

[HEARD 25th—JUDGMENT 26th June, 1850.]

'2 MIM 704 THE RIGHT HON. JAMES, EARL OF GLASGOW, and MESSRS. JOHN WILSON and SON, Coal and Lime Masters at Hurlet, *Appellants*.

THE HURLET and CAMPSIE ALUM COMPANY, *Respondents*.

Process.—Bill of Exceptions.—Record.—It is irregular in preparing a formal Bill of Exceptions, for the Judge to make any alteration upon the Exceptions, as they appear by the note of them tendered by the party, and signed by the Judge, during the progress of the trial.

Ibid.—Ibid.—Ibid.—It is not competent for a Court of Appeal to look at any other Bill of Exceptions than that which has been certified by the Judge to be the Bill which was tendered by the party, however strong the evidence may be that it contains an alteration of that which actually was tendered.

Mines and Minerals.—Landlord and Tenant.—Where a lease of a particular mineral, existing in one and the same mine along with other minerals, gives the tenant a right of working it in the way most profitable and convenient for him, he will not be restrained from working in the way he thinks most beneficial, by the circumstance that that way of working will prejudice the interests of a tenant of the other minerals, by lease made subsequently to his.

THIS was an appeal from an interlocutor of the Court of Session, disallowing a Bill of Exceptions tendered at a trial of issues framed for the purpose of ascertaining the rights of the parties in working veins of coal and alum in a mine, wherein the coal formed a substratum to the alum. The question in dispute being, whether Messrs. Wilson, the lessees of the coal

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under the Earl of Glasgow, were entitled to work the coal which had been left as pillars for the mine, the coal in the mine otherwise being wrought out, or whether the Respondents, the lessees of the alum ore also under the Earl of Glasgow, were, by the terms of their lease, entitled to require that the pillars of coal should be left, so as to keep the wastes of the mine open, and the superincumbent alum undisturbed.

Before going into the merits of the question raised by the appeal, the Appellants raised a new question, which did not appear upon the Record, viz.:—Which was the true Bill of Exceptions? the one upon the Record, written on parchment, signed by the Judge, presented by him to the Court, and adjudicated upon by the Court; or one written upon paper, signed by the Judge, both at the foot and upon the margin, marked by the Clerk of Court as a number of process, but not presented by the Judge to the Court, nor adjudicated upon by it?

The circumstances out of which this state of things arose, rested, of course, entirely upon the statements of Counsel, and were as follows. The trial took place on the 3rd of April, 1849. Immediately the Judge had given his charge, the Appellants wrote out a note of two exceptions to it, which were read in presence of the Jury and handed to the Judge. The Judge made some alterations upon the paper, and then returned it to the Counsel for the Appellants, with a certificate at the foot of it signed by him in the terms required by the statute.

This document was in the following terms:—

“Note of Exceptions *in causâ* Hurlet &c. Alum Coy. *v.*
 “ Lord Glasgow, &c.—Hurlet &c. Alum Company *v.* Lord
 “ Glasgow, &c.

“ The Defenders excepted—

“ 1. In so far as his Lordship directed the Jury, in point of
 “ law, that, according to the sound legal construction of the
 “ contract, it gives the Pursuers the right, throughout its endu-
 “ rance, to prevent the landlord, or his tenant in the coal, from

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“ removing the pillars in so far as necessary to support the
“ roof, though all the solid coal should be wrought out.

“ 2. In so far as his Lordship declined, when requested by
“ the Defenders, to direct the Jury, in point of law, that there
“ is nothing in the contract of 1800, or in the leases of the coal
“ to the Defenders, Messrs. Wilson and Son, and their prede-
“ cessors, to bar the Earl of Glasgow, or any person deriving
“ right from him, to work out the pillar coal in a fair and
“ regular manner, after the solid coal is exhausted.

“ *3rd April, 1849.*

J. IVORY.”

After the trial had ended in a verdict for the Respondents, various meetings of the parties took place, in presence of the Judge before whom the cause had been tried, with a view to adjust the formal Bill of Exceptions by the insertion of the evidence, oral and documentary, and of the technical parts proper to such an instrument.

In the month of November following, the agents for the Appellants got the proposed Bill of Exceptions printed, and sent a proof of it to the Judge in a letter, requesting him to sign it.

The Judge refused to sign the proof so sent to him, without the insertion of the following passage as an introduction to the exceptions.

“ Thereafter the said Lord Ivory, in charging the Jury, did
“ state, as the sound legal construction of the contract or lease
“ 1800, that the said contract gives right to, and entitles the tenant,
“ throughout its endurance—(and so long as there should exist,
“ in the pits or wastes comprehended in the said contract, alum
“ ore unexhausted and workable, being part of the subject
“ thereby conveyed or let,)—to prevent the landlord, and all
“ deriving right through him, from removing the coal pillars
“ in the said pits or wastes, (in so far as these were necessary
“ to support the roof of said pits or wastes, and thereby to pre-

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“serve the requisite access for working the said alum ore); and
 “that it mattered not, as regards this question of construction,
 “and the rights of the tenant of the alum ore in respect of
 “the same, whether the solid coal in the said pits or wastes
 “should or should not have been previously wrought out;—
 “And the said Lord Ivory did proceed accordingly to direct the
 “said Jury in point of law.”

This passage the Judge considered necessary to the proper comprehension of the charge he had delivered to the Jury. But he said that he would be ready to hear judicially any motion upon the subject, but he declined being a party to any correspondence on it.

The agents, on the 26th of November, presented a paper in the form of a note, praying the Judge to appoint a time for adjusting the Bill of Exceptions. On the 28th of November the Judge was attended by the parties, when, after some discussion, he intimated his determination that the passage objected to should be retained, but his willingness to make a verbal alteration suggested by the Appellants. This alteration was made. Thereafter the Appellants transmitted a fresh proof of the Bill to the Lord Ordinary, with the objectionable passage restored. In this form his Lordship signed the Bill, making the conclusion of it in the following ordinary terms, viz. :—

“Whereupon the said Counsel learned in the law for the
 “said Defenders, did then and there propose the aforesaid
 “exceptions to the directions of the said Lord Ivory, and did
 “request him to sign this Bill of Exceptions, according to the
 “form in the statute in such case made and provided; and
 “thereupon the said Lord Ivory, at the request of the said
 “Counsel for the Defenders, did sign the said Bill of Excep-
 “tions pursuant to the said statute, on the 29th day of Novem-
 “ber 1849 years, and in the 13th year of her present Majesty’s
 “reign.

J. IVORY.”

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The Bill thus framed was presented by the Lord Ordinary to the Court. At the hearing of the exceptions the Appellants renewed their objection to the paragraph before alluded to, and argued that the Court, in determining upon the exceptions, should lay it out of view. The Court refused to do this, holding that they were bound to treat the whole Bill as the true Record, and after hearing the parties, they disallowed both the exceptions.

The Appellants then presented their Petition of Appeal, in which they stated that they were advised that the interlocutor complained of was contrary to law, and prayed the House to reverse, vary, or alter it, “and allow *the said* exceptions.”

Sir F. Kelly and *Mr. Inglis* for the Appellants.—The Court below has miscarried, by proceeding upon a charge which was contained, not in the statutory exception adjusted and signed at the trial, but in an exception of which no note was preserved at the trial, and containing matter inserted by the Judge several months’ after the trial.

[*Lord Brougham*.—Why did you not object before the interlocutor was pronounced?]

We did so—the matter was argued before the Court.

[*Lord Brougham*.—Did you move to have the Bill amended?]

No, we did not.—The Court said they could not look at any other document than the one which had been presented to them by the Judge. We submit, nevertheless, that the note tendered to the Judge, and signed by him at the trial, contains the true exceptions, and those which alone can be looked at. This document was prepared in strict conformity in every respect with the provisions of the 7th sect. of 55th George III. cap. 42.

The new matter inserted afterwards may or may not have

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been uttered by the Judge; we won't inquire as to that. We stand by the document prepared in conformity with the statute, and protest against the right of any Judge to put Counsel in the predicament that the truth as to what has taken place must rest on their personal asseveration. The Act of Sederunt, 16th February, 1841, is express, that the Counsel tendering an exception, is to deliver a note of it to the Judge "at the time the exception is taken," that it is "to be certified by the Judge at the time," and that it is "to be settled and certified as aforesaid, before the Jury is inclosed to consider their verdict." This was all done, and accordingly the document on which the Appellants rely bears the signature of the Judge, and the date of the trial, whereas that on which the Court has proceeded, is dated seven months later.

Unquestionably in practice it has been usual, for convenience sake, to postpone, until after the trial, completing the mere formal part of the Bill; but the invariable rule is not to put into the Bill any charge or exceptions not contained in the note tendered at the trial. This practice of deferring the completion of the bill has never been used, and cannot be used as authority for tampering with the note, which for all purposes is the record of the charge, and of the exceptions taken to it, and the only record of what passed, when any discrepancy occurs between it and the formal Bill.

[*Lord Brougham.*—What means had the Court of knowing of the interpolation?]

They had this document, the note tendered at the trial, which is a number of process marked by the Clerk.

[*Mr. Bethell.*—I object to the House looking at that paper, it is no part of the Bill.]

That is our complaint. The Court had no more right to look at the Bill presented to it, than at a Bill in any other cause. They were bound under the statute and the Act of Sederunt, to disregard every thing but the document duly prepared in terms

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of their provisions. If it be said that some preliminary motion should have been made, there is none such in practice. No such step as amending or taking off the file has ever been known. The party is obliged to take whatever Bill the Judge chooses to give him, otherwise judgment is entered up on the verdict against him. In *Pollock v. Morris*, 7 *Dunlop*, 973, the party had omitted to tender any note of exceptions at the trial, and the Judge having framed the Bill of Exceptions according to his own notes of what took place, the party dissenting moved for leave to amend the Bill of Exceptions, but it was refused as incompetent.

Mr. Bethell and *Mr. Cockburn* for Respondents. The House is confined to the Record, as it is brought up from the Court below. It would be contrary to every principle to allow a party to allege against the Record, Buller's *Nisi Prius*, 315. The Record bears to be the Bill of Exceptions of the Appellants; it contains the passage now objected to, and in the conclusion it says that their Counsel "did request the Lord Ordinary to sign " *this* Bill of Exceptions, and thereupon the said Lord Ivory, at " the request of the said Counsel for the Defenders," *i.e.* " Appellants," did sign the said " Bill of Exceptions pursuant to " the said statute." The party cannot now be allowed to disclaim that which the Record says he had done. If he had desired to have any other Bill of Exceptions, he should have taken the proper steps for that purpose before the Record was settled.

But in truth, if he had made such an application, he would not have succeeded, for the attempt he now makes is to conceal from the Court that which is necessary to a proper conception of the exceptions. It is very true that the statute confines the Court to the exceptions signed at the trial—there is no wish to escape from this—these exceptions are embodied in the Bill now under discussion. But the statute does not require

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that the whole Bill of Exceptions should be adjusted while the trial is going on; that would be impracticable in nine cases out of ten. The object of the statute, and it is so understood in practice, is that a note shall be taken and authenticated, while the trial is proceeding, of the particular matter excepted to, as incontrovertible evidence of what then took place, leaving the evidence at large, and other matter necessary to make the exceptions intelligible, to be thrown into the form of a regular Bill of Exceptions after the trial is ended, and there is more time for consideration. That was the course followed in the the Appellants to its regularity. They attended several meetings present instance, without any objection having been taken by for the purpose of adjusting the Bill. At one of these, on the 28th of November, the Lord Ordinary was requested by the Appellants to insert after “throughout its endurance,” in the first exception, the words “while there is alum ore *workable in the waste*,” instead of alum ore “*beneficially available* to the “tenant.” His Lordship adopted this suggestion, and the Appellants themselves then completed the Bill in the form which it now bears. It is impossible then that they can now be allowed to repudiate what is in truth their own act. But, indeed, the passage objected to only expresses the meaning of the Judge in a more expanded form, and as an introduction to the exception, and without it it is not possible to apprehend what passed at the trial, or give the proper force to the exceptions. In inserting the passage, the Lord Ordinary acted in conformity with what is laid down in *Cleland v. Paterson*, 15 *Co. of Sess.*, 1246, viz., that every part of the charge should be set out in a Bill of Exceptions, so far as necessary to bring out the true import of the portion excepted against; and with what fell from Lord Eldon in *Duff v. Fife*, 2 *Wil. and Sh.*, 204, “I apprehend that “every part of what fell from the judge with reference to that “topic which forms the subject of the Bill of Exceptions, ought “to be stated on the Bill.”

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Up to the insertion of this passage the Appellants did not object to the course which was followed in endeavouring to adjust the bill to the satisfaction of both parties; and after their unsuccessful attempts to have the passage expunged, they acquiesced in what had been done, for the bill received its ultimate form from the Appellants themselves; it was by them that it was laid before the Judge for his signature; and it was by them that it was printed and boxed to the Court. Whereas if they really were dissatisfied, they should have absolutely refused to take any other bill than the right one, and have brought their action against the Judge if he refused to certify it.

The exceptions having been completed, and now forming the Record, it was not possible for the Court below to meddle with them, and still less can the Court of Appeal now do so.

[*Lord Brougham.*—They ask a recal of the interlocutor and a remit, with directions to the Lord Ordinary to comply with the statute, and present a faultless bill.]

That is the same thing; the Court cannot meddle with the Record; all that the House can do is either to affirm or reverse the disallowance of the exceptions. The House is sitting substantially as a Court of Error, which cannot touch the Record. Adams on *Jury Trial*, p. 315: Lush's *Prac. B. of Excep.* 553.

Sir F. Kelly, in reply.—The conclusion in the Bill, that the Counsel for the Defenders (Appellants) requested the Judge to sign it, is untrue in fact, there was no such request.

[*Lord Brougham.*—What a position the House is placed in! to have the Record questioned before it!]

But who occasioned this?

[*Lord Brougham.*—The Judge, to be sure.]

No action as suggested by the Respondents would lie against him for refusing to sign and certify the proper Record. The Appellants therefore did all that in the circumstances they could have done, and they deny that they ever adopted the Bill now on the table. Whether what they did would amount to that,

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is of no consequence, for the statute, in order to prevent such an unseemly discussion between Counsel, has required written evidence of what passed; that is here in proper form, and all that the Appellants ask is that it may receive its due effect.

[*Lord Brougham.*—I have no doubt about the matter as to how the truth stands, but the question for the House is a mere technical one, whether you are not bound by the Record of the Bill sent up here, and the statement made in it.]

We don't aver against the Record, the note taken at the trial is the Record according to the statute, and this and every Court has power to inquire which of two documents before it is really the Record. The Judge by sealing the note at the trial was *functus officio*, so far as certifying the exceptions was concerned. He had no longer any power over them. In *Holt v. Meadowcroft*, 4 *Ma. and Sel.* 467, a rule had been obtained for a special jury; but no special jurors answering, the Plaintiff asked to have the cause tried by a common jury. The Defendant objected that the statute required the Court to abide by the rule for a special jury. The Judge disregarded this objection, and tried the cause by a common jury. The Court, although the Defendant joined in the trial, set aside the verdict, and ordered a new trial, and the same thing was done in *Lycet v. Tenant*, 4 *Bing, N. C.* 168.

In both of these cases it was objected that the Defendant by examining witnesses and otherwise taking part in the trial, had acquiesced in the course taken, but in both the objection was overruled, and the party was considered to have done all that was incumbent on him by stating and urging his objection.

LORD BROUGHAM.—My Lords, this case, which has now been very ably and very fully argued by the learned Counsel on both sides, presents for the consideration of this House a preliminary question of great importance, both with a view to the cause itself, and also with a view to the Scottish practice in

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jury trials as far as regards Bills of Exceptions. But as no doubt can be entertained of the judgment which ought to be given upon it, I think it much better that we should at once proceed to dispose of it.

I consider that there has been very great irregularity committed in this case. I go very nearly to the full length of the learned Counsel's argument in impeaching the proceedings. I consider that the Act of Parliament has not only not in form been complied with, but that it has not, even in the substance, been complied with. I consider that it has been in two several ways, if not broken, yet disregarded, and both of those deviations from the statute are matters most material for the due and correct administration of justice.

In the first place, a trial which lasts eight days in March or April, gives rise to a Bill of Exceptions. The exceptions are tendered; they are tendered in writing as by the statute they ought to be, and at that time they are signed by the learned Judge first. There being some difficulty and doubt respecting the correctness of the writing, they are copied over again, after correcting the writing so tendered, and even then there are two inaccuracies, called verbal inaccuracies, but one of them not merely verbal. For greater certainty these are corrected, and the learned Judge who affixes his signature to the body of the instrument, also for greater correctness, to prevent all mistake, and to show that all inaccuracy in the latter part of the instrument had been corrected with his knowledge, with his consent, and before he signed the instrument, affixes his initials, "J. J." to the margin.

Well, then, this was at the very least that which ought to have been the governing instrument. Most emphatically it ought to have been the governing instrument; because it was done *de recenti*, when the whole facts were written within the knowledge of all parties, both of the learned Judge and of the Counsel on either side. This was on the 3rd, or, we will say,

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on the 4th or 5th of April. Some doubts have been raised as to whether the exceptions were tendered before the Jury retired or after. That signifies not, perhaps, much. At all events, they were tendered before the verdict. That is not denied. Then what happened? On the 29th of November, eight months and more after the trial, the learned Judge signed the Bill of Exceptions. Is that according to the statute? No such thing. There is the Statute of Westminster the Second, the celebrated statute of the 13 Ed. I, in the 31st chapter of which the Bill of Exceptions is given, and it is said that there is nothing to make the sealing of the Bill of Exceptions an act that must be binding. Nevertheless the course of the profession is much to be considered. Now the course of practice of the Courts acting by force of that statute is perfectly clear. It assumes that the Bill of Exceptions must be *de recenti* and even *de recentissimo* drawn up and sealed. For here is the statement of my truly learned friend the late Mr. Tidd, the author of one of the very best books in the profession, most logically contrived and arranged, and which I must say, in justice to the memory of that most industrious and remarkable man, one of the greatest benefactors to the profession, next to *Comyn's Digest*, is the most perfect model of clear and logical arrangement, to be recommended to every student, as well as to every author in the law, and one of the few books in which you never look for what you want, without finding it. Mr. Tidd gives, with his usual accuracy, the form of Bills of Exceptions, “Whereupon (the Judge’s direction being given or his refusal being given) the said Counsel for the said C. D. did then and there propose their aforesaid exception to the opinion of the said Judge, and requested him to put his seal to this Bill of Exceptions” (then and there, that is to say,) “containing the said several matters so produced and given in evidence, according to the form of the statute in such case made and provided” (13 Ed. I), “and thereupon” (that is to say, at

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the trial) “ the said Judge, at the request of the said Counsel “ for the party objecting, did put his seal, pursuant to the “ statute.”

Now this shows the opinion of the profession, according to which these precedents were formed and have been always used; it shows the opinion of the profession clearly to be, that a Bill of Exceptions ought to be drawn immediately, and sealed as well as drawn, *de recentissimo facto*; and manifestly this is greatly useful, because it excludes the chance of error and gives the best possible security for accuracy—the best possible guarantee against any fraud being practised by any party, or any error, for want of due recollection, being fallen into by Judges. That is the case now in our English practice, and the Scotch Act of Parliament, the Jury Act, more particularly binds down the parties by specific provisions, which are rendered still more stringent by the Act of Sederunt of the 16th of February, 1841. Now these proceedings are to be according to the statute, which requires that the same exception shall be put in writing by the Counsel for the party objecting and signed by the Judge or Judges. It does not say that it must be signed at the very time, but it clearly means that it shall be signed within a reasonable and short time after. And then the Judge who presides shall forthwith put his seal thereto; that is to say, after adding a note of the issues. It does not say of the evidence also; but no doubt the practice is, that the evidence shall be added, and also that the verdict shall be added, which shows that it is to be signed before the verdict, and notwithstanding the exception being so given in, the trial was to go on, and then the exception, with the order directing the issue and the copy of the verdict endorsed, shall be presented forthwith, that is to say, immediately afterwards, and *de recenti*. So that the Counsel shall present the exception to the Judge, and then the cause shall go on upon that exception. Can anything be more obvious than that this excludes the

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supposition of an eight months' delay, with all the risks attending it? The case is voluminous, but it did not require eight days delay to prepare this Bill of Exceptions instead of eight months. What is the consequence? A Bill of Exceptions goes before the Court, which I am compelled to say I am quite convinced by matters before me is not the Bill of Exceptions which the Judge signed, and ought alone to have signed. There has been interpolated a very important part, and whether we agree with Lord Fullerton's opinion or not, at all events there is a very material addition, of which, in my opinion, the party excepting has good right to complain. It is a great irregularity, one much to be discountenanced, and which I trust will not again be found to interfere with the due execution of the anxious provisions of the Act of Sederunt; I will say, too, with the specific provisions of the statute itself.

Such is the case, and such is my opinion with respect to the unfortunate course which has been followed, owing to the delay. But unfortunately we are shut out from considering that. On this there can be no doubt whatever. The case is before us upon a Bill of Exceptions tacked to a record, and that Bill of Exceptions is not that bill which was signed by Lord Ivory, and corrected by him, which was afterwards accurately signed both in the body and the margin, to identify and authorize the correction; but it is the record of the Bill of Exceptions, which contains the interpolated passage.

It is said, "whereupon the said Counsel, learned in the law, " for the said Defendants, did then and there propose the afore-
 " said exceptions to the direction." That is all very well, for it might mean the last antecedent of two exceptions, according to Sir Fitzroy Kelly's contention; "and did request him to sign
 " this Bill of Exceptions," this identical bill—not this bill, which rests not in parchment, but in paper—but this Bill of Exceptions which has the interpolated passage, according to the form of the statute. "And thereupon the said Lord Ivory, at the

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“ request of the said Counsel, did sign the said Bill of Exceptions”—that is, this Bill of Exceptions. Therefore I am shut out; I cannot take advantage of that which I have said in my argument against this proceeding, because I am excluded as much as if I did not know of the existence of this paper, and as much as if it had been all done a day or a week after, instead of half a year after the thing is at an end; and your Lordships would be guilty of the grossest irregularity if you were to travel out of that which is before you, and to take the course suggested.

Then it is said that this might be done by an application to the Court; which was not made, however; and I do not think there is anything in that. I suppose the learned Counsel were under the instant apprehension of a verdict for 5000*l.* damages; they could not do much less than go on and take the Bill of Exceptions *talis qualis*, and argue it in the best way they could. It is ingeniously argued that the Court here had reason to suppose from the suggestion of the Counsel, fortified by affidavit, that one Bill of Exceptions was before them; whereas the other was the proper one; and that they therefore would not fail to tear the one off and put the other on. I must say that I cannot conceive any proceeding more difficult to do than this, and I do not think it possible, from any knowledge which I possess of the practice of Courts of Error, that they could have yielded to such an application. You see that the Judge is to acknowledge his seal of office. That is part of the statute, and you cannot proceed unless he does so; and it is after he acknowledges his seal that the Court of Error becomes possessed of the Bill of Exceptions. That would shut out all argument as to its not being a Bill of Exceptions. His acknowledgment of the seal would be decisive. What would happen if the Judge refused to acknowledge his seal, and said that one bill has been sealed, whereas he ought to have sealed another, I will not inquire. Suffice it to say, that this is not that case; but it is

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rather the case of a Judge having acknowledged the seal. But neither the Act of Parliament explaining the old statute, nor the statute itself, says a word about the Judge acknowledging. It does not say that he shall acknowledge his signature, for an obvious reason, because the signature identifies itself, whereas the seal does not. That is the reason why the statute, in those days of greater simplicity, calls upon the Judge to authenticate the bill by his seal; but here the signature is supposed to identify itself. It is tantamount to that here, because the Judge presents the Bill of Exceptions according to the form of the statute—not at all according to the statute in point of time—not at all according to the statute in point of substance. He presents one Bill of Exceptions when he ought to have presented another. But at all events we have that which he did present, and he cannot aver against the record, which is the only thing before us, and which not only entitles us, but compels us to say (and stops us from saying the contrary) that this is the Bill of Exceptions which Lord Ivory presented, tantamount to a Judge in England acknowledging his seal; and that all is true which Lord Ivory in presenting this bill avers upon the face of it, namely, amongst other things, that this bill is sealed at the request of the party. Such being the case, I can have no doubt whatever that we are shut out from this consideration; but I wished the argument to proceed, on account of the importance of the matter in point of practice, and because it simplifies and clears the residue of the case, (to the merits of which we have not even approached as yet), namely, the illegality of those two exceptions; and I shall dispense with any argument on the part of the Counsel, on the point whether or not the part interpolated was material, because whether it be material or not, that does not affect the question. The Counsel will therefore go upon the question whether or not the two exceptions are good in point of law.

Now it is fit that these things should be considered, on

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account of the alarming consequences of such irregularities. The practice is of necessity more or less slovenly as to Bills of Exceptions, because you cannot be quite certain at what time you ought to tender them. All that can be said is, that this should be done as speedily as possible after the trial. I look upon this paper, therefore, in the light in which Lord Ivory must have viewed it. I consider it not to be the Bill of Exceptions, if I were entitled to go out of the record and examine it—not the bill, but the materials for the Bill of Exceptions; and that after this draft bill was signed, it was made out more formally and signed by him in its more perfect form. But it contains a passage, the materials for which this paper did not contain—it contains a passage beyond the paper; and that passage it ought not to have contained. Over that, however, we have no power. That your Lordships will pronounce no opinion upon. We shall go into the merits of the case on Friday morning. You will quite understand, on both sides, that you need not argue the point whether Lord Fullerton was right or wrong in looking at the interpolated passage. I am inclined to think that it is material, but that is of no importance at present.

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The preliminary objection as to the Bill of Exceptions being thus disposed of, the cause was this day heard on the merits.

The Appellant, the Earl of Glasgow, was the proprietor of lands, in which there were strata of copperas, lime, alum, and coal, lying over each other in the order in which these substances have been mentioned. The stratum of coal was five feet thick, and that of alum from three to four inches.

Previous to 1800, the coal had been worked by the method called stoop and room, *i. e.*, by cutting out the coal, leaving pillars to support the roofs of the mine, and the alum ore

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had been taken out by the Earl, and delivered by him to his tenants at the mouth of the mine; the tenant of the coal mine being distinct from the tenant of the alum ore. In the year 1800 a contract was entered into between the Earl of Glasgow of the first part, and Messrs. McIntosh and Co. (the predecessors of the Respondents) of the second part, whereby, for considerations therein mentioned, the Earl sold, assigned, and conveyed to McIntosh and Co., “their heirs or assignees, the
“ whole ore in the said Earl of Glasgow’s coal-pits and coal-
“ wastes at Hurlet from which alum can be manufactured,
“ excepting the pyrites or copperas stones, which are already
“ conveyed to the partners of the Hurlet Copperas Company,
“ and that during the space of sixty-three years, from and after
“ the term of Martinmas 1799, which is hereby declared to be
“ the term of entry under this contract, with liberty to the said
“ Charles McIntosh, James Knox, John Wilson, and John
“ Finlay, to work and collect the said ore in all the old coal-
“ pits and coal-wastes at Hurlet; to open up old pits where the
“ same happen to be now shut; to erect gins or other machinery
“ for drawing the said ore to the surface; and to make roads
“ and passages for conveying the same from the pits to the
“ adjacent public roads; but reserving to the said Earl of
“ Glasgow, his heirs, and successors, and the tacksmen of his
“ coal-works, lime-works, ironstone, and other metals, the exclu-
“ sive use at all times of five pits, to be from time to time
“ condescended on or made choice of, for the purpose of working
“ coal, lime, ironstone, or other minerals; and declaring that,
“ while these five pits are thus appropriated, the said second
“ party shall have no right of access thereto, for collecting or
“ taking out alum ore therefrom: but in the event of the said
“ Earl of Glasgow or his foresaids proposing to work limestone
“ in any of the pits after the coal has been wrought out, and
“ from whence the alum ore has not been taken away, he and
“ they shall be bound, as the said Earl of Glasgow hereby binds

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“ and obliges himself and his foresaids, to give the said second
“ party, or the person having the management of their works,
“ two months’ previous intimation of such intention to work
“ limestone; or, in case of their failure to give such intimation,
“ that they shall shovel the ore aside at their own charges, so
“ as the same may not be wasted. Further, the said Earl of
“ Glasgow hereby agrees, that, in the event of him or his foresaids
“ ceasing to work the coal and limestone, and that they should
“ desist from drawing the water out of the waste, the water-
“ machinery, water-lade, and other apparatus which has been
“ employed for drawing the water, shall be sold and delivered
“ over to the said second party, at such valuation as shall be
“ put on the said articles by neutral persons to be mutually
“ chosen; and that the said second party shall afterwards have
“ liberty to draw the water from the coal-waste during the
“ remainder of this contract. And the said Earl of Glasgow
“ hereby binds and obliges himself and his foresaids not to fill
“ up any of the pits now open, or hereafter to be opened, for
“ working coal or lime at Hurlet, the said second party hereby
“ becoming bound to fence in a sufficient manner all such pits
“ as shall be left by the said Earl of Glasgow or his foresaids,
“ within two weeks after being so given up. And he likewise
“ grants to them and their foresaids, during the said period, the
“ liberty and privilege of returning the washed ore from their
“ alum works, and depositing the same in any of the coal-pits
“ at Hurlet where the limestone has been previously wrought
“ out. For which causes, and on the other part, the said
“ Charles McIntosh, James Knox, John Wilson, and John
“ Finlay, partners carrying on business under the firm of
“ McIntosh, Knox, and Company, hereby bind and oblige them-
“ selves, their heirs and successors, jointly and individually,
“ to make payment to the said Earl of Glasgow, his heirs or
“ assignees, or their factors for them, of a clear lordship of 1s.
“ 6d. sterling per ton for the whole alum ore to be taken by

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“ them from the foresaid pits, and that free of all charges, and
“ without any deduction or expense whatsoever, payable the
“ said lordship at the end of each half year during the con-
“ tract, and beginning the first term’s payment as on the term
“ of Whitsunday 1800; and in order that the said Earl of
“ Glasgow may receive a just account of the whole alum ore to
“ be taken from the pits, the said Charles McIntosh, James
“ Knox, John Wilson, and John Finlay, bind and oblige them-
“ selves and their foresaids to keep a weighing machine on each
“ pit from whence the ore is taken, to cause the same be regu-
“ larly weighed as it is brought out of the pit, and the weights
“ regularly entered in account books to be kept for that purpose,
“ to which books the said Earl of Glasgow, or his foresaids,
“ shall at all times have access, and liberty to take extracts
“ therefrom, and he and they shall likeways have it in their
“ power, from time to time, to place check grieves on the pit-
“ heads, in order to take an account of the output of ore; and
“ the said second party bind and oblige themselves and their
“ foresaids to render to the said Earl of Glasgow, or his fore-
“ saids, a weekly or monthly account, if required, of the whole
“ alum ore which they shall work during this contract, to the
“ justice of which accounts the said Earl of Glasgow and his
“ foresaids shall be entitled to demand the oath of the manager
“ or servants at the work.”

The mines were worked under the contract for many years, without any difficulty or difference between the parties occurring. At length, the price of alum having fallen very much in the market, and the stock of the article on the hands of the Respondents having become very large, it no longer was advantageous for them to work the alum ore as vigorously as they had hitherto done; on the contrary, as alleged by them, it was more for their benefit to leave the schistus from which the alum was obtained, and which formed the roof of the mine after the coal was taken out, to exfoliate and fall to the ground, and there

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ripen for manufacture by the action of the atmosphere upon it. In the year 1835, the Appellant, Lord Glasgow, let the coal in the mines to the Appellants, Messrs. Wilson, by a lease which contained these covenants:—“ 1st. The whole minerals shall be
 “ wrought in a fair and regular manner, and either by stoop and
 “ room, or by long-wall working, or open cast quarry, as shall
 “ appear to the said lessees, or in case of difference of opinion
 “ between them and the proprietor, by the arbiter afternamed,
 “ to be most advantageous for the said Earl of Glasgow and the
 “ said lessees; but it is hereby declared, that no operation
 “ whatever is to be carried on in the pleasure-grounds or other
 “ enclosures at Hawkhead, and only limestone or ironstone shall
 “ be wrought by open cast, when practicable. 2nd. It is hereby
 “ declared that nothing herein contained shall in any way affect
 “ or interfere with the lease of coal in Roughmussle, granted by
 “ the said Earl of Glasgow to the proprietors of Househill, nor
 “ in any way injure the rights of the parties who lease the alum
 “ and copperas ores from the said Earl of Glasgow.” Under this lease, Messrs. Wilson continued the working of the coal until the year 1840, when nearly the whole of it had been worked out, with the exception of the pillars which were left throughout great part of the mines.

While the workings were in this relative condition, *crushings*, as they are technically called, began to recur throughout a particular area of the mines; that is to say, the roof began to fall in and consequently to bury everything under it. In consequence, a subsidiary agreement was entered into between the Appellants and Respondents in the year 1843, whereby the Appellants Messrs. Wilson, were allowed to work out the coal of the pillars throughout the area in which symptoms of *crushing* were shown, and the Respondents agreed to take away the alum schale produced by this working, and to pay the Appellant, Lord Glasgow for it, either a fixed rent or a lordship, at his option.

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This agreement continued in operation for 3 years. At the end of that period the Respondents had on hand a very considerable quantity of alum ore, more than their immediate wants required, and the effect of the workings under the agreement having been to arrest the progress of the crushing throughout the remaining area of the mines, the Respondents were not disposed to continue the working of the alum unless for periods and at times which suited their own convenience and advantage. The Appellants, on the other hand, were desirous of working out the coal in the pillars of the mines, which constituted one fourth of the whole field of coal; and Lord Glasgow, assuming that the alum resting upon the top of the coal pillars did not come within his contract with the Respondents, he let it to the Appellants, Messrs. Wilson, who forthwith proceeded to work out the pillars and the superincumbent alum schale.

On becoming acquainted with these operations of the Appellants, the Respondents presented a note of suspension and interdict to the Court of Session by which they prayed that Court to interdict, “ prohibit, and discharge the said Respondents from collecting, removing, or carrying away any ore or substance in the coal-pits and coal-wastes at Hurlet, or any of them, belonging to the Respondent, the Earl of Glasgow, from which alum can be manufactured; and also from cutting out and removing, or weakening and injuring, any of the pillars in any of these coal-pits and coal-wastes, whereby the said coal-pits and coal-wastes, or any of them, may be shut up, or the access thereto endangered or impeded during the remainder of the lease of the alum ore held by the Suspenders, which continues till Martinmas 1862.”

The Appellants offered, during the discussion of the rights of the parties, to collect and bring to the mouth of the mine the whole alum ore either taken from the top of the coal pillars or found in the wastes, and to allow the Respondents to take it

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away on payment of 1s. 6*d.* per ton, within six months from the time of intimation of its having been brought to the pit mouth being given to them.

Upon this offer being made judicially, the Lord Ordinary passed the note of suspension but recalled an interim interdict which he had granted, and the Court adhered to his Lordship's interlocutor.

The Respondents then brought an action against the Appellants by the summons in which they concluded to have it declared that they "have the exclusive right to the alum ore and "substances in the whole coal-pits and wastes in the said Earl "of Glasgow's lands at Hurlet, and that they have the sole "right to work, preserve, and use the same during the remaining "sixteen years of their said lease, and that none of the "Defenders have any right to take out, remove, or interfere "with any of the alum ore therein, or to appropriate the same "to their own use till after Martinmas 1862, or during the "subsistence of the said contract; but that the Pursuers have "full power and the exclusive right to take the alum ore from "the pits and wastes, and may do so at any time prior to the "expiry of their lease: And further, that until after the said "term of Martinmas 1862, the Defenders are not entitled to "close up or destroy all or any of the said pits and wastes in "which such alum ore exists, either by cutting out and removing "the coal pillars or stoops left for the support of the roof, and "necessary for that purpose, or by so diminishing them as to "render them insufficient for that purpose, but that all of the "said pillars and stoops, in so far as requisite or necessary for "that purpose, must be preserved and left during the remaining "years of said contract;" and to have the Appellants decerned to pay damages for the loss sustained by their operations.

The Appellants pleaded in defence that "1. They have no "right under that contract, or any other existing title, to such of

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“the schistus or alum ore as is on the top of the coal pillars,
 “standing even in the old pits or coal-wastes in the lands of
 “Hurlet.

“2. The Pursuers are bound to collect and draw the
 “schistus or alum ore to which they have right in these old pits
 “or coal-wastes in the lands of Hurlet *tempestivè*, and before it
 “becomes necessary to remove the coal pillars, in order to prevent
 “the coal in them and superincumbent limestone from being lost.

“3. By the contract of 1800, Lord Glasgow incurred no
 “obligation to refrain from working the coal pillars whenever he
 “should think proper, or whenever such working should become
 “necessary.

“4. The Defenders, in virtue of the Earl of Glasgow’s rights
 “as owner of the property, and of the rights of the other
 “Defenders as his tenants, are entitled to work the coal and
 “alum and copperas ore as they are doing.”

The two actions of suspension and declarator were conjoined,
 and the following issues sent for trial by a jury:—

“I. Whether the Defenders, or any of them, have removed,
 “or are in the course of removing, or unduly diminishing
 “wrongfully and in violation of the rights of the Pursuers under
 “the said contract or lease, coal pillars in the pits or wastes
 “under the lands or farms comprehended in the said contract,
 “to the loss, injury, and damage of the Pursuers?

“II. Whether, in violation of the rights of the Pursuers
 “under the said contract or lease, the Defenders, or any of them,
 “wrongfully have collected and removed, or are in course of
 “collecting and removing to the surface, any alum ore or
 “schistus from the pits or wastes under the lands or farms
 “comprehended in the said contract; or have wrongfully
 “interfered with the Pursuers in the working, preservation,
 “or maturing thereof, to the loss, injury, and damage of the
 “Pursuers?

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“ III. Whether, in violation of the rights of the Pursuers
 “ under the said contract or lease, the Defenders or any of
 “ them, wrongfully have appropriated, or are in the course
 “ of appropriating, any alum ore or schistus drawn from the
 “ pits or wastes under the lands or farms comprehended in
 “ the said contract, to the loss, injury, and damage of the
 “ Pursuers ?”

The jury, after hearing the presiding Judge’s charge as to the terms of the Respondents’ contract with Lord Glasgow, returned a verdict for the Respondents and assessed the damages at 5000*l.*

The Appellants tendered exceptions to the charge in the course of the trial, which, as they were finally adjusted by the Judge and presented to the Court, were in the following terms, preceded by the passage which formed the subject of the preliminary discussion :—

“ And the counsel learned in the law for the said Defenders
 “ did, on behalf the Defenders, did then and there except to the
 “ charge and direction, in point of law, of the said Lord
 “ Ivory :—

“ In so far as his Lordship directed the jury, in point of law,
 “ that according to the sound legal construction of the contract,
 “ it gives the Pursuers the right throughout its endurance to
 “ prevent the landlord, or his tenant in the coal, from removing
 “ the pillars in so far as necessary to support the roof, though
 “ all the solid coal should be wrought out:

“ In so far as his Lordship declined, when requested by the
 “ Defenders, to direct the jury, in point of law, that there is
 “ nothing in the contract of 1800, or in the leases of the coal
 “ to the Defenders, Messrs. Wilson and Son, and their prede-
 “ cessors, to bar the Earl of Glasgow, or any person deriving
 “ right from him, to work out the pillar coal in a fair and regular
 “ manner after the solid coal is exhausted.”

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Both of these exceptions were disallowed by the Court, after argument, by an interlocutor which was the subject of the appeal.

Sir F. Kelly and *Mr. Inglis* for the Appellants.—The question under the issues.

[*Lord Brougham*.—The second issue is, in truth, two united. The one might be answered one way, and the other in the reverse way. This is an exceedingly loose way of pleading.]

According to English notions it would seem to be so, but no question will arise upon that, as the jury returned a general verdict. The question raised by the issues and now to be determined is, whether what the Appellants have done, and desire to continue doing, is any infringement of the Respondents' rights under the contract of 1800? That contract does not convey the wastes, but only the ore in the wastes, and the reservation to Lord Glasgow of the use of five mines shows the contemplation of the parties that the other minerals in the mines were to be worked by his Lordship. There is no covenant in the contract as to how either of the parties is to work the minerals to which they were respectively entitled, but it is obvious, from the nature of the thing, that they must each show to the other a reciprocity of fair, reasonable, equitable, and usual manner of working, otherwise it would be impossible to explicate their rights; they must exemplify the maxim, *sic utere tuo ut non alienum ledas*. If the Respondents had worked the alum contemporaneously with the coal, there could not now be any objection on their part to the Appellants' working the coal of the pillars, for that would enable them to get at the alum above the pillars, and none other would be remaining in the mines. It is only because the state of the market for alum did not make it advantageous for them to carry on the working that they discontinued it; but that circumstance cannot entitle them to interfere with the rights of the coal owner, and prevent him

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mining that article according to a reasonable mode of working. The contest of the Respondents is for a right to the use of the wastes down to the last day of their contract, to the effect either of working the ore at such intervals as they may choose, or even of not working it at all, but leaving it in the mine at the termination of their contract. There is no such express covenant in the contract. It may be that unless such a right be implied, the Respondents will not draw that benefit which they contracted for, but so on the other hand, if it be implied in their favour, the Appellants will lose that right which they had before the contract, and which the contract does not expressly take away from them.

It does so happen that the coal has been worked by stoop and room, but it might equally, at the option of the Appellants, have been wrought by *long wall* or by *chair*. According to either of these methods, the whole coal would have been wrought out at once, and the alum must have been removed at the same time or else have been lost altogether, for no support of coal having been left for the roof of the mine, it would have fallen in, and so buried the alum. The circumstance that the owner of the coal has chosen one mode of working rather than another, and a mode which did not render the immediate working of the alum necessary, cannot change the right of the two parties, and give the owner of the alum a larger liberty than he otherwise would have had. If the tenant of coal might at first have worked by long wall, and so have left no pillars of coal, there is nothing in the Appellant's contract which compels him not to touch these pillars which are there only because he chose to leave them.

[*Lord Brougham.*—May not the alum tenant refrain from working at all?]

If so, as the only return on the alum is a lordship, there would be no revenue from it. The meaning of the contract was, that both coal and alum should be wrought fairly.

[*Lord Brougham.*—Is there any, and what obligation on the alum tenant to work?]

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None, perhaps, in the ordinary case, but this is a peculiar one, there being several minerals in the same mine, each leased to different parties. The one cannot be entitled to lie by, and so defeat the rights of the others. They must both conform to a reasonable arrangement, by which all may be fairly wrought. And that this is the spirit and intention of the contract with the Respondents, is shown by the covenant that they should receive two months' notice before the Appellant should work the limestone lying above the alum. But the charge to the jury makes no account of the rights of the Appellants; it excludes them entirely from the view of the jury, and rests the decision of the case entirely upon the interests of the Respondents. Instead of giving an opinion upon the terms of the contract having reference to the circumstances of the case, and leaving the jury to say what were the rights of the parties, it decides the meaning of the contract, and leaves nothing for the jury but the amount of damages.

Mr. Bethell and Mr. Cockburn for Respondents.

The Respondents and the Appellants, Messrs. Wilson, were not, as the argument of the Appellants assumes, tenants in common, bound to respect each other's rights. At the date of the contract, 1800, the Appellant, Lord Glasgow's, right to the whole mines was unaffected by any lease of the coals. What he did not then grant, remained in him, and what he did grant bound that which remained in him; accordingly, in giving the Appellants, Wilson and Son, their lease of the coal, an express covenant was taken from them that nothing in it should injure the rights of the lessees of the alum ore. Although this was expressed in the lease to Wilson and Son, it was no more than what the law would have implied against them in favour of the Respondents. The lease to the Respondents does not impose upon them the necessity of working the alum in any particular manner. They are entitled, therefore, to do so in the way most

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profitable to them. That way they had found was by allowing the ore to fall of itself from the roof, and by the action of the atmosphere to exfoliate upon the floor of the mine, and so ripen spontaneously for the purpose of manufacture. It was, therefore, a great object with the Respondents that the passages of the mines or wastes should be kept open, and not filled up, as they would be by the destruction of the pillars. Accordingly, their contract throughout contemplates this reservation of right to work the limestone, which contains a covenant that on failure to give intimation of the intention to work it, the landlord “should shovel the ore aside, so as the same may not be wasted,” shows this most obviously; for if the mines were not to be continued open, the limestone could neither be wrought, nor the alum ore be shovelled aside; and it is shown more clearly still by the privilege reserved to the Respondents of depositing the washed ore in any of the pits.

There is nothing in the Respondents' lease which binds them, as to the landlord, to any particular mode of working; and so far as regards the lessees, Messrs. Wilson, their lease ties them down to working so as not to interfere with the lease to the Respondents, or to injure their rights. So far, therefore, from the alum lessees being bound to work with consideration for the interests of the coal lessee from any rule of equity, the express law of the contract is just the reverse, viz., that the coal lessee must work so as not to injure the alum lessee, and the charge of the Judge was in accordance with this view.

LORD BROUGHAM.—My Lords, this case which was very fully and ably argued, turns upon two points. We disposed of the first, respecting the additions which were made to the Bill of Exceptions very irregularly, and in a manner much to be disapproved of, and which I hope will not occur in future. We disposed of that point on the first occasion of the case coming before your Lordships; and before the second argu-

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ment, which was upon the merits of the case, was heard. The question now more immediately under consideration is as to the two exceptions which have been taken, and both of which turn upon the construction that is to be put upon the contract, and the leases of the coal to the Defenders.

The first exception is, “In so far as his Lordship directed the Jury, in point of law, that, according to the sound legal construction of the contract, it gives the Pursuers the right, throughout its endurance, to prevent the landlord, or his tenant in the coal, from removing the pillars in so far as necessary to support the roof, though the solid coal should be wrought out.”

The second exception is, “In so far as his Lordship declined, when requested by the Defenders to direct the Jury, in point of law, that there is nothing in the contract of 1800, or in the leases of the coal to the Defenders, Messieurs Wilson and Son, and their predecessors, to bar the Earl of Glasgow, or any person deriving right from him, to work out the pillar coal in a fair and regular manner, after the solid coal is exhausted.”

My Lords, I have come, upon a full consideration of this case, to the conclusion at which the Courtbelow arrived, agreeing with the learned Judge who tried the cause—Lord Ivory—in the construction which he put upon the contract. And I think that the reasons given by Lord Mackenzie with his usual clearness, put the whole question in a very strong and commanding point of view. “The pillars are never mentioned in the contract,” (he justly observed) but “a right to work out these not being reserved while other rights were reserved, is very important.” It is most important when you consider that the support of the alum by these pillars was absolutely essential to the right conveyed to work the alum mines. That must never be left out of view

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where the question relates to two strata, the one superincumbent upon the other.

It is further to be considered that there is a provision that the Alum Company shall have the “liberty and privilege of returning the washed ore from the alum works, and depositing the same in any of the coal-pits at Hurlet, where the limestone has been previously wrought out.” There is a manifest intendment here, and in the subsequent part of the lease, that there were to be wastes—that wastes were in contemplation as under the works, and that those wastes were to be kept existing as open and vacant spaces under the “roof of which” wastes “containing alum schistus,” were “to be supported by coal pillars.”

Upon the second exception, I agree with Lord Mackenzie, who justly observes that here “the matter is still clearer,” and I must state that the concluding passage in the explanation of the construction given to the contract, by the learned Judge, is most material. The whole statement of the law, he says, is laid down by Lord Ivory, and is really explained by the concluding words, that “all the solid coal should be wrought.” I am of opinion, having no doubt upon the subject, that the true construction was put before the Jury in the direction of the learned Judge, and that this construction, the objection to which was the ground of the second exception, has been rightly adopted by the Court below. I am, therefore, of opinion against both exceptions, and that the decree against the Bill was right.

It is wholly unnecessary to enter at greater length into the reasons and grounds upon which I have come to this conclusion, which are the same with those upon which the learned Judges in the Court below decided. I only thought it right to occupy your Lordship’s attention for these few minutes, in order to note that on the two points raised, and especially as to the

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first and most material exception, the reasons so forcibly put by Lord Mackenzie are quite sufficient to support the judgment of the Court below.

It is Ordered and Adjudged, That the said petition and appeal be, and is hereby dismissed this House, and that the said interlocutors therein complained of, be, and the same are hereby affirmed: And it is further Ordered, That the Appellants do pay or cause to be paid to the said Respondents the costs incurred in respect of the said appeal, the amount thereof to be certified by the Clerk-Assistant: And it is also further Ordered, That unless the costs, certified as aforesaid, shall be paid to the party entitled to the same within one calendar month from the date of the certificate thereof, the cause shall be and is hereby remitted back to the Court of Session in Scotland, or to the Lord Ordinary officiating on the Bills during the vacation, to issue such summary process or diligence for the recovery of such costs, as shall be lawful and necessary.

SPOTTISWOODE and ROBERTSON—RICHARDSON, CONNELL,
and LOCH.