

opportunity for any further argument at the bar, but that they may be at liberty to send in such amendment in the form of account as they may think desirable in this case.

With these declarations, findings, and directions, I would submit to your Lordships to remit the causes to the Court of Session.

LORD CHANCELLOR.—My Lords, with reference to the last remark that my noble and learned friend has made regarding the expense of this litigation, I should go so far with him as to think that ultimately Mr. Anstruther's property, he being really the cause of the mode in which those instruments were executed, and therefore the source of the vexation and intricacy that have subsequently occurred in solving the various questions which have arisen, might be charged with that expense; but one does not know how the course of events may turn out with reference to the proportion of property in the several estates. As between the three sisters, I apprehend, that all costs should come equally, if they are obliged to have recourse to their own funds, out of that free fund which is left out of the apportionment, but having recourse to the father's estate in the event of that estate being sufficient to answer them in order to recoup the diminution of the fund. The father's estate, therefore, will pay the costs in the first instance, if sufficient to do so. If not, the costs will necessarily have to come out of the fund to be divided.

LORD WESTBURY.—I have not the least objection to that.

LORD CHANCELLOR.—Then the question will be, that the interlocutors complained of, so far as they are inconsistent with the declaration afterwards to be contained in your Lordships' order be reversed. We will postpone the exact form of the declaration, though, I believe, we agree in substance with the proposal of the noble and learned Lord, and as to the expenses, that they be borne in the manner prescribed in the form of order as it will be finally drawn up.

Interlocutors reversed, and orders made accordingly.

Appellants' Agents (Mrs. Mercer), Hamilton, Kinnear, and Beatson, W.S.; Grahame and Wardlaw, Westminster.—*Respondents' Agents* (Mrs. Anstruther), A. and A. Campbell, W.S.; Loch and Maclaurin, Westminster.

FEBRUARY 14, 1873.

JAMES GOWANS, Railway Contractor, Edinburgh, *Appellant*, v. BRAITHWAITE CHRISTIE, ESQ. of Baberton, *Respondent*.

Lease—Minerals—Reduction on the ground of sterility—*G. obtained a lease for 21 years of the freestone and all minerals and substances whatsoever under C.'s lands. No rent was to be paid the first year, and there was a break at the end of the third, seventh, and fourteenth years. G. spent four years in trying experiments, and found he could not get sufficient freestone to work the lease at a profit.*

HELD (affirming judgment), *That he was not entitled to reduce the lease on the ground of sterility, as the risk of quantity is with the lessee.*

SEMBLE, *The rule as to sterility does not apply to a mineral lease.*¹

This was an appeal from a decision of the First Division of the Court of Session. An action was raised to reduce a lease of minerals in the defender's lands, to have it found that its obligations were no longer binding, and for count and reckoning. The condescendence set forth, that in 1866 the pursuer, James Gowans, on the representation by the owner that there was a large stratum of freestone capable of being worked at a profit, took a lease of the freestone and minerals in the estate of Baberton for 21 years, at a rent of £200 a year, subject to certain breaks. The tenant entered into possession in February 1866, and energetically bored and searched for the freestone for four years, but, though some freestone was found, it was not in sufficient quantity to be worked at a profit either by itself or in conjunction with any other material. At the first break in the lease—namely at Candlemas 1869—the tenant had not quite exhausted his preliminary researches, and did not avail himself of the break, but in the following year he made up his mind, and gave notice to the landlord, that he could not go on, and requesting him to name an arbiter to determine the question between landlord and tenant, as provided by the terms of the lease. The landlord

¹ See previous reports 9 Macph. 485; 43 Sc. Jur. 229. S. C. L. R. 2 Sc. Ap. 273; 11 Macph. H. L. 1; 45 Sc. Jur. 229.

had avoided all these proposals, without stating whether he disputed the facts or not ; and the tenant had been compelled to raise the present action. The present respondent, Braithwaite Christie, succeeded his late brother, Alexander Christie of Baberton, on 7th August 1868. The pursuer contended, that the lease had been entered into under essential error, and by misrepresentation on the part of the lessor, and as the freestone was unworkable at a profit, the lease ought to be reduced, and he should have the rent returned to him, and an account taken. The defender contended, that the statements were irrelevant, that the lease was binding, and that as the pursuer had not availed himself of the break at Candlemas 1870, he was now barred by delay and acquiescence from setting the lease aside.

The Lord Ordinary (Mackenzie), by his interlocutor, held, that the pursuer's statements were irrelevant to support a reduction, and that there had not been essential error, and before answer he allowed the parties a proof. On reclaiming note some amendments were allowed on the record, but the First Division also held the action for reduction of the lease incompetent, and dismissed the same, the four Judges being unanimously of opinion, that the lease had fairly provided for the risk of such a subject, and that the tenant had taken all the risk on himself. The pursuer now appealed against that decision, but he abandoned the ground that there was essential error.

Pearson Q.C., and *A. T. Innes*, for the appellant.—The Court below was wrong in holding, that this lease was not reducible on the ground of unworkableness at a profit.

A mineral lease must be taken to be subject to the ordinary rules applicable to agricultural leases. Stair (2, 9, 3) says, the subjects of tacks are land or any other thing bearing fruit or profit, as a fishing, an office, or a casualty. And Erskine (2, 6, 27) expressly includes collieries ; Bell's Pr. § 1207.

Mineral leases have always been treated as ordinary tacks. If so, then it is a fundamental principle, that there must be a subject of the lease ; in other words, the lessor warrants, that there is and that there will continue to be a subject on which the lease may operate—Bell's Pr. § 1208. And when the subject of the lease is destroyed, the tenant is discharged from paying rent—*Bayne v. Walker*, 3 Dow, 233 ; *Murdoch v. Fullerton*, 7 S. 404.

It is also a rule, that the tenant is entitled to abandon a mineral lease on the ground of exhaustion or sterility—Bell's Pr. § 1208 ; *Edmiston v. Preston*, M. 15,172 ; *Murdoch v. Fullerton*, 7 S. 404 ; *Wilson v. Mader*, M. 10,125 ; *Gray v. Hog*, 4 Br. Sup. 635 ; *White v. Moncreiff*, 11 D. 1031 ; *Sinclair v. Mossend Co.*, 17 D. 258 ; *Fleeming v. Baird*, 9 Macph. 730 ; *Dixon v. Campbell*, 2 Sh. Ap. 175. That rule was applied to salmon fishing, which is similar to minerals in this respect—*Foster v. Williamson*, M. 10,131.

The institutional writers all use language to the same effect : Stair, ii. 9, 3 ; i. 15, 1 ; Ersk. ii. 6, 41 ; ii. 6, 39 ; Bankt. ii. 9, 24 ; i. 20, 14 ; i. 20, 13 ; Mack. Inst. iii. 3, 5.

The definition of sterility given by the authorities is, that the lease is unworkable at a profit, that is, it is incapable of doing more than repaying the working expenses.

Both the doctrine and definition of sterility as given are founded on the general principle, derived from the Roman law, that a lease implies a subject that can be enjoyed. And the right to abandon a lease on this ground is implied in every lease, unless excluded by express words. Here there are no such express words. The judgment of the Court below ought, therefore, to be reversed, and the parties allowed a proof as to the alleged sterility.

The *Solicitor General* (Jessel), and *Glasse Q.C.*, for the respondent, were not called upon.

LORD CHANCELLOR SELBORNE.—My Lords, this is an action by a tenant of a mineral lease against the present owner of the property and the representative of the deceased owner. The Lord Ordinary thought it right to allow proof before answer in support of certain averments in the condescence of the appellant, the pursuer, by which he undertook to shew the unprofitableness or incapacity of producing profit to himself of this mineral lease. The parties by their pleas in law have raised the question of the relevancy of those averments, and by allowing proof before answer the Lord Ordinary did not decide one way or the other that question of relevancy. The Inner House thought, on the case coming before them upon a reclaiming note, that there was no relevancy in the averments, and if that was the correct view I think that they very rightly were of opinion, that it was not in any way proper to burden the parties with the expense of what might turn out to be very voluminous and lengthened proofs upon matters ultimately irrelevant. The real question, therefore, before your Lordships, is whether the Inner House were right or wrong in holding these averments to be irrelevant.

The burden of proof undertaken by the appellant in this case is certainly a very heavy one, because he asks for the reduction of this lease as a lease which is vitiated or void between the parties by reason of the failure, as I understood the argument, as to the subject matter of the lease. Mr. Innes did not at all shrink from the principle involved in the form of remedy which is sought. He said, that there was no lease at all in the view of the law ; that there never had been any lease in the view of the law, and that there was nothing at all to be leased. That was a startling proposition, when we look at the lease and consider the nature of the subject matter which it comprehends, viz. all the minerals and materials under particular lands, freestone being

specially but not exclusively mentioned, and all other minerals, of whatsoever kind they might happen to be, being included in the lease. The principle of the argument was this: that by the Roman law adopted into the law of Scotland there is a warranty implied or express (I do not know which it may be, but that there is certainly a warranty in one way or the other) of possession of a subject capable of producing the contemplated fruits or profits.

Now, in one point of view, such a doctrine may be, and I venture to say is, perfectly intelligible and perfectly reasonable, when there is that which in the language of the law of this country would be called a total failure of consideration; when the landlord has not the thing to let which he purports to let, and which is the consideration for the rents, it is perfectly reasonable that the whole lease should fail *ab initio*, and be capable of reduction. Nor is it a very wide extension of that same principle to say, that if a landlord warrants a continuation of the subject matter for a certain number of years, a failure of the subject matter before that number of years has elapsed shall involve a reduction or termination of the contract at the time of that failure and thenceforward. Those views are at all events perfectly intelligible. But your Lordships will see, that they all resolve themselves into either the original nonexistence of the subject, the failure of the landlord to put the tenant in possession of the subject matter of the lease, or the subsequent exhaustion or failure of that subject matter, so that from a given time it ceases to exist.

And when the authorities which have been referred to are considered, they will be found with a few, if any exceptions, to turn entirely upon that principle so understood. When the authorities on the Roman law referred to in the case as illustrations of the principle, *si frui non liceat*, come to be looked at, they prove to be all of that kind. They refer to cases where possession is not given, where there is no prestation of the subject matter, or where some external *vis major* not inherent in the subject matter, and not the fault of the tenant, takes the subject matter away, it may be either temporarily or permanently; but the principle is always the same, resting on the destruction *pro tanto*, or entirely, of the subject matter. But Lord Stair, the authority on the law of Scotland chiefly relied upon, goes further, and as it seems to me lays down the true principle in the most unequivocal terms. He says, that there is a peril or risk undertaken by the tenant, that he is at the risk of the quantity and the value of the subject matter, but he is not at the risk of the being or existence of it. Now, just consider how that will apply to the case of a mineral lease. If there had been in this case a lease of some particular description of minerals only, for instance of a bed or seam of coal or of a bed of freestone, and if there had been no such thing in existence, then, according to Lord Stair's principle, the tenant would not have been at the risk of the being of the coal or the freestone. But that of course cannot apply to a case where the lease is of all minerals, for although there is necessarily some uncertainty and speculation in such a lease, because the minerals may turn out to be of greater or less value, yet some minerals there necessarily must be under every parcel of land, and therefore the peril of the being of the minerals is a peril which no tenant of a mineral lease incurs; nor does the landlord incur it either. But with respect to the quantity and value, which is the whole matter in controversy here, as I understand the case, according to Lord Stair's doctrine, the whole peril of the quantity and value is upon the tenant; so that authority is directly against the appellant's case. Then we are referred to Lord Bankton, who, in the passages quoted, seems to say, that the landlord warrants a capacity to produce fruits. What is the meaning of that? A capacity to produce the kind of fruits, which, according to the substance of the contract, the tenant is to receive. What are the fruits within the meaning of that principle? If, for instance, land is let as good arable land, and it turns out to be totally incapable of any agricultural produce, I can understand that in that case the principle might apply, and that there is a failure of the warranty to produce fruits. Again, I can understand, that if in the case of a mineral lease, the landlord in substance represented that there was workable coal, and the coal turned out, as in the case of *Murdoch v. Fullerton*, to be so nearly exhausted that there was no area of the least value for working, in other words, nothing which could be worked, a thin seam, for example, of a finger's length,—something which was not practically useful for the purpose of working at all,—it may be said that in such a case there was a failure of the landlord's warranty. But the fruits in this case are minerals to be got by working, and according to Lord Stair the quantity and the value of them, if they can be got by working, are at the risk of the tenant; if the minerals can be got, there are the fruits, and there is no failure whatever of fruits in such a case. There is no sterility as long as there are minerals which may be got.

All the cases, as it appears to me, go to the same point. The case of *Edmiston v. Preston* might very possibly be differently decided at the present day, when we should no longer regard a want of proper ventilation of a mine, or a want of maintenance of proper roofing, as a thing arising from the act of God or from *vis major*. Such a defect would doubtless be regarded at the present day as a thing for which the tenant was responsible. But the principle upon which that case was decided was evidently the same as if an earthquake or some natural convulsion had made the mine practically unworkable.

The case of *Dixon v. Campbell*, as far as it is fit to refer at all to an authority turning upon contract, and not upon general law, is strongly against the appellant's argument, because in that

case, there being an express contract, that if the mine should cease to be capable of being worked to advantage by reason of that class of accidents which all these authorities contemplate, the tenant might throw it up, it was expressly laid down, that he could not throw it up for faults which did not occur in the mine, but in the fruit on account of variations in the market price. What has arisen in the present case but a question of market price?

The 3d article of the condescendence tells us, that there is freestone under the land of Baberton, that four years were occupied in boring and in other operations to obtain it. I pass over the allegation, that the quantity was less than was represented, for nothing now turns upon that. The appellant goes on to say, "nor is the said freestone or any other mineral or material or substance in the lands so let, nor are all of the said substances together capable of being worked to a profit in a mineral lease, even if no rent were to be paid." I will stop reading that sentence there, because I agree with Mr. Innes, that he does not take issue merely upon the point which follows, that the minerals are incapable of being remunerative at the rent stipulated for in the lease. He also says, that even if no rents were to be paid they are not capable of being worked to a profit. He goes on: "The pursuer has tried the said lands at all points shewing indication of freestone, but he has in every case been unable to turn out such a quantity as would repay his outlay even upon the most economical methods which can be used for the efficient working of minerals." That allegation is consistent with the existence of an unlimited quantity of minerals, capable of being worked and having a market, but what he says is, that they are not capable of being worked to a profit, that so far as he has worked he has been unable to turn out such a quantity as would repay the outlay. Therefore the proposition really is this, that according to the principles laid down in the law of Scotland the landlord guarantees the tenant against loss by reason of any of these elements extrinsic to the mine, and independent of the nature of the subject matter within the mine which go to the determination of the question of profit and loss. What are these elements?—the quantity, the quality, the cost of labour, the cost of materials, the demand and supply varying in the markets themselves, and the means of conveyance, all of which are things entirely extrinsic to the mine, and certainly not within the view of the principles laid down by any of the authorities, to which a reference has been made. On the contrary, they are exactly those things as to which Lord Stair has said, that the tenant runs the risk of quantity and value.

In that state of things, it appears to me, that even the authorities relied on by the appellant are against him, and independently of the special stipulation in this particular lease the reason of the case wholly repels in my mind the view of the law which the appellant suggests. When we come to look at the stipulation in the particular lease, we find that conclusion fortified by those stipulations. It is admitted, that it is a very common thing with parties entering into mining leases, to contract expressly, that the tenant shall not be obliged to go on with the lease when he cannot work the mine at a profit, and the parties very wisely, because that question is a very difficult one in its nature, frequently add a clause providing for an arbitration. There is nothing of that sort in the lease before us, but there is a provision that at the end of three years, or at the end of seven, or at the end of fourteen years, the tenant may break, as it is called, or throw up the lease. The object of the provision obviously is, that if he finds it cannot be worked with profit he may relieve himself from it in that way by throwing up the lease.

Now it appears to me, that such stipulations are absolutely irreconcilable with the whole principle of the argument of the appellant, because if the lease was vitiated from the beginning, which the argument assumes, and which the doctrine of reduction assumes, it must have been upon grounds which are wholly independent of the exercise of an option at certain periods to retain or throw up the lease. Suppose that at the end of three years the tenant has chosen to throw it up;—I had really great difficulty in understanding whether it was seriously meant to be contended, that because he had made no profit in that time, and then concluded from the experience he had had, that he would make no profit if he went on working till the end of the lease, he would not only have a right to throw it up, but he would also have a right to repetition of the rent he had paid. That seemed to me to be almost a necessary consequence of the argument for the appellant; but that is entirely inconsistent with the whole intent and purpose of the express contract between the parties, which clearly shews, that the landlord is to receive a stipulated rent, that during the first year that rent is to be reduced in amount on account of the outlay of the tenant, and the risk incurred by him in the whole of the earlier years, (it being probably in the contemplation of all parties entering into such leases, that during the earlier years while an outlay is going on the undertaking is not likely to be remunerative,) and that it is agreed, that the tenant shall be allowed to say at the end of three years, whether he wishes to go on or to be released from his contract. In this case he determined to go on. The third year elapsed, and he did not break the lease, but after the expiration of another year he brings his action and asks for the reduction of the lease. It seems to me, that both upon the grounds, on which the judgment of the Inner House expressly rested, and if it were necessary upon broader grounds still, the pursuer is wholly wrong, and therefore the interlocutors appealed from ought to be affirmed, and the appeal dismissed with costs.

LORD CHELMSFORD.—My Lords, I entirely agree with my noble and learned friend, that in this case the interlocutors appealed from must be affirmed. The question is, whether the appellant was entitled to be admitted to proof of the averment in his condescence, that the mineral lease was incapable of reimbursing the tenant for the outlay necessarily expended by him in working the same, and still more of yielding him any return over and above his rent ; in other words, supposing that averment had been proved, whether it would have furnished a ground for the reduction of the lease—whether it was relevant in fact to the conclusion of his summons for the reduction of the lease.

The law of Scotland upon the subject of renunciation of leases either for the non-existence, or the failure, of the subject matter, is very shortly stated in a passage in Mr. Bell's Principles of the Law at § 1208 in these terms: "The contract of lease implies a subject let, and if it turn out, that no such thing exists as the parties intended to be the subject of agreement, the tenant cannot be bound to pay rent. Where the subject fails, (as where a house is burnt, where a farm is by a flood or a hurricane reduced to sterility," which must mean absolute barrenness, "where a coal-mine is exhausted suddenly and unexpectedly,) the tenant's obligation to pay rent will be discharged." It is quite clear, therefore, that where there is a total destruction or exhaustion of the subject matter of a lease, there, by the law of Scotland, the lessee is entitled to abandon it.

But I am not aware, from any of the cases which have been cited in the course of the argument, that where it is a case of sterility merely short of exhaustion, the tenant has any such right to renounce or abandon the lease. The old authorities upon the subject rather to my mind indicate directly the contrary. Take, for instance, the passage which has been cited from Lord Bankton. He says: "The tack-duty is on account of the fruits," and "sterility or vastation liberates in whole or part." Elsewhere he says: "In other subjects besides rural possessions, the tack duty is remitted or abated, when by accident, without the tacksman's fault, the thing becomes unprofitable, or the use of it is interrupted." Again he says: "sterility is not understood, where the increase satisfies the expense of the seed and labour."

So that he says, where there is sterility merely and not absolute vastation, the rent may be suspended or remitted. The question of whether altogether, or for the particular year, will remain to be considered hereafter. Sir George Mackenzie says, "If the ground be absolutely barren, the hire will not be due. If the land yields some profit, though never so little, the hire will be due, if the profit but exceed the expense of the seed and labouring." And from the passage which has been read by my noble and learned friend, it appears, that the authority of Lord Stair is applicable exactly to the same extent, namely, that where there is sterility as distinguished from destruction or exhaustion, it is not a ground for a reduction of the lease, but merely for a suspension or abatement of the rent.

There is very great difficulty in applying this right of suspension of the rent in the case of sterility, and that was observed upon in a case that was cited in the course of the argument, viz. *Fleeming v. Baird*, in which Lord Neaves said: "The question of sterility even in agricultural leases is not free from difficulty when a subject becomes flooded or sanded over, and is therefore made quite different from what it was ; that is a stronger case, but I doubt whether in agricultural leases, the repeal of the corn laws would have entitled a tenant to abandon his lease on the ground that it was not profitable. I also doubt whether every year is to be taken by itself in a continuing lease. Supposing an Egyptian in the time of Joseph had had a fourteen years' lease of land, and had got his first seven years of plenty with his barns crowded, and the years of scarcity had followed, I think it would be hard upon the landlord, that the tenant should get his full measure of the harvest during the first seven years and then pay no rent at all for the next seven." That applies to agricultural leases. There seems to have been a distinction taken between agricultural and mineral leases, upon the ground that a lease of minerals is a hazardous speculation ; and Lord Deas says in this case, that he knows no case where a mineral lease has been brought to an end upon the ground of sterility.

With regard to mineral leases it appears, that it has been usual in leases of that kind in Scotland to introduce a clause that the lease may be abandoned when it is unworkable at a profit, and in a passage from Mr. Bell's lectures on Conveyancing, it is stated: "The mineral lease being of a subject which may be untried, or the extent or quality of which is not fully known, is a speculation on the tenant's part. Provision is therefore necessary for enabling the tenant to be quit of the obligations, in case the trials shall fail, or the field not prove workable to profit ; in other words, in case, after a fair and full endeavour on the tenant's part to turn the lease to good account, the speculation shall not succeed. With that view the lease generally allows breaks to the tenant at intervals of five years upon previous written notice of six or twelve months, and without any cause assigned."

That is the case in the present instance, and that is the ground upon which the Court of Session came to a determination, that in this case the appellant was not to be admitted to proof, because he had, by the contract which he entered into, fenced himself round against the possibility of loss by reason of the sterility of the subject matter. He stipulates, in the first place, that for the first

year no rent whatever shall be payable, that is, the year ending at Candlemas 1867. He then further stipulates, that upon giving six months' notice at the termination of the third, the seventh, or the fourteenth year, he may without any cause assigned abandon the lease. Now this is entirely for the benefit of the tenant, because the landlord has no corresponding right of giving notice, and turning the tenant out of possession. Therefore it seems a most reasonable thing to hold, that where a special contract of this description is entered into, even supposing the common law would give the right of reducing the lease in a case of this description, (as to which I am quite certain from the authorities it would not,) still, as the tenant has chosen to enter into this particular contract, and to guard himself against the consequences of loss by reason of the lease turning out to be unproductive, that is a ground upon which it is impossible to say, that he can fairly and reasonably be entitled to reduce the lease, even supposing circumstances existed, which without a contract would have entitled him to do so.

Under these circumstances I agree with my noble and learned friend, that the interlocutors must be affirmed, and the appeal dismissed with costs.

LORD COLONSAY.—My Lords, I do not consider it necessary to say much upon this case after what has been said by my two noble and learned friends, who have preceded me. It appears to me, that the appellant, the pursuer in the action, has failed in presenting a case which entitles him to proof of what he says he can establish. The parties come before us as parties to a particular contract, which relates to a mineral subject. It is quite correct on the part of the appellant to say, that minerals may be the subject of lease, and that the law of lease applies to them. But it does not follow, although the law of lease applies to them, that in all particulars the application is the same in the case of an agricultural lease as in the case of a mineral lease. The nature of the two subjects is so very different, the perils which naturally present themselves to the eyes of parties when they enter into a lease are so very different in the two cases, that it does not follow, that all these conditions which are imported into an agricultural lease naturally are imported into a lease of minerals.

The question in this case is, whether the pursuer has presented such a statement as entitles him to be relieved from the contract altogether by a reduction of that contract, in respect of the fact, as he himself explains it, that he cannot work these minerals to profit,—in this sense, that the cost of working and raising the minerals leaves nothing with him to pay his rent with, or perhaps leaves him out of pocket. I am not aware of any case in which that has been decided in regard to a mineral lease. All the cases without exception which have been put before us are cases substantially of non-existent subjects, or exhaustion of that which has been the subject of the lease. Even in one of the earlier of those cases, the case of *Wilson v. Mader*, the Court looked to the fact alleged, that the coal after the second year could not be found—that no coal remained—that it was impossible for the tenant to go on paying his rent according to the condition of the contract which he had entered into, whereby he was limited to the working of a certain number of collieries, and if he worked a larger number he was to pay an increased rent, and looking to all the terms and conditions of the contract, the Court were of opinion, that under the particular circumstances of that contract, it was not within the meaning of the parties, (that is the expression used in the decision,) that the tenant should remain bound. The Court therefore in the case treated the nature and condition of the contract, and the inferences to be deduced from it, as an important element in the question. In other cases I think similar grounds seem to have existed. At all events, exhaustion was the ground of the decision in some of them. In the treatise of Mr. Hunter, which has been referred to with a commendation which it fully deserves, that writer says: “the cause of loss must not be such as, although natural, can be deemed to have been in the contemplation of the lessee when he contracted. Increase of depth or accumulation of water in a mine does not give liberation or abatement to the lessee, although the addition to the expense of working should create positive loss.”

I think there has been no case referred to at all indicating a release from the payment of the rent in a mineral lease, or liberating from a lease, on the ground of an allegation, that the tenant could not work the mine to profit. I think the only case that was referred to in which the tenant was released from the payment of the rent was a case, in which a judicial factor applied to the Court for authority to reduce the rent of a mineral tenant upon the estate of which he was the judicial factor, because he found, that the tenant could not pay the rent, and that he must either render him bankrupt, thereby probably deteriorating the value of the subject in the market, or give him relief. A landlord might in these circumstances have given relief to the tenant, but the judicial factor had not the power of doing so. He was an officer of the Court, and he applied to the Court for the power to give relief to the tenant, and the Court, upon inquiry, gave him that power. But that does not by any means establish, that the tenant had at law any right to such relief.

Now, in this case, looking to the condition of the contract between the parties, it appears to me, that the tenant has fenced himself round with protection with reference to any kind of occurrence that could take place under the lease. In the first place, he is going to make a trial, and for the first year of the trial he is to pay no rent. Then he has a period of three years, during

which he may continue the trial, and if he has no profit in these years he may abandon the lease, and he has a similar power of breaking the lease at other periods. He does not introduce into the lease, and he did not under the circumstances require to introduce into the lease, any clause such as is very common in modern mineral leases, that in the event of the subject being unworkable at a profit, he shall be entitled to have relief by means of a reference to an arbitrator. It is said, that he relied upon the common law. If so, he was relying upon an undecided and a very shadowy thing, and it has turned out that he had very little common law to rely upon. But he fenced himself round, and protected himself, as you might have expected him to do if he had not a basis of common law to rely upon, or if it was a doubtful basis, by a condition which enabled him to break the lease at the end of either three, seven, or fourteen years—as it was said in the case of *Wilson v. Mader*, — it was not in the contemplation of the parties when they entered into the contract, that it should continue after the coal was exhausted. So I think here the Court has taken the right view in looking at what was in the contemplation of the parties, and in holding, that the parties have provided themselves with a contract which, looking to the terms of it, is in every respect so favourable to the tenant, leaving it to his own choice whether to relinquish the lease at the end of certain periods or not, that he has shown no ground for the relief he seeks. Therefore I think the appeal must be dismissed with costs.

LORD CAIRNS.—My Lords, in this case there appears to me to be an attempt to make use of a suit, which was instituted upon a different basis, for the purpose, that basis having failed, of obtaining relief upon a ground which was not in contemplation at the time when the suit was instituted. And it is, as it appears to me, an example of an effort to strain a well known, and a well founded principle of law, to a purpose to which that principle was never intended to apply.

When I say, in the first place, that it is an attempt to use the suit for a purpose for which it was not originally intended, what I mean by that is this : If your Lordships will take the trouble of referring to the condescence and the pleas in law in this case, you will find the whole foundation of this suit originally was an allegation, that there had been a specific representation made by the lessor of this property—in other words, that there had been an express and specific warranty given by him with regard to the property. For in the first article of the condescence you will find it is stated, that the pursuer was induced by the representation of Mr. Christie to enter into the lease now sought to be reduced, and then the pursuer goes on to say, that these representations were to the effect, that there was a large stratum of freestone in the lands proposed to be let of a superior quality, and capable of being worked at a profit by a tenant, and in particular by a tenant becoming bound for the rent, and under the stipulations in the said lease ; and again, there being no statement whatever of any implied warranty in law in the first article, the second article pursues the same subject of the representation, and says, that on the faith of these representations and in reliance on them, and under an essential error as to the subject of the lease which was induced by them, (that is, by the representations,) the pursuer signed the lease in question. Again, in this third article, he states, that the result of these exertions has been the discovery, that while there is some freestone in the lands of Baberton, there is (as he avers) no such amount of freestone as was represented to him, (on the faith of which representation he entered into the lease,) nor is the said freestone or any other mineral or material or substance in the land so let, nor are all of the said substances together, capable of being worked to a profit in a mineral lease. Again, in the fourth article, he states, at a particular date he had been led to suspect or believe, that the lease was not workable to profit, and that there was no such freestone or other mineral in the said lands as had been represented to him.

Following up that *catena* of allegation the plea in law states, that the mineral lease entered into between Mr. Christie and the pursuer being unworkable to a profit, that is, incapable of reimbursing a tenant for the outlay necessarily expended by him in working the same, and still more of yielding him any returns over and above his rent, and having been so from the beginning of the said lease, the same ought to be reduced,—I take it, that that plea in law was as obviously introduced as an offer by the pursuer to prove, that one of the representations upon which he relied was a representation which was unfounded. The second plea appears to me to be nothing more than a general plea of general misrepresentation so as to open up the area of proof, and to enable some more proof to be given, for example, as to the other representations with reference to the stratum of freestone. But I believe firmly that both pleas were placed upon the record for the purpose of shewing a readiness on the part of the pursuer to disprove the truth of the representations which he said had been made to him.

In that state of things the case came before the Lord Ordinary. The Lord Ordinary thought that the allegations of representation were not relevant or sufficient, and with that decision, I understand, the pursuer is and was contented, for it was not contested upon the reclaiming note, and therefore the question of representation is now altogether out of the case.

Then these averments to which I have referred being now out of the case, there is an attempt (which is the attempt to which I alluded at the beginning of my observations,) to use the suit for a purpose which I say never was contemplated at the outset, namely, for the purpose of making

out, that although there was no specific and express warranty, there is a law in Scotland which implies a warranty to the same purport, which in the first instance the pursuer had undertaken to shew had been actually made to him.

Before I leave that point I cannot refrain from saying, that it appears to me, that the observations of the Lord Ordinary, in dealing with the questions of express warranty and representation, are very applicable also to the questions of warranty implied by law, as to which, nevertheless, the Lord Ordinary was disposed to allow some proof. Your Lordships will find, that the Lord Ordinary makes these observations: "Then as regards the representation that the freestone was capable of being worked to a profit by the tenant, such capability depends upon many contingencies, as, for example, the skill and capital of the tenant, the rate of wages, the state of the market, costs of transit, and many other elements of hazard. Such representations are, it is thought, a mere matter of opinion, which, even if erroneous, could not form a good ground for reducing the lease."

It is not stated that the alleged representations were fraudulent. I entirely agree with those observations of the Lord Ordinary, but I own I am at some loss to understand why they are not quite as applicable to the idea of a warranty implied by law, as they are to the idea of an express warranty averred to have been made by the lessee; and I am at some loss to conceive when the Lord Ordinary felt that there would be these difficulties in allowing a proof as to express warranty, that it did not occur to his mind, that to a much greater degree they were impediments in the way of allowing proof as to what I have termed, for shortness, an implied warranty of law.

I said that it appeared to me, that the case was also an example of an attempt to strain a well known principle of law to a purpose to which that principle was never intended to apply. By that I mean this: Your Lordships will observe, that the averments as to the state of the mine now amount to this,—not to any averment, that there are no minerals, or that there is no freestone, but merely to an averment, that the freestone and the minerals which the averment implies to exist there, are not capable of being worked to a profit, an averment which not only is consistent with there being minerals, but implies that there are minerals. Consistently with that averment, there may be minerals of unbounded quantity. There may be hundreds of thousands of tons of those minerals, as to which, however, it may not stand true in any commercial sense that you may get a profit out of them. That is the character of the averment in the condescendence.

Now upon that averment the way in which the case is put is this: There is a common form of covenant in mining leases with which your Lordships are perfectly familiar, a covenant that if the minerals which are included in the demise cannot be worked to a profit either generally or in a particular time, there shall be an opportunity to the lessee of giving up the lease upon certain terms stated in that covenant. I think your Lordships will have found, according to your experience, that that covenant is generally, if not always, accompanied with some kind of specification and standard as to profit, and some means for ascertaining by the award of arbitrators, or by the opinion of experts, whether it can be predicated of the mine at a particular time that it can or cannot be worked to a profit. That is an express covenant which is very frequently inserted in mineral leases. I must observe with regard to that express covenant, that the word "profit" is there used in a sense altogether different from that in which the pursuer would use it here, because where you have an express covenant of that kind, "profit" does not mean gain after paying for work and labour, but it means gain after paying for work and labour, and the rent of the mine—a very different position of things from that for which the pursuer contends.

That being the common, or at least a very ordinary, form of covenant or provision to be found in a mining lease, there is, on the other hand, a well known principle of the civil law imported into the Scotch law, and into other laws which follow the civil law, that where there is a demise, and where the subject matter demised either turns out to be non-existent or to be exhausted, or where the working of it turns out to be utterly impracticable, in any of those cases the tenant is relieved from the obligations of the lease. That being a well known principle, it is attempted in this case, and it has been attempted for the first time in this case, to bring up that principle, and to say that after all it means nothing more or less than this, that it gives to a tenant relief, just in the same way that the express provision, which I have referred to as being common in mining leases where minerals cannot be worked at a profit, would give the tenant relief.

That is a very startling proposition, and one which requires to be examined certainly with some care. I asked the learned counsel for the appellant in the first place, is there the authority of any decided case in support of that proposition? The learned counsel who argued for the pursuer at your Lordships' bar were unable to produce any. Undoubtedly it is perfectly accurate to say, with regard to all the decided cases, without going through them, that they are cases which range themselves as illustrations of the principle that I have described, namely, cases where the thing demised was either non-existent or exhausted, or the working of it was impracticable. Apart from decided cases, what is the authority? Some institutional writers have been referred to, and I take Sir George Mackenzie as an example of them. Sir George Mackenzie speaks of a tenant not being obliged to pay rent where there is sterility, and he says, describing it negatively, that

there is not sterility where the fruit, the crop, the harvest, exceeds the value of the labour, and of the seed.

Even with regard to agricultural subjects, I should venture to doubt, whether at the present day that *dictum* of Sir George Mackenzie, and other institutional writers, is to be taken without very considerable qualification. Operations of husbandry are now so extended, and cover so large a space of time in comparison with what was the case at the time when many of those writers wrote, who looked more to the immediate outlay for one harvest than to the consequence of an outlay in succeeding years, that one might doubt very much whether it would be possible to deal with labour and seed in the way in which Sir George Mackenzie evidently was dealing with them in his own mind when he used those expressions which I have referred to. Again, I took the liberty of putting the case to the counsel for the pursuer, that there might be a lease of waste or moor land, which a tenant might well be content to take, intending to reclaim it by degrees, and as to which in any one year, or in any small number of years, it might be utterly impossible to say, that there had been any fruit exceeding the seed and the labour; and yet it would be a very strong proposition to hold, that the tenant could give up a lease of that kind, because the fruit had not exceeded the seed and the labour. Again, there might be land which might be allowed to run down into sterility, and become unproductive by the fault of the tenant himself. There also the *dictum* would not apply.

But without pursuing the question with respect to agricultural leases further, I should doubt extremely whether *dicta* of this kind apply at all to the leases of mineral subjects. In point of fact, although we speak of a mineral lease, or a lease of mines, the contract is not in reality a lease at all, in the sense in which we speak of an agricultural lease. There is no fruit, that is to say, there is no increase, there is no sowing or reaping in the ordinary sense of the term, and there are no periodical harvests.

In point of fact, what we call a mineral lease is really, when properly considered, a sale out and out of a portion of land. It is liberty given to a particular individual, for a specific length of time, to go into and under the land, and to get certain things there, if he can find them, and to take them away just as if he had bought so much of the land. It is very difficult to apply to a case of that kind *dicta* which evidently relate to the ordinary process of agriculture, to reaping and sowing above ground. Further than that, it is obvious, that if these *dicta* were held to apply to mineral leases, the consequence would be, that mineral leases, instead of being what they have always been considered, highly speculative and uncertain contracts, would become contracts absolutely safe and free from any risk whatever, because the tenant, if he found his lease profitable, would continue to hold it, and reap the profit from it. But if he found it unprofitable, he would certainly give it up; and the loss would be not his, but the landlord's.

Again, it would be impossible to apply these *dicta* to mineral leases, without some knowledge of the area of time over which you were to spread the account of profit or loss. I asked Mr. Pearson, who opened the case with great ability for the appellant at your Lordships' bar, to what time he would refer the question of the profit or loss, and I think he was obliged to admit that he would take the whole period covered by the lease, (without counting the breaks,) which in the present case would be a period of twenty-one years. Then I asked, how would it be possible at the end of the third or the fourth year of the lease to speculate as to what the profit or loss would be, if it were spread over the whole period of the lease. How can you at the end of the third or fourth year of the lease tell what the price of labour may be in future years, or what machinery may be introduced in future, which may dispense to a certain extent with labour, or what the market value of minerals of the same kind will be at a future period, or what the effect upon the market value of those minerals may be of the discovery of other minerals of the same kind in the same neighbourhood? All those things are perfectly uncertain. The moment you admit, as you must admit, that you cannot confine the question of profit and loss to the transactions of one year, but that you must spread it over the whole series of years comprised in the lease, that moment you confess that to take beforehand a speculative contract with reference to the future profit and loss for the whole period of the lease is a thing which it is simply impossible to do.

Then, finding that there is no decided case which is an authority for the contention of the pursuer, and that there are no *dicta* of institutional writers which can properly be applied to a case of this kind, I have no hesitation in saying, that it appears to me, that the pursuer has utterly failed to establish, that there is in the case of a lease of this kind any implied warranty in law approaching to that express warranty, which in the first instance he asserted had been made by his landlord. It is upon this ground that I should wish to rest the decision of the case. And I do so the more readily for this reason, that I observe some of the learned Judges in the Court below were rather inclined to rest it to some extent upon another ground, namely, to assume, that there may be the common law right for which the pursuer contends, but that, on the other hand, that common law right is ousted by the express provisions contained in this lease with regard to breaks. If I found that there was a common law right, such as has been alleged, I should have great hesitation in saying, that anything in this lease did oust that right. If there is such a common law right, I do not see that it is in the least degree impossible that it should co-exist

with a lease containing a provision for breaks. I do not therefore hold, that the common law right is excluded by the provisions of this lease, but I rather look upon the provisions of the lease as a proof to my mind, that it never was imagined by those who entered into it, that there was any such common law right. It appears to me, that these provisions, to a great extent at all events, would have been unnecessary. But I believe the provisions to have been introduced, because there was no such common law right, and because no one ever supposed that there was such a common law right.

I think, under these circumstances, that the interlocutors appealed from ought to be affirmed, and the appeal dismissed with costs.

Interlocutors appealed from affirmed, and appeal dismissed with costs.

Appellant's Agents, Lindsay and Paterson, W.S. ; J. Dodds, Westminster.—Respondent's Agents, Hamilton, Kinnear, and Beatson, W.S. ; Grahames and Wardlaw, Westminster.

MARCH 10, 1873.

D. C. R. C. BUCHANAN, ESQ., ROBERT HENDERSON, Coalmaster, Coatbridge, and Others, *Appellants, v.* WILLIAM JACKSON ANDREW, Solicitor, Coatbridge, *Respondent.*

Minerals—Reservation—Feu Contract as to Surface—Injury to Surface—Risk—*B., the owner in fee of land, by feu contract sold part thereof to P. for building purposes, P. obliging himself to build and maintain a house thereon of a certain style, and B. reserving to himself all the coal and minerals under the ground feued, with power to win and remove the same, and not to be liable for any damage that may happen to the said ground, or buildings thereon, by the working of the minerals. At the date of the feu contract both parties knew that there was coal below the ground. P. built his house, and afterwards the whole coal was about to be worked and carried away, leaving no support.*

HELD (reversing judgment), *That B. was entitled to work and carry off all the coal, though the building of P. might thereby be destroyed, P. having taken all such risk on himself.*

SEMBLE, *If P.'s house were to be destroyed by B.'s working of the mines, P. would not be bound to rebuild—(Per LORD CHANCELLOR and LORD COLONSAY.)*

This was an appeal from a decision of the Second Division. Mr. Andrew was the owner of a house in Coatbridge, which he had bought in 1865 from one Porteous, who had built it. The feu contract between Porteous and Mr. Buchanan, the superior, contained an obligation on the feuar to build and maintain a house of a certain size and style on the piece of ground feued, and the superior expressly reserved to himself all the mines, and power to work the minerals under the feu. The words in the contract were—"Reserving always to the said superior the whole coal, etc., with full power to work, win, and carry away the same at pleasure. And it is expressly agreed, that the said superior shall not be liable for any damage that may happen to the said piece of ground or buildings thereon, by or through the working of the coal in or under the same, or in the neighbourhood thereof, by long wall working or otherwise."

The lessees of the Drumpelier coalfields were working the mine near the feu of Mr. Andrew, and there was a well founded apprehension, that the house would shortly be destroyed by the subsidence that would follow when all the coal was worked out, as the lessees were in course of doing. Mr. Andrew accordingly applied for an interdict, which he obtained, three of the Judges construing the feu contract so as to protect him against the working of the coal within 100 yards of his house, while the Lord Justice Clerk dissented, holding, that the feuar had taken the risk of subsidence on himself.

The respondents, the lessees of the coal, now appealed.

The *Lord Advocate* (Young), the *Solicitor General* (Jessel), and *Trayner*, for the appellants.—The judgment of the Court below was wrong. By the express language of this feu-contract the superior reserved entire right to work the coal and carry it away, and he was not to be liable for any damage caused to the building that might be erected on the ground feued. At the date of the contract the coal was being worked by stoop and room, that is to say, the whole of the coal, pillars and all, were to be finally worked out and carried away, leaving no support to the surface.

¹ See previous reports, 9 Macph. 554 : 43 Sc. Jur. 269. S. C. L. R. 2 Sc. Ap. 286 ; 11 Macph. H. L. 13 ; 45 Sc. Jur. 172.