The pursuer replied—Similar averments arising out of similar circumstances were held relevant in *Beveridge* v. *Kinnear*, December 21, 1883, 11 R. 387.

At advising—

Lord Young—I do not think it necessary to call for any further argument here. I do not think the case is relevant. It is not stated that any accident ever happened at this gate before, or that it was out of repair, or that it was left in an insecure state, from any negligence on the part of the owner of the premises. The only thing that is suggested is defective original construction, and beyond that all that is stated is that the gate was not quite open, but only half open, when it should have been quite shut or quite open, and that the man allowed his horse to try to get through the opening, and the cart came against the unopened half of the gate, which fell on the man and injured him so that he died shortly afterwards. He was there quite lawfully, because the defenders invited people to take away the broken pottery from their yard, and deceased's master had sent him to fetch a cartload of it. It is clear however, that he ought not to have tried to make his way through without the gate being opened, and if he did, and the gate came down, I do not think we can take it as a relevant case against the owner of the premises that the gate might have been so constructed as not to have come down.

I therefore think the case is not relevantly stated.

Lord Craighill and Lord Rutherfurd Clark concurred.

The Lord Justice-Clerk was absent.

The Court sustained the first plea-in-law for the defenders, and dismissed the action.

Counsel for Pursuer (Appellant) — Rhind—Gunn. Agent—Robert Stewart, S.S.C.

Counsel for Defenders (Respondents)—Jameson. Agents—Dove & Lockhart, S.S.C.

Tuesday, March 17.

SECOND DIVISION.

[Lord M'Laren, Ordinary.

SMITH SLIGO *v.* DUNLOP AND OTHERS.

Property—Right in Security—Real Warrandice.

The proprietor of certain seams of minerals in certain lands disponed them to the proprietor of the surface, but that only in real warrandice of the payment of all surface damage "occasioned or to be occasioned by the working of the minerals in these and other seams." *Held* that the security so attempted to be constituted was ineffectual, since it was an attempt to create a real security for an indefinite sum.

On 16th September 1795, John Dunlop of Rosebank, trustee on the sequestrated estate of James Dunlop of Garnkirk, proprietor of the lands and coal of Carmyle, conveyed to Thomas Edington of Clyde Iron Works the lands of Over Carmyle. The disposition excepted all feus which had been granted by James Dunlop and his authors, and reserved to Dunlop (the disponer) and his heirs and disponees the whole coal and ironstone in the lands disponed, with power to work the same, and make pits, hills, and roads for that purpose on paying surface damage thereby occasioned at the rate of £5 per Scots acre yearly, and declared that neither Edington nor his heirs nor successors, nor the vassals or feuars in any feus to be granted by him or them, should have right to claim more than £40 for damage done to each house or garden on the lands by working the coal—(this provision as to damage not to extend to any ground already feued by Dunlop or his predecessors, nor to affect the right of the vassals therein).

By another disposition of the same date, Dunlop disposed to Edington the first, second, third, fourth and fifth seams of coal, and all other coal and seams of coal, and the whole ironstone, in the lands of Carmyle disponed by the other disposition already narrated, with power to work the same, and make hills, pits and roads for that purpose, he and his heirs and disponees being bound to pay to Dunlop and his successors, and their tenants and feuars, all surface damages occasioned by working the coal and ironstone, and sinking pits and making roads or otherwise, at the rate of £5 for each Scots acre yearly, it being expressly provided that neither Dunlop nor his successors or feuars in feus granted after August 1794 should have right to claim more than £40 as damage to any house or garden by working the coal.

On 25th September 1795, Edington disponed to James Dunlop, merchant in London, the whole coal and ironstone, other than and excepting the third and fifth seams of coal, and the ironstone that could be wrought therewith, in the lands of Carmyle, and also the whole minerals, including the third and fifth seams, in other eleven acres called Auchinshogle, but with and under the limitation as to damages, that neither Edington nor his heirs or successors, nor their vassals or feuars, should have right to claim more than £5 per Scots acre, and £40 sterling for any damage done to each house or garden on the lands by working the coal. But by another disposition of same date he disponed to himself and William Cadell of Banton, for behoof of the Clyde Iron Company to the extent of two-third parts, and to James Dunlop to the extent of the remaining third part, the said third and fifth seams and the ironstone that could be wrought with them, but with a similar declaration that neither he nor his heirs or successors should have right to claim more than £5 per Scots acre, and £40 damages to each house or garden by working the coal.

In 1797 Edington, for himself and the Clyde Iron Company, disponed to John Sligo the lands of Carmyle. The disposition reserved the whole coal and ironstone in the lands, and power to work them on paying surface damage.

In 1809 the trustees of James Dunlop of London, with Edington's consent, conveyed Dunlop's third part of the third and fifth seams to the Clyde Iron Company.

Sligo proceeded to feu the ground conveyed to him. In doing so he did not refer in the titles he granted to the prior restriction as to the rate of surface damage, but understanding that the Clyde Iron Com-

pany were bound to pay full surface damage to him, merely inserted a reservation to the Clyde Iron Company of the coal and ironstone on condition that they should pay the whole surface damage which should actually arise from the working coal and ironstone in the lands. An action was raised in 1807 by Mrs Buchanan or Dunlop, the other trustees of James Dunlop of London, as proprietors of the coal and ironstone in the lands other than the third and fifth seams, to have it found that although Edington had omitted in the disposition of Sligo to insert the limitation of damages to £5 per Scots acre, and £40 for each house and garden, yet that that limitation did truly affect the lands of Carmyle, whether the property of Edington or of Sligo or of any of the feuars; that the limitation ought to have been inserted, and that Edington and the feuars of the lands were bound to insert it in future transmissions; also for damages against Edington. In that action the Court found that notwithstanding the omission by Edington and Sligo, the pursuers would be entitled to the benefit of the clause limiting the damage.

Sligo brought an action of relief against Edington and the Clyde Iron Company, and the Court in 1811 found that they were liable to him in payment of full surface damages occasioned or that should be occasioned by the working of the coal in the lands of the pursuer (Sligo) or his feuars.

While this process was depending, in the year 1810 William Caddell, for behoof of the Clyde Iron Company, disponed the third and fifth seams to Colin Dunlop, advocate. In 1811 the latter raised an action of declarator against John Sligo (*secundus*), son of John Sligo above mentioned, and the partners of the Clyde Iron Company, for declarator that he, as purchaser of the third and fifth seams, should only be bound to pay surface damages at £5 per Scots acre, and £40 for each house or garden damaged by the working of the coal. They raised a counter action of declarator and relief against him for declarator that he was bound to pay full damages by coal working, as the Clyde Iron Company were.

With a view to put an end to all the litigations and disputes between (1) James Dunlop's trustees, (2) Colin Dunlop, and (3) the Clyde Iron Company, a contract was entered into in November 1812 between these parties regulating their liability *inter se*, and providing what should be done with reference to the then proprietor of the Carmyle estate. The contract having been intimated to John Sligo (*secundus*), he acceded to it for himself and feuars and tenants in the lands of Carmyle, and following thereon a deed of discharge, renunciation, and disposition was granted on the recital of the above dispositions above narrated. By this discharge and renunciation the trustees of James Dunlop discharged the lands of Carmyle in favour of Sligo and his feuars of the "real lien or servitude" created over them, and of the decree of Court in the action raised in 1807 finding them entitled to work the minerals in the seams other than the third and fifth seams for the liquidated damages of £5 per Scots acre, and £40 for a house or garden injured or destroyed by the workings, and bound and obliged themselves as trustees, and their constituents, and their heirs and disponees, to pay to Sligo and his feuars and disponees the full amount of surface damages from 11th November 1815, as if the restriction had never existed. Secondly, Colin Dunlop, as proprietor of third and fifth seams, discharged in favour of Sligo and his feuars and disponees the encumbrance, lien, or servitude whereby the former proprietors of these seams were entitled to work and win them for payment of the said limited rate of liquidated damages, and bound himself to pay to Sligo and his feuars, disponees, and tenants the full amount of surface damages since 11th November 1815; but also in respect of the difficulty that Sligo and the proprietors of Carmyle, their feuars or tenants, might thereafter find in discovering or proving to which of the separate seams of coal and minerals within the lands of Carmyle such surface damages might be attributable, and in order to render such investigation or distinction unnecessary on the part of the proprietors of the lands and their tenants, bound himself and his heirs, disponees, and tenants for the time being of the said third and fifth seams, to make payment to Sligo, and to his feuars, disponees, and tenants of the said lands of Carmyle, of the full amount of all surface damages that may have actually arisen since the said eleventh day of November One thousand eight hundred and fifteen, or that might be occasioned in all time coming thereafter, by the working and winning of the coal, ironstone, and fireclay of the whole six several seams within the lands of Carmyle and others, to whomsoever these seams might belong, and without distinction, whether such damages might have been or might be hereafter committed by the proprietors or tenants of the third and fifth seams, or by those of any of the other seams of the coal, ironstone, and fireclay within the said lands of Carmyle and others: "And moreover, for the further security of the said John Sligo and his feuars and tenants of the said lands of Carmyle and others, I, the said Colin Dunlop, as standing feudally invested in the property of the said third and fifth seams of the said coal and ironstone within the lands of Carmyle and others before described, do hereby sell, alienate, dispone, impignorate, and convey, to and in favour of the said John Sligo and his heirs and disponees foresaid, All and Whole the said third and fifth seams or strata of coal, and the ironstone and fireclay that can be wrought along with the same, in All and Whole the said lands of Carmyle and others before described, with all right, title, and interest, claim of right, property, and possession, petitory or possessory, which I, the said Colin Dunlop, or my predecessors or authors, had, have, or can pretend thereto: But that only in real warrandice and security to the said John Sligo and his foresaids, of the payment of all surface damages already occasioned or that may be hereafter occasioned as aforesaid by the working of the coal, ironstone, and fireclay within the whole or any of the six several seams of coal, ironstone, and fireclay in the lands of Carmyle and others before described, to whomsoever these seams of coal may belong, and without distinction, whether such damages may have been or shall be committed as said is by the operations of the proprietors or tenants of the said third and fifth seams, or by those of any of the other seams of coal, ironstone, or fireclay in the said lands of

Carmyle and others: But reserving always to me, the said Colin Dunlop, and my foresaids, proprietors of the said third and fifth seams, to operate our own relief from the proprietors and tenants of the other seams of their just proportions of the actual surface damages as accords."

Archibald Vincent Smith Sligo, who had come in right of John Sligo, raised this action against James Dunlop & Company, the successors of the Clyde Iron Company and Colin Dunlop in the minerals within the lands of Carmyle—*First*, to have it declared that the defenders, as proprietors of the minerals under that part of the lands of Foxley Farm, part of the estate of Carmyle, and also of the minerals under three fields on the farm of Carmyle Mains, were bound to pay him, as proprietor, all surface damages caused to the lands by the mineral operations of themselves or their tenants, and in particular the surface damages caused to his said lands by the surface operations of the defenders or their tenant. *Second*, to have them ordained to pay him £351, 10s. per annum, but under deduction also of the sum of £17, 11s. 9d. annually, being the agricultural rent payable to pursuer, so long as the pit-heaps and their surface works remained on the said lands. *Third*, to have it declared that the defenders as proprietors of the minerals under the whole lands of Carmyle, excepting the third and fifth seams under the lands of Carmyle (and also excepting the minerals under certain small portions of the lands belonging to the pursuer), were liable to pay the pursuer all surface damages that had been or might have been caused to the said lands by the operations of the defender or their predecessors, or the tenants of either of them. *Fourth*, to have the defenders and their tenants, and all others deriving right from them interdicted from working, taking out, or carrying away any coal from the third and fifth seams of coal under the said lands of Carmyle, which seams were conveyed in warrandice and security to the pursuer's predecessors, of all surface damage caused and to be caused to the lands by the working of the seams of coal, other than the third and fifth seams, by the defenders or others in right of the said seams of coal.

The pursuer averred that the defenders had, by themselves or their tenants, been working out the first, second, fourth, and sixth seams of coal and minerals under Carmyle, and were in course of working out the third and fifth seams, notwithstanding the conveyance thereof to his predecessor in security. He averred that the said third and fifth seams of coal were the only security he had for the damage that might be ultimately caused to his lands by the mineral workings complained of. By these operations very serious damage had, he stated, been done to his lands by subsidence or otherwise, the drainage system had been so upset as to deteriorate the agricultural value of the lands, the mansion-house had been injured, and the lands occupied by coal-hills and pits. The portions of his estate mentioned in the first conclusion of the summons were being rapidly feued for villas until the operations complained of. The pursuer further averred that the defenders were *vergens ad inopiam*, and had granted a trust-deed for behoof of creditors in favour of a trustee, who was also called as a defender to the action.

He pleaded—"(3) The third and fifth seams of coal under the lands of Carmyle having been conveyed in real warrandice and security to the pursuer and his predecessors of all damage caused or to be caused by the workings of seams of coal other than the said seams under the said lands, the pursuer is entitled to interdict as concluded for."

The defenders pleaded—"(2) The averments of the pursuer are irrelevant and insufficient in law to support the conclusions of the summons. (4) The disposition of the third and fifth seams of coal in security of damages to be found due in the future is invalid at common law and under the provisions of the Act 1696, cap. 5. (5) *Separatim*, the said disposition, if effectual, as creating real warrandice, does not warrant the conclusions for interdict, but is only effectual to found adjudication as the damages shall from time to time be liquidated. (6) The conclusions for interdict are inconsistent with the terms of the said disposition."

It appeared that the mineral estate had been sold, and the defenders were under an obligation to convey to Andrew Simpson M'Clelland, chartered accountant in Glasgow. A supplementary action was therefore raised against him with conclusions of the same character as the conclusions in the principal action.

By minute of restriction the pursuer departed from the first and second conclusions of the action.

The Lord Ordinary (M'Laren) pronounced this interlocutor—"Dismisses the action in so far as concerns the first and second conclusions thereof, in terms of the minute of restriction for the pursuer: Further, finds that the deed of security libelled is only effectual as a security for payment of damages which occurred before the date of the infeftment thereon, and that it is otherwise of no force, and finds that the conclusion for interdict is not supported by relevant and sufficient averments: Therefore assoilzies the defenders from the third declaratory conclusion of the libel as laid, and also from the conclusion for interdict, and decerns; reserving the right of the pursuer to bring a new action for damages against the defender for damage caused during their tenure of the mines and minerals.

"*Opinion.*—These actions at the instance of the proprietor of the lands of Carmyle are directed against the owners of the minerals, and contain conclusions for interdict and damages. The first action is directed against the registered heritable proprietors of the mineral estate and his trustee; but as it appeared that the mineral estate had been sold, and that the defenders were under an obligation to convey to Mr M'Clelland, a supplementary action was brought against that defender, with conclusions of the same character as the conclusions of the principal action.

"The only point argued before me was that of the effect in a question with singular successors of a certain conveyance in security of claims of surface damage, and to that point my deliverance will be confined.

"The clause the effect of which is in dispute is contained in a deed of discharge and disposition dated 22d April 1817, which is printed as an appendix to the record. The recitals in this deed explain the circumstances under which the claims had arisen which it was the object of the deed to secure. Referring to the record and

appendix for names and dates, I shall endeavour to state the conditions of the question in a somewhat generalised form.

"In 1795 the lands of Carmyle, and the coal and ironstone of that estate, were by separate conveyances vested in Mr Edington of the Clyde Ironworks; and in each of the deeds of conveyance there was inserted a clause empowering the grantee of the mineral estate to work the minerals, he paying surface damages at the rate of £5 sterling per Scots acre, together with a declaration restricting the claim of the owners of the land to £40 sterling 'for any damages that may be done to each house and garden on the said lands by working the said coal.'

"By the other deeds granted in the years 1795 and 1809, Mr Edington's estate in the minerals came to be vested as follows:—The coal and ironstone, other than the 3d and 5th seams or strata of coal, and the ironstone that could be wrought therewith, were vested in James Dunlop, merchant in London; while the 3d and 5th seams of coal, with the related ironstone, were vested in the trustees for the Clyde Iron Company.

"I interrupt the narrative here to point out that as the title then stood the estate which remained to Mr Edington was an estate in the lands without the minerals, and subject to a servitude or licence in favour of the mineral estate entitling its owners to occupy the surface upon payment of surface damage at the rate of £5 per Scots acre, and to undermine the surface upon payment of a maximum sum of £40 for each house and garden that might be damaged by undermining. This was a servitude or real obligation affecting the right of the owner of the surface, whoever he might be. So it was determined by the Court in the litigation which ensued; and I need not add that the concession of a servitude or licence to the owner of the minerals to work them on such terms was a very material abridgment of the rights of the owner of the lands. Not only was the landowner obliged to submit to the occupation of the surface on a scale of liquidated damages which might be less than the true equivalent of the damage done, but the landowner was also in effect debarred from the exercise of his right at common law to obtain protection by interdict against injury to the buildings on his estate, and was bound to accept what might be very inadequate compensation for such injuries. I may add that the clauses constituting the licence to work contain an exception in favour of feuars of existing feus, and, of course, the owners of such feus would not be bound by any agreement which their superior might make with the owners of the minerals. On the other hand, the granters of any feus which might thereafter be created would be bound by the licence to accept £40 as full compensation for injury by mining. Mr Edington's right or title to the lands was thereafter transferred to the Clyde Iron Company, or rather to Mr Edington and the other partners in trust for the company, who, it will be remembered, were also the proprietors of the 3d and 5th seams of coal.

"In such circumstances, Mr Edington, for himself and his copartners of the Clyde Iron Company, in the year 1798 conveyed the lands of Carmyle to Mr John Sligo (the pursuer's ancestor), excepting the coal and ironstone and their pertinents. But instead of putting their disponee under obligation to submit to the servitudes or licences which had been constituted in favour of the owners of the seams other than the 3d and 5th seams, Mr Edington only inserted in the disposition to Sligo a reserved power of working the minerals in the usual form, together with a clause obliging himself and the disponees of the mineral estate to pay for their occupation of the surface, or damage caused to it, according to the true value of the land occupied or damaged. It is to be observed that the five strata had all been given off by Mr Edington before he granted this deed, although, as I have said, it was not until the year 1809 that the five strata came to be completely vested respectively in James Dunlop of London and the trustees of the Clyde Iron Company.

"From these proceedings obviously a claim of warrandice accrued to Mr John Sligo against Mr Edington and the Clyde Iron Company, whom he represented. That is to say, Mr Sligo was under obligation to submit to the working of the minerals on payment of the liquidated damages, because his title was of later date than that of the mine-owners, and he was entitled to be indemnified by Mr Edington to the extent to which the value of his estate was diminished in consequence of the existence of the licence to work upon payment of liquidated damages. This was found to be the legal result of what Mr Edington had done, but it needed four actions to make this clear to all the parties concerned as appears from the narrative of the proceedings in the deed of discharge and conveyance from which my information is derived.

"I now come to the effective clauses of the deed of discharge and conveyance of 1817. It appears that, pending the litigation referred to, Mr Colin Dunlop had acquired right from the Clyde Iron Company to the third and fifth seams of coal and ironstone, and the deed accordingly is granted by Mr Colin Dunlop and by the testamentary trustees of James Dunlop of London, who was the original grantee of the seams of coal and ironstone other than the third and fifth seams.

"By this deed Mr Colin Dunlop and the trustees of James Dunlop respectively renounce and discharge the 'real lien or servitude' whereby they were empowered to work the minerals upon payment of liquidated damages, and they undertake to make payment to Mr Sligo's heir of the full amount of surface damage which may thereafter arise in consequence of the continued working of the minerals, whether such damage may arise through the working of the third and fifth seams whereof he is proprietor, or through the working of the other seams which are property of James Dunlop's trustees. Then follows the clause, the effect of which is in dispute. In it Mr Colin Dunlop, for the further security of Mr Sligo and his feuars or tenants, does thereby 'sell, alienate, impignorate, and convey' to Mr Sligo and his heirs and disponees the said third and fifth seams or strata of coal, and the ironstone, &c., in the lands of Carmyle, 'but that only in real warrandice and security to the said John Sligo and his foresaids of the payment of all surface damages already occasioned or that may be hereafter occasioned by the working of the coal, ironstone, and fire-clay within the whole

or any of the six several seams of coal, &c. . . . to whomsoever these seams may belong.'

"Mr Colin Dunlop reserves his right of relief from the proprietors and tenants of the seams other than the third and fifth seams, and the deed concludes with the usual feudal clauses.

"The defenders are singular successors of Mr Colin Dunlop, and they plead in their fourth plea-in-law (the third plea in the action against Mr M'Clelland) that the disposition of the third and fifth seams of coal in security of damages to be found due in the future is invalid at common law, and under the provisions of the Act 1696, cap. 5. In argument the objection to the security was rested mainly on the statute. In answer to this plea the pursuers urge that the conveyance of the third and fifth seams was in 'real warrandice,' and is therefore not within the class of securities which are invalidated by the Act 1696, cap. 5, under its second branch.

"The statute annuls all 'dispositions or other rights that shall be granted hereafter for relief or security of debts to be contracted for the future.' It is admitted that a proper conveyance in real warrandice is a valid security, and that the statute will not take effect upon it. I asked counsel why in their view the statute would not invalidate a conveyance in real warrandice, because on the answer to this question I thought the decision of the case must depend. It was observed that such securities are ancillary to conveyances of heritable property. But this cannot be a reason for treating them exceptionally, because the Court has no power to make an exception in favour of securities relating to heritable property which the statute has not made. The reason why the statute has no infirmatory effect upon a conveyance in real warrandice is plain enough. It is because the obligation covered by the warrandice is an obligation instantly prestable, and is not in the words of the statute 'a debt to be contracted for the future.' It is the obligation to give a valid and unencumbered title which the real warrandice is intended to cover, and the measure of the obligation is the estate warranted—the estate which is the subject of the principal conveyance.

"In the present case I am of opinion that Mr Colin Dunlop's conveyance of the third and fifth seams of coal and ironstone in security of the payment of accruing damages is not warrandice in the ordinary sense of that expression, and is not a security for a then existing debt. By 'warrandice' I understand warranty against infirmity in the title, and warranty against encumbrances. In the present case, and until this deed was granted, there was an infirmity in Mr Sligo's title which (in consequence of the warrandice expressed or implied in the title-deed of sale) the partners of the Clyde Iron Company or their heirs were under obligation to cure. Their obligation was primarily to procure if possible a discharge of the servitude or licence to work under which the owners of the first, second, fourth, and sixth seams of mineral were entitled to trespass on Mr Sligo's estate on payment of liquidated damages. If such a discharge could not be procured, then the obligation of warrandice would resolve itself into damages, which damages would apparently be the difference between the amount of the actual damage consequent on occupation of the surface or caused by subsidence, and the amount of the liquidated damages recoverable from the proprietor of the minerals for the time being. I think that a conveyance bearing to be in real warrandice of such a claim would be a good security for damages accrued and to accrue, because in the case supposed the payment thus secured is one of the nature of an indemnity for the infirmity in the title of the vendor under the deed of sale of 1798, and I am supposing the case of the Clyde Iron Company being unable to obtain a discharge of the licence to work. It would be no objection to such a conveyance in real warrandice that it was granted by a third party at the request of the obligant in warrandice.

"But in the actual case the deed is one to which James Dunlop's trustees are parties, and the deed contains a discharge by them and by Mr Colin Dunlop of the servitudes or licences to work which they respectively claimed under their titles, and an undertaking to pay full compensation for surface damage. Now, this is a fulfilment of the obligation of warrandice, because it remits Mr Sligo to his rights at common law with respect to the future operations of the mineral owners and their tenants. Mr Sligo had also a claim of compensation for damage which had accrued and was resting-owing. For this heritable security might be given, and I do not doubt that the conveyance of the third and fifth seams of coal and ironstone was an effectual mortgage or security for damages which had accrued. But the conveyance also purports to be in security for surface damages 'that may be hereafter occasioned,' and I agree with the argument of the defenders' counsel that this is not warrandice. How is it possible to represent such a security as real warrandice when the acts for which the indemnity is given neither result from infirmity of title nor from the existence of an encumbrance which the seller was bound to purge?

"The infirmity or encumbrance—for it is immaterial under which of these heads the licence to work is classed—was purged by discharge, and there was no obligation whatever on the seller or his heirs to warrant against damages resulting from the exercise of the natural right of the mine-owner to win and carry away his minerals. Such damages only give rise to claims at the instance of the proprietors or tenants for the time being of the lands by whom the damages are respectively suffered, and they appear to me to be of the nature of 'debts contracted for the future,' and for which the infeftment in security, in the words of the statute, 'shall be of no force.' I do not overlook the consideration that this was an onerous obligation, because it was one of the stipulations of an onerous deed. But the statute contemplates the case of onerous deeds, and provides that they shall be effectual only as securities for debt contracted before seisin on the disposition.

"It follows, in my opinion, that the conveyance libelled, although not absolutely reducible, is only a good security for damage caused before 12th May 1817, the date of the infeftment, and as I do not understand that any claim is made for damage of ancient date, I accordingly find that the security is ineffectual. The defenders are singular successors of Mr Colin Dunlop, and no claim lies against them upon his personal obligation of indemnity; the claim is only against the warrandice lands. It thus appears that no relevant case has been made to support the con-

clusions for interdict. I understand that the separate pecuniary conclusions are withdrawn under reservation of the pursuers' right to raise a new action."

The pursuer reclaimed, and argued—The estates had been conveyed to him in real warrandice and security of payment of all surface damages already occasioned, or that might be hereafter occasioned, by mineral workings. This was an infeftment in real warrandice, and a valid security by the law of Scotland. It was the common law right of the owner of the surface to have the surface supported unless he had discharged that right. A reservation of minerals did not import a right to bring down the surface, nor did one coupled with a reservation of compensation—*Aspden* v. *Seddon*, March 24, 1875, L.R., 10 Ch. App. 394; *White* v. *Dixon*, December 22, 1881, 9 R. 375—10 R. (H. of L.) 45, March 19, 1883. Under the warrandice the pursuer had (1) a right to interfere with any alteration which might bring down his support; (2) he was unrestricted as regards the amount of damages. In short, there was a servitude constituted over the surface, which had not been noticed in the surface title granted in 1798 to Sligo.—Ersk. ii. 3, 28; *Blair*, November 6, 1741, M. 16,624; Bell's Prin. 894. The Statute 1696, c. 5, did not strike against the disposition as being in security of damages to be found due in the future. A debt was not future merely because it was a debt with a tract of future time.

The defenders replied—The clause in question was not proper warrandice but paction. In the deed of discharge the right of parties are regulated by paction. The proprietors of surface and minerals agreed as to the payment of all surface damages, and therefore if that was so, any claim arising did so under the terms of the obligation. When the minerals were taken, and the surface suffered damage, there was no eviction, but the state of affairs contemplated by the clause emerged. This disposed then of calling it warrandice. But even if it were, the matter could never have eventuated in interdict. The damages must be liquidated from time to time, and the subjects of the security must be adjudged—Duff on Feudal Conveyancing, 91; 1 Bell's Com., M'Laren's ed., p. 733. But (2) the security was bad under 1696, c. 5, as a future debt arising out of a subsisting obligation. A real security to be good must be for a definite sum, which this was not—*Coutts* v. *Tailors of Aberdeen*, August 3, 1840, Ross's Leading Cases, 3; Erskine, ii. 3, 50; *Newnham* v. *Stewart*, 1794, 3 Pat. App. 345. It could not be made definite by reference.

Counsel for M'Clelland adopted the argument for the other defenders.

At advising—

Lord Rutherfurd Clark delivered the opinion of the Court as follows:—The pursuer maintained that he had been evicted, and that he was entitled to have recourse against the estates conveyed by Colin Dunlop "in real warrandice and security of the payment of all surface damages already occasioned or that may hereafter be occasioned by the working of the minerals under the pursuer's lands." So long as there was a discrepancy between the title to the minerals and the title to the surface, there might be room for maintaining that the exercise of any rights within the former title but in contravention of the latter was an eviction which would give recourse on the warrandice. But I do not think it necessary to consider any such question. For the discrepancy which existed in the earlier titles was removed by the deed of 1817, and as no act was lawful under the mineral title which was not also lawful under the title to the surface, it seems to me to be impossible for the pursuer to show that he has been evicted in any sense of that word.

But the pursuer contended that under the clause which I have quoted he had a real security for the damages which he had sustained through the working of the minerals. I am of opinion the alleged security is bad, and on the simple ground that it is absolutely indefinite. Nothing can be more fixed in our law than that a real security cannot be given for an indefinite sum of money, and nothing can be more indefinite than the amount of the damage to be sustained by mineral workings. I prefer this ground of judgment to that on which the Lord Ordinary proceeded.

The Lord Justice-Clerk was absent.

The Court pronounced this interlocutor—

"Recal the interlocutor submitted to review, of new dismiss the action in so far as concerns the first and second conclusions thereof, in terms of the minute of restriction for the pursuer: Further, find that the deed of security libelled is not effectual as a security for payment of damages occasioned by the working of the minerals under the pursuer's lands: Therefore assoilzie the defender from the third declaratory conclusion for interdict and decree, reserving the right of the pursuer to bring a new action of damages against the defender for damage caused during his tenure of the mines and minerals."

Counsel for Pursuer—Mackintosh—Pearson. Agents—J. L. Hill & Co., W.S.

Counsel for Dunlop & Co.—J. P. B. Robertson—Graham Murray. Agents—Tods, Murray, & Jamieson, W.S.

Counsel for M'Clelland — Darling — Low. Agents—Thomson, Dickson, & Shaw, W.S.

Tuesday, March 17.

FIRST DIVISION.

[Lord Kinnear, Ordinary.

MALCOLM *v.* LLOYD.

Process—Jury Trial—Servitude Road—Question of Fact—Proof.

Where the issue in a case was whether the pursuer had acquired right by immemorial possession to a servitude road, the pursuer moved for a jury trial. The defender contended that there should be a proof. The Court *held* that the trial should be by jury as the question at issue was one purely of fact.