ings with a view to the tenant's going on with the lease for a period of some endurance. There is no retention by the tenant of part of the rent, and no indication that he considered that the terms of the lease had not been fulfilled. I am quite clear that the notion of sustaining a claim for damages for the whole period is out of the question.

The only point of any nicety is, whether in lieu of £80 the tenant can now claim an abatement of £16, and make it applicable to his occupation of the subjects for the last year. With reference to that the obligation is peculiar. The lease is one from year to year, and by tacit relocation the obligations of the parties to each other may be the same in the last as in the first year of the tenant's occupation. But this particular obligation is of a peculiar kind. It is plain that five years before there was an obligation to put the subjects in order. It seems to be also clear that in the first year there was outlay by the landlord on the buildings. In these circumstances, and no objection having been made to the payment of the rent for four years, it would have required very clear notice on the part of the tenant that he held the obligation to have been unfulfilled by the landlord in order to raise a claim now. The tenant now says the obligation should apply to the fifth year of the lease, but I think he is barred by his actings, and the absence of any earlier demand from demanding any abatement even in the last year.

The result is that I think the Lord Ordinary's interlocutor should be recalled and the defences repelled.

Lord Adam—It does not appear to me that this claim on the part of the defender is one of abatement of rent at all. It is a claim that the tenant shall not be called upon to pay any portion of the last half-year's rent in respect of loss or damage sustained during the whole of the currency of the lease. If the claim was one for abatement of rent, the loss for each previous year would have been set off against the rent for that year. That would have been the proper way of stating the claim. But that is not so here, for each portion was paid without reservation, and no claim for abatement was made, and so matters continued till the last half-year, and, as I have said before, no claim is set up to retain the portion of rent corresponding to the extent of the farm in which the tenant was not in possession in that half-year. The claim is that the whole loss incurred during the whole currency of the lease shall be set off against that which is, I think, a proper claim for rent for the last half-year. It is an attempt to set off an illiquid claim of damages against a liquid claim of rent.

That being in my opinion the meaning of the record, I am of opinion that we must recal the interlocutor reclaimed against, repel the defences, and grant decree against the defender.

The Court recalled the interlocutor reclaimed against, repelled the defences, and decerned against the defender Duncan Buchanan in terms of the libel.

Counsel for the Pursuer—M'Kechnie—G. W. Burnet. Agent—D. Maclachlan, S.S.C.

Counsel for the Defender—D.-F. Mackintosh—Watt. Agents—Clark & Macdonald, S.S.C.

HOUSE OF LORDS.

Friday, November 18, 1887.

BOWIE *v.* THE MARQUIS OF AILSA.

(*Ante*, March 18, 1887, vol. xxiv. p. 456, and 14 R. 649.)

Appeal to House of Lords—Petition for Leave to Appeal in forma pauperis—*Public Right.*

In an action for declarator that the pursuer as a member of the public had right to fish with rod and line in a river on the defender's property, the Court of Session assoilzied the defender. In a petition for leave to prosecute an appeal to the House of Lords *in forma pauperis*, the Appeal Committeee *refused* the petition.

In the Court of Session 18th March 1887, vol. xxiv. p. 456, and 14 R. 649.

James Bowie, who was an upholsterer in Glasgow, afterwards residing in Ayr, was apprehended on the night of 11th August 1884 by Robert Armour, water-bailiff to the Marquis of Ailsa, on a charge of poaching in the river Doon. In October following Bowie raised an action in the Sheriff Court at Ayr against the Marquis, calling Armour also as a defender, in which he prayed the Court "to find and declare that the pursuer as a member of the public has an undoubted right and privilege of fishing with single rod and line for trout, flounders, eels, and other fish which are not salmon, sea-trout," &c., "in the river Doon, at least in that part of it within the tidal influence of the sea,"—then followed a prayer for interdict.

The Sheriff (Brand) assoilzied the defender.

The pursuer appealed.

The Second Division having doubts as to the competency of the action in the Sheriff Court, agreed to allow the action to stand over to give Bowie an opportunity of bringing an action in the Court of Session. Bowie then raised an action in the Court of Session, concluding for declarator "that the pursuer as a member of the public has right to fish with single rod and line for trout," &c.

The Second Division on 18th March 1887 assoilzied the defender in both actions.

The pursuer presented a petition to the House of Lords for leave to prosecute an appeal *in forma pauperis*.

The respondent's agent objected, on the ground that the appellant was trying a question of public right, and that a committee had been appointed to collect subscriptions to assist Bowie in the litigation.

In the Sheriff Court action the pursuer, when examined as a witness, deponed—"I gave instructions for carrying on this case, and it is carried on under my responsibility, and I am not aware that any subscriptions have been promised. I should be very glad of subscriptions."

Alexander Mitchell, fishing-tackle maker, in cross-examination deponed—"I have agreed to subscribe to help to carry on this case. A subscription-sheet was drawn up, and I put my name to it. The sheet did not specify the sums

I and the others who subscribed were to be liable for. Pursuer told me he was going to try this case, and I told him we would assist. I am not sure that I showed this sheet to the pursuer. I handed the money that had been subscribed to the pursuer's agent. The pursuer knew that there was going to be a subscription. I cannot say if he knew that it had actually been subscribed. . . . The subscribers, so far as I can remember, are, in addition to myself, Mr Hanley, pipe manufacturer, and William Douglas, grocer. *Re-examined*—I cannot say how much has been subscribed for this action; it is not much."

The agent for the appellant read affidavits to the effect that the appellant had raised this action for his own protection, and relying on his own resources, in consequence of the criminal process against him by the Marquis of Ailsa for fishing in the tidal waters of the Doon, and that he was not prosecuting this appeal on behalf of the public or of any person other than himself.

LORD WATSON referred to the evidence of Alexander Mitchell, and was of opinion that the petition should be refused.

LORD MACNAGHTEN concurred.

This decision was reported to the House and agreed to.

Agent for the Pursuer (Appellant)—J. B. Allan.

Agent for the Defender (Respondent)—W. A. Loch.

This decision was followed by the Appeal Committee on 6th July 1888 in the appeal of *Fauld and Others* v. *Vere and Others* (Court of Session January 28, 1887, 14 R. 425), where the appellants representing the public were defenders in an action brought by the pursuers for declarator that there existed no public right-of-way over certain roads—See L.R., 13 App. Cas. 372, note.

Friday, August 10, 1888.

MAGISTRATES OF GLASGOW *v.* FARIE.

(*Ante*, Jan. 21, 1887, vol. xxiv. p. 253, and 14 R. 346.)

Minerals—Clay—Waterworks Clauses Act 1847 (10 *and* 11 *Vict. c.* 17), *sec.* 18—*Railway Clauses Act* 1845 (8 *and* 9 *Vict. c.* 33).

Held (*diss.* Lord Herschell, *rev.* judgment of First Division) that the provision of the Waterworks Clauses Act 1847, sec. 18, excluding from conveyances of lands purchased under the Act (when not expressly included) "mines of coal, ironstone, slate, or other minerals under any land purchased," did not apply to a seam of clay forming the sub-soil of the lands conveyed.

The Lord Chancellor holding that the word "minerals" fell to be construed in accordance with the ordinary use of the word in dealing with proprietary rights in Scotland, and did not include clay.

Lord Watson holding that the "land purchased" included the soil and sub-soil, and that the exceptional depth of the sub-soil (even if mineral) was no reason for bringing it within the category of excepted minerals.

Lord Macnaghten holding that the exception was limited to mines in the proper and usual sense of underground workings, and to minerals in such mines.

Lord Herschell was of opinion that the word "mines" was not limited to underground workings or to minerals that could be won only by such operations, and that the word "minerals," as used in the exception, must be taken to mean all such non-vegetable substances lying together in seams or strata as are commonly worked for profit, and to include clay.

In the Court of Session, January 21, 1887, vol. xxiv., p. 253, and 14 R. 346.

The pursuers appealed to the House of Lords.

At delivering judgment—

LORD CHANCELLOR—My Lords, I cannot conceal from myself the importance and the difficulty of the question involved in this case. The consequences flowing from a decision either way seem to me to be very grave, and I desire therefore to say at the outset that I wish to decide nothing but what is necessarily involved in the particular case now before your Lordships. That question may be very summarily stated to be, whether clay is included in the reservation of mines and minerals under the Waterworks Clauses Act 1847?

I cannot help thinking that the true test of what are mines and minerals in a grant was suggested by Lord Justice James in the case of *Hext* v. *Gill*, July 22, 1872, L.R., 7 Ch. App. 699, which I shall have occasion hereafter to refer to, and although the Lord Justice held himself bound by authority, so that he yielded to the technical sense which had been attributed to those words, I still think (to use his language) "that a grant of mines and minerals is a question of fact—what these words meant in the vernacular of the mining world, the commercial world, and landowners," at the time when they were used in the instrument it is necessary to consider.

I will not at present say how far I think we are bound by authority, because I desire to keep myself entirely free if the question should arise in this House with respect to any other statute or with respect to any grant not controlled by the statute in question in which the words "mines" and "minerals" occur.

It may be that I am influenced by the considerations to which Vice-Chancellor Wickens referred (L.R., 7 Ch. App. 705) when he said that "some inclination may be thought to have arisen on the part of Judges to give more weight than ought to have been attributed to some small circumstances of context in order to cut down the proper and ordinary meaning of the words 'mines and minerals.'" I think no one can doubt that if a man had purchased a site for his house with a reservation of mines and minerals neither he nor anybody else would imagine that the vendor had reserved the stratum of clay upon