view of protecting himself from such calls that Mr Steuart raised the present declarator.

LORD NEAVES (as Ordinary for Lord Barcaple) dismissed the action, as not involving any conclusions which could be the proper subject of a declarator.

Mr Steuart reclaimed.

CAMPBELL SMITH for him.

MARSHALL in answer.

At advising—

LORD PRESIDENT—An action of declarator is one, peculiar indeed to our law, but which has been universally admired. It would, however, become a source of danger if it were not confined to its proper office. Its object is to declare by judgment what are the rights of parties when they come into competition. It never can be used to declare a bare fact. This disposes of the first three conclusions. They are mere announcements of facts—"That a certain ditch is not a march fence," &c. The fourth conclusion is very peculiar, and, in my opinion, liable to many objections. If it could be sustained at all, it must be based on an averment that there are march ditches which require to be cleaned out; but if we look at the record the only allegation is that there are no march ditches. It has been suggested that the conclusion might be taken as alternative, "in case the ditches before mentioned are found to be march ditches." Even then it is liable to objection. It is not confined to the ditches mentioned before, but seeks to declare a proposition of law applicable to any march ditch between the parties. The proposition is said to mean that the defender is not entitled to clean out a march ditch at the pursuer's expense without his consent or judicial authority. But as it stands, the proposition is one which no lawyer could affirm. The fifth conclusion is liable to the same objection as the first three. I am of opinion that the action should be dismissed.

The other judges concurred, LORD KINLOCH observing that he was not prepared to adopt the exact words of the Lord Ordinary's judgment, as he was of opinion that much was involved which might be the subject of a declaratory action if properly laid.

The Court accordingly dismissed the action as not competently raising any question which could be the subject of a declaratory action.

Agents for Pursuer—Maitland & Lyon, W.S.

Agents for Defender—Mackenzie, Innes, & Logan, W.S.

Friday, February 3.

DURHAM *v.* HOOD.

Interdict—Property—Minerals—Explosions—Water. Interdict granted, on the application of an adjoining proprietor, against the lessee of a coal-field on a higher level discharging blasts of gunpowder in a pit within his own bounds, but within 10 yards of the march, or performing any other operations which would have the effect of disturbing materials or opening cracks in the complainer's coal-field, and so increase the flow of water thereon.

This was an application for interdict by Mrs Durham, proprietrix of the Polton Coal-field, against Mr Archibald Hood, tenant of the Dalhousie Coal-field. The Dalhousie coal-field marches with that of Polton, and is on a higher level, and consequently when there is water in the Dalhousie coal-field it passes to the Polton workings, if there is any passage by which it can escape. Some years ago a coal tenant in Polton had made an encroachment on Dalhousie by working the jewel coal (the lowest seam at present worked) for a short distance across the boundary line. This encroachment is now a waste, more or less filled with rubbish. In 1870 Mr Hood, who had previously sunk two other pits in the neighbourhood, sunk a pit (referred to as No. 3) within 10 yards of the Polton march, and immediately over the encroachment—one of his objects admittedly being to let away the Dalhousie water through the encroachment into the Polton field. Reaching water in this pit, he put down a 10-inch bore to the encroachment. The water, however, did not go away, or went very slowly. Thereupon, on the 5th and 6th May, he caused two heavy blasts to be fired in the encroachment waste, consisting of 12lb. canisters of gunpowder. The effect of the blasts was that the water immediately began to subside and escape into the Polton field, in consequence, as Mrs Durham alleged, of the dislocation of the strata and reopening of silted up cracks within the Polton march produced by the explosion. This flow of water greatly increased the expense of the Polton workings. Mrs Durham in consequence presented a note of suspension and interdict, in which she prayed the Court to interdict Mr Hood from discharging blasts in or near the march, and from performing any operation whereby the strata between the respective coal-fields should be disturbed or cracks opened up.

Interim interdict having been granted, and parties being allowed a proof, a considerable body of evidence was led on both sides, particularly of skilled witnesses as to the probable effect of the blasts. Direct inspection was not possible, as the jewel waste was not accessible.

The Lord Ordinary pronounced the following interlocutor:—"Interdicts the respondent from firing off blasts of gunpowder or other explosive material in or near the pit or shaft No. 3, which has been sunk by the respondent within 10 yards or thereby of the march between Polton and Dalhousie coal-fields, and from performing any other operations whereby the strata or materials in the suspender's coal-field of Polton, within the Polton march, may be dislocated or disturbed, or cracks or fissures therein may be opened up, or the silting removed therefrom; and declares the above interdict perpetual.

"*Note.*—The questions raised by the present note of suspension and interdict are attended with nicety, and it is not without some hesitation that the Lord Ordinary has come to think that the suspender is entitled to the interdict now granted.

"In granting the interdict, the Lord Ordinary does not intend to interfere with the right of the respondent to work the whole minerals in the Dalhousie coal-field. In the words of the Lord Justice-Clerk in *Baird* v. *The Monkland Iron and Steel Company*, 18th July 1862, 24 D. 1425—'it is perfectly clear, as a general proposition in law, that a mineral proprietor or tenant is entitled to work out every ounce of the mineral in his own estate without the least reference to the interests of his neighbour.' That is perfectly true, and if the party who lies to the dip is afraid of being drowned or incommoded by the water of the mineral owner or tenant who lies to the rise, it is his business to have a barrier of his own minerals,

sacrificing that portion of his own property for the purpose of keeping out the water. Reference may also be made to *Bald* v. *Alloa Coal Company*, 30th May 1854, 16 D. 870; *Baird* v. *Williamson*, 33 Law Journal, C. Pleas, 101; *Acton* v. *Blundell*, 12 Meeson and Welsby, 324; *Chasemore* v. *Richards*, 1859, 7 House of Lords Cases, 349, 29 Law Journal, Exchr. 81; *Smith* v. *Kenrick*, 18 Law Journal, C. Pleas, 172; Broom's Comms., pp. 79, 82, 85.

"But while the respondent has undoubtedly this right of working out his own minerals to the very edge of his march—even although the effect of this may be to send water into the Polton coal-field—the Lord Ordinary thinks it is equally clear that the respondent must not touch or interfere with the strata, material, or wastes in the Polton coal-field, so as thereby to facilitate the escape of water from the Dalhousie workings. For example, if the ordinary barrier had been left by the Polton coal-owner along the rise of his own field, in order to keep out the water from Dalhousie, it is manifest that the Dalhousie tenant could not destroy that barrier either by directly piercing it, or by dislocating or cracking it by blasting or otherwise, so as to let the water pass through it. In short, while each mineral owner or tenant may work out within his own limits to the fullest extent, he must not interfere, directly or indirectly, with the neighbouring properties; and, above all, he must not, with a view to his own advantage, destroy the barriers which his neighbour has left for the protection of the field to the dip."

After narrating the facts of the case, his Lordship proceeded:—"The point in controversy between the parties is, Were the blasts which the respondent fired on the 5th and 6th May 1870 lawful or not? The suspender says that these blasts disturbed, shook, or dislocated the strata or material within the Polton march, or, at all events, opened seams or crevices in Polton ground, and thus let the water flow into Polton. On the other hand, the respondent maintains that the blasts merely cleared out the waste in the encroachment within the Dalhousie march, and that this was quite legitimate. Now, there is undoubtedly conflicting evidence as to the effects which the blasts would probably produce. Necessarily, it is a matter of skilled opinion, to be judged of in the circumstances, for there is no access to the old waste to see what the blasts really did. The only fact proved is, that immediately after the blasts a large flow of water took place into Polton coal-field. It is matter of conjecture and skilled opinion how this result was brought about. On the whole, and without weighing too nicely the reasoning of the skilled witnesses, the Lord Ordinary has come to be of opinion that the blasts were not a fair and legitimate exercise of the respondent's rights, and, accordingly, he has interdicted their repetition. The following are the leading considerations which have induced him to do so:—(1) Blasts of the size in question (12lb canisters) are very unusual in ordinary mining operations. Blasts by ¼lb or ¾lb charges are not uncommon, but it is in very exceptional circumstances that anything like a 12lb charge is ever used. (2) The blasts were fired very near the Polton march—that is, at the bottom of the pit sunk within 10 yards of the march. Such blasts fired so near the Polton ground may easily be supposed to have some effect within the Polton march. The evidence of opinion is conflicting; but, even if the matter were held to be doubtful, this would be enough to entitle the suspender to complain. Even Mr M'Kenzie, one of the respondent's witnesses, admits that firing such blasts so near the march was 'unneighbourly.' (3) Although the blasts might not affect solid strata, they might easily open crevices in strata already dislocated, which crevices would otherwise have remained silted up, and, at all events, the blasts would shake, loose, or open up the rubbish or material which was in the jewel waste. This last was the very object avowed by the respondent; and, although he maintains that the rubbish thus disturbed and shaken would be all within the encroachment, and therefore within the Dalhousie boundary, the Lord Ordinary cannot take this to be so certain as to allow the blasts to be repeated. The skilled witnesses differ as to how far the effects of the blasts would go, and, operating in loose material, the Lord Ordinary cannot think it unlikely that they would produce effects within the Polton march. It is admitted, and at all events is clear, that the respondent had no right to touch or to shake either strata, or rubbish, or silting outside his own march. (Lastly) The blasts are not necessary, in any view, for the respondent's mining operations. They were not resorted to either to sink the shaft or to take out coal. The respondent can sink his shaft quite well without such blasting, and has actually done so, and of course there is no coal to blast in the waste of the encroachment where the blasts were fired. The respondent argued that he could produce the same effect by boring without blasting, and there is certainly some evidence that a second 10-inch bore without blasts sent water to Polton, though it is difficult to say that this might not have been assisted by the previous blasts. But the true answer is, that if blasting is unnecessary, why resort to it? It is undoubtedly attended with risk, and may interfere with the strata, crevices, and packing in Polton. If boring alone will answer the respondent's ends, there is no interdict against his boring to any extent in his own land. The Lord Ordinary has somewhat varied the terms of the interdict, so as to make it clear that what is interdicted is blasting, or operations which may affect, shake, or disturb strata, material, or crevices within the Polton march."

Mr Hood reclaimed.

FRASER, SHAND, and STRACHAN, for him—It is not proved that the effect of the explosion extended beyond the Dalhousie march. The flow of water into Polton would equally have followed in consequence of the sinking of pit No. 3, and the boring, which were operations that could not be complained of.

MILLAR, Q.C., and G. S. DUNDAS, in answer—What Mr Hood did was a novel and extraordinary operation, close to the march, and not in the fair course of working. It is proved that Mrs Durham has in fact suffered injury, and it therefore lies upon Mr Hood to prove that his operations were not the cause of the injury.

At advising—

The LORD PRESIDENT—The general principles of law in regard to the subject of this case are well settled, but there is some difficulty in applying them to the circumstances. On the one hand, an owner of a mine is entitled to work out his minerals without regard to the interests of his neighbour, so long as he resorts to no extraordinary operations. If the effect is to throw water on the mineral field of the lower heritor, it is a natural servitude to which the latter must submit, and if

he desires to protect himself he must leave a sufficient barrier of his own minerals. All this is clear enough. The peculiarity of the present case lies in the fact that some years beforea previous tenant in Polton committed an encroachment on the Dalhousie coal-field by working the jewel coal beyond the line of march. This wrong, which was probably unintentional, has turned out most disastrous to the party representing the wrong-doer. After the encroachment, it became impossible in the jewel seam to maintain any efficient barrier to prevent the flow of water from Dalhousie to Polton. This, however, does not seem to have caused any great mischief to Polton till the proceedings of Mr Hood now complained of. The question before us is whether these proceedings in his own ground are of such a nature that Mrs Durham is entitled to interdict them. They were undoubtedly very peculiar, and it is not disguised that they were resorted to, at least partially, with the view of getting rid of the water. Mr Hood, after sinking two other pits, sinks a third pit within 10 yards of the Polton march, right over the jewel waste. This is not said to be illegal in itself, and if he had confined himself to sinking the pit, or else sinking it so far and boring the rest of the way, I am not prepared to hold that any legal wrong would have been committed. But he did not find it answer his purpose. He says that if he had gone on boring, his object would have been equally well though more slowly attained. However he resorts to a new expedient, viz,—firing heavy shots in the waste within his own bounds. Mrs Durham says that this was a very dangerous proceeding as regards her interest, calculated to dislocate the strata in her field, and to allow the water to flow more freely, and that in point of fact a rush of water on her workings followed the blasts. I do not think we have any very satisfactory evidence of the connection between the explosions and the flow of water. No doubt the flow of water followed on Mr Hood's operations, and especially on the blasts. But if it can be shown that the effect of blasting was merely to clear out the Dalhousie waste without affecting the Polton strata, Mrs Durham would have no remedy in law. On the one hand, it is not proved that the blasts affected either the solid strata or the packed rubbish on the Polton side. On the other hand, it is not proved that the effects of blasts were confined to the Dalhousie side. The explosions were of an extraordinary character, used very near the march, not for the direct purpose of working and winning the coals, but for the purpose of facilitating the flow of water from one mine to the other. Mrs Durham says that if a party resorts to such extraordinary operations near the march, and they are followed in point of fact by injury to her, she is not obliged to connect the operations and injury as cause and effect, but that it lies on the respondent to prove that the course he took was not the cause of the injury. I think this argument is sound and equitable. It is impossible to prove as matter of fact that the blasts did disturb the strata in Polton. The waste is not accessible. On the other hand, the extent of the waste on the Dalhousie side is so small that a disturbance there would not probably be confined to it. The formal question that arises is, whether such operations as explosions of large quantities of gunpowder were justifiable on the part of Mr Hood? I think not; Mrs Durham had at least reasonable grounds of apprehension, and if she had, that justified interim interdict; and before such interdict can be recalled, the respondent must justify his proceedings and show that they are not productive of injurious consequences. He has failed to do this, and I am of opinion that the interlocutor of the Lord Ordinary should be adhered to.

Lord Deas and Lord Ardmillan concurred.

Lord Kinloch—I agree with the Lord Ordinary and your Lordships. There cannot be any doubt of the general principle, that a lower ground proprietor must receive the water flowing from the higher ground, whether on the surface or beneath it. But the obligation holds only where the water flows down in the natural course of things, and where the upper proprietor is doing nothing more than exercising legitimate acts of ownership. Wherever he makes use of artificial operations, not called for in the ordinary exercise of his rights of property, for the express purpose of sending down the water on the lower grounds, he will be liable to be controlled by the Court. More especially will this be the case if the effect of the operations is to create physical dismemberment to the property of his neighbour, as by the dislocation of the *strata* of an adjoining coal-field.

In the present case, I think it is the fair conclusion from the evidence that the operation of the respondent Mr Hood, in blasting with large charges of gunpowder within little more than ten yards from the march, was not performed in the due and ordinary exercise of his rights as tenant of the Dalhousie Coal-field. It was clearly not necessary to enable him to sink his shaft, or work his coal; nor was it in the ordinary course of working for these purposes. I think it clearly made out that his primary, if not exclusive, object was, by means of a violent artificial operation, to send down the water into the Polton Coal-field. Even with this for his intention, the case might have presented some difficulty had the operation clearly had no effect except on the substance or rubbish of his own coal-field. But I think it the fair result of the evidence, including that given by the experts, read, as it is both the right and duty of the Court to read it, in the light of practical common sense, that the operation was calculated more or less to dislocate the *strata*, and disturb the rubbish in the Polton Coal-field; to open cracks and crevices; and to shake out the silt with which previously they had been filled up. The difficulty in the proof is to discover conclusive evidence that this has actually been done. But however much it might be necessary in an action of damages to bring conclusive proof of the actual fact, it is sufficient, in a question of interdict, to show that such is a natural and probable effect of the operation, and that the proceeding is such as creates a reasonable apprehension of this result. I am of opinion that this has been clearly established; and therefore I think the Lord Ordinary was right in granting interdict in the terms in which his judgment is expressed.

The Court adhered.

Agent for Mr Hood—T. F. Weir, S.S.C.

Agents for Mrs Durham—J. & F. Anderson, W.S.