

May 23, 1826. *Respondent's Authorities.*—White, July 7, 1796. (633.)—Dig. de Recept. l. 17.—Reg. Mag. 2. 5.—1426. c. 87.—1 Bank. 23. 9.—Gordon, Nov. 30, 1716. (655.)—Middleton, June 9, 1791. (Rob. Ap. Ca. 391.)—Dunsmore, July 30, 1745. (656.)—Gardiner, Jan. 19, 1773. (659.)—Brodie, June 1, 1825.—(4 Shaw and Dunlop, p. 53.)—A. S., December 17, 1788.

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No. 29. LADY MARY L. CRAUFURD, Appellant.—*Shadwell—Robertson.*

J. and T. DIXON, &c. Respondents.—*Keay—Jas. Campbell.*

*Tack—Coal—Reparation.*—Stat. 59 Geo. III. 35.—A lease of all the coals within certain lands having been granted, without any stipulation as to leaving a barrier between them and the coal of adjoining lands; and power being given to the tenants to erect engines on pits, to draw the water from the coal on any of the adjoining lands, of which the tenants might happen to be proprietors or lessees; and the tenants having worked out the whole of the coal, whereby the water in the adjoining lands descended into and drowned the coal-field so let to them; and an action having been brought after the lapse of twenty years from the termination of the lease, concluding that the tenants should be ordained to draw off the water, and erect a barrier, failing which to pay damages,—Held (affirming the judgment of the Court of Session), 1. That the tenants were not bound to leave a barrier; and, 2. That the alternative conclusion for damages did not render a remit to the Jury Court imperative.

May 23, 1826.

1ST DIVISION.

Lord Alloway.

THE lands of Knightswood and adjoining lands, situated in the county of Dunbarton, belonged originally to the Earl of Craufurd. The strata of coal in them extend, in a rising position, from the lands of Knightswood towards the neighbouring lands, and were formerly worked in common. In consequence of this position, it was found necessary to sink pits on Knightswood, with a view of raising the water, and so to permit the coal to be worked in an ascending direction. The adjoining lands had been sold to different parties; and, in 1769, the late Earl of Craufurd, as proprietor of those of Knightswood, let to Alexander Houston, James Dunlop, and others, ‘all and whole the coals, seams of coal, and coal heughs, within the said Earl his lands of Knightswood and others, lying in the parish of Kirkpatrick, and county of Dunbarton; and in consideration of the sum of £878 Sterling, paid by the lessees to the said Earl, being the total amount of the sum already expended by him in working and searching for the said coal, and erecting engines thereon, and of all other advances thereanent, and of which he hereby acknowledges the receipt,’ for thirty years, from Candlemas 1770. The lessees obliged themselves to pay

a yearly rent of £250 per annum, and 'to work the coal in a May 23, 1826.  
 ' regular, orderly, and workmanlike manner;' and the works to  
 be ' patent, and subject to be visited at all times by the said  
 ' Earl, or any other person to be appointed by him for that ef-  
 ' fect.' The tack granted ' full power and liberty to the said  
 ' lessees and their foresaids, of working and winning all the  
 ' coals within the boundaries of the said lands, and converting  
 ' the same and proceeds thereof to their own proper use and  
 ' benefit, and of sinking pits, running levels, erecting fire or  
 ' other engines for raising of water or coals from the said col-  
 ' lieries, and making roads,' &c. And it farther contained this  
 stipulation, ' Providing always, as it is hereby specially condi-  
 ' tioned and provided, that if, after the expiry of the lease, or  
 ' that the foresaid main coal shall be wrought out and become  
 ' not worth working, and that the fire-engine, and other engines  
 ' then on the premises shall be proper or useful for draining  
 ' the water off from any neighbouring coals of which the lessees  
 ' or any of them, or their foresaids, shall at the time either be  
 ' proprietor or lessee, then the said Earl hereby grants full  
 ' liberty to the said lessees and their foresaids, to continue the  
 ' said engine or engines, and other machinery on his lands of  
 ' Knightswood, and others aforesaid; and that while and so  
 ' long as the coal on the said neighbouring grounds shall con-  
 ' tinue to be wrought thereby, the said lessees always paying to  
 ' the tenants of the said Earl any damage they may suffer or  
 ' sustain thereby.'

The tenants entered to possession, and worked the coal un-  
 der the firm of the Knightswood Coal Company, of which John  
 Dixon, the father of the respondents, Messrs Dixons, became a  
 partner subsequent to the date of the lease.

In 1775, an agreement, in the shape of a contract, was con-  
 cluded by these parties, whereby the rent was reduced to £160,  
 until Candlemas 1780, and then to be as before, £250, until  
 the conclusion of the lease. It was also provided, that the  
 lessees should have power to give up the lease at the end of 14  
 or 21 years, on giving six months' previous notice; and the  
 Earl was to have the like power of resuming possession on  
 giving the like notice, if the lessees had not paid up their full  
 rent. In case of either of these events occurring, ' The said  
 ' lessees do hereby covenant and agree that when the said lease  
 ' shall be given up agreeable to the terms thereof, or when the  
 ' possession of said coal shall be assumed by the said Earl or his  
 ' aforesaids, agreeable to the powers herein after granted to them,

May 23, 1826. ' the whole machinery upon the said coal or farm ' of Knights-  
 ' wood, or belonging to the said coal, shall be forthwith removed  
 ' by the said lessees and their foresaids, forth and from the said  
 ' coal, lands, and every part thereof.'

In 1778, a tack was entered into of the Knightswood coal, between the Earl of Craufurd and James Dunlop, one of the partners of the Company, proceeding on the narrative of the original lease, 1769, and the subsequent contract, 1775, and stating that James Dunlop was anxious to have the lease of the coal in his own name, after Candlemas 1784, being 14 years from the commencement of the first lease. ' Therefore, the said  
 ' Earl lets to James Dunlop the foresaid coal for 16 years, from  
 ' Candlemas 1784 to Candlemas 1800, the expiry of the first  
 ' lease, with power to work the said coal, and with the same  
 ' privileges that are mentioned and contained in the said former  
 ' tack.' It was further agreed, that at the expiry of this tack at the term of Candlemas 1800, the Earl should be entitled ' to  
 ' receive performance of the third article of the said agreement  
 ' of 10th and 14th April 1775, with respect to the removal of  
 ' the machinery belonging to the said coal, and the delivery of  
 ' the colliers' houses, engines, and machinery therein-mention-  
 ' ed.' This tack contained a renewal of all the other clauses and provisions mentioned in the original tack in 1769, except the clause empowering the lessees, in the event of the main seam being wrought out, to continue the engine on the ground, if it should be in use for drawing the water from any other coal-fields of which the lessees might be proprietors or tenants. Although the tack was in name of James Dunlop, it was truly for behoof of the other partners.

During the currency of these leases, the Company acquired right to the coals in several of the adjoining lands, and among others of Netherton, which they worked in common with that of Knightswood. In 1800, their right to the latter coal terminated, and in that year the Earl of Craufurd granted a lease of the surface of Knightswood to Mr Houston, one of the partners, for 19 years. No new lease of the coal (which it was alleged was exhausted) was granted to any one; and Mr Houston continued to make use of an engine, which had been placed on one of the pits sunk during the currency of the lease on Knightswood, for the purpose of draining the water from the coal which the Company was working in the adjoining lands. The Earl died in 1810, and was succeeded by his sister, Lady Mary Lindsay Craufurd; and although the water was drawn off

by means of the engine on the above pit till the termination of May 23, 1826. the lease in 1819, yet she did not object to it. In that year Mr Houston removed, and the engine having been taken away, the effect was, that the water descended into the pits of Knightswood from those in the neighbouring properties.

Lady Mary Lindsay Craufurd then raised an action against the lessees and partners of the Company, in which, after setting forth that she was proprietrix of the coal and lands of Knightswood, and that the lessees had taken possession of and worked the coal from 1770 to 1800, she stated, ‘ That during this period, ‘ the said defenders did illegally, and to the great hurt and prejudice of the pursuer, work out the whole boundary, and march ‘ coal between the coal of Knightswood and the conterminous ‘ coal-fields to the south, and east, and north, and north-west ‘ of Knightswood, which boundary and march coal so wrought ‘ out, ought to have been left as a barrier to save the coal-field ‘ of the pursuer from being flooded by the water from the wastes ‘ of the said conterminous coal-fields : That the said defenders ‘ did also illegally, and to the great hurt and prejudice of the ‘ pursuer, work out the boundary and march coal between the ‘ said coal of Knightswood and the coal in the lands of Nether- ‘ ton ; and which boundary and march coal should have been ‘ left as a barrier to save the pursuer’s coal from being over- ‘ flowed as aforesaid : That the aforesaid coal-fields and the coal ‘ in the lands of Netherton are to the rise of the coal of Knights- ‘ wood : That the said defenders, who are lessees or proprietors ‘ of the said conterminous coal-fields, having wrought the coal ‘ in the said fields, the water coming from the said coal-fields ‘ did of consequence discharge itself into the waste of Knights- ‘ wood, which was wholly exposed to said water by the illegal ‘ operations of the defenders, in working out the boundary and ‘ march coal, which ought to have been left as a barrier afore- ‘ said. That in consequence of the said waste of Knightswood ‘ being thus overflowed with water, the pursuer is prevented ‘ from working the remaining large and valuable seams of coal ‘ lying in her said lands of Knightswood.’ Upon this medium, the summons concluded against the defenders, ‘ Either to re- ‘ lieve the pursuer’s coal of the said water, and that by drawing ‘ the accumulated water which has been introduced, and making ‘ a barrier in place of that which has been removed by the de- ‘ fenders as aforesaid ; and besides, to pay all the costs, skaith, ‘ and damages which have already been occasioned by the said ‘ illegal workings ; and failing the said defenders so relieving

May 23, 1826. ‘ the pursuer’s coal of the said water, as said is, they ought and  
 ‘ should be decerned and ordained by decree foresaid, to make  
 ‘ payment to the pursuer of the sum of £28,000, being the esti-  
 ‘ mated value of the coal of Knightswood in name of damages,  
 ‘ for the injury and loss sustained by the pursuer, by the afore-  
 ‘ said illegal operations.’

In defence, the defenders referred to the terms of their leases, and maintained that they were entitled to work, dig, carry off, and apply to their own use, all the coal in the lands of Knightswood, without exception; that, as the power of constant inspection was reserved to the landlord, it must be presumed that he exercised that power, and acquiesced in, or homologated, the proceedings of his tenants; that, from the terms of the lease, it was plain that the landlord consented that the water in the neighbouring coal-fields should be allowed to communicate with the workings at Knightswood; that, in point of fact, such a communication did exist antecedent to the date of the lease, or at least prior to the date at which any of the defenders, or those whom any of them represented, were connected with Knightswood.

The Lord Ordinary appointed the pursuer to give in a condescendence of all the facts and circumstances she alleged and offered to prove in support of her libel, and to state the periods of the alleged encroachments; and therewith to produce all the writings upon which she meant to found; and directed parties to be heard on the relevancy and legal effect of the different facts stated in their pleadings.

Thereafter, his Lordship remitted, before answer, to ‘ Robert  
 ‘ Bald, civil engineer and coal viewer, to visit and inspect the  
 ‘ subjects in question, and to report his opinion:—1mo, What  
 ‘ is the usual barrier left betwixt adjoining coal works belonging  
 ‘ to different proprietors, so as to prevent a communication be-  
 ‘ twixt them? And whether, by inspection or otherwise, he can  
 ‘ ascertain if any barrier was left betwixt Knightswood and the  
 ‘ adjoining coal-field? And if so, of what thickness or extent  
 ‘ the barrier was?—2do, Whether the coal at Knightswood, or  
 ‘ the seams of coal that run through Knightswood, and are now  
 ‘ wrought in the adjoining properties, are of so porous a nature,  
 ‘ that if a barrier had been left, it would have been insufficient  
 ‘ to prevent the communication of the water?—3tio, If the lease  
 ‘ of the works in question gave a right of communicating the  
 ‘ levels from Knightswood to the adjoining fields of coal pos-  
 ‘ sessed and wrought by the tenants of Knightswood, whether

' from the porous nature of the coal, or the lie or dip of the May 23, 1826.  
 ' same, would the whole water of the adjoining coal-field fall  
 ' upon the coal at Knightswood, belonging to the family of  
 ' Craufurd; and whether, after the expiry of this lease, this  
 ' could not be prevented by ordinary means?—4to, Whether  
 ' these levels could not be communicated without injuring the  
 ' coal at Knightswood at the expiry of the lease; and whether,  
 ' in ordinary cases, this privilege could not have been withdrawn,  
 ' and the levels stopt or built up at the expiry of the lease when  
 ' that privilege ceased? and if so, to describe in what way, ac-  
 ' cording to his opinion, this might have been effected.—5to, To  
 ' report upon the present state of Knightswood coal, belonging  
 ' to the pursuer, whether it can be made workable in general,  
 ' and at what expense this could be effected; whether from in-  
 ' spection or otherwise, he can form any opinion as to the ex-  
 ' tent of the coal at Knightswood still unwrought; and whether  
 ' any part thereof could at present be wrought? and authorises  
 ' Mr Bald to examine the whole coal-works in the adjoining pro-  
 ' perties occupied by the defenders or others, from which he can  
 ' derive any information with regard to the subjects as to which  
 ' he is to report.'

This remit was objected to by Lady Mary Craufurd, who stated, that as the coal was entirely drained, Mr Bald could only report from the information of others, but she did not complain of it either by representation or petition, and she attended Mr Bald by her agent. After making an investigation, he reported on the different points remitted to him by the Lord Ordinary, and, in particular, that the march consisted, in the part above the main coal, of a porous sand-stone; and, ' with regard to the usual barrier of coal left betwixt ad-  
 ' joining coal-works belonging to different proprietors, so as  
 ' to prevent a communication betwixt them, he stated, that  
 ' there is no rule I know of for regulating the thickness of such  
 ' barriers, or for leaving any barriers whatever along marches.  
 ' If barriers are to be left, it is the common practice to stipulate  
 ' in the lease what is the least thickness these barriers must be,  
 ' and unless the quality and texture of the coals are known, it  
 ' is not possible to decide what thickness of barriers will be suf-  
 ' ficient, as some barriers only three or four fathoms in thick-  
 ' ness will prevent water passing through, owing to the close-  
 ' ness of the coal in its texture; while, on the other hand, a  
 ' coal very open and full of fissures will not keep back water,  
 ' even though the barriers were 100 fathoms thick; besides  
 ' which, the transit of the water through the barrier will be

May 23, 1826. 'quicker or slower, according to the altitude of the water kept  
' back in the old wastes. No barriers whatever have been left  
' by the Knightswood Coal Company along the marches, either  
' in the Knightswood estate, or along the marches of the estates  
' immediately adjoining, where the coal was wrought by the  
' Knightswood Coal Company. The main coal has been wrought  
' in continuation from Knightswood into the adjoining proper-  
' ties as one and the same coal-field.' He also stated, that it  
was impossible, from the porous nature of the boundary, to work  
the coal, and at the same time leave an effectual barrier; and  
having on the other points reported unfavourably for Lady Mary  
Craufurd, she contended, that she was entitled to have the facts  
ascertained by the verdict of a Jury; the more especially as her  
summons concluded for damages. The Lord Ordinary having  
reported the case on informations, the Court approved of Mr  
Bald's report, assoilzied the defenders, and found expenses due.  
And to this judgment they adhered on the 3d of February  
1824.\*

*Lord Hermand.*—The object of Lady Mary seems to be to  
quash the whole proceedings that have been formerly had, and  
to get the case sent to a Jury. But I am of opinion this wont  
do. There is enough already in this case to enable us to decide  
it. She says, this is a pure action of damages. It is no such  
thing. It depends upon points of law; and I agree with the ob-  
servations in the answers, that there is no question of fact for a  
Jury to decide here. The whole coals were let to the tenants;  
and the conclusion of the action is for replacing that barrier  
which has been removed in working that coal. But that is not  
a question of fact. It is a question as to the interpretation of a  
lease or leases, which do not say a word about barriers, or re-  
strict the tenants from working any part of the coals. Besides,  
the lease expressly reserved a power to the proprietor to watch  
the proceedings of the tenants, and to superintend the working  
of the coal; and by the report of the inspector the parties were  
to be regulated. She might have done so herself, or she might  
have sent down an engineer for that purpose. But she did not  
do either; and it is now too late to complain. This property  
was surrounded with coal on all sides, and I see no reservation  
in the lease of any barriers.

*Lord Succoth.*—I am clearly of the same opinion. There does

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\* See 2 Shaw and Dunlop, No. 631.

not seem to me to be any occasion for sending this case to the Jury Court. It is not properly a case of facts, but of law. There is no occasion here for going upon the general question of law, how far it is necessary for a tenant or proprietor of coal to have a barrier between his own coal and that of his neighbour. That was the case of Sir John Hope. It rather appears to me that the Court decided that case on the general question of law. But it is not necessary to go into that question here, for there is a clause in these leases which appears to me sufficient to regulate the matter itself. The clause in substance gives right to work out the coal without leaving any barriers. After this lease expired, a large engine was continued working for a very considerable number of years, for the express purpose, and for the only purpose, as I can see, of drawing the water from the coal of the conterminous heritors. During all this long period, this party had it in her power to object to, or to bring her complaint, if she thought that this clause in the lease was not available to the tenants. She must have known the use they were making of the engine; and by that engine remaining during so long a period, she must have known that the party was making that use of it, for the express purpose of drawing the water from the coal of the other proprietors. But no objections were made during all that time. This is of itself a strong feature in the case. It is, I think, a very strong act of homologation on the part of Lady Mary, as she must have known the purpose for which the engine was working. That being the case, it does appear to me that this clause in the lease goes very far to regulate this case. On the facts Mr Bald's report is decisive. No doubt it is said he did not go down the pits. But he could not do so; and therefore he took the best information which he could get. There were, however, some things which he could see, and which are material in the case. He saw that the boundary was of a porous nature, and that it was impossible to make a barrier without leaving the greater part of the coal unworked. But the lease has no limitation, and it would have been extraordinary if the tenants to whom the whole coal was conveyed were only to have right to work a small part of it. I agree in opinion with Lord Hermand, that this is not an action of damages. It is an action concluding for replacing the barrier. There is only a subsidiary conclusion for damages, provided the barrier is not replaced. This is the plain meaning of it. The right to work with or without the barrier is not really the question here. But at all events, that is a question of law, not of fact.



May 23, 1826. *Lord Balgray.*—There is no doubt that Mr Bald had ample means of reporting on various circumstances of importance; but I have some doubts whether a tenant is not bound at common law to leave a barrier. In the circumstances of this case, however, it seems to have been understood that no barrier was to be left, because the water from the pits of the conterminous proprietors was to be drawn out by means of the engine on Lady Mary's pit.

*Lord President.*—Mr Bald's report is quite satisfactory, and much more so than a proof before a Jury. Indeed, I don't see how any one could have charged a Jury on the subject without his aid.

*Lord Gillies.*—I am of the same opinion.

Lady Mary appealed.

*Appellant.*—It is necessarily implied in the nature of location, that the tenant is to use the subject according to the rules of good management, and not deprive the landlord, after the expiry of the tack, of the means of using the subject located, advantageously and profitably. And nowhere is the most strict adherence to these rules so requisite as in coal-works. The respondents were bound to have left a sufficient barrier to have protected the pits from being flooded by the water descending from the conterminous mines. The appellant's charges are explicit and relevant in law to found a claim of damages. Nothing short of the lapse of the long prescription could cut off her claim. The moment the discovery of the respondents' illegal workings and encroachments was made, the suit was instituted. Both conclusions of her action involve a claim of damages for injury done to lands; and therefore, by the Jury Court Act, the Court of Session were bound to have remitted it to a Jury. Mr Bald's report was founded on hearsay; and the pretended facts on which it proceeded, were given by witnesses neither examined on oath, nor cross-examined; and the appellant offers before a Jury to prove the report to be utterly erroneous, and the conclusions in her action well founded.

*Respondents.*—The works were all along patent to the landlord. The late Earl lived until 1810, and no complaint having been made, it is now too late to seek damages. The appellant is barred by homologation and personal objection. The lease gave the lessees power and liberty of working and winning all the coals within the boundary of the lands; and neither by law nor in practice is a lessee bound, without an express stipulation

for the purpose, to leave a barrier. The clause empowering the lessees to continue the engines on the grounds, if such machinery would be useful to drain off the water from the neighbouring coals, implies, that the Earl knew that no barrier was to be left. As to the shape in which the question has been tried, Mr Bald proceeded on the best evidence, and accompanied by the agent for Lady Mary. There was no room nor necessity for a remit to the Jury Court. This is truly an action *ad factum prestandum*—to make a barrier in place of the one removed. To this, the conclusion for damages is merely subsidiary. There are, besides, legal pleas sufficient to warrant the dismissal of the action. It would obviously have been most inexpedient to have remitted an inquiry like the one sought for to the Jury Court. May 23, 1826.

The House of Lords ordered and adjudged, that the interlocutors complained of be affirmed, but without costs.

LORD GIFFORD.—My Lords, there is another case which has been under your Lordships' consideration, in which Lady Mary Lindsay Craufurd is the appellant, and Jacob Dixon and a great many other persons are the respondents. It is an appeal from a judgment of the Court of Session, in an action brought by Lady Mary Lindsay against the several respondents, by which she sought to have it declared that the respondents, who are the lessees of a coal-work, in which the late Earl of Craufurd was interested, and which now belongs to her, called Knightswood, should be compelled either to relieve the pursuer's coal of water, by draining the accumulated water which had been introduced, and make a barrier in place of that which had been removed by the respondents; and, besides, to pay all the costs, skaith, and damage, which had been occasioned by the illegal workings; and failing to do so, that they should be decerned and ordained by decree to make payment to the pursuer of a very large sum of money,—£28,000 being the estimated value of the coal, in the name of damages, for the injury and loss sustained by the pursuer.

It appears that the lease, or rather leases, (for there were two or three, under which this coal was worked,) were granted so long ago as the year 1775; and that they terminated so long ago as the year 1800—nearly twenty years before the commencement of this action. This action was commenced by Lady Mary Lindsay Craufurd in the year 1820. She then complained against the successors of this company (for most of them were dead), contending, that at the time they had the possession of her coals in Knightswood—the coal belonging to her ancestors—they had worked their coal, and, at the expiration of their lease, did not leave a barrier to save her coal-field from being flooded by the water from the waste of the conterminous coal-works; and that by reason of such a barrier not being left, (which, she says, it was their duty to have left,) the water flowed in upon her remaining coal; and in consequence of this, her remaining coal has been completely drowned, and that she sustained a

May 23, 1826. great injury. They, on the contrary, contend, that under their tack, the whole coal in Knightswood was granted to them ; that although certainly by that lease they obliged themselves to work in a regular, orderly, and workmanlike manner, yet that stipulation on their part was accompanied with the stipulation, that their works should be always open, subject to be visited at all times by the Earl of Craufurd, the then proprietor, or any person to be appointed by him ; and they further said, that in this lease to them was contained a power of making a communication between that coal-work, and other coals they were then working ; and that they were not only to be at liberty to put down fire-engines for raising the water and coal, and so on, during the lease ; but that even after the lease expired, if they should find it necessary to continue the working of the fire-engine, and other engines then on the premises, for draining the water off from any neighbouring coals, of which the lessees, or any of them, should at the time be either proprietor or lessee, then the Earl granted full liberty to them to continue the said engine or engines, and other machinery, on his lands of Knightswood. Therefore, they said, that looking at this lease, not only was there no stipulation binding them to keep up a barrier between this coal-work and the conterminous coal-works, but there was a positive permission given to them to communicate between their coal-works, and the conterminous coal-works, and that they were therefore to be permitted to continue that communication for the purpose of being enabled to work, and to take advantage of conterminous coal-works.

My Lords, on this matter coming before the Lord Ordinary,—Lord Alloway,—he directed the pursuer to give in a condescence, framed in terms of the act of sederunt, of all the facts and circumstances she alleged and offered to prove in support of her libel—to state the periods of the alleged encroachments,—and to produce all the writings upon which she meant to found ; and then he pronounced an interlocutor, appointing the cause to be enrolled, and parties to be heard upon the relevancy and legal effect of the different facts stated in the papers.

The Lord Ordinary having afterwards resumed consideration of the condescence and answers, revised condescence and answers, and the whole process and productions, before answer, remitted to Mr Robert Bald, civil engineer and coal-viewer, to visit and inspect the subjects in question, and to report his opinion.

I do not perceive that any representation was made by Lady Mary Craufurd against this remit to Mr Bald ; but on the 20th December 1821, there is another interlocutor : ‘ The Lord Ordinary having called the ‘ cause, heard the counsel for the parties, and considered what is stated ‘ in a letter from the pursuer, Lady Mary Lindsay Craufurd, which letter is put into process, allows each party, if so inclined, to have a coal-viewer or other scientific person in attendance, at the inspection to be ‘ made by Mr Bald.’ She wished to have Mr Bald attended by a coal-viewer, for the purpose of assisting him in the inspection of those works ; and that each party should be allowed to nominate one.

May 23, 82<sup>d</sup>

My Lords, it appears that Mr Bald made a very elaborate report, the substance of his report being in favour of the respondents; but Lady Mary Craufurd insisted that no attention should be paid to it, and that, under the circumstances, she was entitled to have the cause remitted to the Jury Court; and that this being in the nature of an action for damages, it should go to the Jury Court, in order to have the facts ascertained.

Upon that occasion, the Lord Ordinary pronounced the following interlocutor:—(His Lordship then recapitulated the interlocutors of the Lord Ordinary and the procedure in the Inner House.)

My Lords, on looking at the opinions which the Judges pronounced upon the second occasion, it appears, that on considering the original tack, the nature of the engagements entered into in that tack, the nature of the property leased, and the power given by the lessees, they seem to have thought, that looking at the lease itself, they ought to have assoilzied the respondents from this claim. It appears, however, as I have stated to your Lordships, that a remit had been made by the Lord Ordinary to Mr Bald, upon which the report that I have referred your Lordships to had been made by him; and on that proceeded the judgment of the Court of Session originally.

It does appear to me, certainly, that it is extremely important, considering the nature of this action, and the nature of the present claim, to call the attention of your Lordships to the tack itself. The first tack is so long ago as the year 1769; and by that my Lord Craufurd let to those parties ‘all and whole the coals, seams of coal, and coal-heughs, within the said Earl his lands of Knightswood, and others lying in the parish of Kilpatrick and county of Dunbarton; and in consideration of the sum of £878 Sterling, paid by the lessees to the said Earl, being the total amount of the sums already expended by him in working and searching for the said coal, and directing engines thereon, and of all other advances thereanent; of which he thereby acknowledges the receipt’—that is, a lease for thirty years, which would expire at Candlemas 1800. And then there is a condition on the part of the lessees, ‘that they will work the said coal, and all the parts thereof, in a regular, orderly, and workmanlike manner; and the said work shall be patent, and subject to be visited at all times proper by the said Earl, or any other person to be appointed by him for that effect.’ Your Lordships perceive, therefore, that this was a lease of all the coals within those lands of Knightswood. It gave, therefore, a right to the tacksmen to work out the whole of the coal. My Lords, if it had been intended on the part of the Earl of Craufurd that a portion of that coal should not be touched, and that it should be left as a barrier, it was perfectly competent for him, at the time this tack was executed, to have inserted a stipulation to that effect in the tack. Your Lordships find, however, that the only stipulation is, that they should work the coal in ‘a regular, orderly, and workmanlike manner.’ Now, my Lords, in this case, Lady Mary Lindsay Craufurd does not proceed in her action on any supposed stipulation in that

May 23, 1826. agreement ; but she contends, that, independent of that, there is a duty which custom or the common law imposed upon the tacksman of a mine, at all events to leave a barrier between the lands he is working and the adjoining lands, to prevent the water from the adjoining lands flowing in upon the coal ; but your Lordships will perceive, that in the latter part of the tack, there is an express provision made for a communication to be made between this work and the adjoining works. Now, it will be quite inconsistent and incompatible with that provision, that a barrier should be left all round this mine, of a sufficient thickness to prevent the entrance of the water ; for if that were so, it was impossible for them to work out the whole of the coal. They are permitted, after the expiration of their lease, still to use the fire-engines they have erected, for drawing off the water from the conterminous mines ; and there is no stipulation whatever, that after the purpose has been answered, for which that stipulation has been introduced, namely, the drawing off the water from the conterminous mines in their working, they shall then reinstate the barrier in that part. But it is left for them to determine when they will cease to work the fire-engines for the drawing off the water ; for there unquestionably is no stipulation in that tack, or the subsequent tacks, imposing upon them an obligation, after that purpose shall have been answered, to make any barrier to prevent the water flowing in from the conterminous mines. And your Lordships will recollect, that the works are to be carried on under the inspection, if he thinks fit, of my Lord Craufurd. They are to be patent at all times, and, therefore, he had an opportunity of going at all times to see how they were proceeding.

The lease expired in 1800, and till this claim set up by Lady Mary Craufurd, there has been no complaint of the manner of working, or of any conduct on the part of these lessees. I do not say that period of time is sufficient of itself to preclude Lady Mary Craufurd from sustaining the action ; but it is a question, whether she can maintain the action under the terms of this lease, if she stood by, and saw how they were working this coal, and did not make complaint, and did not call on them to leave this barrier. It is a very strong thing to say, that, under those circumstances, Lady Mary Craufurd, at the end of nineteen years, shall be permitted to call upon them ; and let it be recollected, that the action is to compel them to reinstate this barrier, which, according to her summons, she contends it was their duty to have left ; and therefore, unless she can make out that they were bound to do so, I apprehend she cannot maintain this action. Her allegation is, that this Knightswood Coal Company having made this mine, ‘ did also illegally, and to the great ‘ hurt and prejudice of the pursuer, work out the boundary and march- ‘ coal between the coal of Knightswood and the coal in the lands of Ne- ‘ therton, and which boundary and march-coal should have been left as a ‘ barrier to save the pursuer’s coal from being over-flooded.’ Now, in the first place, as I have stated, all the coal was to be permitted to be worked ; and it would be flying in the face of that instrument to say, that the law implies an exception which does not appear from the face of the

grant itself, as arising from a general custom or usage, when, if Mr Bald's report is to be attended to, he reports that there is no such custom—that it is rather an exception—that it is rather a stipulation contracted for on the part of the landlord, than an obligation on the part of the lessee. But I am rather inclined to wish your Lordships to view this case as arising out of the terms of their tack, than out of the report of Mr Bald. May 23, 1826.

For Lady Mary Craufurd it is contended, that this was an action for damages, and that, therefore, it was compulsory on the Court of Session to have sent it to the Jury Court. I am not disposed to concur in that view of the case; for it is not simply an action for damages; it is an action for damages in one alternative; but the main object of the action is not for damages, but that the lessees shall actually draw off the water, which has been introduced in consequence of their not keeping the barrier; that they shall relieve the pursuer's coal of the water by drawing off the accumulation of water which has been introduced, and by making a barrier in the place of that which has been removed; and then the pursuer goes on to say, that, if they do not relieve her in that respect, they ought to be mulcted in damages. But her leading requisition in the summons is, that they shall relieve her land from the water, and make this barrier. The Court of Session, therefore, thought that the act of Parliament, applying to a claim for damages only, did not apply to this case, and that the case ought not to be sent to a Jury. It appears, that to the interlocutor referring the matter to Mr Bald, as I have already stated, no complaint was made on behalf of Lady Mary Craufurd, except that she wished to have a person there to assist in the inspection. She made no complaint by a reclaiming petition to the Court of that appointment.

Upon the whole, it does appear to me, that this is not a case in which the pursuer could, in that stage of the cause, compel the Court of Session to transfer this case to the Jury Court. Then the question is, upon the fair construction of this lease, and the conduct of the parties, whether Lady Mary Craufurd had a right of action in this case. Now, I shall read to your Lordships the opinions of some of the learned Judges upon this case when it was last before them.—(His Lordship then read the opinions of Lords Hermand and Succoth.)

My Lords, upon the fullest consideration I have been able to give to this case, conceiving as I do that the lease conveyed to the lessees a power of working the whole of this coal—and in construing the whole obligations of the party, you must look at the whole of the stipulations of the lease;—perceiving, also, that, in that very lease, an express power is given to make communications between these and the adjacent mines, it does appear to me impossible to contend that you shall imply an obligation on the part of the tenant, contrary to the express stipulations of the lease, by which he shall be bound to leave barriers round this mine. Because, if Lady Mary Craufurd's construction be right, they could not have worked any of the coal, if it was necessary that coal should be left as a barrier; but they must have been restricted in the enjoyment of

May 23, 1826. the coal, to the extent of that coal which it would be necessary to leave as a barrier against the conterminous mines. There is, however, no such reservation. Then, as I have stated to your Lordships, there is the clause allowing a communication to be made; and it must have been known to Lord Craufurd, or his agent, that it was made. It does appear to me, that the Court of Session were well warranted, therefore, in the interlocutor which they finally pronounced; sustaining the defences of this action, and assoilzieing the defenders; and that they would have been well warranted in coming to that conclusion without Mr Bald's report at all. Mr Bald's report is confirmatory of the opinion the Court of Session entertained upon the obligation of the party to make the barrier; but my opinion does not proceed upon the report of Mr Bald, but the construction of the lease. Indeed, if that report of Mr Bald can be properly looked at by your Lordships, Lady Mary Craufurd, as it appears to me, has very little reason to complain—having concurred as she did in the appointment of Mr Bald; and all she complains of is of Mr Bald having decided on hearsay evidence. But she says, 'I do not ask you to refer it back  
' again to Mr Bald, or any other person; for I insist, that though you have  
' referred it to Mr Bald, and have got his report, it is a case which never  
' ought to have gone to Mr Bald; and I insist that the case shall go to a  
' Jury, this being an action simply for damages, and therefore falling under  
' the act of Parliament.' My Lords, the Court of Session well knew, that this was not compulsory upon them; and looking at the nature of this action, and seeing that there were defences in point of law which rendered it unnecessary to direct any inquiry whatever into the fact,—their opinion being, that, in point of law upon the construction of the lease, that lease gave the lessees a power of working out all the coal, there being no reservation in it binding them to leave part as a barrier, but only that they should work the coal in a workmanlike manner. The defences were sustained on the part of the respondents, and the Court assoilzied them.

My Lords, I do not enter into topics of hardship which have been urged in this case. These respondents, it appears, were united in a concern in which they represented a great variety of persons. Your Lordships, I know, cannot entertain questions of that sort; but after such a lapse of time as has occurred, from the year 1800 to 1819, when this action is commenced, I think it was incumbent on the Court below to watch with some jealousy the nature of such an action. Had it been brought much earlier, Lady Mary Craufurd would not, in my opinion, have been able to establish any case, considering the terms of this lease. In the fair construction of the stipulations entered into by those parties in this case, I am of opinion that there is no ground for saying that the Court can imply, or that your Lordships can imply, an exception of any coal to make a barrier; and particularly when there was a power given to the tenants to make a communication between this coal in Knightswood and the conterminous coal-works.

Though it is not always usual to go into so much detail, in cases where the individual who addresses your Lordships means to move to affirm the

judgment, I was anxious in this case, because it is a case of great importance in point of value, to state to your Lordships the reasons which influenced me in moving your Lordships to affirm the judgments, and to assoilzie the defenders. It is not my intention to say anything on the subject of costs, but simply to affirm the judgment of the Court of Session. May 23, 1826.

*Appellant's Authorities.*—3 Ersk. 2. 16.—Lord Wemyss, Feb. 2, 1800. (F. C.)—4 Ersk. 1. 14.—29. 12.—2 Stair, 7. 10.—59. Geo. III. c. 35.

*Respondents' Authorities.*—Williamson, Aug. 4, 1761. (10459.) Dict. vol. I. 378.—Ayton, May 19, 1801. (App. No. 6. Property.)—Kinnoul, Jan. 18, 1814. (F. C.)—Bayne, Dow's Reports, III. 233.

J. CHALMER—SPOTTISWOODE and ROBERTSON, *Solicitors*

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SIR MICHAEL SHAW STEWART, Bart., Appellant.—*Fullerton*—No. 30.  
*Keay.*

JAMES CORBET PORTERFIELD, Esq. *Respondent.*—  
*D. of Fac. Cranstoun,—Murray.*

*Tailzie.—Faculty.—Prescription.*—A party having executed a deed of entail in favour of an institute and the heirs male and female of his body, and the heirs-male of the entailer's body; whom failing, heirs to be named by any writing under his hand; whom failing, other heirs; reserving a power to alter the succession generally, except as to the institute and the heirs male and female of his and the entailer's body; and thereafter having made a deed, whereby he altered the line of succession, and nominated heirs preferably to the heirs-female of the institute, and to the other heirs called after the substitution *heredibus nominandis*; and the estates having been possessed for more than forty years on the entail alone, without reference to the deed of nomination; the Court of Session held that the deed of nomination was a valid exercise of the faculty to name heirs—that an heir called by it was preferable to an heir called by a posterior substitution; and that prescription had not taken place so as to exclude the former. But the House of Lords remitted for the opinion of both Divisions.

ALEXANDER PORTERFIELD possessed the lands and barony May 24, 1826.  
of Duchal, in the county of Renfrew, under a contract of marriage in 1693 with Lady Catherine Boyd, and by which they 2D DIVISION.  
were destined to the heir of the marriage. His superior in the greater part of the property was the Earl of Glencairn—one portion, the Overmains of Duchal, held of Cochrane of Kilmarnock, who again held of the Earls of Glencairn. He was also superior of the lands of Porterfield and Hapland, yielding inconsiderable feu-duties.