for consideration.

Then come in a number of principles limiting the maximum and minimum, and, of course, if they exclude the consideration of the higher wages he might have earned they must have their effect; but it would appear to me that where they do not exclude them it is most right and proper that those wages should be taken into consideration. Now I do-not find in this statute anything excluding the consideration of a higher wage from the contemplation of the arbiter in fixing the sums within the statutory limits. Within the statutory limits he is in my view perfectly entitled to consider the higher wage, because that is the measure of the loss which the man sustains, inasmuch as he is not able because of the incapacity to earn that higher wage. I do not think, therefore, that the arbiter in this case has taken into consideration anything which he ought not to have taken into consideration. He has confined himself within the statutory limits. He has taken the average wage at the time the accident occurred; he has taken the lower wage which the man was earning now since he met with the accident, and he has only given the actual difference between those sums. I see nothing in the statute whatever to deprive him of the power to take that into consideration under the words which have already been referred to at the end of the sub-section.

LORD PARMOOR—I concur. The question is one of fixing an amount of compensation within a certain defined statutory maximum. I do not think the arbiter is limited in assessing the compensation to considering only the conditions which determine the fixing of the statutory maximum under the Act. Unless this restriction is imported a rise or fall of wages appears to me to be a relevant factor of considerable importance in determining the amount of compensation payable to the workman. If it is relevant, then the amount is solely for the arbiter.

I agree in the judgments given in the case of *Bevan* v. *Energlyn Colliery Company*, 1912, 1 K.B., and in my opinion the case of *James* v. *The Ocean Coal Company* has no reference to the argument in this case, the error there being that the arbiter took into consideration fluctuating maxima, which is certainly incorrect under the terms of the Act.

Their Lordships dismissed the appeal with expenses.

Counsel for the Appellants—Hon. Wm. Watson — Villiers Bayly (for Harold W. Beveridge). Agents—W. T. Craig, Glasgow —W. & J. Burness, W.S., Edinburgh—Beveridge & Company, Westminster.

Counsel for the Respondent — Solicitor-General for Scotland (Morison, K.C.) — Scott. Agents — Cormack & Roxburgh, Dumbarton — Weir & Macgregor, S.S.C., Edinburgh—C. F. Martelli, London.

COURT OF SESSION.

Tuesday, October 16.

FIRST DIVISION.

[Lord Dewar, Ordinary.

TODD *v.* M'CARROLL.

Contract—Sale—Public-House—Property—Mines and Minerals—Right of Purchaser to Refuse to Implement Contract when Seller had not Disclosed Existence of Reservation of Minerals in the Feu.

An offer for the purchase of the goodwill, fittings, fixtures, &c., of licensed premises, "together with the property in which said business is carried on," was accepted by the owner. The whole coal and minerals in the feu where the business was carried on were reserved to the owner's superior, together with the right to work the same without any right of compensation to the owner of the buildings for any damage that might be caused by such working. The acceptance was a simple acceptance, and this reservation was not disclosed, and was unknown to the purchaser. In an action of damages by the seller against the purchaser for failure to implement the contract, *held* (*sus.* Lord Dewar) that as the seller was unable to convey to the purchaser the subjects purchased, the purchaser was not bound to pay the price, and action *dismissed*.

William Todd, hotel proprietor, Wheat Sheaf Hotel, Patna, *pursuer*, brought an action against Peter M'Carroll, *defender*, concluding for £500 for breach of contract.

The *contract* between the parties was constituted by the following offer and acceptance:—

"3 *Overton Road*,
Johnstone, *24th Sept.*, 1915.

"Messrs R. B. M'Caig & Mitchell,
Accountants, 124 St Vincent Street,
Glasgow.

"Dear Sirs—I hereby offer you the sum of One thousand two hundred pounds stg. (£1200) for the goodwill, fittings, fixtures, and all working utensils, including the gas plant and fittings but not including the household furniture and plenishing, of the licensed business known as the 'Wheat Sheaf Hotel,' Patna, belonging to Mr William Todd, together with the property in which said business is carried on.

"I also offer to take over the stock on the premises at mutual valuation and pay for same in cash on obtaining possession.

"Three hundred pounds stg. (£300) of the purchase price to be consigned in bank in our joint names on the acceptance of this offer and pending a transfer of the license to me; the deposit-receipt to be endorsed in your favour on my obtaining the license. Should I not obtain the license you are to endorse said deposit-receipt and return it to me. The balance of the purchase price to be paid when I obtain entry to the premises.

"I also undertake to pay a proportion of the rates, taxes, and license duty from the date of my entry to the premises.

"This offer is on condition that I obtain a transfer of the license for the premises at the Court to be held next month (and will use my best endeavours to obtain same), or at the Appeal Court to follow thereon, also a good and proper title to the property, including searches brought down till date.

"In event of my not obtaining a transfer of the licence this offer to be null and void. —Yours truly, "Adopted as holograph,
"PETER M'CARROLL.

"*Glasgow, October 1st*, 1915.—We hereby accept the above offer.

"R. B. M'CAIG & MITCHELL.
1/10/15"

The *feu-disposition*, which was the pursuer's title to the heritable subjects, contained the following reservation:—"But these presents are granted with and under the reservations following, viz.—Reserving to the said Duke of Portland and his heirs and successors the whole metals and coal, limestone, freestone, and minerals and fossils of every description within the piece of ground before disponed; with full power to him and his foresaids or any person authorised by him or them, but without entering upon the surface of the said feu, to work, win, dig, and take away the same; declaring, as it is hereby expressly provided and declared, that the said William Todd and his foresaids shall have no claim whatever for any damage that may be done or caused to the piece of ground hereby disponed and buildings erected or to be erected thereon by any of the operations in time past or to come of the said Duke of Portland or his predecessors, or heirs and successors and tenants, in working and removing or draining the metals, coal, stone, minerals, and others hereby reserved or in the neighbourhood of the piece of ground hereby disponed, or which may arise from or through the setting or crushing of any waste or other excavation presently existing or which may hereafter exist within or in the neighbourhood of the piece of ground hereby disponed, all loss, risk, or damage in any of the events foresaid being to be borne and sustained by the said William Todd and his foresaids themselves."

The defender *pleaded, inter alia* — "2. *Esto* that the contract in question is valid, the pursuer being unable to give a valid title to the defender of the whole subjects purchased by him thereunder, and free from building restrictions, and in particular to the mines and minerals connected therewith, the defender is entitled to decree of absolvitor."

The *facts* of the case appear from the opinion of the Lord Ordinary (DEWAR), who on 6th February assoilzied the defender from the conclusion of the action.

Opinion.—"This is an action of damages for breach of contract. The pursuer is the owner and licensee of the Wheat Sheaf Hotel, Patna, and he states on record that he was anxious to retire from business, and in September 1915 he advertised the property and business for sale. The defender made an offer of £1200 for 'the goodwill, fittings, fixtures, and all working utensils, including gas plant and fittings, of the licensed business known as the Wheat Sheaf Hotel, Patna, belonging to (the pursuer), together with the property in which the said business is carried on.' This offer was accepted by the pursuer.

"The defender now declines to implement the said contract, and the pursuer sues for £500 in name of damages.

"The defender admits the contract, but he pleads, *inter alia*, that he is entitled to resile therefrom on the ground that the pursuer is unable to give a valid title to the property. It appears from the pursuer's titles, which are produced, that the whole mines and minerals are reserved from the property right, and the superior has right to extract the whole metals and minerals without liability for damage by subsidence to the ground or buildings erected thereon, and the property is also subject to building restrictions. It is not disputed that the defender was unaware of these defects in the title when he entered into the contract.

"In these circumstances I am of opinion that the defender's plea is well founded. It appears to be settled that when a contract rests on missives of sale, and there is a restriction in the titles which was unknown to the purchaser, he is entitled to resile on the ground that the seller of land fails to perform his part of the contract if the title is subject to restrictions which he is unable to remove—*Robertson* v. *Rutherford*, 1841, 4 D. 121; *Whyte* v. *Lee*, 1879, 6 R. 699, 16 S.L.R.

376; *Smith* v. *Soeder*, 1895, 23 R. 60, 33 S.L.R. 44. The pursuer argued that that rule only applied where the seller had offered to sell the property and not when he merely accepts an offer. I do not think that it signifies which side the offer comes from. It is the contract which matters, and by his contract the pursuer undertook to sell the property *a centro ad cœlum*, and he is admittedly unable to do so. In *Whyte's* case I observe the purchaser was also the offerer. He offered to purchase Eildon Lodge, a villa in Edinburgh, and this offer was accepted. After an action had been brought for implement by the seller it appeared that his title was subject to a reservation of minerals in favour of the superior, and it was held that the purchaser was not bound to take the property, although there was a declaration that the superior should have no power to work the minerals without the vassal's written consent. This appears to be a much stronger case for the purchaser, because the superior is entitled to work the minerals—and they are more likely to be worked in Patna (which is a mining district) than in Edinburgh — without the vassal's consent and without liability for damages.

"I accordingly sustain the second plea-in-law for the defender and grant decree of absolvitor with expenses."

The pursuer reclaimed, and in argument the authorities referred to by the Lord Ordinary were cited.

LORD PRESIDENT—I agree with the conclusion of the Lord Ordinary, and with the reasoning on which it is based. The pursuer sold to the defender the property in which his business was carried on. That includes, I think, not only the house but also the ground on which the house was built *a cœlo ad centrum*. The pursuer is, however, unable to implement the contract, because the superior had reserved to himself the right to the minerals and fossils of every description within the piece of ground, with full power to work them without any liability for any damage that might be done to the piece of ground and the buildings on it by the operations of working the minerals reserved and the minerals in the neighbourhood. That means that the pursuer can neither convey the property which he has sold nor give an assurance that that property will continue to exist. It may be let down at any time by the working of the minerals, and the owner has no right whatever to claim compensation from the superior in respect of his letting down the surface.

In these circumstances, and apart altogether from authority, I think it quite plain that the pursuer is unable to implement the contract, and accordingly the Lord Ordinary's interlocutor is right and ought to be adhered to.

LORD JOHNSTON—I concur. Too much stress has, I think, been attempted to be put upon the use of the word "property." It is a loose expression, and in the mind of the writer meant, I think, merely "premises." But however the subjects in which a business is carried on are described, they still must be regarded as heritable subjects, and the acquisition of heritable subjects involves the condition that they have the full right of support unless an express exception is made. If that support cannot be guaranteed by reason of a reservation of minerals, the subject contracted for cannot be conveyed. I think, therefore, that the Lord Ordinary has come to a just conclusion.

LORD MACKENZIE—I am of the same opinion. I think that on a fair construction of the contract between the seller and the buyer in this case, and from what appears in the pleadings, it is plain that the seller cannot implement his part of the bargain, because whether the expression "property" means the land, or whether the parties intended to use the word in the sense in which it is not infrequently used colloquially, as meaning the building, it is plain that it was incumbent upon the seller to convey the foundations of the building, and it is equally plain that if the superior exercises his reserved right the result will be that the building and the land will be brought down.

LORD SKERRINGTON—I agree with your Lordships. There are two separate grounds upon which the Lord Ordinary's judgment can be supported. One ground is that mentioned by my brother Lord Mackenzie, viz., that the construction which the seller proposes to put upon the contract of sale might result in the purchaser being deprived, without compensation, of the building in which the hotel business was carried on. As there is nothing in the agreement which compels us to decide that such was the intention of the contracting parties, I reject this construction. A second and more general ground of judgment is, that when a property or building is sold and nothing further appears, the sale ought to be construed as comprehending the whole subject *a cœlo ad centrum*. I concede to the reclaimer that such words as "property" or "building" are ambiguous, and that they may be used to describe a property or a building, either including or excluding the underlying minerals. Such words may be used in either sense with equal correctness, but if there is nothing to indicate a contrary intention, it is, I think, quite plain that the words must be construed in their natural sense, as meaning a certain superficial area and all above and below it. If in the present case it had been averred and proved that the purchaser knew that his vendor had no right to the minerals, then upon ordinary principles of construction one might have held that the subject-matter of the negotiation and contract was a building without the underlying minerals, and of course one might have come to the same result if the terms of the contract of sale had been different. But the writing in the present case is extremely simple, and does not lend itself to the suggestion that "property" is used in any except the usual sense.

No reference was made at the debate to the opinion of Lord Watson in the case of

Orr v. *Mitchell*, 1893, 20 R. (H.L.) 27, 30 S.L.R. 591, which seems to be in point, although the document under construction in that case was a disposition, and not a contract of sale. He there said (pp. 30 and 592)—"If there were nothing else in the deed to expound their meaning, the words 'all the lands' would include not only the surface, but all the strata below it *usque ad centrum*."

The Court adhered.

Counsel for the Pursuer (Reclaimer)—Christie, K.C.—Gentles. Agent—James G. Bryson, Solicitor.

Counsel for the Defender (Respondent)—A. M. Mackay. Agent—Alex. Bowie, S.S.C.

Thursday, October 18.

SECOND DIVISION.

[Lord Hunter, Ordinary.

FORTUNE *v.* YOUNG.

Cautioner—Guarantee—Representation as to Credit—Mercantile Law Amendment (Scotland) Act 1856 (19 *and* 20 *Vict. cap.* 60), *sec.* 6.

A letter guaranteed the financial position of a man who was seeking a farm. The writer had signed his firm's name although it was outwith the firm's business. The letter was not addressed to anyone, but the writer was aware that it was to be shown to the factor or landlord of the farm. On the faith of the letter the factor gave credit. *Held* that the writer of the letter was liable under the guarantee, which was valid although not signed in his own name and not addressed to the factor.

The Mercantile Law Amendment (Scotland) Act 1856 (19 and 20 Vict. cap. 60), sec. 6, enacts—". . . All guarantees, securities, or cautionary obligations made or granted by any person for any other person, and all representations and assurances as to character, conduct, credit, ability, trade, or dealings of any person, made or granted to the effect or for the purpose of enabling such person to obtain credit, money, goods, or postponement of payment of debt or of any other obligation demandable from him, shall be in writing, and shall be subscribed by the person undertaking such guarantee, security, or cautionary obligation, or making such representations and assurances, or by some person duly authorised by him or them, otherwise the same shall have no effect."

George Robert Fortune, Colinsburgh, Fifeshire, *pursuer*, brought an action against Robert Young, Penicuik, *defender*, for payment, firstly, of the sum of £380, 8s. 4d. with interest, which sum represented the loss incurred by him through having given credit to a Mr George Renton Fortune on the faith of an alleged letter of guarantee issued by the defender.

The pursuer *pleaded, inter alia*—"1. The defender having guaranteed payment of the said George Renton Fortune's account to the pursuer to the extent of £1600, decree should be pronounced in terms of the first alternative conclusion of the summons."

The defender pleaded, *inter alia*—"4. The action as directed against the defender is wrongly laid, and the defender should be assoilzied. 5. The alleged letter of guarantee not being signed by the defender, *et separatim* not being addressed to the pursuer or delivered to him, the defender should be assoilzied."

The *facts* are given in the opinion (*infra*) of the Lord Ordinary (HUNTER), who on 14th December 1916 decerned against the defender in terms of the first alternative conclusion of the summons.

Opinion.—"This is an action to recover loss sustained by the pursuer through giving credit to a Mr George Renton Fortune on the faith of an alleged letter of guarantee issued by the defender.

"The pursuer acts as factor for Mr Rintoul of Lahill, Fifeshire, of which estate the farm of Lahill Craig forms part. During the summer of 1914 the pursuer advertised the said farm to let at the term of Martinmas 1914. Among the inquirers was George Renton Fortune, Herbertshaw, Penicuik, to whom the said farm was ultimately let.

"As the pursuer was not acquainted with the financial position of the said George Renton Fortune he asked him to satisfy him on the point. The said George Renton Fortune accordingly approached the defender and obtained from him a *letter* in the following terms:—'*Penicuik, October* 19, 1914.—The bearer, Mr Fortune, we have known for a long number of years, and have pleasure in testifying as to his good and straightforward character, and guarantee that his financial standing is all in order, in accordance with his statement to the extent of from sixteen to eighteen hundred pounds stg.—JAMES TAIT & Co.' The defender, who wrote and signed the letter, is a partner of the firm of James Tait & Co.

"On its face the letter does not bear to be addressed to anyone, but the defender quite frankly admitted that he granted the letter with a view to its being handed to the proprietor or factor of a farm in Fifeshire, about which George Renton Fortune was negotiating with a view to becoming tenant. That farm was Lahill Craig.

"The pursuer received the letter from George Renton Fortune, and being satisfied from its terms of George Renton Fortune's financial position let him the farm. Some of the stock and crop of the farm were taken over by Fortune at valuation. The remainder was sold by public roup on 20th November 1914. At said roup the pursuer acted as clerk. The accounts due by the purchasers were payable to him, and he guaranteed payment of the purchase price to the seller. George Renton Fortune attended the roup, and was preferred to the purchase of goods amounting in value to £1363, 6s. 8d. The pursuer says, and I believe him, that he allowed the said George Renton Fortune's bids to be accepted in the belief induced by the defender's letter that the said George