

to the liferent of the whole household furniture, in terms of the disposition No. 3 of Appendix; But find that she is not entitled to the liferent of the other half *pro indiviso* of the said house, which belonged to the deceased Joan Taylor, and was conveyed by her to her sister Mrs Stewart in liferent, and Robert Taylor Traquair in fee, by the mutual deed of settlement No. 1 of the Appendix: Find and declare that, in answer to the third question, the said Agnes Martin is not entitled to any *surrogatum* or equivalent for the one-half of the house provided by the said disposition, No. 3 of Appendix, and to which she has been found not entitled: Find and declare, in answer to Fourth question, that the said Agnes Martin is entitled to the said sum of £346, and interest thereon, contained in the deposit receipt set forth in the case: and find no expenses due to or by either party."

Counsel for R. T. Traquair and his Curators—Balfour and Macdonald. Agent—William Skinner, W.S.

Counsel for Agnes Martin—Millar, Q.C., and Hall. Agents—J. & R. D. Ross, W.S.

Wednesday, November 6.

FIRST DIVISION.

[Lord Ormisdale, Ordinary.]

CHARLES BRAND & SON *v.* BELL'S TRUSTEES.

Relief—Agreement.

A, a proprietor of land, entered into an agreement with a railway contractor, by which the latter was allowed to take building stone from any part of a piece of ground at a certain price per superficial yard of rock wrought, of whatever depth, the contractor to settle all surface damages, and fill up the ground to the satisfaction of the proprietor. The contractor carried on his operations in such a way that water from a river found its way through the quarry which he had opened into an old coal waste and thence into the going coal workings. The lessee of A's minerals took legal steps to protect his rights, the result of which was that the contractor was ordained by the Court to perform certain expensive operations for the due protection of the mineral tenant, and found liable in expenses of process to him.

Held, that in the circumstances of the case, the contractor had no right of relief against A for the sums which he had been compelled to disburse.

The pursuers, Messrs Charles Brand & Son, carry on business as railway contractors, and in 1868 they were employed by the Glasgow and South-Western Railway to construct certain branch lines in Ayrshire, and, *inter alia*, to erect a large viaduct across the river Ayr at Knockshoggle Holm, on the estate of Enterkine, belonging to the late Mr Bell, the original defender in this action.

Finding that there existed in Knockshoggle Holm, close to the intended viaduct, stone which could be used in its construction, Mr James Brand, who acted for Messrs Charles Brand & Son, entered into an agreement with Mr Bell, which was executed on 11th and 15th December 1868, as follows:—"Whereas the said Charles Brand & Son are to be allowed to open up a quarry at Knock-

shoggle and Craufurdstone Holms, in order to obtain building stones, to be used towards the execution of their contract for the formation of certain branch railways of the Glasgow and South-Western Railway, and it is proper that the arrangement made for the said quarries be reduced to writing: Therefore it is hereby witnessed as follows:—*First*, The said Charles Brand & Son are to be allowed to open quarries in these farms on either side of the river Ayr, in the property of the said John Bell, and to work the same during the period of the formation of said railways. *Second*, The said Charles Brand & Son are to pay to the said John Bell 6s. for every square yard of rock wrought out, of whatever depth, payable at the following times and in the following proportions—*viz.*, £50 at the first day of January 1869, and the remainder by quarterly settlements thereafter. If the lordship on the quantity of rock wrought out at 1st January 1869 shall not amount to £50, they shall be entitled to credit for the balance at next settlement. *Third*, The said Charles Brand & Son are to settle all surface damages of every kind, until the ground shall have been restored as hereinafter provided. *Fourth*, The said Charles Brand & Son are also to preserve carefully the top soil, fill up said quarry, and restore and make up the ground after their operations are completed, in every respect as good as before they commenced operations, to the satisfaction of the said John Bell and his tenants. In witness whereof," &c.

Messrs Brand selected a spot very near the river for opening their quarry. In consequence of the quarry not being sufficiently protected from the river, which is very liable to floods, water found its way through porous strata from the quarry into an old coal waste, and thence in the going coal workings, which abounded in the neighbourhood. In December 1869 Mr G. A. Jamieson, C.A., trustee for the creditors of Mr Taylor Gordon, the lessee of the minerals on Mr Bell's estate, presented a note of suspension and interdict to the Court of Session against Messrs Brand and Mr Bell, praying the Court to interdict the respondents from excavating the quarry at Knockshoggle Holm, and to ordain them, at the sight of an engineer, to fill up the quarry with such materials as would have the effect at all times of keeping out the water of the river from the complainers' coal workings as completely and effectually as before the quarry was opened.

Answers were lodged both for Messrs Brand and Mr Bell. Before lodging their defences, they intimated to Mr Bell that they would hold him liable for all loss, damage, and expenses which might be incurred by them through the interdict being granted, or otherwise in connection with the interdict proceedings.

On 19th July 1870 a minute was put in for the complainer and Mr Bell, stating that the expenses of process incurred by Mr Bell had been settled by the complainer, and abandoning the case against Mr Bell, and on the same day the Lord Ordinary pronounced an interlocutor allowing the complainer to abandon the note of suspension and interdict, in terms of the minute, and dismissing the same so far as directed against Mr Bell.

The action proceeded against Messrs Brand. In terms of a joint minute for them and the complainer, the Lord Ordinary remitted to Mr James M'Creath, mining engineer, Glasgow, to inspect the quarry. Mr M'Creath returned a report giving a detailed statement of the operations he considered

necessary for the due protection of the complainer's workings. On 15th October 1870 the Lord Ordinary approved of Mr M'Creath's report, and ordained Messrs Brand to execute the works in the manner specified at the sight of Mr M'Creath. This was done, and upon the completion of the operations Mr M'Creath reported that the same had been executed to his satisfaction. There being no longer any question on the merits, the Lord Ordinary decerned against Messrs Brand for expenses, the taxed amount of which was £195, 10s. 2d., besides £1, 0s. 4d. of dues of extracting decree.

Messrs Brand now raised an action against Mr Bell, in which they concluded for relief (1) of the sums paid by them as expenses to the complainer in the interdict, and (2) of the sum of £629 14s. 9d., being the extra cost incurred by them in executing the operations ordained in the process of suspension and interdict, in excess of the cost of the operation stipulated for in the agreement of December 1868 between them and Mr Bell.

Mr Bell having died before the action was raised, it was insisted in against his trustees.

The pursuers pleaded—“(1) The defender having let to the pursuers the stone in question, for payment of a fixed rent, and stipulated for the whole operations or works required by him to be performed by the pursuers in filling up and restoring the ground, he is bound to free and relieve them of the action at the instance of Mr Jamieson foresaid. (2) The pursuers having opened the quarry and excavated the stone in question under and in terms of the lease or agreement foresaid between them and the defender, and in a proper and workmanlike manner, and being willing to execute the whole operations stipulated in their agreements with the defender, the defender is bound to relieve them of the proceedings foresaid, and also of the expense of the operations foresaid, not contemplated by said agreements, and of all claims at the instance of the mineral tenant. (3) The pursuers were only bound to fill up the quarry in the manner and with the material agreed upon between them and the defender, and the defender is bound to relieve them of the extra expenditure incurred by their having been compelled as aforesaid to fill up the quarry in a different manner, and to execute extra works for the protection of the mineral workings. (4) The pursuers having paid the foresaid taxed expenses, and incurred the extra expenditure in filling up the quarry, and also the expense in defending the said suspension before decerned on, they are entitled to be repaid the said sums by the defender. (5) The pursuers having fulfilled all their obligations under their lease of the said quarry, and paid the defender for the stone excavated, are entitled to be protected from all claims of damages that may be instituted by the defender's mineral tenant because of the opening of, or in connection with, the said quarry.”

The defenders pleaded—“(2) The defender is not bound to relieve the pursuers as concluded for; 1. In respect the defender did not come under any obligation to relieve the pursuers; 2. In respect that, upon a sound construction of the defender's agreement with the pursuers, the pursuers only acquired such rights as the defender himself had and could lawfully exercise; (3) In respect that the said application for interdict, and the said operations ordered by the Court, were rendered necessary by the undue and improper exercise by the pursuers of the right derived by them from the defender; 4. In respect that, in any view, the expenses of

filling up the quarry in the manner ordered by the Court were expenses which the pursuers were bound to incur in order to fulfil their obligations under their agreement with the defender; 3. The pursuers are barred from insisting in the claims of relief sued for—(1.) by having allowed the action of suspension and interdict to be abandoned as against the defender without objection; and (2.) by having thereafter made an arrangement for filling up the quarry in any way to be recommended by Mr M'Creath, to which arrangement the defender was not a party.”

The Lord Ordinary allowed a proof before answer, the import of which sufficiently appears from the Note appended to the interlocutor subsequently pronounced by his Lordship.

“*Edinburgh, 26th March 1872.*—The Lord Ordinary having heard counsel for the parties, and considered the argument and proceedings, including the proof—Finds that the decree and sums of money, relief from and payment of which are concluded for in this action, resulted from the acts and conduct of the pursuers themselves, and that they have failed to establish any ground or obligation of relief from or payment of said decree or sums against the defenders: Therefore, assolizes the defenders from the conclusions of the summons, and decerns: Finds the defenders entitled to expenses.

“*Note.*—This action of relief and payment, as originally brought, was directed against the late Mr Bell of Enterkine, and in consequence of his death during its dependence has been latterly insisted in against the present defenders, his trustees and executors.

“The foundation of the action is the document called ‘Minute of Agreement,’ No. 18 of process. It bears to have been entered into by the late Mr Bell and the pursuers on the 11th and 15th of December 1868, and is to the effect—(1.) That the latter were to be allowed to open quarries in the farms or grounds belonging to the former, called ‘Knockshoggle and Crawfordstone Holms,’ for the purpose of obtaining building-stones to be used in the execution of their (the pursuers’) contract for the formation of certain branches of the Glasgow and South-Western Railway Company. (2.) That the pursuers were to pay Mr Bell 6s. for every square yard of rock wrought out, of whatever depth. (3.) That the pursuers were to settle all surface damages, of whatever kind; and (4.) That the pursuers were ‘to fill up the quarry, and restore and make up the ground after the operations are completed, in every respect as good as before they commenced operations, to the satisfaction of the said John Bell and his tenants.’

“This agreement contains no express warrantice, or indeed any other obligation whatever on the part of Mr Bell, except that he was to ‘allow’ the pursuers to open quarries in the grounds referred to. It is not said that Mr Bell did not fulfil his engagement to allow the pursuers to open an quarries they pleased on the grounds referred to; nor is it said that he in any way whatever controlled or interfered with them in their operations, so as to bring about the claims of his mineral tenants against the pursuers, in respect of which the present action has been brought. It is important also to observe that, although the pursuers are taken bound to pay Mr Bell at the rate of 6s. per square yard for the ‘rock wrought out,’ it is not made incumbent on them to put out any given quantity, or to open the quarries on any particular plan, or to work them in any particular way, or to any parti-

cular depth. All that appears to have been left to themselves.

"Such being the nature of the agreement, the question arises—Upon what ground can it be maintained that Mr Bell is bound and liable to relieve the pursuers from the consequences of their operations as affecting Mr Bell's mineral tenants, Messrs George Taylor & Co.? These parties complained that by and in consequence of the pursuers' operations in working the quarries which they had opened on Mr Bell's property, their mines were inundated with water, and on this ground they presented a suspension and interdict against both the pursuers and Mr Bell. The latter was, after some procedure, assolvied; but decree was pronounced against the pursuers, *inter alia* ordaining them to execute certain works connected with the filling up of the quarry necessary for the protection of the mineral tenants, besides being found liable in certain expenses of process. It is for relief of that decree and their liabilities under it, as well as for payment of the expenses incurred by themselves in resisting the proceedings taken against them by the mineral tenants, that the present action has been brought. The defenders cannot be liable in such relief in respect of any express warrandice or obligation in Mr Bell's agreement with the pursuers, for by that agreement Mr Bell undertook no express warrandice or other obligation whatever. As already remarked, he merely gave the pursuers leave, so far as he was concerned, to open quarries on certain grounds of his. They were left apparently to do so or not, and where and in what manner they pleased. The defenders cannot therefore be liable to the pursuers in the relief and payment they conclude for in respect of any express warrandice or other obligation in their agreement with Mr Bell, and this was not maintained by them.

"The next question which arises is, Whether Mr Bell was under any such implied warrandice or obligation? That he was, the Lord Ordinary understands was the contention of the pursuers. He understood them to maintain that under the agreement there was an implied, if not an express, warrandice or undertaking by Mr Bell that they were to have the right to take out all the rock in his grounds of Knockshoggle and Crawfordstone Holms, and that he was to free them from all the consequences of carrying out and making that right effectual so long as they conducted their operations with ordinary skill, and according to the ordinary methods of quarrying. The Lord Ordinary has been unable to satisfy himself that the pursuers are sound in this contention. It appears to him to be founded on assumptions which have no place in the agreement or circumstances of this case. Mr Bell did not give a lease to the pursuers, and in respect whereof take them bound to pay him a certain or definite amount of rent. All he did was to give them leave to open a quarry or quarries. And, on the other hand, the pursuers did not become bound to open a quarry or quarries in any particular spot, or to put out any specific quantity of rock, or to conduct their operations in any particular way. All that was left to themselves. Where, then, is the implied warrandice or obligation on which the pursuers rely, and how does it arise? The pursuers failed at the debate satisfactorily to answer that question; and, as it appears to the Lord Ordinary, no clear or distinct answer to it is to be found in the Record. The Lord Ordinary cannot indeed collect either from the pursuers' Condescendence or their Pleas in Law, looked at separately or in com-

bination, the precise grounds upon which the warrandice or other obligation on which the pursuers rely, is founded.

"Even in the case of a regular lease, where a subject is let to a tenant for an onerous consideration, the lessor is not, in the absence of express obligation, liable to protect the tenant against rights affecting the subject let, arising from vicinage—1. Bell's Comment. p. 644, and 2. Hunter's Treatise on Landlord and Tenant, p. 260. And the case of *Reid v. Shaw* (21st February 1822, 1 Sh. 334), cited by these learned authors, appears to have an important bearing on the present. There, a party who had obtained for a money consideration right to take by any course he pleased the spring water from a farm for the purpose of a bleachfield, having been interdicted by a neighbour from diverting the water from its previous course through his estate, was found not entitled to claim damages from the granter of the right 'in respect,' as the interlocutor of the Lord Ordinary, which was adhered to by the Inner House, bears, 'that the pursuer has not been deprived of the water from the fields mentioned in the libel by any act or deed of the defender; that absolute warrandice is not expressed in the contract or agreement libelled on; that the said agreement has been fully implemented by the respondent; that under it the pursuer has obtained all that he stipulated from the defender; and that the respondent is not responsible for the interruption of the pursuer's operations by a third party, of whose right to interrupt them it must be presumed that both parties were aware at the date of the agreement.' These grounds of abolvitor appear to the Lord Ordinary to be in all essential respects applicable to the present case. In one respect indeed—and a not unimportant one—the case referred to is an *a fortiori* authority in support of the defenders here, for there the party seeking relief had, under the agreement on which he founded, obtained for an onerous consideration, in express terms, the full and unqualified right to take the whole spring water on a particular farm in any course he pleased, and yet the granter of that right was not held liable in warrandice of it against the claims of a neighbour.

"Independently, however, of either express or implied warrandice, the Lord Ordinary understood the pursuers to maintain that the special circumstances of the present case entitled them to the relief and payment from Mr Bell for which they conclude. But it appears, on the contrary, to the Lord Ordinary that the special circumstances of the present case, as disclosed on the proof, are adverse, rather than favourable, to the pursuers' claim. (1.) It was the pursuers, in consequence of their having ascertained, in the course of their railway operations, that there was rock of the description they wanted in Mr Bell's grounds, who applied to him for leave to quarry it. There is no evidence of Mr Bell having made any statement to them on the subject. There is no evidence, indeed, that he was previously aware that the stone in question was to be got in his grounds. (2) The pursuers state, in their letter to Mr Shaw of 4th February 1869 (No. 35 of process, p. 17 of Joint Print), that they could have taken the quarries under their Railway's compulsory powers; and from this circumstance, as well as others disclosed on the proof, it appears that the agreement with Mr Bell was entered into merely in order to save the pursuers the expense of enforcing the compulsory powers. Now if this be so, and supposing the pursuers had proceeded under their statutory powers, it cannot be disputed that they would

have been liable not only to Mr Bell, but to his mineral tenants also, for all the consequences of their operations—that is to say, they would have been bound to compensate and make good to each of these parties their respective claims arising from the quarrying operations in dispute, without any right of relief whatever. If this be so, it is not very easy to see how a right of relief can be available to the pursuers because they have proceeded by the private agreement in question with Mr Bell, in place of under the railway statute, there being no stipulation to that effect in the agreement. (3.) The defenders knew perfectly well when they entered into the agreement that Messrs Taylor and Company had right to the minerals, and were working them, if not actually under the quarry, in its immediate neighbourhood. (4.) They also knew, or had good and sufficient reason to know, when they entered into the agreement, that there was a coal waste under the quarry communicating with the mineral tenant's workings. Besides other pregnant evidence to this effect, the pursuers' manager, Thomas Mason, who had explored the underground workings, expressly says—'I had no doubt the waste extended to the quarry and under the quarry.' (5) On 7th December 1868, being a few days before the agreement was entered into, Mr Wright, the manager of the mineral tenants, wrote the pursuers (No. 205 of process, p. 9 of Joint Print of Documents), warning them of the risk they were incurring by their quarrying operations (which had commenced, although the agreement had not been actually executed), and informing them that 'the growth of the water in Crawfordstone Coal, No. 3 pit here, has increased so rapidly of late as to become quite alarming;' and Mr Wright added—'at the same rate of increase, the colliery will be flooded and laid in ruins in a few weeks. From information which has reached me, this increase can only be attributed to your operations at Knockshoggle and Crawfordstone in connection with the Railway Works you are constructing there for the Glasgow and South-Western Railway.' The pursuer, Mr Brand, when examined in regard to this letter, said (Manuscript Proof, p. 80), 'I don't think I wrote him (Mr Wright) in reply.' And he does not say that he communicated the letter, or the information it contained, to Mr Bell. And (6) there is no evidence whatever to the effect that it was through the fault or wrongous conduct in any way of Mr Bell that the injurious consequences of the pursuers' operations, which have given rise to the decree and claims, relief and payment of which are now concluded for, were caused.

"All these are important features of this case, tending, in the Lord Ordinary's view of them, to show that the pursuers' present action is not well founded. In particular, they show that although the pursuers were well aware before they commenced, and throughout their quarrying operations, not only of the risk they were incurring, but of the actual injury that was being done to the mineral tenant, they persisted in these operations without even notice to, or communication with, Mr Bell on the subject; and this was all the more culpable seeing that they might, by using the necessary precautions, have obtained all the stone that they required without danger or injury to any one. The Lord Ordinary thinks that this sufficiently appears from the proof, and especially from the defenders' witnesses, Mr William Robertson and Mr Robert Brown.

"If the Lord Ordinary is right in the preceding

view, it is unnecessary to inquire how far the circumstance of the pursuers having entered into the reference to Mr M'Creath, without the concurrence of Mr Bell, affects the question of relief, as there is enough in the case otherwise, and independently of that circumstance, to entitle the defenders to the *absolutor* which has been pronounced in their favour."

The pursuers reclaimed.

Argued for them—Under the agreement of December 1865, the pursuers were given right to a quarry, which is not said to be restrained by any other right. They obtain from the landlord, at a price, an unconditional right to work the stone, *i.e.*, one not limited by the consideration that any previous right had been given off by the landlord which could interfere with the pursuers working the stone. Suppose the minerals had not been let, could there be a doubt that there was a right on the part of the pursuers to select any spot of their ground they liked, and to work as deep as they liked? There is nothing to suggest that there was any right to restrain them—nothing in the agreement to suggest that Mr Bell was not his own mineral tenant. Had Mr Bell worked his own minerals, could he have insisted on the pursuers filling up the quarry in any different and more expensive way than that which he himself agreed on?

At advising—

LORD DEAS—The question before us is simply the construction of the agreement entered into in December 1868. There has been a long proof, but if the matter is attended to, the substance of the facts will be found to lie in a narrow compass. As at the date of the agreement the facts stood thus—The late Mr Bell was proprietor of the farms of Knockshoggle and Crawfordstone Holms, mentioned in the agreement. These farms extend upon both sides of the river Ayr. The Glasgow and South-Western Railway Company, in the course of forming a railway through these lands, were constructing a viaduct across the river Ayr, the viaduct being on Mr Bell's ground. Messrs Brand were the contractors for building the viaduct. They required to get freestone for the viaduct, and were naturally desirous to get it as near as they could to the viaduct. Mr Bell's farms are notoriously situated in a mineral country. It was perfectly well known that there were coal wastes and going pits in the neighbourhood. Mr Bell knew it. He had let the minerals to Mr Gordon. Brand knew it still better, if that is possible, because the Railway Company, with a view to give the contractors proper information as to the foundations for the viaduct, had sunk a number of shafts down to what proved to be a coal waste. The plans of these operations were laid before Messrs Brand to enable them to make an estimate. Mr James Brand was bred a civil engineer. He says that he did not know that the waste extended under the portion of ground where he made the quarry, but he cannot dispute that he knew that there were coal wastes which might very probably extend under it.

By the agreement a certain lordship was to be paid for each superficial yard. Messrs Brand were entitled to take the stone from any part of the farms. They fixed on a place beginning at a distance of 100 yards from the river, and ending at a distance of 30 yards. Probably that was the most convenient place for them. They had previously tried whether they could get rock on the other side of the river. It is certainly not proved, and there is no reason for supposing that there was not good

freestone in other parts of the farm, though the precise extent of the ground to which the agreement applied does not appear. Undoubtedly, there was a considerable extent of ground from which Messrs Brand were entitled to get rock, and there is no evidence that rock could not have been found a little further off the river.

If the rock was to be taken so near the river—a river much exposed to floods,—it was quite clear, not only to a civil engineer, but to a person of ordinary intelligence, that the rock could not be taken out so near the river with safety to the mines known to be below without precautions. There was no impossibility in taking out rock even from that spot. We have nothing to do with an agreement by which a thing is let which cannot be got. Stone could be got perfectly well even there, only there must be some expense incurred in protecting the quarry from the river. If this had been done at the outset, a moderate amount of out-lay would probably have sufficed.

The whole question is, Whether this expense was to be incurred by Mr Bell or by Messrs Brand? It has been repeatedly said in the course of the argument that this is not a question of a lease. It is an agreement to purchase a quantity of stone, necessary for Messrs Brand's purposes, at a certain rate per superficial yard, to be taken anywhere within certain limits most convenient to Messrs Brand. Is it reasonable to suppose that with an agreement like that, while Messrs Brand were to be entitled to take stone anywhere they pleased, Mr Bell was to be at the expense of any operations, however expensive, to enable Messrs Brand to work on any spot they might fix upon? That appears an extravagant proposition. It would certainly be required to be expressed very clearly in the terms of the agreement. I find nothing to support such a construction.

If it is necessary to go beyond this, we have the fact that notices were given to Messrs Brand from time to time. We have the letter of 7th December 1868 from Mr Gordon's manager, complaining of the water. What follows? Mr Brand returns no answer, but he admits that he had a conversation with Mr Gordon on the subject. From time to time calls are made upon him to take the necessary precautions. It appears to me that the whole expense and litigation arose from that fearlessness, not to say recklessness, so common in contractors, Mr Brand admits that he made no inquiry as to the nature of the rock, and took no means to ascertain whether there was a waste below. He says he paid no attention to these things—he did not consider them any business of his.

I have no doubt of the soundness of the result at which the Lord Ordinary has arrived.

LORD ARDMILLAN—I have come to the same result, though I do not quite agree with some of the observations by the Lord Ordinary in regard to the law applicable to leases, a subject of great delicacy.

The commencement of the correspondence here is an application by Mr Brand for leave to open the quarry. He has a personal communication with Mr Bell, and after that he writes a letter to Mr Bell's agent, on 26th September 1868, in which he inadvertently or otherwise uses the word "lease." The reply changes the word into "agreement;" and that word alone is henceforth used throughout the correspondence.

The first remark, then, which I make, is that

this was not a lease, but a mere permission to open a quarry for purposes more or less permanent over a considerable extent of ground, payment to be made according to what at first strikes one as a strange estimate, but which appears to be not unusual, viz., at so much per superficial yard.

The next point is, What was the knowledge of Brand, when he obtained that permission, in regard to the collieries in the immediate neighbourhood? It is to be observed that the viaduct is close by, and that he well knew that the coal waste was under the viaduct. Before the agreement was entered into, Mr Wright gave him distinct warning of the hazard of flooding the collieries. In that knowledge—that there was an old coal waste either under the quarry or near it—Mr Brand enters upon the agreement. Assuming equality on the part of Bell and Brand in their knowledge of the existence of the waste, I think that Bell came under no obligation, written or implied, to bear the cost, so that the working of the quarry should not injure the colliery. It was a danger incident to the working of the quarry. It might be a source of great expense. But I do not consider that there was any obligation against Mr Bell to relieve Mr Brand.

LORD PRESIDENT—This is an action of relief. The claim made under the conclusions of the action is that Bell, the landlord, shall reimburse Messrs Brand, the contractors, for the expense which they have been obliged to incur, in the first place, for the protection of the mineral tenant from the consequences of their quarrying operations. The pursuers propose to deduct from the total amount of such expenses the estimated amount which they would have incurred in carrying out their agreement with Mr Bell. That does not, however, vary the nature of the claim, which is a claim for the expenses disbursed by the pursuers in protecting the minerals against these quarrying operations. This is an action not at all in the nature of a claim of relief by a cautioner against the principal debtor, nor is it founded on any express clause of warrandice, or obligation of relief, or any joint written obligation out of which an obligation of relief might be inferred in favour of one of two co-obligants against the other. The only possible ground of the claim is implied warrandice, or an implied obligation against the landlord in favour of Messrs Brand.

In order to determine whether there was implied warrandice, or an implied obligation of relief, it is necessary to bear in mind the leading facts of the case.

In the first place, it is beyond dispute that the pursuers were directly liable to the mineral tenants for the consequences of their operations, and that they could not resist the claim of the mineral tenants in the process of interdict and restoration at their instance. Not only do the pursuers admit this, but it is a necessary part of their case. If they had not been liable to the mineral tenants, they would have lost their right of recourse against the defender by consenting to decree against them. It is therefore an absolutely necessary part of the pursuers' case that they were directly liable to the mineral tenants to make such operations as Mr Monteath directed for the protection of the mineral tenants.

In the next place, this liability of the pursuers should be no matter of surprise to them. It is perfectly well established either that the pursuers

did know, or that they ought to have known, that there was great risk of interfering with the mineral tenants. The nature of the ground itself suggested this. Still further, the pursuers knew that in the immediate neighbourhood of the viaduct there was an old coal waste, and they must have known that this waste was likely to communicate with the existing workings, and that if they worked the freestone down to the waste, and allowed water to get into the waste, it was almost inevitable that the water should find its way into the existing coal-workings. They entered into this agreement, then, with quite sufficient knowledge that they must incur risk.

In the third place, it is clearly proved that it was quite possible to take out freestone out of this very ground without injury to the mineral tenant. No doubt the precautionary measures necessary for this purpose might have cost a good deal of money. But if, after entering into this agreement, the pursuers had found that the cost of the precautionary measures were too great,—that the value of the stone to them was insufficient to justify so great an expenditure,—it was quite within their option not to take any stone out. They had not come under any obligation to pay a rent, or to work under the agreement at all. As far as they were concerned, the agreement was purely permissive. If they found the risk too great, or the expense necessary to avoid the risk too great, they had nothing to do but to give up working.

Keeping these facts before us, we come to the construction of the agreement. By it the landlord gives permission to the contractors to take the stone out of these lands upon the condition that they shall pay at a certain rate for what they took. He was quite entitled to do this in a question with his mineral tenants. It cannot be said that he incurred any liability to his mineral tenants by allowing some one else to do what he was entitled to do under a reservation in the lease to them, viz., to take out freestone. No doubt he was not entitled himself to take out the stone in such a way as to injure them, but he was quite entitled to take out the stone in such a way as not to injure them. And the question is, Whether, by this agreement, he authorised the pursuers to work out the stone without reference to the interests of the mineral tenants, and in such a way as to injure them? *Prima facie*, this is a very unlikely obligation for a man to undertake. If the pursuers, in the full knowledge of the circumstances, intended to reserve a right of relief, it was their duty to insist upon an express obligation to this effect. There is no such express obligation, and nothing in the agreement from which I can infer any such obligation.

If it could be shown that the defender was directly liable to Mr Taylor Gordon, that might create a right of relief *ex lege* in favour of the pursuers, for they would then be in the position of having stood between the defender and a claim which was primarily exigible from him. But can it be maintained by Mr Taylor Gordon that Mr Bell has done anything in violation of his rights? He simply gave permission to another to take the stone; he did not prescribe any mode of working. There was no direct obligation against the defender at the instance of Mr Taylor Gordon. That throws us back on the supposed obligation of warrandice or relief in the agreement of December 1868.

For these reasons, I entirely agree with your

Lordships, and with the result at which the Lord Ordinary has arrived.

The Court adhered.

Counsel for Pursuers—Solicitor-General and Johnstone. Agent—T. J. Gordon, W.S.

Counsel for Defenders—Watson and Mackintosh. Agents—Tods, Murray, & Jamieson, W.S.

Friday, November 8.

FIRST DIVISION.

[Lord Gifford, Ordinary.]

MICHIE'S TRUSTEES v. GRANT.

Property—Street—Aberdeen Police and Water Works Act 1862 (25 and 26 Vict. c. 203) § 334.

The "Aberdeen Police and Water Works Act 1862" empowers the Police Commissioners to allow, upon such terms as they think fit, any building within the limits of the Act to be set forward, for improving the line of street. *Held* that, on a sound construction of this enactment, the Police Commissioners have a discretionary power, for the purpose of improving the street, to allow a person to build beyond the boundary of his property and to encroach upon the *solum* of the street, and that an owner of adjacent property is not entitled to object to such an encroachment if sanctioned by the Commissioners, unless he can show that the change is otherwise than an improvement to the street, or causes substantial injury to his own property.

The pursuers, the trustees of the late George Michie, possess under a long lease a large tenement, consisting of shops and dwelling-houses, at the head of Flourmill Brae in Aberdeen. Flourmill Brae runs east, or rather north-east, from St Nicholas Street. To the north or north-west of Flourmill Brae lies a piece of ground of irregular shape, which may be described as bounded on the west by St Nicholas Street, on the south by Flourmill Brae, and on the west by a continuation of Flourmill Brae that turns northward. This ground was in 1867 purchased by the defender from the Magistrates of Aberdeen. At that date it was occupied by a flour-mill and other buildings. A portion of the buildings projected with a sharp angle into Flourmill Brae. By his disposition Mr Grant was taken bound to remove this projecting corner, so that the street should be in no part less than 25 feet.

For time immemorial the line of buildings on the north side of Flourmill Brae receded at the east end, so as to form a wide entry opposite the pursuer's property.

In February 1871 Mr Grant, who had purchased the property with the view of pulling down the existing buildings, and of constructing in its place a large block of buildings, consisting of warehouses, shops, and dwelling-houses, employed Mr Souttar, architect in Aberdeen, to prepare a plan. According to this plan, it was proposed that Flourmill Brae should be straightened, and the line of Mr Grant's buildings set forward at the eastern part of Flourmill Brae, and set back in other places. It will thus be observed that the result was to encroach upon that street at its eastern or wider end, substituting a square, or nearly square, corner for the receding curve which had hitherto been the boundary of the buildings. On the other hand,