does not follow that if he had gone to the sellers at the time, and they had known he was under stress of having to fulfil a contract, they might not have demanded higher prices. The figures do not seem to sustain the defender's allegation in answer three or the plea-in-law to which I have referred; but if they did, I should still be of opinion that there was no such duty on the pursuer as that for which the defender contends.

Decree was accordingly granted for £29, 1s. 4d.

Counsel for the Pursuers—Shaw—Crabb Watt. Agents—Wishart & Macnaughton, W.S.

Counsel for the Defender—A. S. D. Thomson. Agents—Dowie & Scott, S.S.C.

Tuesday, January 30.

SECOND DIVISION.

[Lord Kyllachy, Ordinary.

WILLIAM DIXON, LIMITED *v.* SEWELL AND OTHERS (DIXON'S TRUSTEES), AND OTHERS.

Landlord and Tenant—Lease—Minerals—Lease of Minerals with Right to Occupy Houses.

The proprietor of a mineral estate, and of certain detached pieces of ground on which stood workmen's houses, let the minerals with the usual enabling rights for working the same, with right also to the tenant to use and occupy the said houses, the tenant paying and so relieving the proprietor of all feu-duties and taxes, and undertaking to repair and insure. For which causes and on the other part the company bound themselves to pay a yearly sum of fixed rent, or in the option of the proprietor certain specified lordships.

The proprietor died, and his testamentary trustees by his directions conveyed to his sister the mineral estate subject to the existing leases.

The detached portions of land on which the said houses were built remained the property of the testamentary trustees. For some years the whole of the stipulated lordships, greatly in excess of the fixed rent, were paid to the sister, but subsequently the testamentary trustees claimed that the rent stipulated by the lease was paid for the whole rights conferred thereby, including the use of the houses, and therefore that part of the rent was payable to them.

Held, on construction of the whole lease, (*diss.* Lord Young) that the rent was payable for right to work the mineral estate, and that the occupation of the houses was a separate right the consideration for which was payment of feu-duties, taxes, and repairs.

In 1851 William Dixon of Govan Colliery, Glasgow, became proprietor of the mineral estate of Carfin. He subsequently acquired various detached pieces of land in the immediate neighbourhood of the estate. In all these latter cases, however, the surface only was acquired, the minerals being reserved by the seller or superior.

In 1851 William Dixon proceeded to sink pits and lay out a colliery for the working of the minerals in Carfin, and erected partly upon the Carfin estate, but mainly on these detached pieces of land, stores, manager's house, and dwelling-houses for the use of the workmen and others employed in the colliery.

William Dixon died on 23rd February 1859, and by his directions his trustees in November 1873 conveyed the lands of Carfin and the detached pieces of land in their neighbourhood to his son William Smith Dixon.

In 1873 the business of iron and coal-master carried on by William Smith Dixon was converted into a limited liability company under the name of "William Dixon, Limited," Mr Smith Dixon taking a large interest therein as one of the shareholders. He subsequently granted a lease to the company for thirty-one years as from 1st September 1872, of the coal, ironstone, &c. still remaining in the lands of Carfin, with the usual enabling rights for working, winning, and carrying away the same. "With right also to the said second party, the company, during the currency of this lease to use and occupy the stores, manager's house, and dwellings for workmen, and other houses and gardens attached thereto, situated at Carfin, the second party paying and so relieving the first party and his foresaids of all feu-duties payable to their superiors in respect of those held by them from other parties in feu, and also paying to the first party and his foresaids a ground rent for those built on land belonging to them forming part of Carfin estate, at the same rate as the rent payable by the second to the first party for land under the separate lease of Carfin farm and others, and paying and relieving the first party and his foresaids of all public and parochial burdens and taxes of every kind in respect of the said houses and others, whether exigible from landlord or tenant, and also insuring the stores and managers' houses against fire, and also maintaining the said houses in a proper state of repair during the currency of this lease . . . For which causes, and on the other part, the second party bind and oblige themselves to content and pay to the first party, and his heirs, executors, and assignees the yearly rent or lordships after specified, and that half-yearly on the last days of February and August respectively in each year, by equal portions, beginning the first payment as on the last day of February 1873 for the half-year preceding, and the next payment as on the last day of August following, and so forth half-yearly thereafter during the currency of this lease, with a fifth part more of each half-year's payment of liquidate penalty in case of failure in the punc-

tual payment thereof, and the interest thereof at the rate of 5 per centum per annum from the time at which the same falls due until payment thereof, *videlicet*—the sum of £800 sterling yearly of fixed rent, or or in the option of the first party or his foresaids the royalties or lordships following . . . And further, the second party bind and oblige themselves to satisfy and pay to the first party's tenants in the surface of the lands the minerals in which are hereby let, for such portions of the said lands as are now occupied or which may be hereafter occupied by the second party, excepting only the houses and others hereinbefore mentioned, and that at such rates as may be arranged between the second party and such tenants, and failing arrangement, as may be fixed by two arbiters mutually chosen, or by an oversman to be appointed by such arbiters, and that in addition to the fixed rent or lordships hereinbefore mentioned."

William Smith Dixon died on 16th June 1880, and in accordance with his testamentary instructions his trustees disponed and conveyed to his half sister, Mrs Anna Jane Napier or Church, whom failing her nearest heir in heritage according to the law of Scotland, his lands and estate of Carfin, with the whole mines, metals, and minerals therein, with all rights and privileges connected with the said lands, but subject to the existing leases of the minerals and surface.

By antenuptial contract of marriage Mrs Church had conveyed to trustees in general her whole means and estate, heritable and moveable, real and personal of whatever nature or denomination, or wherever situated, then belonging to her, or which she should thereafter acquire during the subsistence of the marriage.

The detached feus with the houses erected on them remained the property of William Smith Dixon's trustees. The lordships stipulated in the lease, greatly in excess of the paid rent, were for some years paid to Mrs Church's marriage-contract trustees. Recently, however, the point was raised by Mrs Dixon's trustees that, as a portion of the consideration for the lordships was the occupation of the houses and others upon the detached piece of ground, which belonged to them, and not to Mrs Church's trustees, they were therefore entitled to share in the lordships to a certain extent. The contention of Mrs Church's trustees was that the right of working the minerals was the essential matter under the lease, and that the right of occupying the detached houses and others above referred to could not be separated from it. Intimation was given by Mr Dickson's trustees to the tenants to cease paying the lordships until this point was settled, and Mrs Church's trustees demanded that payment should be paid as usual. In these circumstances the present action of multiplepoinding was raised to have the rights of parties settled. The fund *in medio* consisted of the lordships due under the lease as at 31st August 1892, and amounted to £3198, 10s. 5d.

Lieutenant-Colonel Charles Sewell and others, Dixon's trustees, averred—"The gross annual value of the said detached pieces of ground and buildings thereon is £562, from which certain deductions, amounting in all to £287 or thereby, fall to be made in respect of feu-duties, rates, taxes, &c., which under the lease are payable by the tenants. The claimants' said properties have, since the pursuers' company was formed, been used and possessed by them as tenants and occupants under and in respect of said lease in connection with their said business. The value of this said use and occupation to the pursuers has been not less than £562 per annum, or £275 after deducting said sum of £287. The nett annual value of the claimants' said properties, one year with another, is not less than £275, which sum ought to have been annually accounted for and paid by the real raisers to the claimants, and said sum should accordingly have been in each year deducted from the rents or royalties paid by the real raisers to or on behalf of Mrs Church. The total amount thus erroneously withheld from these claimants, with interest thereon, is £4219, 2s. 2d. They claimed to be ranked and preferred to the whole of the fund *in medio* in payment *pro tanto* of the said sum of £4219, 2s. 2d., or otherwise, to the sum of £550, being the rent due in respect of the tenancy of the claimants' said properties for the two years ending respectively 31st August 1891 and 31st August 1892, with corresponding interest thereon."

They pleaded—"(1) These claimants being proprietors of the properties condescended on, and the same having been used and occupied by the pursuers, the claimants are entitled to be ranked and preferred in terms of the first alternative of their claim. (2) The sums set out in these claimants' state being due and payable in respect of the use and occupation by the pursuers of these claimants' properties, the latter should be ranked and preferred in terms of the first alternative of their claim; *et separatim*, in any event, in terms of the second alternative thereof."

Robert Duncanson Mackenzie and others, Mrs Church's marriage-contract trustees, maintained that all the items composing the fund *in medio* were payable in respect of the subjects in which they were in right, and that no part of the fund was payable in respect of or attributable to the occupation of the houses, stores, &c. The clause in the lease which conferred on the mineral tenants the right to occupation expressed *in gremio* the full agreed-on consideration therefor.

They pleaded—"(1) The claimants being in right of the whole of the subjects in respect of which the various items of rent and lordship composing the fund *in medio* are payable, are entitled to payment of the whole amount of said sum."

Upon 17th June 1893 the Lord Ordinary repelled the claim of Dixon's trustees, and ranked and preferred Mr and Mrs Church's marriage-contract trustees.

"*Opinion.*—The fund *in medio* here consists of certain mineral rents or lordships due by Messrs Dixon, Limited, as lessees of the mineral field on the estate of Carfin. The question is, whether those rents or lordships belong wholly to Mrs Church, who is now owner of the estate of Carfin, or have to be shared by her with the other claimants, the trustees of the late William Smith Dixon. These trustees claim, as owners of certain miners' houses let to the pursuers under their lease, and situated not on the estate of Carfin but on certain lands adjacent, which are now the trustees' property.

"I do not think that I need resume the facts. The original lessor was the late Mr William Smith Dixon, who owned at the date of the lease both the minerals and the miners' houses. He left by his settlement the estate of Carfin to his sister Mrs Church, but the conveyance for some reason did not include the lands on which these miners' houses were built. These houses accordingly fell to his general trustees, and they claim a share of the mineral rents on the ground that the same are payable partly for subjects which are now their property.

"The question appears to me to depend upon this, whether, upon the just construction of the lease, the miners' houses in question are let simply as part of the mineral subject, or, on the other hand, are let as a separate subject, and for a separate consideration.

"I am of opinion that the latter is the correct view. The right to occupy the houses (along with other houses as to which no question arises) is certainly let by a separate and distinct clause in the lease; and that clause undoubtedly specifies certain definite payments or prestations which are the conditions of such right of occupation. In particular, the tenants are taken bound to pay for the houses on the estate of Carfin proper, certain groundrents which are to be calculated in a certain manner, and for the houses in question, which are built upon feus, the feu-duties payable to the superiors. They are also bound to relieve the lessor in both cases of all public and parochial burdens effeiring to the houses which are thus let to them; and all this is stipulated apart from and in addition to the proper mineral rents or lordships, which are imposed upon the tenants by the clauses in the lease which follow.

"It is true that the obligation to pay the mineral rents or lordships begins in the usual way with the words 'For which causes, and on the other part;' and the trustees found upon that expression as implying that the mineral rent or lordship is payable, *inter alia*, for the right to occupy the houses. But it rather appears to me that this is giving too much weight to the mere collocation of the clauses, especially seeing that as matters stood at the time, the question which has now arisen was not foreseen and was of no importance. And on the whole, I prefer the construction which assumes that according to the scheme of the lease the houses were let as one subject on certain terms, and the mineral field as a separate subject on certain other terms. I am the more disposed to adopt this view that it appears to have the support of two judgments pronounced in the Valuation Court by Lords Fraser and Lee in 11 R. 844 and 12 R. 640."

Dixon's trustees reclaimed, and argued—The presumption was that rent was due for a subject occupied—*Glen* v. *Roy*, November 28, 1882, 10 R. 239. If there was a construction of the lease compatible with the payment of rent, that construction ought to be adopted. The Lord Ordinary's note showed sufficiently that there was such a construction. He did not say that the present claimants' claim was absurd, merely that he preferred the other. "And for which causes" included the possession of the houses according to the natural meaning of the words. It might be difficult to apportion the items, but that was not the question here. The decisions by the Lands Valuation Judges were not authoritative—here at least. The present claimants were not parties there. These decisions proceeded on the assumption that the rent or royalties were a consideration for the minerals alone. That was an ill-founded assumption.

Argued for Church's trustees—The Lord Ordinary had taken the sound view. The consideration for the rent or royalties was the minerals only; the houses were a mere incident of the lease, which was a mineral lease. The consideration for the right of occupancy of the houses was the payment of feu-duties and taxes. If the houses were not occupied, the tenant was under no obligation to pay the taxes, but the rent did not diminish if the houses were not occupied. Further, if royalties instead of rent were paid, the rent of the houses, if any was due, would rise, for it must be a certain proportion of the rent or royalties actually paid. It was absurd to suppose that the value of the houses increased because the output of coal was increased.

At advising—

LORD YOUNG—The material facts seem to be these. In 1873 Mr W. Smith Dixon, who was then proprietor of the lands of Carfin, and also of certain lands adjoining, granted to the pursuers (the real raisers) a lease of the minerals of Carfin "with right to use and occupy the stores, manager's house, and dwellings for workmen and other houses and gardens attached thereto, situated at Carfin." These stores, houses, &c, were most, not all of them, situated not on the lands of Carfin but on the adjoining lands, of which, as I have said, Dixon was also proprietor. Three of them of the annual value of £78 were on Carfin. The words "situated at Carfin" were reasonably descriptive of all of them. Mr Smith Dixon died in 1880, and under his testamentary settlements his testamentary trustees (who are the first claimants) became, and are now, proprietors of the lands adjoining Carfin on which the houses, with the exception of the three I have noticed,

are situated, while his sister Mrs Church became proprietor of the lands of Carfin in which the minerals exist, and subsequently conveyed them to her marriage trustees, who are the second claimants.

The fund *in medio* consists of the rent for the years 1891 and 1892 under the lease of 1873 (which still subsists) in so far as in excess of the fixed rent, the amount of which the tenants paid termly as required by the lease, before the lordships were ascertained. That excess amounts to £3198, 10s. 5d.

From Mr Smith Dixon's death in 1880 down to 1891 the whole rents were paid to Mrs Church's trustees, his testamentary trustees having made no claim to them. They have however come to think that they have right, which it is their duty to assert, to a fair rent for the houses standing on the ground of which they are the proprietors, and their consequent claim has led to this multiplepoinding. The tenants (the raisers) have no interest in the matter—no claim being made against them beyond the fund *in medio* which they are ready to pay to the party having right.

No question of amount can be decided on the case as it stands. The only question argued was the general question whether the testamentary trustees have any right to rent under the lease as being proprietors of the houses, &c., referred to, which they admittedly are and have been since 1880.

The testamentary trustees aver that the annual value of the houses, their property, of which the tenants are in possession under the lease, is £562, and we must assume that they may prove this if allowed an opportunity. Assuming the truth of the averment, it would certainly *prima facie* be unjust to deny the owners a corresponding return from those who have the whole use and occupation of them. Mrs Church's trustees, however, maintain that this *prima facie* view is overcome by the terms of the lease, subject to which the testamentary trustees became owners. They contend that by this lease the tenants had right "to use and occupy" these houses for this rent and return only, viz., that they should pay and so relieve the proprietor of all feu-duties payable in respect of those held in feu, and paying a ground rent for those built on ground belonging to the proprietor "forming part of Carfin estate" at a certain farm rate—the same as the tenants paid for a farm on the Carfin estate under another lease—and paying and so relieving the landlord of all taxes and keeping the houses in repair. Ground rent at a farm rate applies only to the three houses on the land part of the estate of Carfin, and with these we have here no concern. The view therefore is that the tenants were by the lease to have the houses in question for the return of relieving the owner of feu-duty, taxes, and cost of keeping in repair, and that none of the rent payable under the lease, *i.e.*, none of the fixed rent, or lordship in excess of it, was payable for the right to use and occupy them, that right being accorded altogether irrespective of such rent. The Lord Ordinary accepts this view, and in support of it refers to two judgments of Lord Lee and Lord Fraser in the Valuation Court upon the import of this very lease in a question between the lessees and the assessor.

I shall have something to say regarding these judgments before I conclude, but in the meantime observe—1st, that the only parties to the lease who were before the Valuation Court were the lessees; 2nd, that they admitted that the actual value of the buildings now in question, as they then (in 1885) stood as lettable subjects, was over £600; 3rd, that they admitted, and indeed contended, that the rent (whether fixed or lordship) specified in the lease was applicable, or at least intended to be so, to them as well as to the minerals, both being alike subjects let by the lease, and that the view that the landlord had given them property worth over £600 only because they undertook to relieve him of the landlord's burdens upon it, was on the mere statement of it extravagant. I take the figures as stated in the Valuation Court—Value of the property £602; landlord's burdens £129.

The parties now before us in this competition are the two landlords—for there are two—viz., Mrs Church's marriage trustees, as owners of Carfin and its minerals, and Mr Smith Dixon's testamentary trustees, as owners of the buildings, &c. on the adjoining lands—both being equally let by the lease. When two subjects let by the owner of both under one lease to one tenant, pass on the landlord's death to two successors—one succeeding to the one, and the other to the other—there must necessarily be an adjustment of their respective rights under the lease, with a partition of the rent accordingly, and that this necessity occurs here is not disputed. Where the lease bears that each of the subjects is let as a distinct and separate subject, at a distinct and separate rent, there will of course be no difficulty in making the adjustment, and consequent partition, for in such case you have in effect two leases although in one deed. I think—and I must say, without doubt—that this cannot at least *de plano* and without inquiry be predicated of the lease before us. I say "without inquiry," for it is conceivable that property may not be worth more for use and occupation than the feu-duty and the public burdens upon it, so that relief of these will be a fair equivalent for such use and occupation given by an ordinary business lease without grace or favour. This, however, would not be "rent" in the ordinary or any reasonable sense of the word, and the landlord in such lease would no doubt return the rental of the subject let as *nil*. The record is not so precise and satisfactory as it might and probably ought to have been, and I have been unable to reconcile the valuations given with those which appear to have been given and accepted in the Valuation Court. But I understand that the testamentary trustees (the owners of the houses) undertake to show to our

satisfaction—1st, that the lease was for a fair rent of both subjects at their lettable value; and 2nd, that the fair lettable value of the subject to which they succeeded was about £600. The matter in hand is a just and equitable adjustment of the rights of successors to distinct and separable portions of the subjects let by the lease, with a corresponding partition of the rent, and in dealing with it I think the facts I have stated must, if admitted or proved, be taken account of. Suppose them admitted, the injustice of giving the whole rent to the one party, and to the other only relief of feu-duty, taxes, and repairs, is too obvious to require more than simple expression.

Now, is there any *prima facie* unlikelihood in the case which the testamentary trustees aver and (as I understand) undertake to prove? As regards the fair lettable value of their property their statement is confirmed by the valuation in 1885 of the statutory authority under the valuation Act, and it is not suggested that there was any notable rise of value between 1873 and 1885, although it may possibly be proved that there was. Then as regards the notion that it was the intention of the lease to let the tenants have this property at a fraction of its value (really only for relieving the owner of the owner's burdens), I am disposed to assent to the view of it taken by the tenants under the lease — viz., (as Lord Fraser states it) "that no landlord would give to a tenant property worth £602, 9s. merely because the tenant undertook to relieve him of obligations to the amount of £129, 13s. 4d." His Lordship does indeed observe upon this that he does "not appreciate the force of the argument," adding as his reason—"the landlord was content upon receiving a certain lordship," (viz., in consideration of that) "to let to his tenant upon easy terms all the houses, stores, and schools which have been separately valued"—*i.e.*, to let to his tenant at £129 what is worth £600. But this simply means that the rent is a fair rent on the whole—the deficiency in the rent with respect to the one subject being made up by an exactly corresponding excess with respect to the other. To do this in terms and of purpose would be unmeaning if not foolish, the same end and result being rationally and without injustice attained by holding that the rent is one rent for both subjects, undistributed (or unapportioned), because both belonged to the lessor and were let to the same lessee.

In the matter immediately before us, viz., a division or partition of the rent (or rents, if you please, although I think the singular more accurate — the relief from burdens not being in my opinion rent in any reasonable sense of the term) between the two successors, in several parts of the subjects, to the original owner of the whole, we have I think a satisfactory principle of of justice and equity to guide us. There is no reason for regarding this lease otherwise than as an ordinary business contract for fair valuable consideration on both sides, the tenants giving as rent the fair lettable value of what they got. Nor is there any difficulty in ascertaining what was the fair lettable value of that part of the subjects which has descended to the testamentary trustees. It was indeed ascertained in 1885 to be about £600. The present owners say it is £562. But if the parties differ the value can be ascertained, and I think the ascertainment should be as at 1873 the date of the lease, and that this (taking account of the tenant's obligation to relieve of burdens falling on the landlord) is as regards these subjects the value which the tenants get from the owner of them in return for the rent they pay. Nor, in my view, does this value ever fluctuate either up or down. The remainder of the value which the tenants take under the lease they take from the owners of Carfin and its minerals, and it may fluctuate and has in fact always done so, the rent being arranged with reference to the quantity of minerals carried off, which was of course contemplated as a very possibly varying quantity. The fixed rent of £800 is the least payable, and taking the testamentary trustees' estimate on record of the value of the property which the tenants have from them, viz., £275, the balance of £525 is what Mrs Church's trustees are on an apportionment or partition (perhaps the preferable word) entitled to receive as the value which the tenants have in their property, although it might consist of mere permission to mine if they pleased and to exclude others. If they work mines to such extent as to acquire minerals yielding lordship beyond £800—the fluctuation in the value of what they have from Mrs Church's trustees begins to operate, but to the exclusive benefit of these trustees, the testamentary trustees asking no share of it.

I am of opinion, therefore, that the rent ought to be partitioned or divided between the owners of the subjects which produce it, and in respect of which it is paid, according to the value of the subjects contributed by each respectively, and this will, I think, be fairly and satisfactorily done by giving the testamentary trustees the fair lettable value of their property which the tenants have by the lease, without taking any account of the increase of rent beyond £800 in respect of the extended working and appropriation of the minerals. To the whole of this increase the owners of the minerals (Mrs Church's trustees) are in my opinion justly entitled. But I need not dwell on this topic, as the testamentary trustees claim no part of the increase, but put their claim exactly as they would, and at the amount they would, were there no increase and the fixed rent alone were payable. If, therefore, we shall sustain the view contended for by the testamentary trustees, there is no difficulty in making the partition of the rent accordingly, and the only question is whether that view ought to be sustained. It is simply this, that these trustees are entitled to so much of the rent as represents the fair lettable value at the date of the lease of the property which has passed to them, taking account of the tenant's obligation to keep it in repair and to

relieve the proprietors of all taxes and burdens upon it falling on them as such. I think it is sound, and ought to be sustained for the reasons which I have stated at length. There really ought to be no dispute between such parties as are before us as to what that fair value is, but if there should be, there can be no serious difficulty in ascertaining it.

A suggestion was made in the course of the argument of a distinction between letting and giving right to use and occupy for a term, which I should have noticed sooner had I attached importance to it, which I confess I did not. I have, however, since writing all that I have already read, and communicating it to your Lordships in consultation, learnt that such distinction is favourably regarded by your Lordships who dissent from the views which I have expressed, and it is, I think, therefore my duty to express distinctly my opinion upon it. The view, as I understand it, is this—that when a right to work minerals for a term is let to a tenant with right to the tenant to use and occupy specified buildings during the currency of the lease, the tenant paying and so relieving the landlord of all taxes and burdens thereon, and keeping them in repair, the buildings are not really let at all, but only a right of use given, when the tenant finds it convenient to take it, as an accessory convenience to him in his mineral workings, and that he is bound to relieve the landlord of the burdens and keep the subjects in repair only during such periods as he may find it convenient and so choose to make use of them. I cannot assent to this view as applicable to this lease or to the buildings in question, which really form a village adjoining the mineral workings, and consist of dwelling-houses, shops, stores, and two schools. The word "let" is certainly unnecessary to the constitution of a lease of houses which is, I think, very clearly effected by any words which give right to use and occupy for a term. The term here is 31 years from September 1892, and during the whole of it the tenant has the exclusive right of use and occupation, which the lessee can during that term neither take himself nor give to another. The proposition that the tenant's obligation to make the stipulated return (whatever that is) does not, as regards the term, correspond with the term of his right and the landlord's obligation to give it, whatever use he makes of it or whether he makes none, is in my judgment untenable. If that were taken to be the meaning of the contract, it would follow that it was to the tenant's advantage, at least in his opinion, that he should during the currency of the lease have the control of the buildings to the exclusion of the landlord and all others, whether he found it convenient to use them or not; that the landlord gave him this advantage in consideration of no other return than relief of taxes, &c., corresponding to the periods (and there might be none) of use by the tenant, and that the fact of the landlord giving it to his own manifest detriment was not to be regarded as one of the "causes" for which the tenant on his part agreed to pay the stipulated rent. Suppose that the subject the rights to use and occupy which were by the lease given to the mineral tenant, the same language being used, had been not buildings but a farm (and farms are often let to mineral tenants) of the same lettable value, say £600 a-year, with the proviso that he should relieve the landlord of the burdens, no matter what or of what amount, but only a fraction (larger or smaller) of the lettable value, would it be a true view of the contract that the farm was not one of the subjects thereby let, and was not to be taken account of as referred to in the rent clause commencing with the very intelligible and familiar words, "For which causes and on the other part." If so, it might indeed follow that if the minerals and the farm passed to different proprietors, the proprietor of the minerals would take the whole rent, the proprietor of the farm taking nothing, in the view that the tenant had it rent free.

If the learned Judges in the Valuation Court thus construed the lease now before us, I could not follow their opinion in adjudicating upon the interests of the parties now before us, which are of a different order and of much greater magnitude than those which had to be considered between the assessor and the tenants under the Valuation Act. It is noticeable that the view on which they proceeded—Lord Fraser at least, for I doubt whether Lord Lee concurred in it — was not presented by the terms of the case stated by the magistrates and adjusted by the parties, and does not appear to have been suggested in the argument. Lord Lee says—"But it is maintained that by the lease the stipulated rent of £800 and the stipulated lordship are not due for the minerals alone, but for the consequent right of working the minerals and using the houses. The terms of the case support this view, but it is necessary to look at the lease itself in order to see if it is sound." I quote this only to show that the case adjusted and settled by the parties supported the view of the true meaning and construction of the lease which I have taken. His Lordship proceeds to say—"On an examination of the lease I am of opinion that unless the fixed rent of £800 or alternative lordships are to be regarded as the consideration stipulated for the minerals, it is necessary to revalue the whole subjects. But this is not what is asked by the appellants." And again—"It is not one of the facts of the case that the rent of £800 or alternative lordship is in excess of the annual value of the minerals alone." This seems to indicate a re-valuation of the whole subjects would or might have been ordered had the appellants asked it, or that a statement in the case that £800 (or lordship at the rate named) was in excess of their lettable value would have received effect.

But the question before us is quite another question than this. The whole

rent bargained for as such, "for which causes, &c.," may not in 1885 have been in excess of the annual value of the minerals alone, and yet it may have been so in 1873, at least in the estimation of both the parties contracting, who agreed to it as the fair rent and return for the houses and minerals together.

LORD RUTHERFURD CLARK—The case is attended with much difficulty; but I am disposed to follow the Lord Ordinary, and to concur in the decisions which have been already pronounced. The mineral field is, I think, the true subject of the lease. I regard the right to occupy the houses as a privilege which is given in order that the landlord may obtain the rent of the minerals for which he stipulates. The houses are not let as the other subjects are let. For the tenants are not bound to occupy them, and while nothing can be payable unless they occupy, the rent stipulated in the lease is not the less due to the landlord if they do not occupy. The conditions on which they may occupy are stated. They are bound to pay feu-duties and landlord's taxes, &c. I take this to be the consideration for their occupation, and I think that subject to these payments the landlord gave his tenants a right to occupy the houses rent-free as the condition of obtaining the mineral rent. I am aware that in form the rent is stipulated as the consideration for all that the landlord had conceded to his tenants. But we may disregard form in order to give effect to the true meaning of the parties, and I think that we do so when we hold that the rent was truly payable for the right to work the mineral field. It is to be observed that the rent in the option of the landlord might be a lordship on the output, and it is in my opinion the most natural construction of the lease to regard such a payment as a rent for the minerals alone.

At the date of the lease the point which we are considering could be of no practical importance. It was immaterial to the owner of the whole subjects from which of them the return was to be made. But this makes it all the more likely that he was regarding the return for the minerals alone and making an arrangement by which that return should be as large as possible.

If the rent were held to be payable for the houses as well as the minerals it must be apportioned. It would in that case be a *cumulo* rent, and there could be no other alternative. I see great difficulty in effecting an apportionment especially as the landlord has been in use to exact a lordship greatly in excess of the fixed rent. The reclaimers were not able to furnish any satisfactory principle. I see no other than this, that the *cumulo* rent should be apportioned among the subjects comprehended within the lease in the ratio of their value. Apart from the difficulty of putting a value on the mineral estate, the application of this principle would lead to very anomalous results. The rent of the houses would be increased in proportion to the increase of the lordships on the minerals. The increase in the output cannot increase the value of the mineral subject. On the contrary, it necessarily diminishes it. If the output is maintained, the necessary result would be that an increasing share of the lordship must be apportioned to the houses, and it may be a share altogether exceeding a reasonable rent.

It was said by the reclaimers that in order to fix the rent of the houses we must take the rent at which they are let by the tenants and deduct that rent from the fixed rent or lordship. But this is in no sense apportionment, and is therefore inadmissible. Nor can I hold that in making the necessary apportionment we are to take the fixed rent alone, for there is no fixed rent due if the lordships are exacted, and the lordships are payable for the same "causes" as the fixed rent.

These considerations may not be in themselves conclusive, but to my mind they support the construction which I have put on the lease.

LORD TRAYNER—I quite appreciate the argument addressed to us in this case on behalf of the claimants Dixon's trustees, to the effect that the stipulated rent, whether fixed rent or royalty, is to be paid in return for or in consideration of the whole rights conferred on the tenants in that part of the lease which precedes the rent clause, and that therefore some part of the rent is due and paid in respect of the houses in question. The words "for which causes" &c., with which the rent clause commences, might bear the construction put upon it by Dixon's trustees without doing any violence to the language used. But a consideration of the whole clauses of the lease bearing upon the question now to be decided leads me to the same conclusion as that which the Lord Ordinary has reached. The real subject of the lease is the mineral let, and for it the rent is stipulated. That the stipulated rent is payable for the minerals and for the minerals only, appears to me to be a conclusion supported by the fact that that rent is to be estimated or ascertained by a royalty or lordship on the quantity of minerals worked by the tenant, a mode never adopted so far as I know for ascertaining or fixing the rent of houses. It is quite true that the lease stipulates for a fixed rent or royalty in the option of the landlord. But that in effect is just stipulating for lordship with the proviso that the landlord shall never be required to accept less as lordship in any year than the sum denominated fixed rent. In addition to the right to work the minerals for which the royalty or lordship is to be paid, a right is conferred on the tenant to occupy certain houses, but the conditions upon which that right may be exercised are stipulated for separately from the conditions on which the minerals are to be worked. If the houses are occupied by the tenant, then he is to keep them in repair, and to pay the feu-duty and landlord's taxes effeiring thereto. These, however, seem to me to be the whole of the

tenant's obligations in respect of his occupancy of the houses. If he does not exercise his right of occupying the houses, he incurs no obligation to the landlord for repairs or otherwise. But his other obligations in respect of the minerals are not affected by his occupancy or non-occupancy of the houses. I think with the Lord Ordinary that the right to occupy the houses is a separate right from the right to work the minerals, and that the conditions on which the two rights or either of them may be exercised are separately stipulated. I agree further with the Lord Ordinary in thinking that the argument for Dixon's trustees is based more upon the mere collocation of the clauses in the lease than upon the terms of the clauses themselves. If the clause conferring the right to occupy the houses in the precise terms in which it now stands had been inserted after the rent clause, there could have been no question.

The Court adhered.

The LORD JUSTICE-CLERK was absent.

Counsel for Reclaimers—C. S. Dickson—Macphail. Agents — Melville & Lindsay, W.S.

Counsel for Respondents — Jameson — Salvesen. Agent—F. J. Martin, W.S.

Tuesday, January 30.

FIRST DIVISION.

[Sheriff-Substitute at Kirkcudbright.

GIBSON *v.* STEWART.

Reparation—Public Road—Horse Shying at Heap of Manure in Field Adjoining—Landlord and Tenant—Breach of Lease—Trespass—Issues.

An outgoing tenant brought an action of reparation against his landlord for personal injuries sustained through a fall caused by his horse shying at a heap of manure lying in a field adjacent to a country road. He averred that the landlord was in fault (1) in illegally putting the manure too near a public road; and (2) in placing it upon ground which under the lease he could not enter except by trespass.

Held that the pursuer was entitled to an issue on the second ground but not on the first, the placing of manure in fields being necessarily incidental to agriculture.

Thomas Gibson, lately farmer, Airds, in the parish of Crossmichael, brought an action of damages for £500 in the Sheriff Court at Kirkcudbright against Robert Stewart of Culgruff, his landlord in the farm of Airds. He held a lease for fifteen years from Whitsunday 1891, which he had renounced on 12th December 1892, taking himself bound to remove from the houses and grass lands at 28th May 1893, and from the land in white crop at the separation of the crop.

According to his averments the pursuer and his niece drove to Castle-Douglas on 12th May 1893 to make preparations for the displenishing sale to be held on 16th May. When driving down the loaning or farm road from Airds to the public road he observed a large quantity of bags of artificial manure built up within a corn-field on his said farm of Airds, and immediately adjacent to the loaning. The height of the bags so built up was over 7 feet, and they were placed within 2½ feet of the inner wheel track of said loaning. They presented an unusual appearance, and emitted a strong offensive smell. The defender had no right to the use of that part of the field where the bags were placed. The pursuer got down and led the pony past. In returning in the evening he drove his pony safely through the gate from the public road into the loaning, up which it proceeded for about 8 yards until owing to the turn in the road the manure bags came first into full view. Just when the pony would be within 10 yards or thereby of the said manure heap, without any warning, it turned sharply round, with the result that he and his niece were thrown out and hurt. Since he had previously passed the manure bags a tarpaulin or other covering had been thrown over them, the loose portions of which were waving or flapping with the wind.

The accident to the pursuer was due to his said pony taking fright and swerving or shying through the fault of the defender in placing such an unsightly and offensive obstacle as the said bags of manure so near the said (at that part unfenced) loaning, and where he had no right to place them. They created a nuisance to the said loaning, and rendered it unsafe for driving horses along it. So placing them there was not only in the circumstances negligent of the defender, but was also in breach of his said contract of lease with the pursuer, by virtue of which the defender had no right to use that part of the field where the bags were placed during the occupation of the pursuer thereunder. The defender placed the manure bags in said field without any consent from the pursuer to his doing so, and at his own risk. He was well aware that they would be a source of danger to horses passing up and down the said loaning. The accident to the pursuer was the natural result of the defender placing said manure bags where he did. Further, the insufficient and negligent manner in which the said tarpaulin or other covering was secured by the defender also materially contributed to the accident.

The pursuer pleaded—"(1) The pursuer having been injured through the fault of the defender, is entitled to reparation as craved with expenses."

The defender pleaded — "(1) The pursuer's statements are irrelevant and insufficient to support the prayer of the petition. (2) The pursuer having approached with said pony what had to be regarded by him as a known danger, and the accident having resulted therefrom, the action should be dismissed. (4) The defender having acted