

to them. Mr Coupar admits that letter to have been received by his firm, but no answer was made to it. More than a fortnight elapsed, and nothing was done after the complaint had been formally made by Mr Paterson. That state of things could not be allowed to continue, so Paterson went with his people to the place for the purpose of seeing what ought to be done. What was said thereafter is of no great moment. Probably foolish things were said on both sides, and both parties became heated and inclined to be unreasonable. But let us see what was actually done. Mr Paterson writes his letter of 13th October, which is a very important one. It is clear from that letter that his act of taking possession of the premises on 13th October was not for the purpose of taking the work off the hands of the pursuers, but for the limited purpose of remedying the existing defects in the buildings. On 18th October a further visitation took place, and again there are doubts thrown on what was said by the parties at that time. But we have again a distinct record of what was done in the letter of Mr Paterson's agent on 20th October. He says the imperfect and dangerous work has now been put all right, but explains that unless Messrs Borland will proceed with the buildings, resuming their work in the course of a week, it would be necessary for the defender to finish them himself, and sell them in terms of the agreement. To this letter no answer was made. There was no intimation by the pursuers, or any one of them, that they were willing to go on and finish the work. They had had several intimations that they should be going on with it, as winter was approaching, and it was necessary to get the houses roofed in. Then on 26th October Mr Paterson's agent again writes a very reasonable and proper letter. After that some further letters pass, and on November 1st he writes to Mr Kennedy, as agent for the pursuers and their creditors, in these terms:—"Dear Sir,—I beg to intimate to you, as acting for Messrs Adam Borland & Coy. and their creditors, that Mr T. L. Paterson will forthwith, in consequence of their leaving the tenements at Govan unfinished, and in terms of the agreement, proceed to finish the same, and sell and dispose thereof when finished, and apply the price or prices obtained therefor in repayment of his advances made and to be made, interest thereof, and all costs, charges, and expenses incurred and to be incurred in the premises, and he will account for the surplus, if any, to the person or persons having right thereto. I shall feel obliged by your acknowledging receipt of this intimation." Then Mr Paterson goes on with the work. Now, is he not justified in so doing by the terms of the agreement, for here he must rely on its terms? Before, when he was merely remedying existing defects, he was only acting the part of a prudent man, and his conduct could inflict no damage whatever upon the pursuers, but now, on the other hand, he does propose to end the job altogether, and must act under the terms of his agreement. The pursuers had not answered his letters, and I think in these circumstances Mr Paterson was entitled to assume that they had abandoned the work, and that he was, under the terms of the agreement, entitled to go in and finish it himself. The agreement provided—
"Third—The second parties shall before the

term of Whitsunday 1881 erect and finish on said plot of ground tenements of dwelling-houses, or of shops and dwelling-houses, of four square storeys in height, with suitable offices, and the houses shall consist of not less than two apartments each, but the second parties shall have liberty to have one house of one apartment in each flat. . . . Eighth—The first party shall also have full power, if he thinks proper, to complete and finish any of said tenements left unfinished, at the sight of any architect in Glasgow whom he may appoint previous to selling and disposing of the same, and a certificate under the hands of said architect of the sums which may be expended by the first party in completing and finishing said tenements, including said architect's remuneration, shall be sufficient evidence of the sums of money that may be so expended." It was argued for the pursuers that the import of these clauses is, that if the pursuers fail to finish the work by Whitsunday 1881 the defender will be entitled thereafter to go in and finish it. I think that is part of their import; if the buildings were unfinished at Whitsunday 1881 Mr Paterson would no doubt be entitled to take possession, but there is also another view in which he is entitled to do so. I think after the intimation of 1st November it would be unreasonable to hold that he must wait till Whitsunday 1881 before entering into possession of the tenements, which the tenants by their conduct had shown their intention of leaving unfinished. Mr Paterson's actings were, in my opinion, justified by the emergency of the case, and after the intimation of the 1st November I think he had quite a right to act as he did. I am therefore for adhering.

LORDS MURE and SHAND concurred.

LORD DEAS was absent.

The Lords adhered.

Counsel for Pursuers (Reclaimers)—Mackintosh—M'Kechnie. Agent—John Macpherson, W.S.

Counsel for Defender (Respondent)—Trayner—Guthrie. Agents—Macandrew & Wright, W.S.

Wednesday, December 21.

FIRST DIVISION.

[Lord Adam, Ordinary.

SCHOOL BOARD OF HARRIS v. MACKAY
AND OTHERS.

Process—Reclaiming Note—Multiplepoining—Competency.

Held, following *North British Railway v. Gledden and Others*, June 26, 1872, 1872, 10 Macph. 870, that a reclaiming note against a Lord Ordinary's interlocutor which repelled objections to and approved of a condensation of the fund *in medio*, and found the objectors liable in expenses, is competently presented without leave of the Lord Ordinary, and within twenty-one days of the date of the interlocutor.

Counsel for Reclaimer—Jameson. Agents—J. & J. Ross, W.S.

Thursday, December 22.

FIRST DIVISION.

[Lord Rutherford Clark,
Ordinary.]

WHITES v. WILLIAM DIXON (LIMITED)
AND OTHERS.

*Mines and Minerals—Support—Surface Damages
—Injury to Buildings.*

Held, on a construction of the titles of the owner of the surface of certain property, and of the owner of the underlying minerals, both of whom had derived right from a common author, that the surface owner had not surrendered his right to require the owner of the minerals in working the same to leave sufficient support for buildings erected upon the lands.

Opinions reserved as to the rights of parties if the weight of buildings is excessive.

This was an action at the instance of John and James White, proprietors and occupants of chemical works at Shawfield, near Rutherglen, against William Dixon (Limited), the mineral tenants, concluding, *inter alia*, that it should be found and declared that the defenders are not entitled to work the minerals adjacent to and under the pursuers' lands of Shawfield Brae, Clydebank, Southercroft, and Hayfield, "in such manner as to break the surface of or injure the springs in the said lands of Shawfield Brae and Clydebank, or to cause disturbance or subsidence of the surface of any part of the pursuers' several lands foresaid, or to bring down or injure the buildings and machinery and erections upon any part of the said lands."

The pursuers' titles, so far as the minerals in question are concerned, stood as follows:—By feu-contract, dated 14th February 1799, Mr Robert Houston Rae (who was at the time proprietor both of the lands and of the minerals therein) feued the lands of Shawfield Brae, including Clydebank, extending to about 6½ acres, to Mr John Goudie, from whom the pursuers' authors acquired right, "reserving to him (the said Robert Houston Rae) and his foresaids the whole coal and other metals and minerals in the said lands, with full power and liberty to him and them, by themselves, their tacksmen or servants, to work and win the said coal, metals, and minerals so as not to break the surface of the said lands or injure the springs therein, upon paying to the said John Goudie yst. and his foresaids any damage that may be occasioned to the said lands by working of the said metals and minerals, as the same shall be ascertained by two neutral persons to be mutually chosen by the parties."

By disposition dated 9th and 14th January 1801, in terms of articles and minutes of roup dated 30th July 1800, the said Robert Houston Rae and Archibald Grahame, his trustee, sold and disposed part of the lands of Southercroft of Shawfield, which includes Hayfield, consisting of 25 acres, to James Hill, Professor Young, and Robert Graham, the predecessors of the pursuers. This deed contained a clause of reservation in the following terms:—"Reserving also to us and our successors, tacksmen, or feuars, the whole

coal and ironstone in the foresaid lands and estate, with power and liberty to us and our successors, feuars, or tacksmen, or others deriving right from us, to work and take away the same, and to drive levels and drains, and do all other things necessary for the purpose of working and draining the said coal and ironstone, the persons carrying on these operations being also liable to the said James Hill, Mr John Young, and Robert Grahame, or their foresaids, for the whole damage thereby occasioned, as the same shall be ascertained by two neutral men mutually chosen; declaring always that the said James Hill, Mr John Young, and Robert Grahame, or their foresaids, shall have no claim against me, the said Archibald Grahame, or my successors in office, or my heirs and successors, for the damages occasioned by working the said coal and ironstone, or making the said pits, hills, and roads, or any other operations whatever. And further, we and our foresaids, or our tacksmen and feuars, or others deriving right from us, shall have no right to break or enter upon the surface, or to erect any houses, or make pits, or hills, or to make any other roads than that before reserved, in the lands hereby disposed, all as particularly mentioned in a disposition of the said coal and ironstone granted by _____, in favour of Andrew Houston of Jordanhill, and me, the said Robert Houston Rae, bearing date the _____, which was laid on the table

at the foresaid rousps, and was referred to in the said article of rousps, and which is hereby referred and held as repeated; declaring that the rules and regulations and provisions contained in the said feu-right shall be the rule of proceeding and settlement between the said James Hill, Mr John Young, and Robert Grahame, and their foresaids, and the feuars of the said coal and ironstone, anything to the contrary above written notwithstanding."

The defender's title was contained in a feu-disposition, dated 26th and 28th July 1800, by which the said Robert Houston Rae, with consent of the said Archibald Grahame, his trustee, sold and disposed to himself and the said Andrew Houston, equally between them as partners, the predecessors of the defenders, the whole coal and ironstone in the whole lands of Little Govan, and in the lands of Polmadie, Shawfield, Rutherglenmuir, Benathill, and Blackfaulds, "with full power and liberty to the said Andrew Houston and Robert Houston Rae, as partners foresaid, and their foresaids, to work and win the foresaid coal and ironstone for their own benefit and advantage; and for that purpose, with full power and liberty to them to set down coal-pits, make coal-hills and mouths, drive levels, drains, erect dwelling-houses, engines, and all machinery necessary for the purpose of working or drawing the foresaid coal and ironstone: But it is hereby expressly declared that they shall not have liberty to set down any coal-pits, make any coal-hills or mouths, or erect any machinery, make any drains, levels, or break the surface of the land belonging to the said Robert Houston Rae, lying on the north side of a line delineated on a plan of the lands of Little Govan signed as relative hereto, . . . with full power and liberty, however, to my said disponees to work and win the coal and ironstone of the said lands lying to the north of the said line, provided the same be done from