

having failed to deliver up the nets when he ought to have done so. If it was not in his power or authority to deliver them up because a public authority had said they were to be forfeited, he cannot be asked to make payment of their value as being in default.

I am of opinion that a judge in a competent court has decided the questions of fact here in dispute, and that no means having been taken to set aside his judgment there is no case to go to proof. And upon the question of damages, in respect that the defender wrongfully seized these nets and made them the subject of a criminal prosecution, I observe again that a court of competent jurisdiction has held he did rightly what he is charged with having done wrongfully. I cannot therefore see how it is open to the pursuers to make this claim, and I think that the action cannot proceed.

LORD YOUNG—I concur in the result and generally upon the grounds which have been stated by your Lordship. I wish, however, to guard myself against any avoidable general observations, and to confine myself to the individual case before us, which is in many respects special and peculiar. I begin by saying that we must assume the validity of the Sheriff-Substitute's judgment of 22nd October. His jurisdiction was not questioned, the instance was not disputed, the regularity of the proceedings was admitted. We must assume, therefore, the validity of the judgment. I would only make this observation, that in my opinion it would have been quite competent to bring under the Sheriff's notice the fact that a summons in an action by the accused against the complainer had been signeted in the previous month, and would come before the Court of Session shortly, and that it would have been quite competent for the Sheriff if he had seen fit upon that statement to have declined to go on with the case before him until that action had been disposed of. Such an application would have been addressed to his discretion, and assuming that it was made, he acted quite legally in refusing it, and I think he also exercised a proper discretion in doing so. The only questions of fact involved were two, first, were the nets of a description calculated to take salmon? and second—although this was scarcely disputed—were they placed beyond the legal boundary? The Sheriff thought it would not be wise to delay the case because the summons in a civil action had been signeted. We are dealing with the action raised by that summons, but the legality or illegality of the seizure of these nets, which is the question presented to us, is just the question which was presented to the Sheriff. I think the two questions of fact were properly and conclusively answered in the most obviously fitting court in which to try them, and between the same parties as are here, and should not be tried over again in this action of damages. I do not want to go into any case where the facts may be different, and

a very little difference might distinguish another case from the present with a different result; but in the circumstances here I think the action should be dismissed.

LORD RUTHERFURD CLARK—I desire to deal with this case by itself, and I think that here the defender should be assolized.

LORD LEE—I think the admission that no means were taken to suspend this judgment is conclusive of the case. There are cases where something done and conclusively done in a court of supreme jurisdiction as to the subject-matter before it may be open to be tried over again in a superior court with larger jurisdiction, but there is no question of that sort here. No irregularity in the prosecution has been complained of, and I therefore concur in the judgment proposed.

The Court recalled the Lord Ordinary's interlocutor of 12th June, sustained the defences, and assolized the defender from the conclusions of the action.

Counsel for the Pursuers—Rhind—A. S. D. Thomson. Agent—Wm. Officer, S.S.C.

Counsel for the Defender—Guthrie—F. T. Cooper. Agents—John C. Brodie & Sons, W.S.

Saturday, June 21.

SECOND DIVISION.

[Lord Kincairney, Ordinary.]

WADDELL v. THE GOVERNORS OF DANIEL STEWART'S HOSPITAL.

Landlord and Tenant—Lease—Construction—Damage by Subsidence—Mineral Working.

An agricultural lease reserved to the landlord right to work minerals, the landlord "being always bound and obliged to pay to the tenants all damage which may be done to the surface of ground by the exercise of the above powers, and that by deduction from their rent as the same shall be fixed by two neutral men mutually chosen."

In an action for arrears of rent by the landlord against the agricultural tenant the defender averred damage to the surface of the ground by subsidence. *Held* that the clause in the lease included such damage, and was not confined to damage to the surface by operation on the surface, and that accordingly the action was excluded by the clause of arbitration.

By lease dated 7th June and 19th October 1875 the Governors of Daniel Stewart's Hospital let to John Waddell & George Waddell, contractors, Edinburgh, and the survivor and his heirs, a part of the estate of Balbardie, in the county of Linlithgow, known as "Meikle Inch," for nineteen years, at an annual rent of £240 sterling. In the lease

was this clause—"Reserving to the said Governors, and their successors and assignees, the whole coal, lime, freestone, ironstone, clay, sand, gravel, stones, and all other metal, minerals, and substances of every description within or upon the lands hereby let, and liberty to search for the same, with power to erect engines and furnaces, buildings, and machinery of every description, and to sink pits, form levels, make roads, railroads, canals, and drains, and to carry on any works which they may consider necessary, the said Governors and their foresaids being always bound and obliged to pay to the tenants all damages that may be done to the surface of the grounds by the exercise of the above powers, and that by a deduction from their rent, as the same shall be fixed by the two neutral men to be mutually chosen." The Governors also leased the minerals under the said lands to a tenant, who, in order to the proper working of the minerals, sunk pits under and constructed a railway upon the lands. The damage done by these operations had formed the subject of a reference between the mineral tenant and the agricultural tenant.

Upon 17th July 1889 the Governors of the Hospital brought an action against George Waddell, the survivor of the joint agricultural tenants, for the rents of the lands of "Meikle Inch" since Martinmas 1887. The defender admitted that the rents sued for would have been exigible under ordinary circumstances, but that under the clause of the lease quoted *supra* he was entitled to withhold the rent for damage to the lands. He averred that since 1st February 1879 "great damage has been caused, and loss sustained, to the said deceased John Waddell and the defender in consequence of the said mining operations. Large portions of the land were and are rendered useless, and wholly unfit for ploughing or grazing in consequence of subsidence, and the deep and wide rents made therein. The drains and fences—the latter of which were erected by the defender at considerable cost—were, in respect of the portions of land damaged, rendered entirely inoperative and useless. The burn intersecting the lands also became choked by reason of the said mineral workings, and had to be and was cleaned out at the defender's cost. The said deceased John Waddell and the defender were thereby in a large measure deprived of the beneficial use and enjoyment of the said lands. The defender frequently informed the pursuers of this, and called upon them to nominate an arbiter along with him, in terms of said lease, in order that the sum in respect of said damage to be deducted from their rent might be ascertained, but this they refused to do, although admitting that considerable damage had been done. The defender's claims, in respect of the clauses above mentioned and otherwise, amount to the sum of £2745, 9s., being a sum very largely in excess of the amount sued for."

The pursuers pleaded—"(1) The defender, as heir-at-law to his father the deceased John Waddell, and in possession under the

first-mentioned lease, and as the survivor and in possession under the second-mentioned lease, being bound and obliged to pay to the pursuers the rents, drainage charges, and interests sued for, the pursuers are entitled to decree therefor, in terms of the conclusions of the summons, with expenses. (2) The defender is not entitled to retain the rents and others now sued for in respect of illiquid counter claims dating from 1879, now put forward. (4) The defender's counter claims being unfounded in fact and unwarranted by his lease, the same should be repelled, and the pursuers are entitled to decree as concluded for."

The defender pleaded—"(1) This action is excluded by the arbitration clause in the lease between pursuers and defender. (2) The defender having been deprived to a material extent by the pursuers of the beneficial use of the subjects let to him, is entitled to retain the rent payable by him to them, to the extent of the damage he has suffered. (4) The defender is, in terms of the lease of 7th June and 19th October 1875, entitled to deduct from his rent all damage sustained by him by the mineral workings under his lands."

Upon 6th January 1890 the Lord Ordinary (KINCAIRNEY) found "(1) that the defender is liable for the rents and sums of interest on drainage expenditure sued for; (2) that the clause in his lease whereby the pursuers became bound to pay all damages done to the surface of the ground by the exercise of the powers there specified, and that by deduction from the rent, does not apply to injury to the surface by mineral workings; (3) that the defender's claim of damages for such injury cannot be entertained in answer to the present action: Therefore repels the pleas for the defender, and decerns in terms of the conclusions of the action: Finds the pursuers entitled to expenses, &c.

"*Opinion.*—The pursuers, the Governors of Daniel Stewart's Hospital, are proprietors of the lands of Balbardie and Bathgate, and have raised this action for arrears of rent of two portions of these lands called Meikle Inch Meadow and Meikle Inch. They let Meikle Inch Meadow to the late John Waddell in 1873, and in 1875 they let Meikle Inch to him and to the defender, his son, and the survivor of them, and the heirs of the survivor. John Waddell died on 17th January 1888, and his son and heir, the present defender, has succeeded to the lease of Meikle Inch Meadow, and is now the occupant of Meikle Inch as the survivor of the two joint tenants.

"The rent of Meikle Inch Meadow is £20, payable half-yearly, and four sums of £10 each are concluded for, with interest from the several terms Martinmas 1887, Whitsunday 1888, Martinmas 1888, and Whitsunday 1889, when these rents became due. No defence is stated to this part of the action except that the defender has a claim of damages for injury to the other subjects, Meikle Inch, which largely exceeds the arrears of rent of Meikle Inch Meadow. There is no doubt that the defence founded on alleged damage caused to a different

subject cannot be entertained as a defence to an action for the rent of Meikle Inch Meadow, and it was not strongly pressed. Indeed, the defender had sent his cheque for £40 in payment of the arrears of the rents of this subject, but it was returned because the pursuers claimed interest, as they were entitled to do, on each half-yearly rent. No other defence has been stated to the action so far as it relates to Meikle Inch Meadow.

"The other part of the action, which relates to Meikle Inch, is in a different position, and raises questions of much greater difficulty. The rent of Meikle Inch is £240 per annum, and four half-yearly rents are sued for, together with four sums which are interest on drainage expenditure, and are claimed under the lease.

"In defence to this part of the action the tenant has averred that the lands have suffered a great deal of injury in consequence of the working of the minerals under them, which minerals belong to the pursuers, and have been let to the mineral tenants, by whom they have been worked. It is averred that the lands have been greatly injured by the subsidence caused by these mineral workings, and that 'the deceased John Waddell and the defender were thereby in a large measure deprived of the beneficial use and enjoyment of the said lands.' The pursuer states his claims as amounting to £2745, 9s. He further avers that the drains, the annual charge for which is sued for, have been rendered to a large extent inoperative. The injury averred to have been done to the lands is injury by subsidence of the surface caused by mineral workings. The defender further founds on the clause in his lease by which the pursuers reserved right to themselves to work the minerals and power to 'erect engines, furnaces, buildings, and machinery of every description, and to sink pits, form levels, make roads, railroads, canals, and drains, and to carry on any works which they may consider necessary; the said Governors and their foresaids being always bound and obliged to pay to the tenants all damage which may be done to the surface of the ground by the exercise of the above powers, and that by deduction from their rent, as the same shall be fixed by two neutral men mutually chosen."

"On this clause the defender has founded his fourth plea-in-law, to the effect that he is in terms of the lease entitled to deduct from the rent all damages sustained by him by the mineral workings under his lands.

"If this clause relates to the kind of damage averred, that plea is no doubt sound, and it would be necessary to ascertain the amount of the damage by arbitration or by proof. But it appears to me that I am bound to construe this clause, and ought not to remit the cause to probation, leaving the clause to be construed afterwards, and I have formed the opinion that the clause has no relation to damage by subsidence caused by mineral workings. I think it relates to damage done to the surface by operations on the surface.

"It appears to be now well settled that

clauses of this kind, at least when they occur in dispositions of the surface, confer no power to let down the surface, and the same rule of construction seems equally applicable when the clause occurs in a lease. Damage in exercise of the power conferred is damage caused legally and under the reserved power, but injury caused by letting down the surface is wholly unauthorised, and founds not a claim for compensation *ex contractu*, but a claim for damages *ex delicto*—*White v. Dixon*, December 22, 1881, 8 R. 375—*aff.* March 19, 1883, 10 R. (H. of L.) 45; *Davis v. Traherne*, 1881, L.R., 6 App. Cas. 460; *Love v. Bell*, 1884, L.R., 9 App. Cas. 286. The powers specially conferred are powers to be carried out on the surface, and the specialty that the damage is to be paid by deduction from the rent points to damage by the occupation of the surface from time to time, and not to damage occasioned by withdrawal of its support.

"If that be the sound construction of this clause, it has no bearing on the defence, which is rested on damage by withdrawal of support.

"But the defender also maintains (plea 2) that having been deprived to a material extent by the pursuers of the beneficial use of the subjects, he is entitled to retain the rents to the extent of the damage he has suffered. I am not prepared to affirm the law stated in this plea. It is not a plea pointing to abatement of rent, and therefore the recent cases of *Muir v. McIntyre*, February 1887, 14 R. 470, and *Munro v. M'Geoch*, November 15, 1888, 16 R. 93, and the similar cases there quoted, do not apply. I think the plea truly amounts to a claim of damage pleaded against a liquid claim for rent. The rule of law that such a claim cannot be entertained, has as yet always been saved in those cases in which petitions for sequestration have been refused on the ground that the tenant has not received possession of the whole subject leased—*Guthrie v. Shearer*, November 13, 1872, 1 R. 181. The claim advanced may turn out to be quite well founded, but it is by no means obviously so, nor is it capable of anything like instant verification.

"On the whole, I think the pursuers cannot be required to abide the establishment of the defender's claims without violating to a greater extent than any decision has as yet warranted the rule that an illiquid claim of damages is no defence to a liquid claim for debt."

The defender reclaimed, and argued—The defence here was a sound one. The pursuer brought his action for payment of rent, but the defender alleged that the land had been injured by the operations of the pursuers or their tenants, and therefore they were not entitled to recover the whole amount. The landlord, as proprietor also of the minerals below the surface, was bound to work them in such a manner as would give support to the surface—*White v. Dixon*, December 22, 1881, 9 R. 375. The pursuers had been lawfully working their minerals and had brought down the surface; that was a damage *ex contractu* and not *ex delicto*. It was plain that the clause in the lease did

not refer only to damage caused to the surface by workings on the surface. The words in the clause could only refer to workings underground, as such words as "sink pits, drive levels", could not be used for any working above ground. The damage therefore had been caused by the landlord through his tenant doing exactly the work he had reserved his right to do, and therefore the amount of the damage must be ascertained in the manner prescribed by the clause. That being so, the tenant was entitled to retain his rent for the damage done to him by the loss of the ground—*Muir v. M'Intyre and Others*, February 4, 1887, 14 R. 470.

The pursuers argued—The Lord Ordinary's judgment was right, and ought not to be disturbed. It had been settled, and the cases cited in the Lord Ordinary's note were conclusive on the subject, that a reservation of the minerals in favour of the landlord was not a reservation of the power to cause a subsidence of surface by his workings. The only power given by this reservation was the power to work and win the minerals without causing any damage. *White's* case showed that if the tenant found the mineral owner was working his minerals in such a way as to bring down the surface, he could interdict him and so prevent the damage. If this damage was done to the land it was not done under the contract, but *ex delicto*. The clause in the lease referred to was not intended to have the effect of bringing such serious damage as here alleged to be tried in a summary manner. The only way the defender could recover was by an action of damages.

At advising—

LORD YOUNG—This is an action for payment of rent by a landlord against an agricultural tenant. In defence the tenant pleads that he has suffered damage during the course of the lease through the exercise of the power which the landlord retained by the lease to work the minerals underneath the farm, and secondly, referring to a certain clause in the lease, he says he is entitled to have the amount of the damage so caused ascertained by arbitration, and to retain the amount so determined from the rent. The Lord Ordinary has refused that defence, and the question which we have to determine is whether the Lord Ordinary was right in refusing to give effect to it?

The Lord Ordinary points out that the damage complained of was caused by subsidence of the ground caused by the working of the minerals below, and he is of opinion that such damage does not come within the provisions of the clause referred to by the defender, because in working the minerals so as to bring down the surface of the ground the landlord was not acting lawfully and within his powers under the lease, and that although he may be liable in damages to the tenant it is *ex delicto* and not *ex contractu*, and that the clause in the lease has no application. The ground of his judgment is that when the minerals are being worked they must be worked with a

due regard to the legitimate interests of the owner of the ground above, or the surface owner as he is often called in our law, and that their prejudicial working may be restrained by the surface owner. The Lord Ordinary refers us to certain cases where it has been held, that in actions between the mineral owner and the surface owner the mineral owner was not entitled to work the minerals in the manner most beneficial and commodious for himself without consideration for the interests of the surface owner.

I of course assent to that law. It is really founded on and illustrative of the maxim *Sic utere tuo ut alienum non laedas*. It was attempted at one time to set up the pretence that the mineral owner had nothing to do with the risks incurred by the owner of the land, and that was specially pressed in cases where there was a clause for surface damage in the lease. But the Court decided against that contention. Accordingly we have those cases in which the mineral owner has been restrained by interdict from working the minerals in the manner he desired when he did not leave sufficient support for the surface. Generally that support can be left, but where it cannot either some arrangement must be come to or the minerals left unworked. That principle, however, was never held to involve this, that if the working of the minerals was likely to cause any damage to the surface, that the minerals must not be worked. The mines are worked skilfully and with the best appliances that science can procure, and the intention and the likelihood is that the surface will not be shaken, but it may in some cases happen to be damaged, but that is not a case for stopping the working of the minerals by interdict; it is a question of damages. Even where it is plain that the minerals cannot be worked without causing damage to the surface there is a large discretion in the Court whether interdict is to be granted or not. We had a case of that sort before us not long ago. The land above was barren moorland, but the minerals below were rich, and the owner of the land tried to interdict the mineral owner from working until he had been paid for his consent. We refused that interdict. It was, however, plain that the damage would be inconsiderable.

But I am satisfied the case before us does not raise any such question. In the first place, this case is not one between the owners of two separate estates—the minerals and the ground above them—it is a question between a tenant and his landlord. The landlord, who is the owner of the mines, is working his minerals, but he desires to utilise the surface too, and so the surface is let to an agricultural tenant. He gives the tenant notice that in taking a lease of these agricultural subjects they are over mineral workings and are liable to fall in from these workings, and the tenant takes the farm with this undertaking embodied in his lease, that whatever damage is done to the surface by the mineral workings the owner will pay for, and that the amount of damage is to be ascertained by arbiters.

Now, is that proposal not binding on the landlord? If there should be a subsidence by reason of the mineral workings, is the landlord entitled to say, "I admit there is a subsidence, and that it arose from my mineral workings, but you cannot get the damage fixed by arbitration; you must bring an action in the Court of Session with the chance of having it appealed to the House of Lords." Why? Because the landlord says that he was not working the minerals lawfully, but in delict, and the tenant could have stopped his working by interdict, and therefore he must bring his action into Court. I cannot assent to that proposition. I do not know, and we have not the materials before us on which to form an opinion, that the tenant could have interdicted his landlord from working the minerals as he did. Even assuming, which I do not decide, that the law is the same between a landlord and tenant as between the owners of two separate estates, I cannot hold that the tenant could have interdicted his landlord from working. Assume that that mode of working the minerals was the very way contemplated when the lease was entered into, and the damage that happened was the very damage that the parties intended should go before the arbiter, I cannot listen to the landlord when he says that he had worked the minerals in a wrong way, and therefore the tenant must go into Court with his claim. I think that if the landlord designedly or undesignedly caused the damage complained of, that the landlord must pay for it, and that the tenant is entitled to have the loss caused by the damage assessed in the manner provided for in the lease.

My opinion is that the tenant is right in his contention, and that this subsidence was damage provided for by the clause in the sub-section upon which the defender relies.

As regards the contention that the clause applied only to damage arising from operations done above ground, and not from below by withdrawal of support, no doubt the ground might have been damaged by use made by the colliery owner above ground, and that use might have been so greatly against the tenant's interest that he could have interdicted the landlord from acting in that manner. That again might have raised the question whether it was necessary for the mine owner in the proper exercise of his rights to have used his tenant's ground in such a manner as to cause damage. Could the landlord in such a case have said, "I did the damage, but I did it in delict, and although I am liable in damages these cannot be ascertained by the arbiters, but must be settled by an action in the Court of Session." I think that the tenant has stated a relevant defence to his landlord's claim for rent, and that the damage caused to his farm must be assessed in the manner provided for in the lease.

LORD RUTHERFURD CLARK—I concur in Lord Young's opinion, but I confess I do so only with great difficulty.

LORD LEE and the LORD JUSTICE-CLERK concurred.

The Court recalled the Lord Ordinary's interlocutor and assoiized the defender.

Counsel for the Reclaimer—D. F. Balfour, Q.C.—Baxter. Agents—R. R. Simpson & Lawson, W.S.

Counsel for the Respondents—Asher, Q.C.—Vary Campbell. Agent—Alex. Heron, S.S.C.

Thursday, June 26.

FIRST DIVISION.

[Lord Kinnear, Ordinary.]

ROBINSON AND OTHERS (DALHOUSIE'S TUTORS) v. STEWART.

Church—Glebe—Boundaries—Decree of Presbytery.

Terms of a decree of presbytery fixing the boundaries of a glebe, which was held to be so clear as not to admit of construction by evidence of possession.

Early in the present century a new church and manse were built in the parish of Lochlee at some distance from the old site. In consequence of this change of site the proprietor of Lochlee and the minister of the parish presented a petition to the Presbytery of Brechin praying them to take the legal steps for making an excambion of the existing glebe for a new glebe nearer the new manse. After certain procedure, and a remit to practical men as assessors, along with the Presbytery of Brechin, and also to a land surveyor, and after perambulation of the ground, the Presbytery on 21st June fixed the boundaries of the new glebe. The minute of the meeting of that date bore—
"Pursuant to the injunction of last meeting, the Presbytery proceeded to perambulate the ground intended for the new glebe of Lochlee, and having viewed the line of march formerly specified, they proceeded to fix the march stones for said new glebe as follows, viz., on a hillock at the foot of the Broad Pool of Dalhowan, and then proceeding in a straight line to the source of the burn of Glascurie, another stone near the foot of the hill; from thence, passing by the prop. of Greenbush, to the source of the said burn of Glascurie, and from thence in a straight line to Scots well, in which line there are two march stones planted; from Scots well till it issue in Brannie, and along the Brannie till it issue in the Water of Mark; from thence along the waterside of Mark to the Broad Pool of Dalhowan; and the Presbytery did, and hereby do, discern the whole arable land, hill pasture, moss and muir within said boundaries, to be the exclusive property of the minister of Lochlee, present and to come; and they discern the former glebe and privileges to belong to and to be the exclusive property of the Honourable William Maule of Panmure, and his heirs and