which was presented to the club as a body and intended to remain its property.

On the whole matter I am of opinion that the appeal should be sustained, and that the defenders should be ordained to deliver up the cup to the pursuers. He would have acted wisely if he had adhered to his original resolution to refuse the offer.

The Court pronounced the following interlocutor:—

"Sustain the appeal: Recal the interlocutor appealed against: Ordain the defender to deliver to Mr John Young, secretary of the Upper Annandale Curling Club the silver trophy known as the 'Waterlow Cup,' the property of the club, which was handed over to the defender as custodier for the club for the season 1893-94, within twenty-one days from the date hereof, and decern."

Counsel for the Pursuers—Salvesen—Constable. Agent — G. Brown Tweedie, Solicitor.

Counsel for the Defender — H. Johnston —Clyde. Agents—J. & A. Hastie, Solicitors.

Thursday, July 9.

FIRST DIVISION.

[Lord Moncreiff, Ordinary.

MACDONALD AND OTHERS *v.* WELSH AND OTHERS.

Mines and Minerals—Reservation of Coal in Feu-Contract—Liberty to "Search and Work Out" Coal except in Prohibited Area—"Shank or Open"—"Close or Garden"—Construction.

A superior granted a feu-contract in which he reserved the coal in the subjects feued, with liberty "to search for, work out, and dispose of the said coal . . . and provided that in searching for or working said coal we do not shank or open the ground within the house, office houses, close, or gardens to be built or made upon the said lands."

In an action for interdict raised by the subsequent proprietor of the feu against the superior's successor, to prohibit him from boring for coal at a spot within 13 yards of a main-door of the mansion-house, and situated in an enclosed piece of ground, partly in lawn and partly laid out in flower-beds, the respondent pleaded that the operation of boring did not fall within the definition of "opening or shanking," and that the place where the work was being done was not within the prohibited area.

Held, on a proof, (1) that boring was covered by the exception; (2) that the *locus* was a garden in the sense of the feu-charter, and therefore was part of the prohibited area.

Opinion (*per* Lord Kinnear) that even if boring did not fall within the definition of "opening the ground," yet the right to bore being ancillary to and an incident of the right of searching for and working the coal, the respondents had no right to exercise it within an area where they were prohibited from searching for and working the coal.

Opinion (*per* Lord President and Lord Kinnear) that when the right of the owner of the minerals to interfere with the surface is expressly defined in his titles, the common law of neighbourhood had no application.

This was an action of suspension and interdict at the instance of the most Reverend Angus Macdonald and others, trustees for the Roman Catholic Church in the Archdiocese of St Andrews and Edinburgh, against Mr John Welsh, S.S.C., Edinburgh, and others.

The complainers were the heritable proprietors of the house and lands of Mount Vernon, at Liberton, near Edinburgh, and the respondents were the proprietors of the coal on Mount Vernon, and the assignee of his mineral rights.

The complainers craved the Court to interdict the respondents "from boring for coal or in any way opening the ground, and from depositing materials on any portion of the close or gardens of the complainers' mansion-house of Mount Vernon."

The Lord Ordinary (MONCREIFF), after a proof, on 6th March 1896 granted interdict.

The questions raised in the action and the purport of the proof are sufficiently indicated in his Lordship's opinion, *infra*.

Opinion.—"The original feu-charter by which the complainers' predecessors acquired the lands in the immediate neighbourhood of Liberton, which are now called Mount Vernon, was granted to Joseph Cave by George Lord Rosse, therein designed Master of Rosse, on 11th September 1728. The granter reserved the coal of the lands disponed by the following reservation—'But excepting and reserving always to me, the said George Master of Rosse, and my heirs and successors, the whole coall of the lands hereby disponed, and declaring that it shall be free leisum and lawful to me and my foresaids to search for, work out, and dispose of the said coall, we always paying and satisfying all dammadges which the said Joseph Cave or his said son, or his foresaids, shall sustain thereby; and provided that, in searching for or working said coall, we do not shank or open the ground within the house, office-houses, closs, or gardens, to be built or made upon the said lands by the said Joseph Cave, or his said son, or his foresaids, for their own proper dwelling.'

"It will be seen from the terms of the reservation that the lands were bought for the purpose of erecting and making a dwelling-house, offices, and gardens.

"The respondents are now proprietors of the coal, and the complainers proprietors of the surface and other minerals. The respondents have recently proceeded to bore for coal at a spot within 13 yards of one of the main entrances of the mansion-house. The complainers seek to have them

interdicted from doing so, on the ground that they are within the excepted area; and the question which I have to decide is whether this is so or not.

"The history and character of the ground in which the borings complained of were made clearly appears from the proof and plan. The mansion-house of Mount Vernon has two main entrances, one to the north or front, and one to the south or back. The one to the back is not the servants' entrance; it is one of the main doors of the house, and some of the windows of the public rooms look to the south. Immediately to the south of the house a footpath runs parallel with the house, and on the farther side of the footpath is the piece of ground in question. It is about a quarter of an acre in extent, and has been made up and levelled probably in order to be used as a bowling green. In former days, as now, such a piece of ground was an invariable adjunct to a country house. I should have explained that the green or lawn is surrounded by a fringe of shrubs and trees, among which flowers have been at one time planted, some of which survive. The whole enclosure is surrounded by an old holly hedge. There is no evidence that the ground was ever used except as pleasure ground, except that when the house was unoccupied by the family the caretaker seems to have used it as a washing green for her own purposes. It is said that at one time a line of cedars stood between the house and the bowling green; and it is suggested that they were planted for the purpose of screening the house from the green. I think the truth is, that the cedars were planted for ornament, but being rapidly growing plants, they grew so high as to darken the windows and obscure the view, and were accordingly cut down by Mr Lockhart Thomson's orders. Lastly, there is no evidence that, until recently, any flowers were ever planted on the bowling green itself. There are flower beds on a similar plot of ground immediately to the east of the mansion-house; and recently, one or two flower beds have been formed between the bowling green and the footpath. The kitchen-garden and vineries, which are walled in, lie a little distance to the east. The green or lawn in question is quite different from the fields or paddocks to the north and south of the house, as to which there is no dispute.

"This being the description of the green or lawn in which the respondents claim right to bore, the question is whether it does or does not fall within the terms of the exception in the titles.

"The words within which this piece of ground must be brought are, 'The house, office-houses, closs, or gardens to be built or made on the said lands.' The plain object of the exception was to secure the privacy and comfort of the dwelling-house and its immediate precincts. It is quite plain that to permit boring or shanking at the spot in question would make residence in the house intolerable or impossible. At the same time, it is necessary to see whether the ground in question can by reasonable construction be brought within the terms of the exception. The words which are said to cover it are 'closs and gardens.' The Scotch word 'closs' rather suggests a yard enclosed by the offices or the wings of the mansion-house itself, or a back-yard enclosed with a wall. In England the word 'close' or 'curtilage' would probably cover a piece of ground like this, these words meaning and including a courtyard or a piece of ground lying near or belonging to a dwelling-house, such as a back-green or a strip of ground lying between the house and the street. There is a good deal to be said for the view that the piece of ground which I have described is so closely connected with the house as fitly to fall within the description 'closs.' But it is unnecessary to decide this, because there is another word which perhaps more appropriately applies to the green, and that is the word 'gardens.' It is to be observed—and this is material—that the word is plural and not singular, and therefore I think it must be liberally construed as including all made and ornamental ground in the immediate vicinity of the house which can fairly be held to come within that description. Now, a garden is not necessarily composed entirely of flower beds; it is not complete without a certain extent of ground kept in grass. Indeed, some people instead of planting flowers prefer to keep the ground adjacent to the house entirely in grass. But it does not, I apprehend, for that reason, cease to be garden ground in a reasonable sense of the word. It requires as much trouble and expense, if not more, to keep it mown and in order.

"I therefore think that, giving a fair meaning to the terms of the exception, they must be held to cover the ground in question.

"In coming to this conclusion I have not disregarded the contention that in construing the exception the word 'gardens' must not be taken in its widest signification. The 'gardens' referred to are not public gardens; and I think it must also be conceded that the owner of the surface could not, by laying out and planting flowers on the whole or a large part of the surface, exclude the owner of the coal. 'Gardens,' in the sense of the title, means gardens which are suitable and appropriate to a dwelling-house of the kind; and such I take the piece of ground in question to be.

"The respondents maintain that the exception does not apply to boring; that boring is not 'shanking' or 'opening the ground.' I do not think that this is a fair interpretation of the words as used. What the granter of the charter binds himself not to do is not to shank or open the ground within the excepted premises, not merely in working the coal, but also in searching for it; provided that, 'in searching for or working said coall we doe not shank or open the ground,' &c. Therefore, while the terms 'shanking' and 'opening the ground' may not usually be applied technically to boring, I think that the words as used in this deed are wide enough to cover, and do cover, boring.

"It is said that boring is a simple and inoffensive operation. It is not always so. If coal is not quickly struck, or if the ground is difficult, it may take several months, and cause much inconvenience by noise and the accumulation of rubbish. To conduct this operation within 13 yards of the main door of a house must plainly cause much discomfort and inconvenience to the inhabitants, if it does not render their occupation of the house impossible. I apprehend that it was to protect the owner of the house from such a disturbance that the exception was inserted in the feu-charter.

"In the view which I take it is not necessary to consider whether, assuming that the ground in question is not within the excepted area, the respondents did not act emulously in boring where they did.

"The result is that I shall interdict the respondents from boring, opening the ground, depositing materials, or trespassing within or upon what has been called the lawn or green in question opposite the south entrance of the mansion-house. The remainder of the prayer for interdict is too wide and indefinite."

The respondents reclaimed, and argued —(1) The operation complained of was not covered by the exception in the feu-charter. The expressions "shanking" or "opening the ground" did not apply to such an operation as boring, which was a simple and inoffensive operation. (2) The operations had not been conducted within the prohibited area, the place not being a "close or garden." (3) The rights of parties having been defined by contract, the question could not be governed by the general law of neighbourhood.

Argued for complainers—The reclaimers had worked within the prohibited area by means of searching from above, which was expressly included in the exception. Even if the expression used were ambiguous, by the ordinary interpretation the granter of the feu had undertaken to protect the grantee, and the Court would not go back upon this protection. (2) The spot where the work was going on fell clearly within the prohibited area. (3) In any case, by the general law of neighbourhood the reclaimers were prohibited from exercising their rights of property so as to injure their neighbours. The reserved right to the coal was only a right of servitude which must be exercised without causing unnecessary inconvenience.

At advising—

LORD PRESIDENT—My opinion on this case may be very briefly stated; but this does not at all imply that I deem the questions discussed before us at considerable length to be trivial or plainsailing.

I think that by the operations complained of the respondents "opened the ground within the gardens" in the sense of the title. First, as to the operation, and then as to the place.

It is to be observed that the title prohibits opening the ground in searching as well as in working. Naturally the opening in searching will be a less opening than the opening in working. Now, the operation of boring may require only a small aperture; but the object being to fetch up what is below the surface, an opening of some size is indispensable, and is, past all doubt, made by breaking the surface. On this simple medium I consider the operation to be within the prohibited acts.

As to the place, I think it is a garden. It is enclosed; it is artificially formed; part is in grass and part in flower beds. The circumstance that the bore is in the part which is lawn does not take it out of the garden.

The Lord Ordinary has said all this with much more completeness; and accordingly I desire only to add that I entirely agree with him. I think his Lordship has rested his judgment on the right ground, and I do not go at all on the alternative argument of the complainers, that even if the bore were not in the expressly prohibited area, it might yet be interdicted on the ground that it was an undue interference with the comfort of the proprietor. I doubt whether such an argument is admissible where the title itself defines the area of protection.

LORD KINNEAR—I agree, both that the grounds on which the question must be decided depend on the construction of the particular feu-contract, and not on the general law of neighbourhood, and also in your Lordship's construction of the clause in the contract. I think, in the first place, that the area within which the operations complained of are being conducted is a "garden" within the meaning of the clause, and in the second place that these operations fall within the description of "opening" ground within the prohibited area.

But even if this last point were doubtful I am not satisfied that the respondents have any title to execute operations within the protected area. They have no right of property in the surface of the ground, and such right as they do possess is accessory to their separate estate in the minerals, viz., to make such use of the surface as may be necessary for the purpose of enjoying their mineral estate. Accordingly, they are entitled to "search for, work out, and dispose of" the coal, provided that in doing so they do not open the ground within the prohibited area. Now, there is no doubt that where they are entitled to open the ground for working the coal, there they have a right to bore for the purpose of ascertaining whether there is workable coal. But the right of boring being ancillary to the right of searching for and working the coal, and an incident of it, I find no basis in any legal right for their claim to enter on the surface and bore at a place where they have no right to work.

LORD ADAM concurred.

LORD M'LAREN was absent.

The Court adhered.

Counsel for Complainers—W. Campbell—W. Thomson. Agent — Charles George, S.S.C.

Counsel for Respondents—Balfour, Q.C.—Clyde. Agents—Welsh & Forbes, S.S.C.

Thursday, July 9.

FIRST DIVISION.

[Lord Kincairney, Ordinary.

HIGHGATE & COMPANY *v.* BURGH OF PAISLEY.

Process—Preliminary Pleas—"All Parties not Called"—Superior and Vassal—Reservation of Minerals—Mineral Lease—Damages.

A proprietor granted a feu-contract containing a reservation of the minerals in the subjects feued, and of power to work them "but not to occupy the surface." The feuar was bound to erect and maintain buildings of a certain value. The superior having leased the minerals to tenants, subsidences took place in consequence of their operations.

In an action of damages raised by the feuar against the superior in respect of injury sustained through the subsidences, the defender averred that the damage was caused by the mineral tenants' disregard of the prohibitions contained in their lease, and pleaded, "all parties interested not called."

Held (*rev.* the judgment of Lord Stormonth Darling) that the pursuer was not bound to call the mineral tenants.

The Corporation of Paisley, as represented by the Provost, Magistrates, and Town Council, granted to Messrs Hugh Highgate & Company, oil refiners, Paisley, a feu of certain subjects in Murray Street, Paisley.

The feu-contract, which was dated 26th July 1872, contained the following reservation as to the minerals in the subjects:—"But reserving always to the said Parliamentary trustees and their successors and assignees the whole coal and other metals and minerals within the said steading of ground, and power to work, win, and carry away the same, but not to occupy the surface."

The contract also contained a building clause to the effect that the feuars were bound within two years of the date of entry to erect and to maintain on the subjects feued a building capable of yielding a yearly rental of at least triple the feu-duty paid.

Buildings were erected on the subjects, and were used by the feuars for the purposes of their business. By lease dated 22nd September 1885 the Corporation let to Alexander Speirs, fireclay goods manufacturer, and John Faill, as trustees for the firm of Speirs, Gibb & Company, the fireclay under the ground feued to Messrs Highgate. Under the lease the lessees were taken bound to relieve the Corporation of all damage caused by their operations in working the fireclay, and stringent regulations were laid down as to the method of working.

Subsidences having taken place on the lands occupied by Messrs Highgate in consequence of the working of the fireclay, they raised an action against the Corporation for declarator that the defenders were not entitled either by themselves or their lessees to work the minerals under their feu in such manner as to cause subsidence, for damages in respect of the injury caused thereby, and for interdict against future workings.

The defenders averred that the subsidences had been caused by the fault of their tenants, and pleaded—"(1) All parties interested not called."

The Lord Ordinary (STORMONTH DARLING) on 29th May 1896 sustained this plea, and continued the cause.

Opinion.—"The fuller discussion to which I listened in the cognate cases of *Magistrates of Paisley* v. *Spiers, Gibb & Company* has led me to reconsider the view which I was disposed to take (but to which I had not given effect by interlocutor) on the plea of 'All parties not called' in this case.

"The main defence of the corporation is that the letting down of the surface is due to the fault of the lessees, and that for such fault they are not responsible. This defence makes it proper, I think, that the lessees should be called. As a general rule, a landlord is not liable for the consequences of his tenant's act or default unless it be the necessary result of the lease having been granted (*Westorn* v. *Tailors of Potterrow*, 1 D. 1224; *Lyons* v. *Anderson*, 13 R. 1020). Nor is this rule affected by the circumstance that the pursuers here stand in the relation of vassals to the defenders. A superior who feus ground for building without special stipulation may not be entitled himself to do anything that will bring the buildings down, but he does not warrant support to his feuar against the illegal acts of all and sundry. Accordingly, in the case of *Tassie* v. *Magistrates of Glasgow*, in 1 S. (June 18, 1822), where the pursuers were the tenants of the Corporation, and complained of operations by other tenants, the Magistrates were assoilzied and the actual wrongdoers were held liable.

"It appears from the defences of the mineral tenants to the action of relief at the instance of the Magistrates against them, that they mean to maintain that the subsidence was caused not by their operations but by the operations of their predecessors. It is right, I think, that they should have the chance of substantiating this defence, if they can, in the present action; otherwise the question might have to be tried over again in the action of relief.

"I shall therefore sustain the first plea-in-law for the defenders and continue the cause, in order to give the pursuers an opportunity, if so advised, of bringing a supplementary summons against the mineral tenants."

Argued for reclaimers—The defenders