

completion of the lease. Be that as it may, the meeting was held upon the 12th September, and the defender states that when he signed the offer on that day he supposed it was an offer embodying the stipulations contained in the prior one of the 14th August. There is an entire omission of the conditions of the offer of 14th August with reference to the alteration of the existing and the erection of additional byres, but included in it were the printed conditions imposed upon all persons offering for leases upon the Hamilton estates. That offer was never accepted any more than the first had been. It is an improbativ document, and is not validly tested.

Thereafter possession was given and taken, and the parties are at variance when and how that was done and what were the circumstances of it. The pursuer says—"The said offer was accepted by the pursuer, and the defender in terms thereof was allowed to enter into possession of the said farm at Martinmas 1873 as to the arable land, and Whitsunday 1874 as to the houses and grass, and has since continued in possession of the said farm." What is meant by the offer being accepted is, I presume, that possession was allowed to follow upon it. It is conceded that there was no written acceptance. The averment is relevant only in respect of the insertion of the words "in terms thereof." Otherwise it is utterly irrelevant, and there can be no lease. The pursuer hereby undertakes to prove that possession was given, taken, and held under the second offer of 12th September, as distinguished from that of 14th August. In short, that possession is referable to the second offer. That averment is absolutely essential to success in the action. On the other hand, it is fairly enough represented in the next article that the defender's account was that possession was given and taken by him with special reference to the offer of 14th August alone.

Without the determination of the matter of fact it is impossible to decide the case. When we look to the record it is not so clear whether the defender means to contend that possession is to be ascribed to the offer of the 14th August or to both offers together. But that does not matter. Whichever of the two contentions is to be made the foundation of the defence, it requires matter of fact to be proved before either the one or the other can be established. If there had been a written contract, although only in missives, we could not have gone beyond it. For in that case possession would have been immaterial, because it would have been natural, and its quality could not have entered into the question whether the contract was completed or not.

It appears to me therefore that before we can decide the question, which I think is prematurely decided by the Lord Ordinary, we must know the history of the transaction. And I do not know that there are any circumstances attending the giving and taking possession which will not be very material for the decision of the case.

LORD DEAS, LORD MURE, and LORD SHAND concurred.

The following interlocutor was pronounced:—

"The Lords having resumed consideration of the cause, with the printed copy of the reports of commission and diligence, No. 57 of process, and heard counsel, Recal the

interlocutors of Lord Rutherford Clark, Ordinary, of 31st May and 18th October 1876; Allow parties a proof of their averments on record, the proof to be taken before Lord Shand on a day to be afterwards fixed by his Lordship."

Counsel for Pursuer—Gloag—Asher. Agents—Tods, Murray & Jamieson, W.S.

Counsel for Defender—Balfour—Keir. Agents—H. & A. Inglis, W.S.

Saturday, January 27.

SECOND DIVISION.

HOULDSWORTH v. BAIN AND OTHERS.

(See *Ante*, vol. xiii, p. 187.)

Landlord and Tenant—Lease—Minerals—Removing.

It was agreed between the landlord and tenant of a colliery that, in the event of the tenant's death during the currency of the lease the landlord should be entitled to resume possession of the colliery "at a valuation if he should at any time be dissatisfied with the working thereof by the representatives." The tenant having died, his representatives entered into possession under the lease, and the landlord, on 3d February 1874, gave them notice that he was dissatisfied with the working of the colliery, and had resolved to resume possession.—*Held* that the representatives were entitled to reasonable time after the date of the notice to obtain and adjust the valuation, and to complete the arrangements necessary for the cession of the colliery, and that until the Whitsunday term 1874 was such reasonable time.

Reparation—Landlord and Tenant—Lease—Minerals—Failure to Remove.

Principles upon which the Court, acting as a jury, assessed damages due to the landlord of a colliery by the tenants, who had failed to remove from the colliery when required by the landlord to do so in terms of an agreement between them.

This was an action at the instance of James Houldsworth of Coltness against William Bain and others, trustees of the deceased Alexander Brand, and representatives of the deceased Robert Brand in a lease from the pursuer of the Greenhead coal-fields under a portion of his estate. In the lease the pursuer had reserved right to resume possession of the colliery "if he should at any time be dissatisfied with the working thereof by the representatives" of the said Robert Brand. On 3d February 1874 the defender intimated that he was dissatisfied with their working, and had resolved to resume possession of the colliery in terms of the lease. The defenders refused to cede possession, but the Court, in an action at the instance of the pursuer, found that they were bound to do so. This present action concluded for £10,000 in name of damages or violent profits said to be due on account of the defenders' failure

to remove, and was brought with consent and concurrence of Mrs Brand, to whom at the date of the intimation of 3d February 1874 the pursuer had agreed to let the colliery.

The Second Division on 8th January 1876, found that the defenders had wrongfully retained possession of the colliery after the period at which they were bound to remove, and were therefore liable to the pursuer in reparation for such injury as had been thereby occasioned to him, and allowing a proof of the amount of damage. A proof was obviated by a joint minute for the parties, from which it appeared (1st) that the gross output of coal from Greenhead Colliery for the period from 4th February 1874 (when notice of dissatisfaction was given by the landlord) to 11th November 1875 (when the colliery was taken over by the pursuer at the valuation provided for in the lease) was 71,478 tons; (2d) that the total receipts during the same period was £42,642, 14s. 11d., which after deduction of £18,136, 10s. 3d. for materials and incidental expenses, wages (including manager and traveller), and lordship and wayleave received under protest, left a balance of £4,506, 4s. 8d., subject to a further deduction of £482, 18s. 6d., representing taxes, surface damages, engineer's fees, and law-agent's account for management of colliery, which was in the hands of trustees; (3d) that the sum of £608 represented 5 per. cent. on capital and 5 per. cent. for depreciation of machinery and other plant by wear and tear during the said period; (4th) that the value of the plant, engine and machinery at the colliery was, at 4th February 1874, £4,800, 13s., and at 11th November 1875, £2,671, 0s. 8d., the difference, so far as not consisting of depreciation, being caused by the fall of the iron market, and that the value at 15th May 1874 was £4,450; (5th) that the pursuer let the Greenhead colliery by missives of 31st January and 3d February 1874 to Mrs Brand, who concurred in this action, and who entered into possession at 11th November 1875; (6th) that the lordships which would have been paid by Mrs Brand to the pursuer had she got possession at 4th February 1874, for the period to 11th November 1875, exceeded those actually paid by £2,871, 3s. 3d. Under the missives Mrs Brand took the unexpired terms of the current lease, and she undertook the risk and expense of the proceedings for resumption of that lease and the risk of the valuation to be made on resumption. The Court had intimated in their prior judgment that the case was not one for violent profits but for damages in respect of breach of contract. The question now argued was, What deductions the defenders were entitled to make?

The pursuer argued.—The landlord here is entitled to tenant's profit. The intention of the landlord to enter into another lease is irrelevant; it would not have been a good plea against full damages in a removing. In England the rule till lately was that trespassers in the position of the defenders were not even entitled to working expenses. This has been relaxed to the extent of allowing working expenses, but no trade allowances, and no expenditure or interest on capital account has been included.—*Jegon v. Vivian*, Jan. 25, 1871, L. R., 6 Ch. App. 742. In re *United Merthyr Collieries Company*, Nov. 14, 1872, L. R., 15 Eq. 46, where coal was wrongfully taken by working into the mine of the adjoining owner,

and only disbursements for severing and bringing the coal to bank were allowed, capital expenditure not being claimed, general wages, depreciation, and consumption of stores and material, were expressly disallowed. The owner may have had available capital expended; for instance a going pit from which the coal might have been worked. The damages run from the date of landlord expressing dissatisfaction. The risk of the fall in the iron market must fall on the person who has delayed the valuation. The trust-accounts would not have been incurred if the landlord had been in possession. If, however, Whitsunday 1874 be taken as the term from which damages run, we are at least entitled to the lordships' which would have been received under Mr Brand's lease for the period to November 1875.

Argued for the defenders—The landlord cannot have sustained greater damage than is measured by the difference of lordship under the leases. If the claim to profits be sustained, all ordinary deductions must be allowed, for they would have been incurred by the landlord in possession. The pursuer was not entitled to resume possession till after valuation. This valuation must be taken at the date when, according to the pursuer, it ought to have been made.

At advising—

LORD ORMDALE—In this case the Lord Ordinary by his interlocutor of 26th July 1875 found the defenders, in respect of their wrongful possession of the colliery in question, liable to the pursuer Mr Houldsworth for violent profits "as from 15th January 1875." But that interlocutor was recalled by the Court on 8th January 1876, when in place thereof it was found "that the defenders having wrongfully retained possession of the colliery in question after the period at which they were bound to remove, are liable to the pursuer for such injury as has been thereby occasioned to him; and before further answer a proof was allowed to both parties in regard to the amount of the damages.

In place, however, of going into a proof, which might probably have led to considerable expense and delay, the parties have very wisely, I think, agreed to a minute of admissions of the facts upon which they desire the judgment of the Court on the question of damages. Parties having been fully heard, it is now for the Court to give judgment.

The principle upon which the damages are to be estimated or assessed has been to some extent already determined. It has, by the interlocutor already referred to, been determined that the defenders are not liable in the penal consequences denoted by the technical expression "violent profits," but merely by the actual damages which it can be shewn the pursuer has sustained through their breach of contract, as fully explained in the opinions of the Judges as reported in the 3d vol. of the 4th series of Court of Session Cases, 304.

Before, however, entering into the inquiry as to the amount of damages, it is necessary to fix the date of the commencement, or, in other words, the date from which the defenders' wrongful retention of the colliery is to be held to have commenced—a point which was left undetermined by the Court when the case was formerly before them—in the expectation that the parties would,

by proof or otherwise, have furnished some more certain *data* than then existed for forming a satisfactory judgment regarding it. The Court must now, however, determine the matter as they best can on the materials before them, just as a jury would do; and the whole matter is of the nature of a jury question.

Two matters of fact are clear—First, that the pursuer, in terms of the agreement of 5th October 1869, under and in reference to which the whole dispute has arisen, gave the necessary notice to the defenders that their lease of the colliery was to terminate as on the 3d of February 1874; and, secondly, that by the same agreement the pursuer was entitled to get possession of the colliery “without any process of law being used or necessary, together with the whole pits, plant, and others connected with the same, including waggons belonging to and leased by the second party, as soon as the value of the latter can be fixed and ascertained, and the amount paid to the second party or his representatives,” that is, the present defenders. What, then, is to be held as a reasonable time to be allowed the defenders for ceding possession of the colliery and getting the plant valued after the pursuer’s notice that the lease was to terminate on 3d February was given? They were certainly not entitled to any time they might be pleased to take or might find most advantageous for themselves—in the meantime working out the pursuer’s coal; nor, on the other hand, do I think that they could at once and immediately on 3d February, when they received the pursuer’s notice, be held bound to desist from all further operations, to, it might be, their great loss and damage. They were, I think, entitled to a reasonable time within which the necessary and unavoidable preparations for ceding possession might be made and completed. By their agreement with the pursuer they were entitled to have their plant valued and paid for before ceding possession; but plainly this was a very important matter, which required care, attention, and time to get satisfactorily accomplished. Neither could the defenders be expected at once, and without some time and opportunity being afforded them for making the necessary arrangements in connection with the discharge of their employes and closing their colliery engagements, to give up possession. What exact time and opportunity was really requisite for all this it is difficult for the Court to say in the state in which the matter has been left by the parties. I cannot, however, think that to allow the defenders to the term of Whitsunday, the 15th May 1874, which is little more than three months after 3d February, would be unreasonable or such as either party can justly complain of. I am prepared, therefore, to hold that the calculation or estimate of the damages ought to commence and to proceed as from the 15th of May 1874 till the 11th of November 1875, when possession was ceded by the defenders, and I have acted on this footing in ascertaining the amount of damages in which the defenders are liable to the pursuer.

The next question is, Whether the criterion of the damages to which the pursuer is entitled is the lordship which he would have received from Mrs Brand under the proposed lease to her, assuming it had been entered into as on 15th May 1874, or the profits which have been shown, or may be reasonably held to have resulted from the

defenders’ operations from that date till 11th March 1875, when possession of the colliery was ceded by them? I have come to think that the more reliable criterion in the circumstances is the latter, and have accordingly been chiefly guided by it. It is difficult, indeed, to hold that any lease to Mrs Brand was actually completed. That one might have been completed if possession of the colliery had been got at Whitsunday 1874, is highly probable; but as matters then stood the lease appears to me to have been left uncompleted, and possibly Mrs Brand might have resiled, and been entitled to resile, from ever completing it. It is by keeping this in view that I have come to think that the proper course for me was to hold that it is chiefly for the profits which have resulted or may be fairly held to have resulted from the defenders’ colliery operations since the 15th of May 1874 till the 11th of November 1875, when they ceded possession, that they must now account to the pursuer. At the same time, I am not to be understood to have thrown entirely out of view as an element for consideration the gain which in all the circumstances, and having regard to the established facts, it may be inferred the pursuer would have reaped under a lease of the colliery to Mrs Brand or any other party, or by working it himself, if possession had been given up by the defenders on 15th May 1874, in place of being wrongfully retained by them for a year and a-half after that date.

But taking it to be so, there are still some points of nicety and importance which must be attended to, and which I have not overlooked, in regard to the deductions or allowances to which the defenders are entitled in ascertaining the profit or balance for which they are accountable to the pursuer. Although they are not to be held liable in “violent profits,” or other penal consequences, as if they had by violence or positive fraud held retention of the colliery beyond the date when they ought to have ceded possession, they are bound to make good to the pursuer the damage or injury he has sustained by their wrongful retention from him of possession of the colliery; or to put it differently, the pursuer is entitled to be placed in the same position, as nearly as possible, as regards profits, as he would have been in had there been no breach of contract by the defenders.

Now, the parties have by their minute of admissions shown the amount of the output of the coal from 15th May 1874 till 11th November 1875, and also the expenditure in producing that output. But whether more coal might not have been put out at less expenditure is a different question. And, in particular, whether the defenders are, besides the expenditure referred to, entitled to the allowances or deductions claimed (1st) for certain law expenses, (2d) for wear and tear of machinery and plant, and (3d) for interest on capital invested, is another question, about which the parties are not agreed.

In regard to the first of these claims, I have been unable to see any sufficient reason for giving effect to it as in a question with the pursuer.

On the other hand, an allowance or deduction for tear and wear cannot, I think, be resisted by the pursuer, for it is clear, for anything that has been said or shown to the contrary, that if there had been no wrongful retention of the colliery, and if the pursuer had obtained possession of

it on 15th May 1874, his machinery and plant must, if made available at all, have been subjected to tear and wear to some extent. And so, as regards an allowance or deduction in respect of interest on capital invested, the only question in connection with these claims that can fairly be said to raise any difficulty is the value of the machinery or plant, and the amount of capital on which the deductions for wear and tear and interest are to be calculated. Is the estimated value of the machinery and plant as at 15th May 1874 or 11th November 1875, or at some other and what date or dates, to be taken as the amount on which the percentage for tear and wear and interest of capital is to be calculated? And is the percentage claimed by the defenders for the whole period of their wrongful retention of the colliery to be assumed as correct? The parties have not, to my mind, in their minute of admissions given any precise or perfectly satisfactory data for an answer to these questions. They have merely specified the results as at certain dates, on the assumption that the value of the plant and the amount of capital and the percentage are to be taken as throughout the same. I should have liked if the parties had agreed upon a scale showing how and when, monthly or quarterly, or at what dates, the value of the plant and consequent amount of estimated capital had varied, according to the rise or fall in the market, between 15th May 1874 and 11th November 1875. But as the parties have not furnished this information, I have been left to come to a conclusion on the subject as I best could without it.

Having now adverted to what have appeared to me to be the leading considerations to be attended to in determining the amount of damages sustained by the pursuer Mr Houldsworth through the wrongful retention of the colliery in question by the defenders, it only remains for me to say that, according to the best of my judgment, and dealing with the matter as I believe a jury would have dealt and be entitled to deal with it, the amount of the damages ought to be assessed at £2000.

LORD GIFFORD—The question in this case is, Whether the pursuer Mr Houldsworth is entitled to damages or reparation from the defenders in respect the defenders wrongfully retained possession of the coal and minerals held by them under lease from the pursuer, and that for the period from 3d February down to 11th November 1875; and if so, what is the amount of the damages to which the pursuer is entitled?

The pursuer's claim under his first alternative plea-in-law was for damages estimated on the principle of violent profits which are due to a landlord by a tenant who has wrongfully—that is, in the eye of law violently—retained possession of the subject after the expiry of the lease.

The Lord Ordinary gave effect to this plea, but the Inner House after full debate found, upon 8th January 1876, that the true principle upon which the reparation due to the pursuer was to be ascertained was not by estimating violent profits as in a question between landlord and tenant, when violent profits are due, but simply by estimating the damages suffered or sustained by the pursuer through the defender's breach of a mercantile contract; and a proof was allowed, in order to ascertain the amount of the damages

sustained by the pursuer through the defenders breach of contract.

Instead of proceeding with the proof, the parties adjusted a mutual note of admissions, which are embodied in the joint-minute now before the Court, in which minute full materials are given to enable the Court to assess the damages to which the pursuer is entitled; and the Court, upon these admissions, which are to be held as expressing what would have been the results of a proof, are now to assess the damages due to the pursuer.

The sole question is the assessment of damages; and the Court are to make such assessment precisely as a jury would have done, answering an issue of damages upon evidence laid before them. The joint-minute contains the proved facts upon which the jury must proceed in assessing the damages.

Now, if the question had been referred to a jury on an issue, and upon this evidence, what the jury would have done would have been to find for the pursuer and to assess the damages at a certain amount, naming the amount at which the jury had arrived. I think we must do the same, and I propose agreeing with your Lordships that we should find for the pursuers and assess the damages at £2000.

Here perhaps I might stop, for a jury never gives, and is not bound to give, the details of the calculations upon which the estimate of the damages proceeds. The verdict of the jury is not subject to review, and although on a motion for a new trial the verdict may be set aside if the damages awarded are excessive—that is, extravagant and beyond what any reasonable view of the evidence could support—yet the burden of showing this rests upon the party attacking the verdict, and it is always a very difficult matter to instruct inordinate or excessive damages.

But although acting as one of a jury I am not bound to explain the data upon which the calculation of the damages rests, I have no objections to do so, and I shall do so as shortly as possible.

In cases where damages are due for breach of a mercantile contract, the object is to place the pursuer in as good a position pecuniarily as if no breach of contract had been committed. The supposition is to be made that the contract had been duly implemented, and then the inquiry will be what would have been in money value the result to the pursuer—What could he have made by or through the fulfilled contract?—and then the difference between this amount and the amount which the pursuer actually has realised, after or notwithstanding the breach, is the amount of loss which the pursuer has sustained by and through the breach of contract complained of.

In order to reach this result, and to fix what loss the pursuer has sustained, there are two leading lines of inquiry which the jury may take, and to which the evidence should be directed—First, It may be shown speculatively what the pursuer might have done and probably would have done if the contract had been exactly observed and fulfilled; and the fair amount which the pursuer would have gained or realised had he followed an ordinary and reasonable course will be the amount which the defender must make up to him—the defender by his breach of contract having wrongfully prevented the pursuer from securing the amount supposed. But second,

Another course may be taken, and instead of inquiring—or besides inquiring—what the pursuer has lost or has probably lost by the breach of contract, the jury may ask quite fairly what has the defender gained by and through his wrongful failure to implement his contract; and it will very often happen—I think it happens in the present case—that the defenders' gain through the breach, when compared with the estimate of what the pursuer might possibly have himself made, will lead to an equitable estimate of his damages. Thus, in the present case, when the question is, What has the pursuer lost by reason of not getting back his colliery at a given date, very great assistance will be got by finding what the defender has made or gained by keeping and working the colliery wrongfully and after the date at which he ought to have given it up—for it may be fairly held that the pursuer would have been able to make as much of the colliery if he had got it at the proper time as the defender has actually made during his undue retention of it.

No doubt the amount of the defenders' gain or nett profit will not necessary limit the pursuer's claim, for the pursuer might be able to satisfy the jury that if he had got possession of the colliery at the time fixed by the contract he would have made more of it than the defenders have actually done. He may shew that he could have worked it more profitably, or relet it on better terms, and so as to give him a better return than the defenders have actually realised, for it is always the pursuer's loss which is to be sought for, and not merely the defenders' illegal gain. Still the defenders' actual realised gain is always a most important and a most relevant element to lay before the jury.

I am of opinion that the jury are entitled to look at the question in both aspects—to take both into account, and to draw therefrom a reasonable conclusion. As a jurymen I have done so, and it gives me some confidence that I cannot be far wrong in the amount of damages which I have assessed—that the results of the two views do not very greatly differ, although the sum which the pursuer would have got from Mrs Brand as new tenant seems larger than the actual gain realised by the defenders, at least if the deductions claimed by the defenders are allowed.

But in estimating the damages according to either view, the jury must fix the period of time or date at which the defenders ought to have ceded possession of the colliery to the pursuer; for this also is, I think, a jury question. It has been fixed that the pursuer was entitled to resume possession of the colliery at a valuation,—“If he so wishes,” and if “at any time he should be dissatisfied with the working thereof by the representatives of the said Robert Brand.” Under this clause the pursuer on 3rd February 1874 gave notice of his intention to resume, but it is plain that resumption of an extensive colliery under such a clause could not be effected in a day. Reasonable time must be allowed for obtaining and adjusting the valuations, and for completing the arrangements necessary for the cession by the defenders of the going colliery, and for its assumption as a going colliery by the pursuer. Workmen or miners, managers above ground and under ground, and all the necessary officials, had to be arranged with, dismissed, or transferred; current orders provided

for, accumulated stores or undisposed-of coal had to be removed or sold, pumping arrangements had to be kept up without interruption, and many similar details had to be attended to and adjusted. We have no special evidence before us as to these; the question as to what is a reasonable time is simply left to the jury to dispose of as it best may. In this state of matters, and approximating as best I can to what would be fair and reasonable in the circumstances, I fix Whitsunday 1874 as an equitable date at which the defenders ought, in consequence of the notice of 3d February 1874, to have fully and completely ceded possession to the pursuer. In thus allowing the defenders three months to clear out, I give them the fullest allowance possible. Perhaps a shorter time would have sufficed, but looking to the terms of the lease and agreement, and the references therein to legal terms of entry and removal, I think it not unreasonable to give the defenders till the Whitsunday term instead of fixing upon some intermediate and necessarily arbitrary date.

Taking, then, the period from Whitsunday 1874 till Martinmas 1875, and applying as I best can the evidence both of what the pursuer might have made by working the colliery himself or by a new lease to Mrs Brand or to anybody else, and also what the defenders have actually made by wrongfully continuing the working during that period, and making all reasonable deductions for working expenses, tear and wear, interest of capital, and incidental costs, I reach £2000 as being as nearly as I can estimate the damage to which the pursuer is entitled.

In reaching this result I attach great weight to the pursuer's bargain with Mrs Brand. I think that if the pursuer had got possession of the colliery at May 1874, Mrs Brand would then have entered, as in point of fact she did at Martinmas 1875, and the pursuer would have got from her the new and enhanced lordship, and then the pursuer would have had no working or other expenses or outlay to pay. In the other view—that is, what profit the defenders themselves have made—I do not allow the defenders the full amount they claim for working expenses, for I think some of the items claimed are inadmissible or only partially admissible—for example, the accounts paid to the defenders' law agents. Interest on capital, again cannot be dealt with precisely; it involves considerations not only as to market value of money, but also as to whether the pursuer would not have been saved all outlay in consequence of his agreement with Mrs Brand, who was to take the whole concern over at the same amount as it was valued at to the pursuer.

I think it right to add also that I do not give much weight to the alleged depreciation in the value of the machinery between Whitsunday 1874 and Martinmas 1875. The loss from depreciation to a large extent arose from the fluctuations in the value of iron, and whether there is to be ultimate loss or not on this ground can hardly be ascertained till the plant comes to be actually realised by the pursuer or his assignees. Besides, it seems to be sufficiently instructed that the pursuer had little interest in this question, for Mrs Brand was to have taken over the whole plant at whatever sum it was valued at to the pursuer, be the value more or less. Even if Mrs Brand were not held tenant, it is obvious the pursuer might have made a similar lease

with some other tenant who would have taken over the plant as at Whitsunday 1874, at its then value—that is, precisely at the value which the pursuer himself was to pay for it. All these details, however, must be dealt with, and necessarily only approximately dealt with, by the jury. I have tried to take everything into due account, and my verdict is for the pursuer. Damages assessed at £2000.

LORD JUSTICE-CLERK concurred.

The following interlocutor was pronounced:—

“Find the defenders liable to the pursuer in the payment of Two thousand pounds in name of damages for the injury sustained by him, and by the defenders having wrongfully retained possession of the colliery in question after the period at which they were bound to remove therefrom: Find the pursuer entitled to expenses up to the date of said minute of admissions, including the expense of said minute, and remit to the Auditor to tax the same and to report; and find no expenses due to either party after that date, and decern.”

Counsel for Pursuers—Mackintosh. Agents—Murray, Beith, & Murray, W.S.
Counsel for Defenders—Asher—Moncrieff.
Agent—Alexander Morison, S.S.C.

Friday, January 26.

FIRST DIVISION.

[Lord Young, Ordinary.

SCOTT v. KALNING.

Ship—Charter Party—Breach—Unseaworthiness.

A vessel became unseaworthy during a voyage for which she was chartered, and put into port for repairs. These were executed, but surveyors who were employed by the owner to examine her reported unfavourably, and advised that she should be further strengthened. This was not done, and she proceeded to sea. In a question between the shippers of cargo, which was damaged, and the owners—*Opinions (per curiam)* that the report by the surveyors, though not conclusive, operated to shift the *onus* of proving unseaworthiness from the shippers, and laid upon the owners the burden of proving the contrary.

Counsel for Pursuer—Lord Advocate (Watson)—Guthrie Smith. Agent—Thomas Dowie, S.S.C.
Counsel for Defender—Trayner—Thorburn.
Agent—P. S. Beveridge, S.S.C.

Friday, January 26.

FIRST DIVISION.

[Lord Rutherford Clark, Ordinary.

COLQUHOUN'S TRUSTEES v. ARCHIBALD ORR EWING & COMPANY.

Property—River—Alveus.

Held that the proprietor of land on the banks of a navigable non-tidal river has no right to raise in the bed of the river any structure which may tend to obstruct navigation.

Observations (per Lords President, Deas, and Shand) on the distinction between navigable tidal rivers and navigable non-tidal rivers.

Observed (per Lord President) that the right of the public over a navigable non-tidal river is akin to that of a right-of-way.

Observations per Lord President upon his remarks in the case of *Buccleuch v. Cowan*, December 21, 1866, 5 Macph. 214, and upon the case of *Bickett v. Morris*, 2 Macph. 1052, 4 Macph. (H. of L.) 44.

Opinion (per Lord Deas) that the right of free navigation in a river where the tide does not ebb and flow arises from use only, and depends upon the nature and extent of that use.

Opinion (per Lord Shand) that if a non-tidal river be navigable, and a natural highway between public places, it is not necessary that it shall have been previous use to entitle the public to vindicate a right to use it.

Acquiescence.

An action was brought for the purpose of having it declared that a river was a navigable river, free and open to the public, and that the piers of a bridge which the defenders were erecting in the *alveus* of the river at a point where they were proprietors on both sides, “do at present and will when completed obstruct the free navigation of the said river;” and for decree ordaining the defenders to remove the said bridge and piers. The defenders founded upon a letter written to them by the pursuers' predecessor agreeing to make no objection to the erection of the bridge, “provided his fishings and other rights are not interfered with.”—*Held* that the pursuers were not barred by acquiescence from insisting in the action, as it had for its object the vindication of their right, as representatives of the public, to use the river for the purposes of navigation.

Opinion (per Lord Mure, diss. from the other Judges) that the object of the action as laid was simply to have the bridge removed on the ground that it obstructed the navigation of the river, and that therefore the pursuers could only succeed (in view of their predecessor's letter) if they instructed a case of injury to their own patrimonial rights.

The trustees of the late Sir James Colquhoun of Luss raised this action against Archibald Orr Ewing & Co., calico printers and turkey-red dyers, Levenbank, concluding, firstly, for declar-