expressed a unanimous opinion upon the subject.

Interlocutors appealed from affirmed, and appeal dismissed, with costs.

Wednesday, November 22.

JAMIESON (BELHAVEN'S TRUSTEE) *v.* HARVIE.

Property—Superior and Vassal—Charter—Coal—Reserved Right.

By charter of *novodamus*, in 1708, the superior reserved the coal in certain lands, and in all the titles following upon that charter the coal was in like manner reserved. The coal was not worked till 1875, when the vassal attempted to do so, and the superior brought a note of suspension and interdict against him.—*Held* (*aff.* judgment of Court of Session) that the vassal could not plead in defence titles prior to 1708, as he was not able to connect himself with these titles.

This was an appeal in a note of suspension for William Harvie, Esq., of Brownlee, Lanarkshire, against George Auldjo Jamieson, C.A., Edinburgh (sole trust disponee of Lord Belhaven), and Archibald Russell, coalmaster in Glasgow. The note of suspension prayed the Court to interdict the respondents "from working, excavating, bringing to the surface and taking away, or in any way disposing of or interfering with the coal or coal-seams within the lands described in the titles of the said Lord Belhaven as 'the three-score and five acres of the five-pound land of Brownlee, lying on the south-west side thereof, and upon the east and north-east side of Garion-Gillburn, and next adjacent to the deceased Robert Hamilton's lands of Garion.'"

The suspender was superior of the sixty-five acres in question, of which the deceased Lord Belhaven was proprietor, and the ground of suspension was that the coal in the lands were reserved to the superior. Lord Belhaven's predecessors, the Hamiltons of Wishaw, had been proprietors of the sixty-five acres since 1708, in which year they acquired them by charter of *novodamus* from Daniel Carmichael of Mauldslie, therein described as "immediate lawful superior of the lands," by which he disponed—'All and Haill the said three score and five acres of the said five-pund Land of Brownlie, lying on the south-west side thereof, and upon the east and north-east side of Garine Gillburn, and next adjacent to the said William his lands of Gairen; together also with the said lands of Coblehaugh and Peelhouse, and all oyer pairts, pendicles, and pertinents of ye said five-pund land of Brownlie, lying on the west side of Gairen Gillburn; together also with the woods, fishings, and haill pertinents of the said lands hereby disponed: excepting and reserving to me, the said Mr Daniel Carmichael, and my heirs furth and from this present charter, the whole coals, coall-heughs of the said sixty-five acres of land above written, hereby disponed, with liberty and privilege to me and my foresaids to set down shanks, put in heads, make levels, and roads for coal-heughs in any part of the said sixty-five acres of land,—the said William Hamilton and his airs and successors being always satisfied for what damnage shall be sustained thereby in ye corns and grass of the said lands, all lying within the barony of Mauldslie and Brownlie, parochin of Carlouck and sheriffdom of Lanark."

The charter of *novodamus* further set forth that Hamilton of Wishaw had, by a disposition and procuratory of resignation *ad remanentiam*, disponed to Mr Daniel Carmichael, his immediate lawful superior of the lands and others mentioned in the deed, "all and haill the five-pound land of Brownlee, of old extent, with its parts and pertinents, reserving to him, the said William Hamilton, furth of the said disposition, the number of three score and five acres of the same lands, lying upon the south-west side thereof, and upon the east and north-east side of Garion-gill Burn; and also reserving to the said William Hamilton and his foresaids the lands of Coblehaugh and Peilhouse," and certain other pertinents. The disposition and procuratory of resignation was not at the date of this case extant, but the respondents founded upon the narrative in the charter of *novodamus* as showing that the sixty-five acres in question were not included in the resignation.

Of the same date with the said charter of *novodamus*, David Carmichael granted in favour of the said William Hamilton a charter of apprising and *novodamus*, whereby he disponed "to his well-beloved William Hamilton of Wishaw, his heirs and assignees whomsoever, All and haill the £5 land of Brownlee of old extent, together with all and sundry manor-places, houses, biggings, yards, orchards, woods, fishings, coals, coal-heughs, mosses, muirs, meadows, and haill other parts, pendicles, and pertinents of the same, lying and bounded in manner mentioned in and conform to the original rights and infeftments of the said lands; excepting always the feu-farm rights granted to Gavin and John Davidsons, portioners of Brownlee, and their authors, of a proportion of the said lands, and his right to the coals of the said parts, all lying within the barony of Mauldslie by annexation, parish of Carluke and sheriffdom of Lanark. Which lands and others above written, with their pertinents, were by said charter declared to have pertained heritably of before to the deceased Claud Hamilton of Garion, held by him, his predecessors and authors, immediately of him the said Daniel Carmichael, his predecessors and authors, and were duly and lawfully apprised, conform to the several decreets of apprising and decreet of adjudication (to all of which the said William Hamilton had acquired right), therein mentioned, obtained at the instance of Robert Whitehead of Parck, and others against the said deceased Claud Hamilton of Garion, as lawfully charged to enter heir in special to the deceased Claud Hamilton of Garion, his father, in the lands and others above specified."

In defence, Jamieson pleaded that he was entitled to go back beyond 1708, and found upon the titles in favour of the Hamiltons of Garion, who were the predecessors of the Hamiltons of Wishaw. Down to the year 1622 the whole five-pound land of Brownlee belonged both in property and superiority to Livingstone of Jerviswoode, who in that year feued out the whole of the land as follows:—

1. He granted a feu-charter on September 14, 1622, in favour of Robert Hamilton, portioner in Brownlee, of the *dominium utile* of the said lands to the extent of—
   (1) £2, 18s. 4d. of the £5 land of Brownlee, ... £2 18 4
   (2) 12s. 6d. of the said £5 land, . 0 12 6
2. He, on September 14, 1622, also granted a feu-charter in favour of John Davidson senior, portioner of Brownlee, of the 14s. 7d. lands of old extent in Brownlee (now known by the name of Townhead), . . . 0 14 7
3. Of the same date he granted another feu-charter in favour of John Davidson, in Brownlee, of another 14s. 7d. lands (now known as Townfoot), . 0 14 7

£5 0 0

After 1622 the transmission of the lands could not be clearly traced, but before the end of the seventeenth century the greater portion of the lands of Brownlee, including the sixty-five acres in question, had passed into the hands of the Hamiltons of Garion. Hamilton of Garion fell into debt, and his whole rights were apprised by various creditors. The right to the apprisings came to centre in the person of Hamilton of Wishaw, Lord Belhaven's ancestor, in whose favour the deeds in 1708, already narrated, were granted. The coal in the said sixty-five acres was not worked until 1875, when Jamieson commenced to do so.

The ground upon which the appellant claimed right to the coal in the sixty-five acres was that the charter of *novodamus* in 1708 was a mere charter by progress, and should be regarded not as a new grant of the sixty-five acres, but as a simple renewal of a previously existing right, including coal which belonged to William Hamilton of Wishaw.

The First Division, on 17th March 1876, found that Jamieson had no right or title to the coals lying below the said sixty-five acres, and accordingly granted the interdict craved.

Jamieson appealed.

At delivering judgment—

Lord Chancellor—My Lords, this case has been very fully and very ably laid before your Lordships, and if there appeared to be any prospect that by further consideration more light would be thrown upon it, your Lordships would gladly have heard the remaining arguments in the case; but I think none of your Lordships have any doubt that the unanimous decision of the Court of Session in Scotland, to which must be added the concurrence of the Lord Ordinary, was the right decision, and the only decision which could have been arrived at in the case. My Lords, that the case is free from difficulty could not possibly be asserted; at the same time, there are in it certain great landmarks by which I think your Lordships will do well to be guided, and as regards the importance and the validity of which no argument has been advanced at your Lordships' bar which could for a moment bring them into doubt.

My Lords, the appellant in the present case represents for all purposes the Belhaven property, and he has been interdicted by an interlocutor of the Court of Session from exercising a certain mining right which he claimed, namely, the right of getting coal under sixty-five acres of land in the neighbourhood of Wishaw, in the county of Lanark. The person who has obtained the interdict is the superior of the lands in question, and undoubtedly the superior of these lands has the right to prevent the working of any coal under them unless he has parted with the coal under the lands as part of the *dominium utile* which the vassal has received. Your Lordships have therefore, on the one hand the vassal, Lord Belhaven, claiming to have as part of the *dominium utile* of the land a right to the coal; and you have, on the other hand, the superior asserting that that right is still possessed by him.

Now, your Lordships have at the outset this most remarkable fact, that for a period now of one hundred and seventy years, during which the coal has not been worked by any person, the titles to the property have been in progress—titles have been passing between the superior on the one side and the vassal upon the other—and throughout the whole progress of those titles, from the year 1708 down to the present time, there has invariably upon every occasion when the title was made the subject of conveyancing been a clear and distinct recognition of the right to the coals as existing in the superior, and not as belonging to the vassal. My Lords, to that statement there is no exception whatever, and therefore although, I repeat, the coal has not been actually worked by any person, you have the vassal holding the land—you have the superior holding the superiority—for a period of 170 years with titles which assert that the coal belongs to the superior and does not belong to the vassal.

My Lords, it is a well-established principle of Scotch law, recognised in the cases to which reference has been made by the learned counsel at the bar, that if in a progress of titles you have got on the part, we will say, of the superior, a claim to a certain reservation or to a certain right, still if the vassal, when that reservation or right comes into controversy, can shew that at the commencement of the title there clearly was no such right given or reserved by the superior, but that the title of the vassal was independent of any reservation or right of the kind, the vassal may, as it were, correct the progress of the titles by the inception of the title, and he may stand upon that which was the original title and put aside or brush away those claims of title which from time to time have been made by the lord, and which the vassal is thus entitled to get rid of. But, my Lords, of course that doctrine of law depends of necessity upon this, that the vassal is able to shew at the inception of the title a certain state of things clearly and distinctly existing—a right on his part clearly and distinctly conferred upon him—which state of things and which right have been disregarded by the progress of titles which have claimed a right of a different kind. The question in the present case, therefore, is this—There having been for 170 years a recognition of the right in the superior to the coal, does the vassal come and shew to your Lordships at the commencement of that period of 170 years, or anterior to that period, a title and right in himself to the coal which has become disregarded in the progress of the title?

My Lords, the circumstances of the title anterior to the year 1708 are these—I put aside altogether what at first appeared to me of some

moment—the deed of 1622, which is printed at page 105 of the appellant's case; that is an instrument of sasine in favour of one Robert Hamilton and his wife, and the peculiarity of it is this—there is no doubt that it relates to the same land, and that it professes to grant to Robert Hamilton and his wife the coal in the land, but then it reserves some right which is not very particularly described—a right of coal under part of the land in one Claude Hamilton of Garion. My Lords, so far as this is an instrument of sasine in favour of Robert Hamilton and his wife, the present appellant cannot shew any relation subsisting between him and that Robert Hamilton. He admits that he does not claim under him, and therefore he cannot have the benefit of that part of the grant. With regard to Claude Hamilton, I shall refer to the connection with him afterwards; but I only dwell upon the nature of the title of Robert Hamilton here for the purpose of saying that I think your Lordships cannot accept the argument which was strongly pressed at your Lordships' bar, that if there be in the case of any particular property a grant in old times by a lord to a vassal of, we will say, the coal under the land, and if there comes at a subsequent period to be a controversy between the lord and some other person wholly unconnected with the original grantee as to whether the coal belongs to the lord or belongs to that other person, that other person can suggest that because there is a proof that at some early time the lord granted out to some person or other the coal under the land, therefore it is to be assumed as against the lord in his controversy with an entirely different person that the coal is not a part of the property of the lord.

My Lords, with regard to Hamilton of Garion, he is no party to the instrument with which this instrument of sasine is connected, and all that can be said of the reservation with regard to him is, that it is, as it were, a protection in his favour against the author of the grant connected with this instrument of sasine, in order that he may not be supposed to have granted by that instrument anything which belonged to Hamilton of Garion. How does the appellant in any way connect himself with Hamilton of Garion? It appears that in the year 1708 the person who then claimed as Hamilton of Garion had got into difficulties; he became the subject of proceedings by way of apprising, and the land which belonged to him was sold by formal proceedings under the Court, and under those proceedings one William Hamilton of Wishaw, who clearly is now represented by the appellant, became the purchaser of the interest of Hamilton of Garion.

The charter of apprising by which Carmichael, the then superior, confirmed the apprising in favour of Hamilton of Wishaw is dated the 12th February 1708. My Lords, it would not, as it seems to me, be proper to look at that charter alone. There were executed on one and the same day several instruments, and among the rest the charter to which I have referred, the charter of apprising, and a charter of *novodamus*. My Lords, it appears to me that according to the ordinary rule of law, where you have between the same parties several instruments executed upon the same day as part of one and the same transaction, the whole of those instruments must be looked at together, and you must, if possible, put a construction which will reconcile the different parts of those instruments. My Lords, with regard to the charter of apprising, I will say no more than that it professes on the part of Carmichael, the superior, to give, grant, and dispone to Hamilton of Wishaw, "All and haill the five-pound land of Brownlee, of old extent, together with all and sundry manor places, houses, biggings, yards, orchards, woods, fishings, coals, coal-heughs," &c., "excepting always the feu-farm rights granted to Gavin and John Davidsons, portioners of Brownlee, and their authors, of a proportion of the said lands, and my right to the coals of the said parts."

My Lords, a question may arise upon that, whether the exception of "my right to the coals of the said parts," means an exception by the superior of his right to coals over the whole of the Brownlee lands, or only an exception of his right to coals under that part which had been given to the Davidsons. If it means an exception of his right to the whole, it is the more unfavourable to the appellant; but I prefer not to adopt that construction of the deed, as it may be a matter of some doubt, but to read it as though it referred only to a smaller portion of the lands —the portion of the Davidsons'. Then, my Lords, that being the charter of apprising, what your Lordships find in the charter of *novodamus* is this—and I will ask your Lordships' particular attention to the introductory words—"To all and sundry whom it effeirs, to whose knowledge these presents shall come, greeting, me, Mr Daniel Carmichael of Mauldslie, immediate lawful superior of the lands and others underwritten, reserved by William Hamilton of Wishaw in manner after mentioned."

The charter appears there to take a distinction between the lands which were reserved by Hamilton of Wishaw, as after mentioned, and lands not reserved, as if the position of superior and vassal was to continue as to those lands which were reserved, but as to the others not reserved, but surrendered *ad remanentiam*, of course he would become the superior without there being any exception whatever in connection with them. Then it runs—"For as much as the said William Hamilton of Wishaw has disponed to me the five-pound land of Brownlee of old extent," &c., reserving to him, William Hamilton, out of the said disposition the number of three score and five acres of the lands of Brownlee, and also reserving to William Hamilton and his foresaids the lands of Coblehaugh and Peilhouse," &c. Then it proceeds—"And now, therefore, wit ye me upon certain good causes and considerations to have of new given, granted, disponed, and by this present charter perpetually confirmed;" then comes a grant by way of *novodamus* of the five-pound lands of Brownlee and Coblehaugh and Peilhouse—the very same lands which in the recital appear to be said to be reserved out of the resignation. And then there is further a reservation —"Excepting and reserving to me, Carmichael, and my heirs furth and from this present charter, the whole coals, coal-heughs of the said sixty-five acres of land underwritten, hereby disponed, with liberty and privilege to me and my foresaids to set down shanks, put in heads," and so on, making compensation to the Hamiltons for any damage. And then comes a feu-rent different from the former feu-rent of the land.

My Lords, there is no doubt that it is extremely difficult to put a sensible interpretation upon every part of this deed. That there is an error, or, as the Lord President says, a "bungle," in the deed is perfectly apparent; but taking this together with the charter of apprising, I own that it appears very strongly to me to have been the intention of the parties to draw a distinction between those parts of the property which were surrendered by Hamilton of Wishaw never to be granted back, and those which were surrendered for the purpose of being the subject of a new grant. There appears obviously, as the Lord President thought, to have been some transaction on this occasion between the superior and the vassal leading to a change in the feu-duty, and leading to the superior getting back some part of the property which was not to be re-granted; and I think your Lordships may give an intelligible explanation to the whole if you consider that the recital here is a recital which in substance states that whatever was surrendered *ad remanentiam*, there had been excepted out of that surrender these particular portions of the lands—the lands of Brownlee, of Coblehaugh, and Peilhouse, because they were reserved to be the subject of a re-grant. Then everything else would remain in the superior, and there would be a re-grant of these lands, but a re-grant of them in the way in which this charter re-grants them. Then when you find that the charter re-grants them, with the exception of the right to coal under the land, and when you find that for 170 years from that time there is a consecutive series of deeds repeating that exception and asserting that right to coal on the part of the superior, and when you find that anterior to this there is no title that can be produced which asserts clearly and distinctly or carries the right to coal in or to the vassal, it appears to me, my Lords, that it would be a conclusion altogether too violent to arrive at to say that the vassal can now come forward and maintain that merely because there is a want of clearness and distinctness in the mode of conveyance which was adopted in the year 1708 you are to assume or to presume that the right to coal was in the vassal and not in the superior.

My Lords, speaking for myself, I am quite satisfied with the decision which, I repeat, was unanimously arrived at by the learned Judges of the Court of Scotland, and I therefore humbly recommend your Lordships to dismiss the present appeal and to affirm the interlocutor, with costs.

Lord Penzance—My Lords, I will only say that after the elaborate and able argument that we have heard at the bar, the provisions of these deeds of the date of 1708 are still by no means free from obscurity. It is difficult to my mind, upon any theory which has been presented, to account for the language of those deeds; but, on the other hand, I am very well satisfied with the reasoning of the learned Judges in the Court below, that the upshot of the deeds, upon the whole, must be taken to be this, that there was accepted by the appellant's ancestor at that time a grant of the lands in question, subject to the reservation of coal. No doubt, under the authorities to which reference has been made by the learned counsel at the bar, notwithstanding the acceptance of that grant or conveyance, it would be competent to the appellant, if he could clearly establish a prior title which was free from any such reservation, to make good that title at law; but he fails to do so, because he fails to connect himself with the deeds of 1622 and the grant then made to Robert Hamilton, and consequently he fails to connect himself with any previous conveyance which is free from that reservation which is found in the grant which his ancestor accepted in 1708.

I think it is quite unnecessary, my Lords, to go further into the matter. I entirely agree with what has fallen from my noble and learned friend the Lord Chancellor, and I would advise your Lordships that this appeal should be rejected.

Lord O'Hagan—My Lords, in my opinion the contention of the appellant has failed equally in fact and in law. He has failed to give evidence of any circumstances connecting for the purpose of this case the Hamiltons of Wishaw with the Hamiltons of Garion, and warranting Lord Belhaven to pray in aid the deeds of 1605 or 1622, or to rest on any title antecedent to that which arose under the transactions of 1708. Indeed, although such a title appears to have been much relied on in the Court below, the learned counsel scarcely pressed it here at the close of their argument. Then, failing in fact, it seems to me to follow that the appellant fails in law also. No doubt, according to very high authority, if an antecedent title had been substantially made out, the reservations of subsequent instruments could not be allowed to derogate from it, or authorise the superior to re-assume to himself an interest theretofore vested in the vassal. But as the matter stands, there is no contradiction of the kind—there is no title to nullify the reservation; and we have therefore to consider the deeds of 1708,—"bungled" though the conveyancing may have been, according to the opinion of the learned Lord President,—as evidencing an arrangement, possibly in the nature of a compromise between the parties to them, by which the superior gave to the vassal certain rights and reserved to himself other rights, and by which the vassal accepting rights so limited must be taken, in the absence of any proof to the contrary, to have deliberately admitted the validity of the act of reservation. That act has been repeated over and over again on every occasion when the title came to be dealt with, for more than one hundred and seventy years, without objection from any one, with the tacit assent, generation after generation, of those under whom the appellant derives, and whose estate was qualified and cut down throughout by the same continuous claim of those represented by the respondent. It appears to me impossible now to say, whatever may be the "bungling" of the conveyances or the obscurity of portions of the case, that that claim so clearly asserted, and so unequivocally allowed in so many formal documents for such a length of time, can be ignored and set aside in the total absence of any conflicting title. I have no doubt that the appeal should be dismissed.

Lord Blackburn—My Lords, I am of the same opinion. I think it appears clearly enough here that with regard to the title under which the Belhaven family have held from 1708 down to the present time, there has never been (to borrow the

language of the Lord President in the Court below) a Hamilton of Wishaw who held under grant or title of any kind except one which expressly reserves coals. I do not dispute what has been argued at the bar, and supported by some cases which were referred to, that notwithstanding the lapse of that length of time it might be shown that there was a mistake in the charter, and if there was a mistake it might be set right; but I say that when 170 years have run, it requires strong proof and good evidence of a mistake. It seems to me that the appellant has totally failed to show any such mistake. He has totally failed to connect the title of Hamilton of Wishaw with the title of any person who may previously have held these coal rights.

It was ingeniously argued by Mr Kinnear that, inasmuch as coals belong *prima facie* to the owner of the *dominium utile*, the charter of apprising was an admission by the respondent's predecessor that Hamilton of Wishaw had at that time the *dominium utile*, and therefore *prima facie* had the coal. But it seems to me that the deed of apprising was purposely drawn with reference to what I cannot doubt was the fact. It was purposely drawn so as to make no admission or statement that the coals belonged to the superior. I have no doubt that the fact was that during the more than 80 years which had elapsed between 1622 and 1708 matters had got into a state of great confusion and that the superior claimed the coals, and that the charter of apprising was drawn in the way in which it was, not solely owing to some want of skill on the part of the conveyancer, but with a view to make a compromise and settle the matter. It seems to me, therefore, that there is no ground for saying that there can be shown to be a mistake in the title which has been acted upon in charters from 1708 downwards.

Therefore, my Lords, I quite agree that the judgment of the Court below should be affirmed.

LORD GORDON—My Lords, I agree with the judgment of the Court below, and after the very full and clear manner in which the grounds for adhering to that judgment have been stated by the noble Lords who have already addressed the House, I think it would be a waste of time for me to add anything further.

Judgment affirmed, and appeal dismissed.

Friday, December 1.

WILSON AND ANOTHER *v.* WADDELL.

(*Ante*, vol. xiii. p. 196.)

Property—Minerals—Reparation.

Held that the lessees of a colliery had no claim against the lessees of an adjoining colliery on a higher level for damages caused by surface-water, which collected in subsidences in the surface caused by the workings in the higher mine, found its way into said workings, and from thence into the lower mine, nor for the expense of pumping or otherwise removing the water from the lower mine.

This was an appeal for John and James Wilson, coalmasters in Glasgow, against a judgment of the Second Division in an action brought by them against James Waddell, also coalmaster in Glasgow, concluding for £2000 in name of damages for injuries done to a colliery leased by the pursuers, by surface-water which collected in subsidences in the surface, caused by the workings in an adjoining colliery leased by the defender—which was upon a higher level,—and which water found its way into the said workings, and from thence into the pursuers' mine. The summons further concluded for declarator that the defender should be ordained to make such operations in or on the ground in which he carried on his coal-workings as to carry off the surface-water from the ground, and thereby prevent its passing through the same into his workings, and thence into the pursuers' coal-workings; or otherwise, that the defender should be ordained to remove the surface-water from the pursuers' coal-workings by pumping, or insome other way.

The circumstances of the case are fully narrated in the report of the proceedings in the Court of Session (*ante*, vol. xiii. p. 196).

The Lord Ordinary (CURRIEHILL) pronounced an interlocutor assoilzieing the defender, and upon the reclaiming-note the Second Division adhered.

The pursuers appealed.

At giving judgment—

LORD BLACKBURN—My Lords, in this case the Lord Ordinary decided in favour of the defender, on the ground that the evidence did not show that the defender had done anything wrong as against the pursuers. The Second Division of the Court of Session affirmed this judgment, Lord Gifford agreeing with the reason of the Lord Ordinary, but Lord Ormidale and the Lord Justice-Clerk intimating that they were disposed to hold, on the evidence, that the defender had so acted as to make himself liable for the damage sustained by the pursuers, had it not been for the pursuers' own acts, which their Lordships thought to have been of such a description as to bar and preclude their claim for reparation.

Your Lordships, on the 23d November, heard the counsel for the appellants, who argued the whole case fully and ably, maintaining, first, that the conduct of the defender was such as to make him liable to the pursuer for damage; and, second, that the ground on which Lord Ormidale and the Lord Justice-Clerk based their judgment could not be supported, as the pursuers had done nothing to preclude their claim to reparation.

My Lords, your Lordships have not thought it necessary to hear the counsel for the respondent, who might have furnished arguments to show that this second point furnished a good defence. It would not therefore be proper to say more than that if it had been necessary to decide this point the counsel for the respondent would have been called upon to argue in support of the ground on which alone these two learned judges below based their judgment.

But, my Lords, it is not necessary to decide anything on this point if your Lordships are satisfied that what is alleged and proved does make the defender liable to the pursuers. And after hearing the able arguments of the counsel,