

LORDS DEAS and ARDMILLAN concurred.

LORD PRESIDENT—I am sorry to be compelled to differ, but I concur in the opinion of Lord Benholme. It appears to me that the words of the 76th section of the statute are not open to construction in so far as regards the nature and quality of the residence required. It must, in my opinion, be a personal residence of the pauper himself, and not of his wife and family. The word "continuous" is open to construction, because in one sense "continuous residence" is next to impossible. The ordinary emergencies of life prevent any man from always being in the same place, or even from sleeping in the same place, and therefore this word "continuous" has been reasonably construed so as to admit of certain interruptions; and a pauper is not required to be *de facto* resident the whole time. But here the pauper did not reside for half of the time, and never for one year continuously. The mere statement of this is to me conclusive against the pauper acquiring a settlement. The majority of the Court think that the house in which the pauper's wife resides is, in the meaning of the Statute, the residence of the pauper himself. This is a new construction of the Statute, not turning on the construction of the word "continuous" but of the word "residence." I am not moved by the consideration that, unless the construction of the word by the majority of the consulted judges be adopted, it will be impossible for a seaman to acquire a residential settlement. This is of no consequence, and paupers have no interest in the question whether the parish of their birth or some other parish shall bear the burden of their needful sustentation. I dissent from the judgment to be pronounced, (1) because it involves an unwarrantable construction of words used in the Statute in their ordinary meaning; and (2) because I could not adopt it without contradicting the words of my judgments in previous cases, in which I understood some of my brethren now in the majority concurred.

WATSON for pursuer moved for expenses of attending the debate in the Inner-House.

In accordance with the decision in *Hay v. Thomson*, 23d June 1854, 16 D., 994, motion refused.

Agent for Pursuer—A. Greig, S.S.C.

Agent for North Leith—A. Duncan, S.S.C.

Agent for South Leith—P. S. Beveridge, S.S.C.

Friday, July 19.

HAMILTON v. TURNER AND ANOTHER.

(*Ante*, vol. i, pp. 52, 338.)

Reparation—Superior—Mineral Tenant—Feuar—Obligation—Delict—Underground Working—Property. A party holding a feu-right of property in a mineral district brought an action against the superior and his mineral tenant for damages on account of injury to buildings on the feu by reason of underground working. A proof was led. Held (1) that the superior was liable, and (dub. LORD DEAS) that his liability was entirely *ex contractu*; (2) (diss. LORD CURRIE) that the mineral tenant was also liable, and (dub. LORD DEAS) that his liability was entirely *ex delicto*.

This was an action of damages for injury caused to property by mineral workings, and was directed against the superior of the ground and the mineral tenants.

The pursuer holds a feu-right of his property from Mr Dennistoun, the predecessor of the defender, Mr Turner of Barbauchlaw, which was granted on 12th August 1856. The superior reserved to himself the property of the minerals, "I and my foresaids paying to my said disponees and their foresaids all damages the subjects belonging to them may sustain in and through working or taking away the same. . . . But declaring always that should said minerals be let by me or my foresaids, my said disponees and their foresaids shall have recourse against the lessee thereof for all damages which may be occasioned by the working thereof, and not against me or my foresaids farther than that I and my foresaids shall be bound to oblige our tenants to settle said damages with our said disponees and their foresaids in manner above mentioned."

The Monkland Iron Company had become tenants of the minerals lying beneath the pursuer's subjects under a lease from Mr Dennistoun, dated in 1854. The lease stipulated that his tenants "shall annually satisfy and pay all damages done by their operations, whether above or below ground." Farther "the said second parties (the tenants) bind and oblige themselves and their foresaids to free and relieve the said first party (the superior) of all claims and demands whatsoever which may be made against him and his foresaids by the tenants of said lands arising in any way out of the operations of the said second parties in working, raising, storing, carrying away, or disposing of the minerals hereby let."

The pursuer averred that, in consequence of improper working of the minerals, proper support not being left for the surface-ground, his subjects had sunk and given way, his houses and buildings being weakened, and put in danger of falling.

The Lord Ordinary (KINLOCH) held the action relevant as against the mineral tenants, but dismissed it as against the superior. The Court recalled that interlocutor, and allowed a proof before answer of the averments of all the parties.

After the proof, the Lord Ordinary found it proved that the ground and houses belonging to the pursuer had sustained damage through the operations of the Monkland Iron Company in working the minerals without leaving sufficient support for the surface, and held that these defenders were liable in damages, which he modified to £500. He again assoilzied Mr Turner. The Lord Ordinary, in his note, stated his adherence to his former opinion,—that every mineral tenant is bound so to conduct his workings as to afford sufficient support to the surface. He was as much bound to this as the proprietors of an under-floor of a house is bound so to conduct operations on his property as not to injure the support afforded to the floor above. When the minerals are constituted into a separate property from the surface the proprietor or tenant of the one is as little entitled to do injury to the other through the necessary consequence of his operations as in the case of any other wholly distinct properties. Here injury had been proved. It was said that the minerals could not possibly have been worked without causing some subsidence to the surface, but the rest of the evidence explained this simply to mean, that subsidence could not be avoided where the workings were carried on in the particular way adopted, and so as to work out the minerals under the pursuer's property. There was no impossibility in leaving these minerals unwrought—probably none in working them to such

diminished extent as would leave sufficient support. If the defenders, for their own profit, wrought all the minerals out, and wrought them in such a way as to bring down the pursuer's house, they were, on every principle of law and equity, bound to repair the damage. In this matter there was no distinction between the ground and the houses. Where minerals were constituted into a separate property from the surface, the proprietor of the surface was not thereby disabled from building houses more than from any other legal use of his property.

As to the defender, Mr Turner, the Lord Ordinary thought he was not liable. The damage was done, not by the landlord, but by the tenants. A landlord was not liable for the acts of the tenants, except when the lease was of such a character as necessarily to authorize these acts; in which case the landlord, by his authority, would be as truly a party to the wrong as the tenant by whom it was perpetrated. This lease was not of that character. It had nothing in it to import that the minerals might be worked without leaving sufficient support for the surface.

The pursuer and the Monklands Iron Company reclaimed.

PATTISON and STRACHAN for pursuer.

CLARK and WATSON for mineral tenants.

DEAN of FACULTY (MONCREIFF) and GIFFORD for superior.

LORD PRESIDENT.—This is a question of considerable importance. Some of the legal questions involved in it are of general application, but some of them, I think, are very special. The Case against the defender, Turner, the lessor in the mineral lease, and the superior in the feu, is very peculiar. I am not able at all to concur with the Lord Ordinary on that point. On the contrary, the only thing I think clear in the case is, that Turner is liable. But I think he is liable entirely *ex contractu*. The first plea stated by the pursuer is, that the defender, Turner, as successor of Dennistoun, the granter of the said feu-disposition in favour of the pursuer's author, is, under and in virtue of the said feu-disposition and obligation thereby incumbent upon him, bound to make payment to the pursuer of the damage occasioned to the pursuer's said subjects in and through the working of the minerals under the same, he having acknowledged and adopted the lease granted to the other disponee by his author, Mr Dennistoun, and taken payment of the rent payable under said lease. The grounds of liability involved in that plea I take to be these:—(1) that the original granter of the feu-disposition came under an obligation to pay to the pursuer the amount of all damage that might be occasioned to him in his feu by the working of the minerals under it; (2) that that transmitted against Dennistoun's singular successors in the superiority; (3) that the defender, Turner, who is the singular successor of Dennistoun, farther incurred liability by adopting the mineral lease in favour of the other defenders. According to the view I take of the feu-disposition, that last element is unnecessary to the pursuer's case under the first plea.

The subject of the feu-disposition is part of the estate of Barbauchlaw, near Armadale, a district which seems to be generally a mining district, and the object of feuing this piece of ground to the original feuar was that he might build houses on it—for he is taken bound to build in the feu-disposition—the houses to be built being of a very small class. It was in the knowledge of both

parties to this feu-disposition that the minerals under the estate were let to the other defenders, and it was well known to both that that lease authorized the lessees to work the minerals under the ground of the feu. In these circumstances the parties might have dealt with the minerals in a different way. Dennistoun might have given out the feu without any reservation of the minerals, the effect of which would have been to make the feuar to a certain extent the landlord of the mineral tenant in that lease, and that would have given rise to an apportionment of rent between Dennistoun and his feuar. The feuar would have become a party to the lease with the company, and would have stood in the relation to them of a party bound by the contract. The parties resolved to take a different course, and it was made matter of agreement, expressed in this way, that the pursuer reserved to himself and his successors in the superiority, the property of the minerals, and, as the counterpart of this agreement, he and his foresaids were to pay to the disponees all damage which might be sustained by their subjects through working the minerals. Then follows this stipulation:—"But declaring always that should said minerals be let by me or my foresaids, my disponees and their foresaids shall have recourse against the lessee thereof for all damages which may be occasioned by the working thereof, and not against me or my foresaids, farther than that I and my foresaids shall be bound to oblige our tenants to settle said damages with our said disponees and their foresaids."

As regards this last declaration, it seems to me that it has no application to the case here. It is clear, from the terms of it, that it was not intended to apply to operations under the then existing lease, which was fully in the knowledge of both parties. If that had been intended this clause would have been expressed in different terms. It is in form applicable to future leases, and not to existing ones. And that is still clearer, because the substance of the declaration is this, that when such a lease is let, the only obligation prestable against the superiors succeeding is, that they shall take their tenants bound to settle with the feuar, a stipulation which did not exist in the current lease. Therefore, I throw that part of the clause out of view altogether in dealing with the question between the superior and the feuar. And looking to the remaining part of the agreement as to minerals, it seems to admit of only one construction. The superior says, I reserve to myself and my successors in the superiority the whole minerals of the feu, and, in return, I fix this obligation on myself and my foresaids, that we shall pay the amount of any loss you may sustain through the working of the minerals. This is one of the simplest obligations possible, and therefore I shall merely state my opinion, that Turner is clearly liable.

But there remains the liability of the other defenders. The pursuer has no relation to the mineral tenant arising *ex contractu*. He has no stipulation in that lease applicable to his case at all. Nothing is stipulated on his behalf, and therefore if the mineral tenants are to be liable, that must arise not *ex contractu* but *ex delicto*. And therefore the question is, whether these mineral tenants are liable to the pursuer in consequence of improper working under his ground?

A great deal of argument was directed to showing that the right of these mineral tenants was in some views preferable to that of the feuar, and in

case of competition must prevail, because earlier in date in this case; and for other reasons. I am not disposed to question that there was constituted in favour of the mineral tenants a real right to the minerals. The authorities are all in favour of mineral tenants having the benefit of the Act 1449, and probably the real character of the right which the lessee takes is more apparent in the case of a mineral than in the case of an agricultural lease. For both rights are temporary; but the possession of the mineral tenant is of such endurance that he is supposed to be able to exhaust his subject, and therefore his right approaches more nearly to a right of property. But supposing that to be so, and that the mineral tenants had a right of property in the minerals, the question still is, under what obligations at common law do they lie as to the subjects of which they are the owners? That is a difficult question, and it is not without hesitation that I have formed an opinion. But there is one principle of law pretty clearly involved in the relation of the mineral tenant to the owner of the surface, independent of lease or contract, and that is, that the owner of the minerals is bound so to work the minerals as to do as little damage as possible to the property of the surface. That is the foundation of the whole law on the subject. And that is well brought out in the case of *Dunlop v. Corbet*, in the time of Lord President Blair, and is applicable to this class of cases. The maxim applies *sic utere tuo ut alienum non laedas*. Now the application of this to such workings as we have here, as I understand the matter, is this, that the mineral workers must use all reasonable precautions not to bring down or disturb the surface; and that, even where the owner of the surface is himself the seller of the minerals, he is not restrained from building, although no such buildings existed at the time when the mineral lease was entered into. He is not, on the one hand, entitled to occupy the ground, building large factories or towns, so as to prevent the tenant from working with any profit; but the mineral tenant, on the other hand, must not restrain him beyond what is reasonable, and must take care to protect his property, whether it still remains an agricultural subject or is occupied by buildings. We have now to apply these principles. I am not going to trouble your Lordships by an exposition of the proof. My conclusion is, that in working out the minerals under the property of the pursuer, the mineral tenants did not use due care and diligence; that they omitted to use the precautions usual and reasonable for the protection of the surface and the houses built thereon; and therefore, applying the principles of the common law, they also are answerable to the pursuer. But having got two parties, both equally answerable, it must be remembered that the liability rests on different grounds. That is not a joint but a several liability, and in any decree now to go out, there must be a decree on one ground against the one party, and on the other ground against the other.

LORD CURRIEHILL concurred with the Lord President in holding that the superior was liable to the pursuer *ex contractu*. On the question of the liability of the other defenders, he took a different view. He could not find any evidence, in the proof which had been led, that the act of the mineral tenants was wrongful. They had wrought out their minerals by a mode which was both legal and usual. It was said they had not adopted certain precautions they were bound to adopt to prevent

injury to the surface. He thought the proof showed that they had only done what they were entitled to do. He doubted whether their obligation was increased by the owner of the surface, or any one in his right, erecting houses, and whether they were liable for damage to the ground in any other state than it was in when this lease was entered into.

LORD ARDMILLAN—There are some points in this case on which I think there is little doubt. The difficulty I feel arises from the position of the defenders as sued on entirely different grounds. The pursuer (Hamilton) is proprietor of certain houses near the village of Armadale, a miners' village, in the middle of mineral workings. His title is a feudisposition in August 1856. He was taken bound to build, and he did so. The whole of the minerals were reserved by the superior; and there can be no doubt that the fact that minerals were being worked was known to, and in the view of, all the parties. The superior bound himself to pay damages caused by working. If he should let the minerals, he stipulates that the lessee shall pay the damages. This applies, I think, to a future lease—not a prior lease—and an existing working. The demand for enforcement of this obligation by the superior is not rested on a liability for fault. There is no delict involved in it. The damages are to be paid if the subjects are injured, even though there was no fault.

The lease to the Monkland Company was in 1854—prior to the feu-right. The superior who granted the feu was landlord, and received the mineral rents under the lease. By his tenant he thus worked these minerals under the reservation in the feu-disposition; and he could only do so on the condition of paying for the injury done by the act of working.

If there was no fault in the manner of working, that would exclude action on delict; but not on this contract.

If there was fault in the working, that delict may render the mineral lessees liable to the pursuer; or it may render them liable to the superior in relief, just as they would have been liable to him if the land had not been feued and built on.

I am therefore of opinion, 1st, That the defender (Mr Turner) is liable under the contract in compensation to the pursuer.

2dly, I also think that the defenders (the Monkland Company) are liable to the pursuer *ex delicto*. This, however, is a more difficult question. There is no case or contract against them; on the contrary, they are not parties to the feu-contract, and the pursuer is no party to their lease. There is no privity of contract to support an action at the pursuer's instance against the Company on that ground. I am, however, of opinion, that their liability must be determined by the state of the facts, and that, as matter of fact on the proof, enough has been proved to sustain the action on the head of delict against the Company.

I agree with your Lordship and the Lord Ordinary that every mineral lessee is bound so to work the minerals as not to bring down dwelling-houses on the surface. I should be sorry if this could be doubted; and I have no doubt on it myself. That these defenders could have protected the houses and avoided this calamity by some additional cost, and additional caution, is to me plain on the proof. They could not have actually removed all the minerals without endangering the houses: that is true. But I am not prepared to say that they had a right to work up to within a few inches of the

surface under a dwelling-house, in order to work out the whole of the minerals beneath.

Their case is, that they are not bound to more care under houses than away from houses. I cannot think this according to law, or reason, or humanity. There must be a reasonable obligation to work with due care and caution in the circumstances, and more care where danger is greatest. Nor can I admit the proposition of the defenders, that the mineral lessees are only bound to sustain the surface without buildings, or with the buildings at the date of the lease; and that if there were at that time no buildings, then only to sustain the ground without the buildings. I cannot accept that as good law.

I do not think that the granting a mineral lease operates as a prohibition against all building or feuing on the surface, except under the peril of destruction of the buildings without redress.

There is no question here of the building contributing to the subsidence, nor of an unfair or extravagant addition to the amount of damage by a building of an unusual and inappropriate description. Nothing was done here beyond what was in the contemplation of parties.

On the question of evidence, I have only to say that I agree with your Lordship, that the pursuer's claim, on the ground of fault or carelessness in working, has been sufficiently established.

It appears to me that the defenders, knowing that they were working under, and very near, dwelling-houses, did not take all the precautions within their power, and according to their duty, for securing against the injury, and, it may be, against the sudden and entire destruction of the dwelling-houses. That is, I think, a sufficient ground for holding the mineral lessees responsible.

There is no joint liability.

There may be questions of relief between these parties. They are, I understand, reserved.

Lord DEAS concurred in holding both the superior and the mineral tenants liable in reparation to the pursuer. He was not sure if the liability of the one rested entirely on contract, and the liability of the other entirely on delict; but the main thing was that both were liable. As to the tenant, the question was a very general and important one. There was nothing unusual in the terms of the mineral lease, which seemed to have been prepared by some one quite familiar with the form of such instruments. Further, there was nothing illegal in the "longwall" system of working which the mineral tenants had adopted. That was the natural and usual mode. Still the question was, whether there was not some obligation on the mineral tenants with regard to the owner of this feu? This mineral lease comprehended a considerable extent of field. The rent under it was about £500 or £600 a-year. It was in the neighbourhood of a mining village, where houses were rapidly increasing. It was, therefore, a lease of minerals in a property as respects which it could not be held that the granter of the lease was giving up to the mineral tenants his right to deal with any part of that ground. It was not to be supposed that the lessor was not to build on any part of this estate under which the minerals were let;—that, for example, he was not to put up a farm-house or offices, or to build a lodge at the entrance of the avenue to his house. The superior did not give up that right. If he himself had built, the mineral tenant would have been bound to take care. There might be a difference as regarded the erection of large

buildings, and perhaps all that was to be built was some colliers' houses. In the mineral lease there was an obligation to build twenty such. It might fairly be expected that such houses would be built, even by the superior. The question was just this, is there to be no use of the surface on account of the minerals? Suppose the minerals had been sold, the result would have been that the owners would still have been owners of the estate, subject only to such restrictions as are imposed by the rights of neighbourhood. He could not be debarred from exercising his usual right of property because there was another estate below. There was no authority for the contrary doctrine. Therefore, although the mineral tenants were entitled to work their minerals, yet, when they saw these houses, they were bound to take all the precaution they could not to bring them down, and if no other precaution would do, they must simply not work under the houses. But it was very plain, in the present case, that the mineral tenants had taken no precautions at all. They were at least bound to take all reasonable care, but they did not profess to have taken any; and such they maintained to be their right. That was clear from many parts of the evidence, and, though it was true that all the proof was not in one direction, the fair result of it was that they had done nothing at all to prevent injury to the surface.

Agents for Pursuer—J. Paris, S.S.C.

Agents for Mineral Tenants—Maconochie & Hare, W.S.

Agents for Mineral Tenants—Davidson & Syme, W.S.

Friday, July 19.

ZIZINIAS AND MANDATORIES, PETITIONERS.

Petition—Leave to Enrol. Circumstances in which a petition for special authority to enrol in the roll of undefended causes, refused.

The petitioner, Stamatius Paul Zizinias, merchant in London, and his mandatories, presented this petition, stating that on the 27th June 1867 they had raised and signeted a summons against Francesco Fioretti, presently in Greenock, master of the Italian vessel the "Daniele Manin," and Leon Serena, shipowner in London, against whom arrestments had been used, *ad fundandam jurisdictionem*, concluding for payment of the sums contained in two bills of exchange: That the said summons was executed edictally against both defenders, of the said date, and was also served personally on the defender Fioretti, on July 3, 1867: that the *inducivæ* expired on the 18th of July 1867, and the summons had accordingly been lodged for calling on that day, before Lord Ormisdale.

That by section 29 of the Act of Sederunt, 11th July 1828, it was provided, *inter alia*, that "no cause shall be enrolled earlier than on the second lawful day after it shall have been called, unless special leave shall be given by the Inner-House." The time allowed for the defenders entering appearance would expire on Friday the 19th July 1867, at seven o'clock p.m.; but if no appearance was made (and the petitioners had reason to believe that no appearance would be entered) it would be too late to get the case enrolled in the Roll of Undefended Causes for the day following (Saturday), which was the last day of