The Court dismissed the Special Case.

A similar Special Case for the same parties, in regard to the condition in the certificate which prohibits sale by other than the imperial standard weights and measures, was also presented, and dismissed on the same grounds.

Agent for Robert Morton—A. Kelly Morison, S.S.C.

Agent for John Gardner—John Galletly, S.S.C.

Friday, February 24.

SECOND DIVISION.

HENDERSON AND OTHERS *v.* ANDREW.

Superior and Vassal—Minerals—Property. A superior bound his vassal by a feu-contract to build and maintain in all time thereafter a house of a particular description, and also reserved the minerals to himself, with full power to work, &c., "and that free of all or any damage which may be thereby occasioned to the said second party or his foresaids." *Held* (affirming Lord Ormidale's interlocutor, *diss.* Lord Justice-Clerk) that the superior was not entitled to conduct the workings in such a way as to destroy a house built in accordance with the stipulation in the feu-contract.

This was a process of interdict, and was commenced in the Sheriff-Court of Lanark by a petition at the instance of William Jackson Andrew, solicitor in Coatbridge, against Robert Henderson and Richard Dimmack, carrying on business at Drumpeller, Coatbridge, as coalmasters, under the firm or style of The Drumpeller Coal Company; and also against David Carrick Robert Carrick Buchanan, Esq., of Drumpeller, for any interest he may have.

After a proof, the Lord Ordinary (ORMIDALE) granted the interdict craved, and the following passage from the note to his interlocutor will explain the important question of law raised by the case:—"There remains the important question whether, in the special circumstances of the present case, and in particular having regard to the conditions of the respondent's feu-right, he is entitled to complain of the operations in question, and to an interdict against their continuance, whatever may be the injurious consequences to his property, even although the result may be, if these operations are continued, the total destruction of his dwelling-house. The advocators maintain that the respondent is not entitled to any interdict, and in support of this contention they chiefly founded on the reservation in the feu-contract of the minerals to the superior, Mr Buchanan, and of his right to work and remove the same without being liable to the feuar for any damage that might thereby happen to the piece of ground in question or the buildings thereon. On the other hand, the respondent maintained that he was entitled to interdict against the continuation of operations which it was proved would destroy his dwelling-house, and in support of this contention, besides appealing to the common law principle that the owner of minerals was only entitled to work and remove them in such a manner and to such an extent as not to deprive the owner of the surface of its natural and necessary support, he founded on the stipulation in the feu-contract whereby he was taken expressly bound 'to erect, in so far as not already done, a single or double dwelling-house or villa of one storey with attics, or a dwelling-house of one and a-half or two storeys in height, which house or villa shall be for the occupancy of one family only, and shall yield a yearly rent equal to triple of the foresaid feu-duty, and to maintain and uphold the foresaid building in a sufficient and proper state of repair, so as always to yield such a yearly rent, and of an equally good style of architecture, in all time thereafter.' It is certainly not very easy to reconcile these stipulations of the feu-contract with the alleged right of the superior so to work the minerals as to destroy the feuar's dwelling-house—to reconcile the right, on the one hand, of the superior, by himself or his tenant, to work out and remove all the minerals below the respondent's feu, even although that should have the effect of destroying his property, with the very stringent obligation which has, on the other hand, been laid upon the feuar not only to erect, but to keep in good repair a dwelling-house of a particular description on the ground of his feu. The Lord Ordinary is of opinion that the stipulations of the feu-contract must be considered and dealt with in subordination to its main object, viz., the erection and keeping up of a dwelling-house. That was the main object of the feu-grant, and it would be altogether unreasonable and absurd to suppose that while the feuar was to be bound not only to erect, but always to uphold in good repair, a dwelling-house of a certain description, the superior should be at liberty to destroy that house whenever he pleased, and that, too, without being answerable in the loss or damage thereby occasioned to the feuar. It is possible to conceive that there may be damage done to the feuar's property short of actual injury to or destruction of his house, for which he may have no claim, and in that way the stipulations in the lease may be reconcileable, but the Lord Ordinary entirely fails to understand how it is possible to reconcile these stipulations on the footing of the feuar being bound to erect and uphold in good repair a dwelling-house on his grounds, while the superior is at the same time to be entitled to carry on operations which must have the effect of seriously injuring, if not entirely destroying, such dwelling-house. Various decided cases, both English and Scotch, were cited in argument by the parties, but as in none of them did the same *species facti* occur as those which characterise the present case, the Lord Ordinary cannot say that any of them is of the nature of a precedent precisely in point. The general principles, however, which appear to have influenced the Court in deciding the cases of *Bald* v. *The Alloa Coal Company and Lord Mar*, 30th May 1854, 16 D. 870; *The Caledonian Railway Company* v. *Sprot*, 1856, 2 Macqueen, 449; and *Hamilton* v. *Turner and Others*, 19th July 1867, 5 Macph. 1086, go far, the Lord Ordinary thinks, to support the contention maintained in the present case by the respondent, and the judgment which has been pronounced."

Messrs Henderson & Dimmack reclaimed.

The SOLICITOR-GENERAL and BALFOUR for them.

SHAND, TRAYNER, and MACLEAN for the respondent.

At advising—

LORD COWAN—The discussion under the reclaiming note was confined to two questions, which are the subject of the third and fourth heads of the note attached by the Lord Ordinary to his in-

terlocutor, and more especially to the latter, viz., the legal effect of the provision in the feu-contract by which it is alleged the respondent is excluded from claiming the interdict sought for in his petition to the Sheriff. The feu-contract was entered into in 1859 between Mr Buchanan and James Porteous, from whom the respondent acquired the subjects in 1865, the extent of the ground feued being 1 rood, 18 poles, and 2 yards or thereby. The contract demonstrates that the purpose of its being entered into was the erection of a dwelling-house, to form part of a line of street which it was the superior's design to have erected in the neighbourhood of the populous village of Coatbridge. With that view various obligations are imposed upon the feuar as to the erection of his dwelling-house, to secure uniformity with the houses erected, or to be erected, on the surrounding feus in the village; and these obligations, under seven different heads, are appointed to be engrossed in the title deeds as real liens and burdens on the ground feued. Farther, the dwelling-house to be erected by the feuar on the ground, whether a single or double dwelling-house, or villa of one storey with attics, or a dwelling-house of one and a half or two storeys in height, it is specially declared shall be of such value as to yield a yearly rent equal to triple of the feu-duty, fixed at £5 yearly; and the obligation imposed on him is "to maintain and uphold the foresaid building in a proper and sufficient state of repair, so as always to yield such a yearly rent, and of an equally good style of architecture, in all time thereafter." By the terms of the feu-contract, coal and other minerals are reserved to the superior in these terms—"Reserving, &c., the whole coal, fossils, fire-clay, ironstone, limestone, freestone, and all other metals and minerals in the said piece of ground, with full power to work, win, and away carry the same at pleasure, as also to remove as much stone and other matter as may be necessary for the proper working of the said coal, ironstone, and others, and that free of all or any damage which may be thereby occasioned to the said second party and his foresaids." The terms of this reservation are not materially different from what is usual in such cases, and, had the clause stopped here, there is not much, if any, doubt that the loss suffered by the feuar, or damage arising to him, to which it applied, was exclusively that which might incidentally arise from the proper working of the minerals, and could not have included loss suffered from the adoption of any unusual or reckless mode of working that might lead to the demolition of the erections on the surface. The decisions referred to by the Lord Ordinary make it clear that in the event of the surface being undermined to the destruction of such erections, the loss caused to the owner must be made good to him by the superior, or by the parties authorised by him to work the minerals. That cannot be "proper" working of reserved coal in a building contract which must lead to the demolition of the buildings erected under this very contract. There follows, however, a provision which the superior has inserted in the various feu-contracts of the ground, the buildings on which constitute a large part of the neighbouring village, and the true effect of which it is important for the respondent and the whole feuars to have judicially ascertained. Its terms are—"And it is expressly agreed that the said first party, &c., shall not be liable for any damage that may happen to the said piece of ground, buildings thereon, or existing hereafter thereon, by or through the working of the coal, &c., in or under the same, or in the neighbourhood thereof, by long-wall workings or otherwise, or which may arise from or through the setting or crushing of any coal waste or other excavation presently existing, or which may exist hereafter, within, or in the neighbourhood of the ground hereby disponed, through the said first party or his foresaids working or draining the said metals or minerals or others as aforesaid." This is no doubt a very stringent provision, but I cannot think that, having regard to the fact of the deed being a proper building contract, the clause could have been intended to authorise the superior or his mineral tenant, by long-wall coal workings or otherwise, so to undermine the surface as to destroy the property of the feuar without compensation for the damage thereby caused. The mode of working the coal proved to have been in use prior to 1859, was one which protected the interests of the owner's surface erections, inasmuch as by the old system of stoop and room, pillars of sufficient strength were left for their support, or if by "long-wall" the same object was effected, to some extent at least, by filling up the excavation, and some system of this kind must have been in contemplation of the parties. It is not conceivable that the feuar would have entered into an agreement under which his superior could at any time, by excavating the whole coal under the ground feued, bring down the dwelling-house, which by the same deed he was taken bound to erect and uphold in all time. Nor can it be supposed that the superior could have intended that the agreement with the feuar was to have such a one-sided and unjust construction put on it. Both parties must, I think, have contemplated the damage against liability, for which the superior provides in the terms quoted, was that which might occur notwithstanding of the working of the minerals being conducted with due regard to the interests of the owner of the surface. In other words, the damage to which the stipulation applies can have regard only to what may occur through crushing or otherwise, notwithstanding the coal being duly and properly worked, and the interests of the feuar being duly regarded. It is in this argument to be held as proved by the evidence that by the system of working now carrying on by the advocators—that is excavating the whole of the pillars by which the surface is supported, and leaving the whole seam of six feet void—buildings on the surface must be injured and destroyed as dwelling-houses; and yet the contention of the advocator is, that by this clause the feuar expressly agreed to this being done without any claim for the damage he might suffer. It is a good test of this construction to suppose that in place of the involved way in which the agreement, if such be its meaning, is set forth in the deed, it had been in plain words stated that the superior and his mineral tenants were to have full power at their pleasure to put the pursuer's property into this certain peril, and to ask whether the feuar would have entertained such an unreasonable and disastrous proposal. He certainly never would. At the date of the contract, the coal under the ground feued was leased to Mr Wilson of Dundyvan, and on the termination of his lease in 1866, the advocators became the mineral tenants. It is made certain by the evidence that in working the coal Mr Wilson, all around the respondent's house, had left large pillars by which the surface was supported. The

mode of working is explained by Mr Landales. He states that the higher seams had been worked out by the system then practised, that is, leaving props about one-fourth of the whole area, to serve as permanent pillars in keeping up the surface. But for the last dozen years, *i.e.*, from about 1858, he explains that a different system of stoop and room working had been introduced, which he describes in these terms—"The modern stoop and room, or complete excavation, is to go away with half the coal and come back with the other half, and then you leave nothing." This modern system, he explains, had been begun by Mr Wilson some years before the advocators entered on their lease; that Wilson had begun to take out the pillars in some parts of the field of which he was tenant, and that this operation was resumed by the advocators, and continued until the interdict obtained against them at the instance of one of the respondent's neighbouring feuars. The effect of this mode of working, as may be well conceived, is described to be that the buildings on the surface will be destroyed. Mr Landale adds, that unless the mineral lessees make up their minds to sacrifice the buildings and take the risk, which they often do, they give the buildings "a wide berth," so that wherever the surface is to be protected in the working of the minerals, there is always a barrier left to protect the buildings. In these statements by Mr Landale all the other engineering witnesses substantially concur. The case then stands thus. The modern system of excavating the coal, on which the advocators are avowedly acting, must lead to the destruction of the houses erected by the respondent and the neighbouring feuars; and their contention is that they have full right and power to do so without liability for any compensation or damage thence arising, because of the provision in the feu-contract to the terms of which it is said no other meaning can be attached. I am not of that opinion. The provision in question may, as it appears to me, be construed more consistently with the character of the feu-contract, and the several obligations of the parties to it, by holding it to apply to damage incidentally arising from the mineral workings, due care being always taken that the system of working is not such as inevitably to bring down the buildings on the surface. It appears to me that to enable the advocators to maintain their construction the clause behoved to have in express terms provided that the feuar was to submit to have his property destroyed without redress should the superior or his mineral tenants resort to this modern system of stoop and room working, and leave no mass or pillars of coal to support the buildings, as would have been the case had the old system of stoop and room been followed. The lease under which the advocators are in possession of the coal bears to be dated February 1869 and June 1870, long after the respondent's petition for interdict, which was in February 1867; but the lease, which is for the period of twenty-five years, sets forth the commencement as at Whitsunday 1866. It is not therefore surprising to find the cautious terms in which the liability of the advocators for damage to the surface owners is expressed. They are taken bound to pay to the landlord and his feuars all damages any of their operations may cause to the surface of the land or erections now existing, and these damages they are to settle directly with the parties suffering the same, and it is added, "but that to the extent only that the said second parties and their foresaids (*i.e.*, the advocators) are liable under the feu rights and leases respectively." But it is of more importance to observe that by this lease what is let is "the *workable* seams of coal" within the lands, and that throughout the lease and its several stipulations those powers conferred on the tenants contemplate "the *regular* working and obtaining the . . . coal hereby let," and the "*fair* working" of the minerals let; and they accordingly bind themselves "to work the whole coal in a *regular*, *systematic*, and *proper* manner, without unnecessary waste of material either by pillar and room, chain-wall or long-wall, or other approved system." Hence, although the respondent is no party to this lease, and is not bound by its provisions, it is not immaterial to find that the tenants are here expressly taken bound by their landlord to have regard to the rights of the surface owners in their coal workings, and that whatever system they should adopt for getting the coal out of the seam, they were bound to work the coal "regularly, systematically, and properly." By this provision protection was secured to the owner of the buildings on the surface, unless, indeed, the respondent can be held to have agreed to suffer the demolition of his dwelling-house without redress. As regards the superior's contention that he ought not to have been made a party to this application for interdict, I adopt the views of the Lord Ordinary, which appear to me consistent with the evidence before the Court as to his sanction of and concurrence in the proceedings of his mineral tenants. Various decisions were referred to in the course of the discussion, but in none of them did there occur the great peculiarity of the provision as to the working of the minerals being for construction under a *building contract*, binding the feuar not only to erect but to uphold and maintain certain erections on the surface. And in the most recent of these authorities, *Wakefield* v. *Duke of Buccleuch*, decided in the House of Lords, March 1870, the provision in the statute was qualified by the declaration that reasonable compensation for damages should be made to all parties suffering damage from the underground working. That consideration appears to me to have entered largely into the views of their Lordships who decided the case on appeal. Accordingly the Lord Chancellor, in concluding his comments on the clause which there occurred for construction, states that he could not but come to the conclusion that it was the intent of the Legislature and of all the parties to the Act, "that there should be given the fullest and completest power of working these valuable minerals, but that that power should be fettered by the condition (a most important one undoubtedly) contained in the end of the clause, that those who worked the minerals should make compensation for all such injury as might be occasioned by the acts necessary to the proper working of the mines." In the course of the discussion it was remarked that an application for interdict was not the best mode of raising this question of the construction of the contract, but this objection in form was not pressed, and I rather understood it to be the desire of both parties to have the judgment of the Court as to their relative legal position and rights under this record at once determined. On the whole, I think no sufficient ground has been stated for disturbing the interlocutor of the Lord Ordinary.

LORDS BENHOLME and NEAVES concurred in the opinion expressed by LORD COWAN.

LORD JUSTICE-CLERK—I regret that I am unable to concur in the judgment your Lordships propose to pronounce, or in the reasoning on which it is supported. My opinion in this case is entirely founded on the construction of the agreement embodied in the feu-contract between Buchanan and Porteous in 1859, which forms the only title of the complainer Andrew to his house and grounds. I think that the terms of that agreement are unambiguous in themselves, and that the intention of the parties to it is sufficiently clear. It appears to me to have been carefully, anxiously, and effectually framed for the purpose of excluding the demand which is made in this action. The complainer alleges that the working of the minerals adjacent to his feu have injured, and threaten to destroy, his house, and he asks for an interdict against their being continued to his prejudice. The respondents, the owner of the minerals and his tenants, while denying that the workings have produced this result, plead that the complainer is precluded from making this demand, in as much as he or his author acquired the property on the express condition that the owner of these minerals should be at liberty to injure the surface so far as might be necessary for obtaining the minerals. It is to this plea alone that I intend to advert. Of the relevancy of this answer, there cannot, I think, be the slightest doubt. At common law the owner of the surface of the soil is entitled to subjacent and adjacent support from the strata below and adjoining his property, and if the ownership of these be in another, the minerals can only be worked subject to this obligation of support. If the mineral owner by his workings injure the surface, he will be responsible for the damage which he does, and may be prevented from doing damage for the future. The right to support is an incident of the ownership of the surface, and does not depend upon the use to which the surface may be put. But this obligation of, and right to support, like other things connected with land, may be made the subject of contract, and may be modified or increased or altogether abandoned as the owners of the surface and the minerals may mutually agree. For instance, the owner of the minerals below may, and often does, undertake for a valuable consideration to leave the minerals entirely unworked, in order to afford greater security to the surface, and if he does so, he must fulfil his bargain. In like manner, the owner of the surface may also, for a sum paid down, or other valuable consideration, agree that the mineral owner may injure the surface in so far as may be necessary for his mineral workings, and if he does so he is equally bound. There is no principle of construction of presumption of law which does not equally apply to both contracts. Both are restrictive of the common law rights implied in the ownership of the respective estates, and must be construed according to the ordinary and natural signification of their terms. It may no doubt happen in either of the cases supposed that the engagement may turn out unprofitable or burdensome to one of the contracting parties. But this is a consideration with which a Court of law has no concern. Our duty is to ascertain what parties undertook towards each other, and to see that they fulfil their mutual obligations. It is true that at one period an impression prevailed that a contract of the nature alleged by the respondents was to be viewed with disfavour, and to be subjected to more rigid and critical construction than other bargains about land. In the case of *Hilton* v. *Lord Granville*, Lord Denman went so far as to say that a Court of law would refuse to give effect to such a condition in a grant of the surface. But there is no foundation in law, nor I think in reason, for this distinction. An estate in minerals is often more valuable than an estate in the surface, and equally requires and is entitled to be protected by the law. This principle, so important to this great branch of our national industry, has now been put beyond all question by two authoritative judgments of the House of Lords, the first the case of *Rowbotham* v. *Wilson*, in 1860, and the second, that of *Westgrove* v. *The Duke of Buccleuch*, in 1870. Lord Wensleydale and Lord Chelmsford, with the concurrence of Lord Kingsdown and Lord Chancellor Westbury in the first of these cases, and Lord Chancellor Hatherley and Lord Chelmsford in tha second, conclusively dissipated these doubts, and ruled that such agreements depend for their force and effect simply on the terms of the instrument in which they are contained. As to the law applicable to the case, therefore, there seems no question. It only remains to inquire whether the feu-contract before us contains the agreement alleged. I entertain no doubt that it does. At the date of this feu-contract, the respondent Buchanan was the owner of a large mineral field in the vicinity of and below this plot of building ground, which he feued off to Porteous. This rood of ground, which he feued for a feu-duty of £5 annually, stood above two mineral wastes, the seams in which had been worked out many years before. The ground, therefore, was not only in the centre of a mineral district, but was immediately above old workings, and the streets referred to in the feu-contract were to be built on that foundation. The third seam, which was below the other two, was at this date in the course of being worked by Buchanan's mineral tenant, Wilson of Dundyvan, on a system the proper operation of which was to work out the whole coal without leaving any support for the surface. According to this process large pillars or stoops were left in the forward working, and on the return these pillars were worked out one by one, until the whole coal was excavated, without any support being left. Mr Landale, the principal witness for the complainer, explains very distinctly that it was the rule in this system of working to leave no pillars for the surface, excepting in cases in which the mineral owner was obliged to do so from not having power to disturb the surface. He says—"By the old-fashioned stoop and room method we could keep the surface up, but either by long wall or complete excavation, such as this, it is impossible—the surface must come down;" and he adds, that is the method now generally practised by miners. It is also proved by Landale that Wilson's workings were conducted on the new system of large pillars left, with the intention of taking them entirely out on the return working. What Buchanan, therefore, in this feu-contract, had to provide for was to retain so much control over the surface as might entitle him to work out these pillars without incurring any responsibility to his feuar. It seems from Mr Landale's evidence, that the seam immediately below the complainer's feu was not workable to profit in respect of a dyke or fault in the strata. The interest of Buchanan, therefore, lay in the right to work the adjacent pillars. In this feu-contract, accordingly, Buchanan conveys the surface to Porteous, but he does not convey the minerals; and he does not convey the right to claim damage for

any injury which the working of the minerals may occasion. On the contrary, he reserves the minerals and the right to work and win them free of any such claim of damage. It is thus clear that Buchanan retained something more, and Porteous acquired something less, than at common law the ownership of the minerals and the surface respectively would have conferred on them. But this reservation, although it illustrates, is immaterial to, the question now before us, which relates not to the minerals below the feu, which, if not reserved, would have passed by the conveyance, but to the minerals adjacent, in regard to which no relation of superior and vassal was, or could have been, created by the instrument. Accordingly, the conveyance is followed by a special agreement between Porteous, as acquiring right to the surface, and Buchanan, as owner of the minerals both below and adjacent. This agreement, which is a burden on the conveyance and passes with the land, is most anxiously and comprehensively expressed, and every clause of it deserves attention, because every clause of it is evidently carefully framed. The substance of the agreement, as I construe it, is this:—Porteous, as the owner of the surface, agrees that Buchanan, as the owner of these minerals, shall not be liable to him for any injury which may be occasioned to the surface itself, or to any buildings existing on it, or to any buildings to be erected on it under the feu right, which may be caused by the working of the minerals, whether below or adjacent; and whether such injury may be caused directly by the workings, or indirectly by the workings, affecting the wastes above, and so causing a sit or crush; and whether such effect is produced by disturbance of the strata, or by the liberation of water from the wastes. In short, all the ordinary results of mineral workings on the surface are here provided for in terms as unlimited and explicit as the conveyancer could have used. The substantial intention of the parties was, that Buchanan should have uncontrolled power to work out the pillars, and that Porteous should have no power to prevent him. The result in law is, that Buchanan retained the right to disturb the surface to this extent, and that Porteous, to this extent, did not acquire and did not pay for the right to support. I am fortified in this construction of the obligation by the opinions of Lord Wensleydale and Lord Chelmsford in the case of *Rowbotham*, the operative clauses in which are not dissimilar. The instrument there provided that the owner of the minerals might work them free of molestation and without being liable to actions for damage for injury to the surface. The complaint, as in the present case, was that houses which had been erected subsequently to the date of the instrument, but more than twenty years before the action, had been cracked or injured by reason of the mineral workings. Lord Wensleydale said—"Feeling assured that the covenant operates as a grant of a right to disturb the surface, it is enough to decide the case on that ground." Lord Chelmsford said—"That the effect of the deed operates as a grant of a right to Howlett, his heirs and assigns, to work the mines without molestation, denial, or interruption, even to the taking away the support and defacing and injuring the surface of the lands, which, without such a grant, could not lawfully have been done." The event for which provision was so carefully made has occurred. The present mineral tenants are in the course of removing the pillars, and disturbance of the surface is said to have ensued; and now the owner of the surface, whose author only acquired it in consideration of this grant or reservation, wishes us to stop the workings. I should think it very unjust to do so; but shall shortly advert to the grounds on which he supports his demands. No reasonable limitation has been or can be deduced from the words of the covenant itself. It has been suggested that it only applies to such damage as may ensue when the common law obligation of support has been fulfilled—in other words, that the agreement gave Buchanan nothing but what common law would have given him. I do not stop to consider this view, for there is not a single expression which can infer such a limitation, and it is opposed both to the manifest intention and to the express words of the agreement itself. It is not to be supposed that the agreement was intended to apply to a mode of working which had been abandoned in the district. The kind of working expressly contemplated was long-wall working, or working which, like long-wall, leaves no support for the surface. But it has been said that, although the words of the agreement are quite unlimited in themselves, they only apply when the minerals are properly worked, and that no workings can be proper which disturb the surface. The first proposition is sound. There can be no doubt (although the agreement is entirely silent on that matter) that the right to disturb the surface so far as may be necessary for winning the minerals, implies an obligation not to increase the burden on the proprietor of the surface by negligent or unskilful working. But then the united testimony of all the witnesses proves that these workings were not negligent or unskilful, but were in every respect regular, systematic, and careful. But the second proposition is entirely unsound, as was clearly found in Rowbotham's case. The only particular in which the workings are said to be improper is, that they have disturbed the surface. But the agreement, by its terms, gave the respondents a right to disturb the surface; and the argument thus resolves into a vicious circle, and involves the contradiction that a right to disturb the surface implies an obligation to support it. In the last place, it is suggested that the agreement is controlled by the subsequent clauses of the instrument. But the rights of the owner of the minerals are not so much as alluded to in any subsequent clause of the instrument. We were, indeed, referred to a clause not relating to this subject, but intended to regulate the relative rights of the superior and vassal in the surface, namely, the very common provision that the vassal shall, as a security for the feu-duty, erect and maintain buildings of a certain value on the ground. I am at a loss to see how this provision can give us any assistance. It does not regulate, and was not intended to regulate, the right to work the adjacent minerals; while the antecedent agreement, which does regulate that matter, applies expressly to future buildings. There is not the slightest repugnancy or inconsistency in these provisions; on the contrary, they are entirely in harmony. It may be true that in inserting this clause in regard to the maintenance of buildings on the surface, parties mainly contemplated decay from natural causes; and if this were an action at the instance of the superior to enforce the obligation to build, it would be open to the vassal to plead—with what effect I do not say—that this obligation did not apply when the superior's own act had made

building unprofitable or impossible. But for the purpose of construing or controlling the antecedent agreement, this clause is entirely unavailing. The essence of the complainer's case in reality is the supposed hardship which the plain words of the contract are said to imply, and some views of policy or expediency, which are more suited for the legislature than for a court of law. I cannot say that I am impressed by either consideration. I greatly doubt if there be any hardship. Building over mineral wastes is no novelty, and in this case an existing danger was disregarded, while the risk of future danger was foreseen and undertaken. Nor have we any evidence that the bargain, even under the most stringent construction of the clause, was not a good one for the feuar. As to the houses in Coatbridge, the rights of the feuars there must depend on the terms of their contracts, by which, like the complainer, they must be bound. I do not see that, even if we knew what they were, they could aid us in the construction of this agreement. But in Coatbridge, as elsewhere, we shall best protect property by seeing that parties fulfil their engagements. In the present case I look on these obligations to the mineral owner as part of the consideration for the feu, and I can see no reason for permitting the complainer, while he retains the benefit, to repudiate the conditions of his right.

Agents for Henderson & Dimmack—H. & G. Cairns, W.S.

Agents for Mr Buchanan—Duncan, Dewar, & Black, W.S.

Agents for Mr Andrew—J. & R. D. Ross, W.S.

Saturday, February 25.

FIRST DIVISION.

JOHNSTON *v.* BUDGE.

Process—Maills and Duties—Bankrupt—Trustee—Expenses. A heritable creditor of a bankrupt raised an action of maills and duties, concluding for expenses of process against the trustee on the sequestrated estate. The trustee in no way disputed the rights of the pursuer, but appeared to resist the conclusion as to expenses. *Held* that he was not liable in expenses, and the pursuer found liable to him for the expenses of his appearance.

This was an appeal from the Sheriff-court of Edinburgh. Miss Margaret Johnston held a bond and disposition in security, granted by Alexander Gordon Smith, over certain subjects in Edinburgh. Smith was afterwards sequestrated, and Mr Budge, C.A., appointed trustee on his estate. Miss Johnston raised a summons of maills and duties, in which she called as defenders the tenants and occupants of the subjects, and also Mr Budge, as trustee. The pursuer concluded for expenses against Mr Budge as trustee, and against the other defenders if they should appear to oppose. Mr Budge appeared, and objected to the conclusions in so far as expenses were craved against him as trustee. No appearance being made for the other defenders, the Sheriff-Substitute (CAMPBELL) decerned in terms of the conclusions, except as to the conclusion for expenses against Budge, and found the latter entitled to the expenses of his appearance.

Miss Johnston appealed, but the Sheriff (DAVIDSON) adhered, with additional expenses, and added the following note:—

"*Note*—The only conclusion against the defender Mr Budge, as trustee on the sequestrated estate of Smith, is that he be found liable in expenses. A distinction is taken between him and the other defenders, who are the tenants of the subjects covered by the bond. Expenses are asked against the tenants only if they appear as defenders. Expenses are concluded for against the trustee whether he appears or not. He does appear only to defend himself against this demand; and if he is not liable to pay the pursuer's expenses, he was entitled and bound so to defend himself.

"The pursuer has not been able to adduce any authority or practice for her demand. Her contention is, that as, if there had been no sequestration, and the debtor in the bond himself had been called, he would have been bound to pay the expenses of this decree, so he, being sequestrated, the trustee on his estate stands exactly in his place, and is equally bound to pay these expenses. But the trustee is not exactly in the position of the debtor. He has, no doubt, as trustee to regard the interests of the bankrupt, but he is trustee for his creditors, and the estate is vested in him for their benefit. The estate in the trustee, so far as heritable, is qualified and limited by all preferable securities existing at the date of the sequestration not null and reducible, and subject to an action such as the present. While the pursuer after sequestration is entitled to have such a decree as this, the statute which gives that right and limits its extent, does not provide that the trustee or the other creditors are to pay the expenses of obtaining it.

"The trustee has not disputed and has in no way interfered with the rights of the pursuer, and was not entitled to do so. It may be doubtful if anything more was required than an intimation of the action to the trustee, without his being called as a party. Be that as it may, he is not bound to pay the pursuer's expenses.

"Whether the pursuer, in virtue of the obligations in the bond, is entitled to be ranked as a creditor for the expense of getting her decree, is not now for consideration.

"If the trustee was entitled to appear and defend on the ground he did, and is right in his contention, he is entitled to his expenses."

Miss Johnston appealed to the Court of Session.

The SOLICITOR-GENERAL and WATSON for her.

SCOTT and STRACHAN for Mr Budge.

The Court adhered, with additional expenses.

Agents for Pursuer—Millar, Allardice, & Robson, W.S.

Agents for Defender—Watt & Anderson, S.S.C.

Saturday, February 25.

SECOND DIVISION.

IRVINE *v.* FIELD.

Landlord and Tenant — Verbal Lease — Wrongous Ejectment—Notice—Damages—Issue. A party was ejected from a piece of ground which he alleged he held under a sub-lease, but did not set forth any written title. Issue of damages for wrongous ejectment allowed.

This was an action by Alex. Irvine, gardener, Hawkhill, against Thomas Field, proprietor of the