The title of the petitioner is a general disposition by her father, the last heir in possession, in her favour; and if the entail is bad it will embrace the entailed lands, or if the last heir had power to disregard the entail. But it is necessary for the petitioner to go a step further, and state her objections in such a way as to make an impression on the Court that there is a *prima facie* case that the entail is bad. A record has been made up in this Court to have this entail declared invalid; and the objections to it have been stated before us by the petitioner's counsel. I do not see that these objections are fatal to the entail; but I may quite well be brought to see that they are. In the meantime the respondent is heir under that entail, and has been served heir; and I therefore think that we should refuse the petition.

The other Judges concurred.

Agents for Petitioner—Murray, Beith & Murray, W.S.

Agents for Respondent—W. F. Skene & Peacock, W.S.

Wednesday, March 16.

ROBSON *v.* BYWATER'S TRUSTEES.

Mora — *Taciturnity — Transactions importing discharge — Goods in communion — Abandonment.* Circumstances in which *held* that a claim made by a lady as executrix of her deceased husband for his share of the goods in communion between his father and mother at his mother's death in 1844, was barred by the actings of the parties, which imported a discharge of the claim, and by *mora* and taciturnity.

This was an action at the instance of Mrs Emily Rannie, formerly Bywaters now Robson against the trustees of her father-in-law Thomas Bywater (as executrix-dative of her former husband, John Thomas Bywater), for the purpose of recovering the share of the goods in communion to which the said John Thomas Bywater was entitled on the dissolution of the marriage of his parents by the death of his mother in 1844.

There had been no contract of marriage between Mr Thomas Bywater and his wife, and on the death of his two sisters intestate Mr John Thomas Bywater became sole heir and next of kin and representative of his mother, but during her life he never made up any title to the share of the goods in communion which belonged to him as her next of kin.

He was married to the pursuer in 1849, and died survived by his wife and three children in 1855. He left his wife, the present pursuer, residuary legatee. The executor named was his father Thomas Bywater, who, in the inventory of his estates given up for confirmation, did not include the value of the present claim.

Mr Bywater paid over to the pursuer the balance due to her under her husband's settlement, and received a receipt in the following terms:—

"3*d October* 1857.—Received from Mr Thomas Bywater the above balance of twenty-nine pounds and four shillings sterling, which is in full of all claim I have against him in reference to the estate of my late husband, and of his intromissions therewith."

Mrs John Thomas Bywater married her present husband, Mr Robson, in 1857. And in 1862 Mr Thomas Bywater also contracted a second marriage.

Mr Robson was employed by him at that time to make a settlement of his estate, which was done by two deeds. By one of these he disponed to himself in liferent and to the children of the pursuer in fee, stock and shares to the amount of £3000, and by the other he settled £2000 upon his second wife.

The defenders further alleged—"The said Thomas Bywater entered into the foresaid arrangements, and executed the foresaid deed of disposition and assignation in favour of his grandchildren in the faith and belief, induced by the pursuer Mr Robson, that he would be at liberty to dispose of the whole means which he then possessed, or might come to possess, other than what was included in the said disposition and assignation and marriage-contract. The said Thomas Bywater was exceedingly anxious that such power should be reserved to him in the event (which actually occurred) of his having to provide for a child or children of the second marriage; and the pursuer Mr Robson represented to and assured him that his whole estate, other than as aforesaid, was at his free disposal. *Inter alia*, the said pursuer, by letter dated 21st March 1862, written by him as law-agent of Mr Bywater, stated—'Your estate, so far as it exceeds £5000, together with future accumulations, can be disposed of by will, which can either be made now or hereafter. If you wish me to draft it now, I shall be happy to do so.' Had it not been for his belief that the fact was as has been stated, the said Thomas Bywater would not have executed the deeds above mentioned."

The pursuer answered—"Explained that Mr Robson had no knowledge of Thomas Bywater's circumstances or liabilities beyond what he himself disclosed in said correspondence, and Mr Robson never advised Mr Bywater that his general estate would not be affected by his debts. On the contrary, he expressly told Mr Bywater that the estimated surplus of his means, beyond the provisions then made, was applicable, in the first instance, to the payment of all his obligations. Mr Robson assumed that Mr Bywater, in estimating the value of his estate, made full allowance for all his liabilities. Mr Robson was then in entire ignorance of the existence of the liability forming the subject of this action, and could give no advice regarding it one way or the other. He knew nothing whatever of the affairs of the late Mrs Ann Bisset or Bywater; not even whether she had died testate or intestate, or whether there was any contract of marriage or other deed regulating her affairs."

Mr Bywater died in 1866, survived by his second wife, and a daughter by his second marriage. He also left a testamentary writing, by which he directed his trustees to pay over the surplus of his estate, after satisfying all his obligations, to his daughter by the second marriage.

The Lord Ordinary (Barcaple), in June 1868, remitted to an accountant to report the state of the goods in communion between Thomas Bywater and his wife Ann Bisset or Bywater at the dissolution of the marriage in 1844; and on 11th December 1869 pronounced the following interlocutor:—"The Lord Ordinary having heard counsel for the parties on the objections for both parties to the report of the accountant, and also on the closed record and whole pleas of parties, and considered the closed record and whole process; and the par-

ties having concurred in asking for a judgment upon the objections to the accountant's report, although the pleas stated in defence against the claim for a share of the goods in communion, which forms the subject of the action, should be sustained by the Lord Ordinary—With reference to the objections to the accountant's report, sustains the seventh objection stated for the pursuers to the report of the accountant, in so far as regards the sum of £21, 9s. paid to John Ness, sculptor, for a monument to Mrs Bywater: Finds that said sum ought not to be stated as an item of deduction from Mrs Bywater's share of the goods in communion; but, *quoad ultra*, repels said objection: Sustains the ninth objection stated for the pursuers to said report, and finds that the sum of £98, 11s. for board of John Thomas Bywater ought not to be stated as an item of deduction from the amount of the claim for the said share of the goods in communion: Sustains the twelfth and thirteenth objections stated for the pursuers to said report, in so far as regards the sum of £2, 9s. 6d. for price of Venetian blinds, embraced in the miscellaneous payments and balance to which said objections relate: Finds that said sum of £2, 9s. 6d. ought not to be stated as an item of deduction from the amount of the claim for the said share of the goods in communion; but, *quoad ultra*, repels said objections: Sustains the fourteenth objection stated for the pursuers to said report, and finds that the amount of the alleged transactions between Mr Bywater and his grandchildren ought not to be deducted from the amount of the claim for the said share of the goods in communion, and does not enter into any question of accounting between the parties in this action: Sustains the fourth head of the first objection stated for the defenders to said report, and finds that the debt due by James Bisset junior to Mr Bywater ought not to be included in the state of the goods in communion at the dissolution of the marriage; *quoad ultra*, repels the whole objections to said report stated *hinc inde* by both parties, and approves of said report; but finds that the pursuers are barred from insisting in the claim made by them in this action for the share of the goods in communion belonging to the deceased Mrs Ann Bisset or Bywater at the dissolution of the marriage between her and the deceased Thomas Bywater in 1844 in respect of *mora* and taciturnity, coupled with the fact that in the year 1862 the said Thomas Bywater, with the knowledge and acquiescence of the pursuer, settled his means and estate on the footing that no such claim existed: Sustains the first, fifth, and sixth pleas stated for the defenders; assoilzies the defenders from the whole conclusions of the libel, and decerns: Finds the pursuers liable in expenses; allows an account thereof to be given in, and when lodged, remits the same to the auditor to tax and report."

Mrs Robson reclaimed.

FRASER and ASHER, for her, contended that there had not been *mora* or taciturnity sufficient to exclude the claim, and cited the following authorities; *Scott* v. *Taylor*, Jan. 21, 1848, 10 D. 377; *Allan*, 13 D. 1220; *Gourlay*, 2 Macph. 1284; *Lindsay*, 1796, 3 Paton's Ap. 432.

The SOLICITOR-GENERAL and WATSON in answer.

At advising—

LORD ARDMILLAN—The only part of the Lord Ordinary's interlocutor brought under review is the finding: "Finds that the pursuers are barred from insisting in the claim made by them in this action, for the share of the goods in communion belonging to the deceased Mrs Ann Bisset or Bywater, at the dissolution of the marriage between her and the deceased Thomas Bywater in 1844, in respect of *mora* and taciturnity, coupled with the fact that in the year 1862 the said Thomas Bywater, with the knowledge and acquiescence of the pursuers, settled his means and estate on the footing that no such claim existed."

I concur in that finding, though I am disposed to place it on grounds somewhat broader than those stated by the Lord Ordinary.

I am not very favourable to the plea of taciturnity. which has sometimes been sustained without sufficient discrimination. To mere lapse of time and non-assertion of right—in other words, to silence for a long period short of forty years—I would not give effect as sufficient, taken alone, to exclude or bar a demand for justice. But where, in addition to the fact of long continued silence, you have conduct and transactions on the footing which excluded the idea of such claim as this being contemplated, and where you have persons, now dead, induced to make important arrangements, which they would not have made if they knew this claim was to be urged, arrangements which cannot now be undone, that presents a very different question. The nature of the plea, viewed legally and reasonably, is thus quite altered.

It is in this view of the case, taking together the *mora*—the taciturnity—the conduct, and the transactions of the parties—that I think the Court is called on to deal with the defenders' pleas.

The marriage between old Mr Bywater and his first wife Ann Bisset, which took place in 1822, was dissolved by her death in 1844. John Thomas Bywater the only son of this marriage was of full age when his mother died, and lived till 1855. He left his father his executor, and without ever having made or suggested any claim on the goods in communion as at the death of his mother, he left his widow, the present pursuer, his residuary legatee.

It does not appear to me probable or possible, that he ever meant to make this claim, or to leave the claim or the right to make it to his widow as part of the residue of his estate.

I am satisfied that he had no such intention. That is the first element in the combined view which I take. But observe what happened afterwards. John Thomas Bywater left three children, one a posthumous child. His estate amounted to £3520.

The pursuer, widow of John Thomas Bywater, married in October 1857, Mr Robson, solicitor in Kelso. At that time, October 1857, old Mr Bywater had a settlement with her, and as executor of her husband paid her a "balance" of £29, 4s., and the receipt for the balance is thus a distinct acknowledgment of the settlement out of which it was brought. Now, according to this settlement, the nature and extent of the estate of John Thomas Bywater was explained and accounted for; and the balance on adjustment was paid to the pursuer Mrs Robson calculated on a footing inconsistent with this claim.

Then again, at the time of the second marriage of Mr Bywater, in 1862, the pursuer Mr Robson was taken into consultation by Mr Bywater, and, acting as a legal adviser and as a friend, he gave his approval and sanction to an arrangement by which Mrs Robson's children received from Mr Bywater provisions to the extent of above £3500. It is scarcely possible to believe that these provi-

sions would have been granted if Mr Bywater had known of this claim. I have no doubt that they would not. The whole arrangement proceeded on the footing of there being no such claim. A large sum was provided and paid to the children of Mrs Robson on that footing, her husband, the pursuer Mr Robson, approving, and as a man-of-business advising and effecting the arrangement. The deeds were prepared by him. Now, this proceeding in 1862, even if it stood alone, would be important, because it was a serious and deliberate adjustment of the rights of Mr Robson's wife and family on the footing of the absence of any such claim as this—an adjustment involving provisions most favourable to the family, which would never have been granted if such claim had been made, and these granted by a person now dead, so that the provisions are beyond recall. But the importance in this question of what occurred in 1862, is greatly increased by referring to the proceedings in 1857 which I have already noticed, and to the conduct of John Thomas Bywater himself, who survived his mother for eleven years, yet never made or indicated any claim; who appointed his father his executor; and whose will, on which the right of his widow, now Mrs Robson, rests, does not express or imply, or even suggest, any intention on his part to confer on her a right to claim what he had never claimed himself.

Taking a comprehensive view of the whole proceedings, conduct and circumstances disclosed in this case, I think it is not one in which the pursuers are now entitled, in the face of all that has been done, to enforce this old claim.

This is not a case of mere taciturnity. On the other hand, it is not a case of emerging facts, or emerging knowledge of facts. Mr Robson knows nothing now that he did not know when he advised the arrangement and prepared the deeds in 1862. The question is not free from difficulty, but on the whole history of the case and on combination of the facts which I have mentioned, I think the judgment right.

Lord Deas concurred.

Lord Kinloch—The Lord Ordinary has held the claim made in the present action precluded by implied discharge or renunciation: and he has drawn his inference from the lapse of time and taciturnity, coupled with the consideration of a particular transaction or dealing. I consider him to have herein applied an unquestionable and most important doctrine of our law. Mere lapse of time and taciturnity will not undoubtedly, in the general case, suffice to cut off a claim where the period is short of prescription. But where these are coupled with transactions, fairly importing settlement, discharge, or abandonment, I conceive it wholly undoubted that by our law a claim may be competently held thereby extinguished or precluded. There are many decisions to this effect: some of them even applicable to the case where the constitution of the debt was in writing: others more suitably applying to the case of claims arising, as here, out of the domestic relations. The doctrine is undoubtedly one to be enforced with great caution and delicacy of handling; but, thus enforced, it is so conformable to the dictates of natural justice, that I think to allow no place to it would infer an essential defect in any modern system of jurisprudence.

I am of opinion that, in the present case, the Lord Ordinary has soundly applied the principle: and the only fault I have to find with his Lordship's interlocutor is, that he has limited his attention to the transactions of 1862, where I think that there are other dealings and proceedings to be also fitly taken into view.

The claim now insisted in, for a share of the goods in communion between Mr Thomas Bywater and his wife, arose in the year 1844, when the latter of these two died. John Thomas Bywater, in whom the right vested, survived till 1855, or for a period of eleven years; having lived with his father till his marriage to the pursuer in 1849. During all these eleven years, he never seems to have intimated any claim against his father for his mother's share of the goods in communion. In November 1855, about a month before he died, he executed a last will and testament, appointing his father his executor. He left £100 of bank stock to each of his two existing children by the pursuer (another was posthumously born): and on the narrative, *inter alia*, "that my said children will naturally inherit at least a portion of the property of their grandfather," he appointed the pursuer, his wife, his residuary legatee to his "property of every description."

It is plain, almost to demonstration, that John Thomas Bywater had personally no intention of prosecuting any claim against his father for his mother's share of the goods in communion. If such an intention had been in his mind, he would presumably not have appointed his father his executor; nor have left his children to the spontaneous good will of the grandfather; of whom, in that view, he was creditor to the extent of a good many hundred pounds. He cannot reasonably be supposed to have intended to convey to his wife, for her own behoof, this alleged claim. Though formally the bequest of residue carried to her all his moveable estate, any claim against his father for his mother's share of goods in communion is so unlikely to have been intentionably comprehended in the bequest, that, even at this early stage, it might have been made a question whether the pursuer could have sustained any action against the father, as assignee to such a claim.

But matters do not stop here. An inventory of the estate of John Thomas Bywater is given up, containing, as may be supposed, no allusion to the claim now insisted in. Thomas Bywater proceeds to act as his son's executor, and has considerable intromissions. In regard to these, he comes in 1857 to a settlement with the pursuer as the residuary legatee. It seems never to have been dreamed on either hand, that this claim against him for his wife's share of the goods in communion, should be stated as an article to his debit. The accounts are made up without any notice of such an item. Mr Bywater brings out a balance in his favour of £628, 7s. 11d. due him by the widow. If there was a debt due by him of which to constitute a set-off against this demand, now was the time to mention and insist in it. But in place of this, what occurred was, that the widow agreed, at Mr Bywater's instigation, to pay the demand by making over certain bank stocks to her two children, Catherine and John Thomas, respectively. The price of these stocks exceeded the amount of the balance due to Mr Bywater by £29, 4s., and on 3d October 1857 this sum was paid to the widow, on a receipt bearing:—"Received from Mr Thomas

Bywater the above balance of £29, 4s. sterling, which is in full of all claim I have against him in reference to the estate of my late husband, and of his intromissions therewith."

These proceedings bespeak a full persuasion, on both sides, that no claim such as now insisted in remained at the pursuer's instance against her husband's father, Thomas Bywater. If such a claim had been thought possible, Mr Bywater would have presumably retained the balance in his hands to meet it; and would not have been so hasty to settle the amount on his two grandchildren. On the other hand, the pursuer would scarcely have been so willing to divest herself of her bank stocks in payment of Mr Bywater's balance, but would have met the balance with a counter claim. The mode in which matters were adjusted is conclusive to show that no such claim as is now advanced was considered to be even a possible claim at the pursuer's instance against old Mr Bywater.

At this date of October 1857 the widow had made arrangements for entering into a second marriage with her present husband, Mr Charles Robson, solicitor in Kelso. In the view of this marriage, a correspondence took place between old Mr Bywater and the pursuer, and between him and the intended husband Mr Robson, and others, bearing direct reference to the pecuniary arrangements connected with the impending event. Throughout all this correspondence not a word occurs suggesting any claim against Mr Bywater of the nature of that now set forward.

It appears that a marriage-contract was executed between the widow and Mr Robson, but it has not been produced; and, in the absence of any other information, it must be assumed that his wife's personal property passed to Mr Robson *jure mariti.* Mr Robson was therefore, from the time of the marriage, the creditor in the claim presently insisted in, if any such claim subsisted. But not a whisper of such a claim was breathed to Mr Bywater, either in the communications preceding the marriage or in those which naturally followed. And so there passed five additional years, or down to 1862, when there occurred the transactions on which the Lord Ordinary more especially relies.

In that year, 1862, old Mr Bywater himself entered into a second marriage. In the prospect of the occurrence he had a correspondence with the pursuer Mr Robson, whom he employed professionally to prepare the deeds connected with the event. In this correspondence he explained to Mr Robson his intention of settling £3000 of stock on his grandchildren, the children of the pursuer, and £2000 on his intended wife, and of keeping the remainder of his fortune, estimated at about £767, in his own disposal. Now then, if not before, was surely the time for Mr Robson to warn Mr Bywater of his having to meet a claim lying against him, to the extent, it is now computed, of about £780. But, so far from such warning being given, the correspondence is of an import exactly the opposite. Mr Robson assures Mr Bywater that he will have all his fortune above this £5000 in his free disposal. "Your estate," he says in one letter, "so far as it exceeds £5000, can be disposed of by will, which can either be made now or hereafter." In another letter he says—"According to my estimate, as noted below, the surplus of your means beyond £5000 amounts to £767." On these assurances, and in the belief which they created, that no claim whatever lay against this surplus of his estate, Mr Bywater executes, through Mr Robson's professional instrumentality, two several deeds—the one an assignation of upwards of £3000 of stock in favour of himself in liferent and his grandchildren in fee, the other a contract of marriage with his second wife, settling on her £2000 in the event of his decease. Three years afterwards—viz., on 11th May 1865—Mr Bywater makes a last will and testament, appointing the defenders in the present process his executors, leaving certain legacies, and bestowing the residue at his disposal on his daughter by this second marriage; and, failing her by predecease, equally on her mother and his grandchildren then in life.

Mr Bywater died on 10th February 1866. By that event all his previous arrangements became fixed and unalterable, even supposing that he had any power to change them. His grandchildren took irrevocably the large sums he had settled on them, in the unquestionable belief that he was liable for no legal claims at the instance of their mother and her husband. All his other arrangements in regard to his second wife and their child remained on the same footing. It was now beyond possibility to adapt these arrangements to any altered state of things.

In these circumstances the present action was raised on 24th May 1867, at the instance of Mr and Mrs Robson, concluding for an accounting as to the goods in communion between old Mr Bywater and his first wife, and payment to them of his said wife's share of these, with interest since 6th December 1844, or for more than twenty-five years.

I am clearly of opinion with the Lord Ordinary that the pursuers are now debarred from insisting in this claim. The case is not one of mere silence for more than twenty years, however strongly even this might speak against the enforcement of such a demand. The case is one involving repeated transactions between those in right of the claim and Mr Bywater, all proceeding on the assumption of no such claim being kept up, and several of which Mr Bywater clearly would not have gone into had such a claim been intimated. Now that these transactions are irreversible, and are not indeed proposed to be undone, I think it impossible to allow the pursuers to make a claim which is directly at variance with the footing on which the transactions proceeded. The pursuers cannot be allowed to retain the benefits acquired by them, and to repudiate the condition of their acquisition. They cannot be permitted to pursue a claim the abandonment or non-enforcement of which was the clearly implied ground on which Mr Bywater transacted. I think the law in such circumstances infers a discharge or waiver of the claim, as completely as if such discharge or waiver were expressly set forth as an essential part of the transaction. It would, in my apprehension, be against all the principles of justice and fair dealing to come to any other conclusion.

It was strongly urged on us that all parties concerned were in ignorance of the existence of such a claim as that now insisted in, and that therefore it cannot be held that, knowingly and intentionally, the claim was given up. I cannot assume such ignorance to have existed, particularly on the part of Mr Robson, a legal practitioner, who ought to have known, if he did not, that the death of old Mrs Bywater, without a marriage-contract, had the effect, in 1844, of giving to her children a legal right to one-third of the goods in communion be-

tween her and her husband. If this was not antecedently known to Mr Robson, I think he was bound to inform himself regarding it before allowing Mr Bywater, towards whom he then was holding a professional relation, to complete the transaction. But I put aside all inquiry into this matter, on the ground that, in the present question, such alleged ignorance is, in my apprehension, irrelevant. Where one of two parties so situated engages another in a transaction for the benefit of himself, or of others in whom he is interested, into which other transaction that other would certainly not have gone if a particular claim had been set forward, and the transaction cannot be, or is not proposed to be undone, it will not, as I think, warrant a prosecution of the claim to say that, at the moment, the parties were not conscious of its existence. If the fair deduction from the circumstances be, that if the claim had been present to their minds as a claim still enforceable, the transaction would not have been gone into, it is against equity to hold by the transaction and still to enforce the claim. The transaction cannot be maintained in validity, and yet a claim made, the disclosure of which at the time would beyond doubt have prevented the transaction being engaged in. Undoubtedly it must be made very clear that such would have been the result of disclosure. But in the present case I consider it to be beyond the shadow of a doubt that if the claim now made had been stated to Mr Bywater, as a claim still held over him, he would not have made the arrangements he did, whatever others he might have framed. It therefore appears to me that the pursuers are barred from prosecuting the present claim, in whatever precise condition of knowledge or ignorance all concerned stood at the time.

I am of opinion that the Lord Ordinary has rightly assoilzied the defenders.

Lord President—I have nothing to add.

Agent for Reclaimer—Thomas Landale, S.S.C.
Agent for Respondent—L. M. Macara, W.S.

Thursday, March 17.

BAILLIE AND OTHERS *v.* DURHAM.

Heir and Executor—Vesting—Lease—Lordships—Rent—Sale. Under contract the minerals in an estate were let to tenants for a fixed rent payable at Whitsunday. The proprietor, however, had the option of taking, instead, the lordships on the minerals "raised, sold and carried off, or consumed on the ground," as estimated at Martinmas for the year preceding, deducting the rent paid at the previous Whitsunday. He died on 31st May 1869. *Held*—(1) that the contract was one of lease and not of sale; (2) that the executors were entitled to half of the year's lordships, less the rent paid at Whitsunday 1869; and (3) that lordship was not exigible on minerals raised to the surface and lying unsold at 31st May 1869.

The late Thomas Durham Weir, proprietor of the lands of Boghead and others, by tack dated 22d July and 25th August 1851, let to Messrs Russel & Son, coalmasters, Blackbraes, the minerals in the lands for thirty years from Martinmas 1849, which was declared to be the commencement of the lease and entry of the lessees. "The lessees were by the tack taken bound to pay a fixed rent of £100 annually for the coal and other minerals let (with the exception of the first year of the lease, during which the royalties only, and no fixed rent, were to be charged); or, in the option of the proprietor, certain royalties specified in the tack. Then followed a declaration as to the term of payment, in the following terms—viz., 'Declaring hereby that the foresaid fixed rent or optional lordships shall be paid as follows, *videlicet:* at the term of Martinmas 1850 the lordship on the several minerals raised, sold, and carried off or consumed on the ground (except colliers' coal and others aforesaid) in the preceding year shall be reckoned up at the several rates hereinbefore provided for, and the amount thereof shall then be paid to the proprietor, and at the term of Whitsunday 1851, and at every subsequent term of Whitsunday, during the currency of this lease, the fixed rent for the half-year preceding shall be paid, and at Martinmas thereafter, and also at each subsequent term of Martinmas during the currency of the lease, the lordships payable in respect of the whole minerals raised, sold, and carried off or consumed on the ground as aforesaid, except as before mentioned, shall be reckoned up when the proprietor shall declare whether he is to take the other half-year's fixed rent due at each respective term of Martinmas, or the lordship for the byegone year, and if he shall prefer the lordship for the year past, the same shall then be paid by the lessees under deduction of the half-year's fixed rent, paid to account at the preceding term of Whitsunday, with a fifth part more of each term's payment of the said respective rents or royalties of liquidate penalty in case of failure, and the legal interest of each term's payment from the time the same shall become due during the not-payment thereof, and so forth half-yearly and termly thereafter, during the foresaid period of thirty years, excepting the first year, as aforesaid.'"

By minute of agreement between the parties, dated 8th February 1860, certain alterations were made on the amount of the fixed rent and lordships; and in regard to the term and mode of payment it was stipulated as follows:—"And further, that the said second party, the tenants, shall, at the term of Whitsunday next, 15th May 1860, and at each subsequent term of Whitsunday during the currency of said tack or lease, pay to the said first party, the landlord, or his successors, the sum of £350, being the increased optional fixed money-rent as aforesaid; declaring that at Martinmas next, and at the term of Martinmas of each year thereafter during the currency of said tack or lease, the lordship payable on the several minerals for the twelve months preceding, shall be reckoned up; and the amount thereof, so far as the same shall be found to exceed the said sum of £350, shall thereupon be paid by the tenants to the landlord at said term of Martinmas in each year yet to run of said lease, as in full of each year's rent and lordships."

At Whitsunday 1869 the fixed rent of £350 was paid to Mr Weir by the tenants. He died on 31st May following, and questions arose in regard to the rights of the executor to lordships on minerals sold and carried off or consumed during the year ending at Martinmas 1869, and on minerals raised to the surface and lying unsold at 31st May 1869.