statute that a licence had been applied for "for William Teacher & Sons" to enable them to carry on their business in certain premises. What does it matter to the public whether that application was made for the firm by one partner or the other provided the magistrates are satisfied with the character and fitness of the person put forward as the person in whose name the certificate shall be issued, as the person who shall be individually answerable to them for the fulfilment of the conditions of the certificate. I am unable to see what interest the pursuers have in litigating on this question at all. As members of the public they have a title to question any violation of the statute by the Magistrates, but their interest is not discoverable, and has not been stated.

I think the application lodged on 28th March in name of Adam Teacher for his firm of William Teacher & Sons is not open to any objection—that it did not fall by reason of Adam Teacher's death—that the defender William Curtis Teacher was competently sisted as a party to the application in room of his deceased partner, and that the certificate granted by the Magistrates on that application is not subject to reduction on any ground stated by the pursuers.

LORD YOUNG and LORD MONCREIFF were absent.

The Court adhered, allowing additional expenses to the defender William Curtis Teacher, and a watching fee to the Town-Clerk as representing the Magistrates.

Counsel for the Pursuers—Guthrie, Q.C. —Salvesen, Q.C.—Lyon Mackenzie. Agent —A. N. Stephenson, S.S.C.

Counsel for the Defender Teacher — Solicitor-General (Dickson, Q.C.)—Clyde. Agent—James Purves, S.S.C.

Counsel for the Defender the Town-Clerk of Glasgow—A. O. Deas. Agents—Simpson & Marwick, W.S.

Friday, March 16.

SECOND DIVISION.

[Lord Kyllachy, Ordinary.

ANDERSON *v.* M'CRACKEN BROTHERS.

Mines and Minerals—Working Minerals—Conveyance of Minerals—Right of Support—Whether Right Granted to Bring Down Surface—Damage Clause—Extrinsic Evidence—Long-wall Working—Custom of District.

A disposition of minerals gave power "to work, win, and carry away the said minerals, and for that purpose to sink pits, erect machinery, make roads, railways, and watercourses, and to calcine the said ironstone, and coke the said coal, all on the foresaid lands, and generally to do every other thing for the profitable and convenient working, winning, and carrying away the said minerals before specified on payment of the annual surface damages for the ground occupied by such operations, and of all damages done to crops and grass," and to buildings then on the ground, or to any new buildings erected in lieu thereof, no damages being payable for moss ground, and subject to the declaration that no pit should be sunk within 100 yards of the farm-steadings except of consent. It was proved that the long-wall method of working, by which all the mineral is removed without leaving any pillars, and which necessarily brings down the surface, was the only method by which the minerals in question could be worked at a profit; that it was the method usually adopted in the district at the date of the disposition, and that these facts were known to the granters. The coal in the lands had not been worked prior to the date of the dispositions. In an action for interdict against the minerals being worked in such a way as to bring down the surface, *held* (*rev.* Lord Kyllachy, Ordinary) that the mineral owners and their tenants were entitled to work on the long-wall system, a licence to bring down the surface upon payment of damages being implied from the terms of the damage clause in the title as construed in the light of the circumstances proved to have existed at the date of the grant.

Expenses — Several Defenders — Separate Representation of Different Defenders with Same Defence.

Held (*diss.* LORD YOUNG) that where a pursuer has convened more than one defender, each defender is entitled to the expense of lodging separate defences under the assistance of his own counsel and agent, but that if it appears from the closed record that the interests of all the defenders are the same, the defenders ought to arrange for a joint defence by the same agent and counsel, and that if they do not do so the pursuer will only be found liable in full expenses after the closing of the record as for one defender and a watching fee as for the other.

Circumstances in which the Court (*diss.* Lord Young) *found* a pursuer liable in expenses as for one appearance from the date of closing the record, and in addition in a watching fee of £16, 16s., the amount of expenses found due being directed to be divided equally between the two sets of defenders.

This was an action at the instance of Thomas Anderson of Langdales, in the parish of New Monkland and county of Lanark, against (1) M'Cracken Brothers, coalmasters, and the individual partners of that firm; (2) the marriage-contract trustees of James Mitchell, banker, Auchengray House, near Airdrie, and his wife;

(3) the testamentary trustees of Mrs Margaret Thomson Rankin or Alston, wife of John Motherwell Alston, writer, Coatbridge; (4) the said John Motherwell Alston; and (5) John Rankin, coalmaster, Glasgow.

The minerals in part of the pursuer's lands of Langdales were worked by the defenders M'Cracken Brothers under leases from the other defenders, who were the proprietors of the minerals in these lands under dispositions from the pursuer's authors.

The pursuer concluded (1) for declarator that the defenders were not entitled to work the minerals so as not to leave sufficient support for the pursuer's lands above and adjacent to the seams worked by them; that they were bound to work the minerals in such a manner as not to alter the surface of the lands or the natural level thereof, and for that purpose to leave sufficient stoops, dykes, and pillars to support the pursuer's lands above and adjacent without injury and damage, and unaltered in level; (2) for interdict against the defenders working the minerals in such a manner as to break, injure, or alter the level of the surface of the pursuer's lands, or endanger its being injured or altered in level, or to injure buildings, machinery, or erections, or cause disturbance or subsidence; and (3) for £1000 as damages.

The pursuer averred that the defenders M'Cracken Brothers were working the minerals "in an illegal and improper manner, and in such a way as to bring down the surface," and that they had excavated the minerals "without leaving pillars, or otherwise providing for the support of the surface," and that subsidence and consequent damage had resulted. He also averred that the M'Crackens' method of working had been authorised by the other defenders.

Defences were lodged (1) for M'Cracken Brothers, and (2) for the other defenders. M'Cracken Brothers denied that they were working the minerals in an illegal way. The other defenders averred that they had only granted to the first defenders the power of working the minerals to the extent conferred on themselves by virtue of their titles. They also averred as follows:—"The coal seams are thin, and average 15 to 19 inches in thickness. Seams of this nature can only be worked to a profit by a system of complete abstraction of the coal seams. This system, known as the long-wall system, is that which for a century has been universally practised in the neighbourhood. Upon no other system could the coal belonging to these defenders be worked to a profit. No seams of coal which have been worked could have been worked by any other system. This was well known to the pursuer's authors at the time when they granted the before-mentioned dispositions. In particular, one of the disponers, Mr Robert Anderson, was well aware of this. The price then paid for the minerals was paid upon the footing that the coal should be exhausted by the said long-wall system."

They averred further that the lands under which the minerals were worked had no feuing and little agricultural value; that no buildings had been injured; that there were no buildings upon that part of the lands; that they had always been willing to pay for any damage caused by the mineral tenants; and that the minerals had been worked on the long-wall system since 1872 with the knowledge and approval of the pursuer.

The disposition in favour of the author of the second, third, and fourth defenders was granted by Thomas Anderson, residing at Langdales, the father of the pursuer, and Robert Anderson, mineral borer, uncle of the pursuer. It bore to be granted in consideration of the sum of £800 instantly paid, and of the sum of £200 covenanted to be paid, out of the first and readiest profits which might be derived from the minerals, and disponed all and whole two-thirds of the whole coal, ironstone, limestone, and fireclay and other metals in the lands, "with full power and liberty to the disponee and his heirs and assignees, together with all right, title, and interest, claim of right, property, and possession which we or either of us, our authors or predecessors, heirs or successors, had, have, may, or can claim to the said coal, ironstone, limestone, fireclay, and other metals and minerals under said lands, with full power and liberty to" the disponee "to work, win, and carry away the said minerals, and for that purpose to sink pits, erect machinery, make roads, railways, and watercourses, and to calcine the said ironstone and coke the said coal, all on the foresaid lands, and generally to do every other thing for the profitable and convenient working, winning, and carrying away the said minerals before specified on payment of the annual surface damages for the ground occupied by such operations, and of all damages done to crops and grass, as the same shall be ascertained from time to time by arbiters mutually chosen, or by an oversman to be appointed by them; declaring that so soon as the ground is not required to be further occupied the same shall be restored as near as circumstances will admit to its former condition by trenching the rubbish under the surface; . . . declaring that no damages shall be paid for moss ground, nor shall the same require to be restored; declaring also that no pit shall be sunk within 100 yards of the farm-steadings, except with the consent of the respective proprietors, as also all damages done to the buildings on the ground shall from time to time be paid, or to any new buildings to be erected in lieu of those presently existing." It was also provided that the disponers, or such of them as should occupy Langdales for the time being, should be entitled to 80 carts of coal free annually during the time that coal was wrought in the lands, and also to ashes, rubbish, and certain dross.

The dispositions in favour of the fifth defender's author contained similar provisions.

It was not disputed that the defenders were working, and intended to work, the

minerals on the long-wall system, or that this system necessarily brought down the surface.

A proof before answer was allowed and led in support of the defenders' averments, the import of which sufficiently appears from the opinions of the Judges.

On 9th November 1899 the Lord Ordinary (KYLLACHY) pronounced the following interlocutor—"Finds and declares, and interdicts, prohibits, and discharges in terms of the conclusions of the summons for declarator and interdict, and decerns: Finds the pursuer entitled to expenses since the date of closing the record," &c.

Opinion.—"The pursuer here is the proprietor of the surface of the lands of Langdales, and the defenders amongst them own the minerals under those lands. The surface and minerals were separated by dispositions granted on 9th June 1853 and 4th July 1862, by the then owners of the *plenum dominium*. The earlier of those dispositions is, in so far as material, quoted on record, and is printed at length in the appendix of 10th July 1862. The later disposition does not appear to be printed, but it is agreed that for the present purpose it may be taken to be in the same terms.

"The question is, whether in disponing the minerals, and so separating the two estates, the pursuer's predecessors, as owners of the surface, surrendered the right of support which—apart from such surrender—they retained at common law. It is not contended that the right to support was expressly surrendered; but the defenders maintain that there is a necessary implication to that effect derived from the terms of the clause in the original disposition, which provides for the working of the minerals and the payment of compensation for damage thereby caused. They seek to assimilate the present case to the case of *Aspden*, 10 Ch. App. 403, where such implication was deduced successfully from the terms of a compensation clause providing in unequivocal terms for contemplated injury to buildings. But the defenders found further and separately on inferences which they seek to draw (1) from the mode of working practised in neighbouring coalfields at the date of the two dispositions—a mode of working which it is not disputed brought down the surface; (2) from the impossibility or difficulty of working to profit such minerals as are here in question consistently with supporting the surface. Of their averments on those heads the defenders were allowed a proof before answer, and according to their contention the result of that proof brings the present case within the principle of the case of the *Bank of Scotland* v. *Stewart*, 18 R. 957.

"At the close of the proof which was led the other day I heard a very full and careful argument on both sides, which included a review of most of the recent cases on the subject. Having again considered those cases and given my best consideration to the whole matter, I have come to the conclusion that the defenders have failed to make good their contention.

"In the first place, I am unable to hold that the facts disclosed by the proof at all affect the rights of parties under their titles, or materially help in the construction of those titles. The minerals here were not being worked when they were given off by the proprietors of the surface. Nor were they in fact worked until about the year 1872. I cannot in these circumstances consider the present case to be at all similar to the case of a disposition of a going colliery worked in a particular manner at the time of the disposition. That was the state of the fact in the case of the *Bank of Scotland* v. *Stewart*. But here, on the contrary, all that is proved is that for a long period prior to 1853 long-wall working had been extensively practised in Lanarkshire, and was the mode of working generally in use in the coal-fields adjacent to the coal-field in question. That is all that is proved, taking the proof at its very best. And that being so, I cannot hold that the legal import of the titles which were accepted in 1853 and 1862 by the defenders' authors can be controlled or affected by inferences as to the probable contemplation of parties—inferences drawn from the mode or modes of working practised by other people and on other estates. For the same reason I am equally unable to sustain inferences drawn from the thinness of most of the seams of coal in this particular coal-field, and the alleged impossibility of working such seams to profit except by long-wall. In point of fact there is at least one seam in the field which cannot be described as specially thin, viz., the Virtuewell coal; but even assuming generally that long-wall working is the only mode of working to profit the known seams in this coal-field, that appears to me to be a matter on which the defenders' authors must be held to have taken their chance, and in connection with which, if they required special powers, they ought to have stipulated for such powers when they made their purchase.

"The case therefore does not, in my opinion, fall within the principle of the case of the *Bank of Scotland* v. *Stewart*. It remains to consider whether it can be brought within the reasoning which prevailed in the case of *Aspden*, and cases of that class. As to this, I can only say that I have not been able to discover in the defenders' title any provision which, in my opinion, requires to be read as applying to damage to the surface by subsidence—subsidence caused or induced by proper working underground. There are, of course, the usual clauses providing for surface damage—that is to say, damage done to the surface by the sinking of pits, the making of roads and railways, and other operations above ground; and in the enumeration of the heads of damage to be compensated there is no doubt included 'damage done to buildings on the ground.' But this reference to buildings must, in my opinion, be read in connection with the context, and must—or at least may—be read as pointing, not to damage by subsidence caused by underground workings,

but to damage *ejusdem generis* with that mentioned, viz., damage done in the course of sinking of pits, making of roads, and other surface operations. That is at least a possible reading of the clause, and having in view that the defenders must establish the surrender of the right of support by necessary implication, I am unable to hold that such necessary implication exists here. Of course the clause may cover—probably does cover—casual damage, damage done negligently or by accident, even by underground operations. But what the defenders have to show in order to bring their case within the case of *Aspden* is that the surface damage clause cannot reasonably be read otherwise than as providing compensation for injury done by subsidence—subsidence not caused accidentally but caused in the regular course of working the minerals. I do not think the defenders have shown that; and therefore on the whole matter I must grant decree of declarator and interdict, and continue the cause on the question of damages."

The defenders reclaimed.

Argued for the defenders other than M'Cracken Brothers—(1) In the clauses of the dispositions as to working the minerals, and as to damages for injury caused in doing so, it was plainly implied, apart from the proof, that the parties contemplated and intended that the minerals should be worked in such a way as would bring down the surface. Plain implication was enough. It was not necessary that the inference should be inevitable, or that the clause should not be reasonably capable of being read otherwise. Here the compensation clause clearly referred to damage caused by underground workings, and that implied a licence to the defenders to bring down the surface subject to payment of damages—*Aspden* v. *Seddon* (1875), L.R., 10 Ch. App. 394; *Smith* v. *Darby* (1872), L.R., 7 Q.B. 716. In *White* v. *Dixon*, December 22, 1881, 9 R. 375, March 19, 1883, 10 R. (H.L.) 45, the terms of the clauses negatived any right to bring down the surface. (2) From the proof it appeared that it was impossible to work the minerals at a profit except by the long-wall system, which necessarily brought down the surface, that this was the method of working universally adopted in the neighbourhood, and that both these circumstances were well known to all the parties when the dispositions of the minerals were granted. This case was therefore within the principle of the decision in *Bank of Scotland* v. *Stewart*, June 19, 1891, 18 R. 957. The surface here was of little value, chiefly moss and rough pasture. Where the seams were thin, as here, the effect of long-wall working was merely to cause a slight general subsidence without cracks in the surface, and in this case such subsidence could only cause very slight injury. In view of these circumstances it might readily be presumed that the disponers of the minerals intended them to be fully worked out, even if that involved some injury to the surface—*Davis* v. *Treharne* (1881), 6 App. Cas. 460, *per* Lord Blackburn, at page 466. To grant interdict here would be to allow the pursuer to derogate from his author's grant. (3) In any view, this was not a case for interdict. The surface was of little value, and the result of preventing the defenders from working in the way adopted by them would be to make it impossible to work the minerals at a profit, and so to render the whole expenditure of the mineral tenants useless, and also to cause very serious loss to the mineral owners. As to the impropriety of granting interdict under such circumstances, see *Governors of Daniel Stewart's Hospital* v. *Waddell*, July 2, 1890, 17 R. 1077.

Argued for the pursuer—A grant of the minerals in lands was a grant only of such minerals as could be removed without disturbing the surface.—*Smith* v. *Darby*, *cit.*, *per* Lush, J., at page 726; *Aspden* v. *Seddon*, *cit.*, *per* Mellish, L.J., at page 402; *Davis* v. *Treharne*, *cit.*; *Love* v. *Bell* (1884), 9 App. Cas. 286. The burden of proving a right to bring down the surface lay upon the mineral owner.—*Davis* v. *Treharne*, *cit.*; *Love* v. *Bell*, *cit.* The fact that the grant contained a clause as to damages for injuring the surface was not sufficient, unless that clause was so framed that it was quite inconsistent with the presumed prohibition, or would have been quite inconsistent with an express prohibition, against bringing down the surface, and necessarily implied a right on the part of the mineral owner to do so. The burden which lay upon him could not be discharged by pointing to a damage clause which might refer to damages arising from underground working intentionally designed to bring down the surface, but which could also be reasonably held to refer merely either to damage caused accidentally by underground workings, or to damage caused by operations on the surface, and so could receive full effect consistently with the right of support—*Davis* v. *Treharne*, *cit.*; *Smith* v. *Darby*, *per* Lush J. at page 726; *Governor of Daniel Stewart's Hospital* v. *Waddell*, *cit.*; *Greenwell* v. *Low Beechburn Coal Company* [1897], 2 Q.B. 165. The damage clause here could be quite fairly read as not applying to underground workings, but merely to operations on the surface. There was nothing in it which would have been inconsistent with a clause expressly prohibiting such a mode of working as would bring down the surface. The argument for the pursuer and respondent upon the other points in the case sufficiently appears from the Lord Ordinary's opinion.

Counsel appeared for the defenders M'Cracken Brothers, but they did not consider it necessary to address the Court.

At advising—

LORD JUSTICE-CLERK—The question in this case is between the proprietor of certain lands and the disponees of the minerals in those lands, as regards the rights of the latter in the working of the minerals on the one hand, and the protection of the interests of the proprietor of the lands on the other. It is maintained on the one

hand that the proprietors of the minerals are not entitled to bring down the surface at all, the contention on the other is that they are entitled to work out the minerals, and that if in doing so they do damage, the deed itself gives the rules for compensation where compensation is stipulated for (*Aspden*, 20 Ch. App. 403). It is necessary, therefore, to consider what the terms of the deed are as relating to damages. In the first place the usual power is given "on the condition of payment of annual" surface damages for the ground occupied by the operations, and of restoration of the surface "so soon as the ground is not required," and so far as circumstances will admit. There is further a restriction against sinking any pit nearer than 100 yards to a farmsteading, and lastly, the mineral owner is taken bound that "all damages done to the buildings on the ground shall from time to time be paid, or to any new buildings to be erected in lieu of those presently existing."

Now, these being the stipulations as regards damages, they seem to me to fall into two classes—one class, damage done on the surface of the ground by the surface being used for works in the ordinary way in which the use of the surface must be interfered with when material has to be brought up and conveyed to a public place or laid down on the surface; and the other class, damages done to buildings on the surface. There is no stipulation of a general kind relating to disturbance of the surface itself.

Such being the general terms of the deed as regards working and damages, the question of the rights of the mineral owner must be considered in relation to these. In doing so I think that, as was expressed in a case in England, "the primary basis for consideration is that where a grant of minerals is made, *prima facie* it is presumed that the minerals are to be enjoyed." If that be so, any stipulations in the deed which can be so read reasonably as to favour the enjoyment, must be so read. And in the questions how the stipulations are to be read, the circumstances may be considered, for to some extent the question of the possibilities of enjoyment of the grant must depend on circumstances.

How then must the stipulations be read? It appears to me that the only stipulation that is of consequence in the question is that which relates to buildings on the ground. That is, in my opinion, a separate and distinct stipulation. I cannot agree with the Lord Ordinary that it must be read as referring to "damage *ejusdem generis*" with that referred to in an earlier part of the deed, viz., surface damage by the works on the surface. The Lord Ordinary says that this "is at least a possible reading of the clause." I do not think so. The clause relating to buildings is a different clause commencing with disjunctive words "as also." And the first clause refers exclusively to ground on which there are no buildings, for the stipulations regarding restoration on the cessation of working plainly refer to a restoration of surface for agricultural purposes only, as the mineral proprietor "is taken bound to restore" by trenching the rubbish under the surface. But further, it is not easy to see how the latter damage can be read as applying to damage done to buildings by the operations on the surface. It would be quite an unnatural reading of the words, and it was not suggested in argument what damage could be caused in that way. Damage must be actual and not fanciful. I cannot read these words otherwise than as referring to damage caused by the workings below ground. And the deed refers in my opinion, not to damage which the mineral owner shall wrongfully do, but to damage he may cause by his rightful acts in winning the coal, which is what the deed makes lawful to him by conveying them to him. It is damage done in doing what is contemplated by the parties, and not what is outside contemplation and unlawful. Here injury to houses on the surface by mining operations was contemplated as it was in the case of *Smith* v. *Darby*, L.R., 7 Q.B. 716. It was held in that case that that cannot mean injury by any acts done on the surface, and that it must mean damage from mining operations done below the ground. When the second point, viz., the circumstances of the case are considered, they tend all in the same direction. For it is established by the evidence that the nature of the seams of coal, as they were well ascertained in the district surrounding this property many years before the sale, made a mode of working necessary as regards most of the seams of coal by which it was certain that there must be risk of the surface sinking, and that if it were not permissible to the proprietor of the minerals to work in that way he could have no proper enjoyment of the subject. It was certain that, some of the seams of coal being thin seams, no other mode of working than long-wall working was possible, and it was equally certain that such a mode of working was impossible if the mineral owner had no right to affect the level of the ground.

I come to the conclusion that the true reading of the deed is, that the disponee was given the right to work the minerals upon the footing that in doing so there would be subsidence of the soil, and that the right so given was fenced with this condition only; that as there were buildings on the ground he should pay for any damage done to these existing buildings, or to other buildings put in their place, but that otherwise he obtained unrestricted right to win the minerals by the ordinary mode of working.

I am therefore of opinion that the Lord Ordinary's judgment ought to be recalled and the interdict refused.

LORD YOUNG—I agree. It would not be useful to enter into details, but I think I can express the grounds of my opinion almost in a sentence. When a person sells minerals he does so by granting a disposition. It is intended in every case that the subjects sold should be taken possession of.

As in every other case we must look at all the circumstances which may have a legitimate bearing on the question, we must look here to the character and quality of the estate conveyed. It must have been intended that the subject sold should be removed. Such minerals were constantly being removed in the neighbourhood, where there are minerals of the same kind. We have evidence, very properly allowed, as to the manner of this removal. It appears that with the exception of one seam, with which we have no concern here, the method universally adopted in the neighbourhood was that which the pursuer seeks here to interdict. That was the only method in which the mineral could have been removed not only with the best profit, but with anything but serious and substantial loss. Indeed, it is not plain that it could not have been removed at all without affecting the surface. I think it was the intention of the parties to this contract that the minerals should be removed in the same manner as they were removed by others in the neighbourhood. This view is borne out by the terms of the disposition—[*His Lordship read the clauses above quoted*]. In that view of the facts, and of the effect of the disposition, I think the defenders are doing nothing except what is reasonable and necessary to enable them to work and win these minerals. I therefore think that the Lord Ordinary's interlocutor should be recalled and interdict refused.

LORD TRAYNER—There can be no doubt of the soundness of the general rule which the Lord Ordinary has applied in deciding this case. When the surface of lands and the minerals underneath are divided and held as separate tenements, the owner of the minerals, in working them out, is not entitled to let down or damage the surface, the owner of the surface being entitled to support from the subjacent strata. But the question is, whether that general rule is applicable here. The defenders are working out two seams of coal below the pursuer's lands by long-wall workings, the result of which is that the surface will be let down, but not so (according to the weight of the evidence) as to inflict any material injury on the pursuer or his lands. The pursuers, however, are not content to have a claim of damages against the defenders, but desire to have them interdicted from working the seams in question in any way which "will alter the level of the surface" of the pursuer's lands. The Lord Ordinary has granted interdict as concluded for, but I agree with your Lordship that that judgment should be recalled.

Assuming the general rule as to the right of support to the surface, to which I have already referred, the main question in this case is, whether that right has been surrendered, and I think it has. Not in express terms, I admit, but by the fair implication of the title on which the principal defenders hold. When I say the principal defenders, I refer to the owners of the minerals, not their tenants. The principal defenders' title to the minerals in question, dated in 1853, proceeds from the pursuer's father, and by it there is conveyed to the defenders the whole minerals in the land in question, with full power to them to work, win, and carry away the same, and "generally to do every other thing for the profitable and convenient working, winning, and carrying away of the same." The pursuer's father, when he conveyed the minerals to the defenders, was also the proprietor of the surface and he continued to be so till 1869, when he is said to have conveyed the surface to the pursuer. The consideration which the defenders gave for the conveyance in their favour was a cash payment of £800, and obligation to pay a further sum of £200 out of the first and readiest of the profits they derived from the minerals, and some minor considerations in the way of supply of coals and ashes. It appears, accordingly, that the defenders were authorised to work and win their minerals in the most "profitable and convenient" manner, and that part of the consideration depended on their working the minerals to profit. I think it is conclusively proved that the coal in question could not have been worked either profitably or conveniently in any other way than in the mode adopted, namely, by long-wall, and that for many years the coal in the immediate district of the pursuer's lands and elsewhere in Scotland was being worked by the long-wall system and no other. Of this fact I cannot believe the pursuer's father was ignorant at the date of the conveyance to the defenders. I think he must have known what was notorious in the district, and that he had in view the coal would be worked long-wall when he authorised it to be worked in the most profitable and convenient manner, and stipulated for a payment out of the profits. The coal in question could not otherwise than by long-wall have been worked to profit. I think it must, consequently, have been in the view of the pursuer's father that the authorised working would affect the level of the surface of his lands. In the conveyance to the defenders there is also a provision, imposing liability on the defenders for surface damage. Of course there may be surface damage caused by some other operations than underground workings, and therefore a provision of that kind does not necessarily imply a right to cause subsidence. But this deed provides for damage to houses on the surface, and I think such damage most naturally refers to damage occasioned by underground working, and if it was meant to cover damage to houses arising from some other cause, I would have expected that to have been specified.

I think it is also material to notice that the transaction between the pursuer's father and the defenders was a transaction of sale. It can scarcely be supposed that the defenders bought and paid for a subject of which they were to get no use, and I cannot impute to the pursuer's father that he sold for an adequate price a subject which he could interdict the defenders from using and working immediately after

the sale. For his claim for interdict would have been irresistible immediately after he became aware of the defenders' intention to work the coal by long-wall, if the pursuer's claim for interdict now is held to be well founded. A threatened wrong may be interdicted as well as one which has been commenced and is being continued.

If the defenders or their tenants' workings had been improper or irregular in themselves, apart from the system under which they were working, that would have been a ground for interdict. But that is not alleged, at least not proved. The contrary is established.

On the whole matter, I am of opinion that the fair reading of the conveyance in favour of the defenders authorises a working of the coal which may result in altering the level of the pursuer's lands. If the pursuer can qualify a claim for damages, that is quite open to him, but from the description given by the witnesses of the pursuer's lands it does not appear that much, if any, damage will be inflicted on them by the defenders' workings.

LORD MONCREIFF was absent.

Counsel for the pursuer maintained that only one set of expenses should be allowed as against him.

Argued for the defenders M'Cracken Brothers—These defenders were entitled to get at least some expenses. The general rule was that where there were two defenders having the same defence, full expenses after the date of closing the record were allowed to one of the defenders only as against the opposite party, with watching fees for counsel and agent to the other defender, but that the total expenses recovered were divided equally between the two defenders—*Stott* v. *Fender*, October 17, 1878, 16 S.L.R. 5; *Leslie* v. *Davidson*, March 9, 1858, 20 D. 787. The case of *Rooney* v. *Cormack*, October 18, 1895, 23 R. 11, which was differently decided, was very special. But here both defenders were entitled to full expenses because the pursuer had not merely accused the tenants of working long-wall with consent of their landlords, but of improper and illegal working. If the pursuer had merely accused the defenders of working long-wall it might have been different, but here the allegation was "improper and illegal" long-wall working, and the tenants required to lead—and did lead—evidence to rebut that allegation.

Argued for the other defenders—If only one set of full expenses was to be allowed here, then there should be no division between the defenders, and the whole sum recovered should go to the mineral owners. These defenders were bound to maintain the tenants in possession. The primary defenders were those who held the title. Of the cases quoted by the defenders M'Cracken, one was a case of partners with exactly the same defence. Here different interests might have developed during the proof. In *Murray* v. *Macfarlane's Trustees*, November 6, 1895, 23 R. 80, two sets of full expenses were allowed.

Argued for the pursuer—No doubt each set of defenders was entitled to appear and to be heard by the Court, but they were only entitled to one set of expenses as against the opposite party. It was the duty of the parties to an action to conduct the litigation as cheaply as possible, and where as here the interests of different defenders were identical, if they failed to arrange among themselves for a joint defence, their opponent ought not to be made liable for any more expenses than he would have been if they had done so. Apart from authority it would be just that only one set of expenses should be allowed against the pursuer; but there was a well-established rule of practice to this effect—*Bell* v. *Goodall*, June 1, 1883, 10 R. 905 (a case in which a tenant and his subtenant were maintaining the validity of a lease); *Burrell* v. *Simpson & Company*, July 19, 1877, 4 R. 1133; *Liquidator of the Consolidated Copper Company of Canada* v. *Peddie*, December 22, 1877, 5 R. 393, where see form of interlocutor as to expenses which the pursuer submitted should be followed here.

At the proof both sets of defenders led evidence, four witnesses being examined by each of them.

At advising—

LORD JUSTICE-CLERK—In this case the defenders have been successful. The question now to be decided is whether the two sets of defenders are to be allowed their full expenses as for a separate appearance for each of them. The practice is, I think, well established that in such a case as this the unsuccessful party is not to be called upon to pay two sets of expenses, and that he should only be made liable in one, he being also liable to a watching fee to the second party. This was admitted to be the practice in the discussion. Of course if the two defenders choose they may appear separately at proof and debate. But the question whether they can be allowed to do so, so as to double the expenses which their opponent may be called on to pay on non-success, is a different matter, and the practice is against it. I am in favour of granting a finding of expenses in this case in accordance with the practice as applicable to the expenses incurred since the closing of the record. The amount ascertained on audit will fall to be divided between the two sets of defenders.

LORD YOUNG—This question is not of much importance in itself. But I have thought it desirable, as I am responsible for our delay in pronouncing judgment, to formulate and state my views on the rule of practice which is said to exist, and on the view entertained by my brethren that it is applicable here.

There is no question of law. The general rule of law, or rather of practice, is that expenses follow the result, but are always in the discretion of the Court, so that the Judge can always do as he thinks just by modifying or otherwise. Now, the facts here, so far as bearing on the question of

expenses, are as simple as can be. We have before us the proprietor of an estate with minerals in it. His authors sold the minerals a number of years ago, and conveyed the mineral estate by disposition. The terms of that disposition are not in dispute. The disponees let the minerals to tenants — M'Cracken Brothers, who are called as defenders, and who are designed as coalmasters. They proceeded to work the minerals. I suppose that beginning to work minerals such as these causes considerable expense. They had worked them for some time when it occurred to the owner of the estate that they were working in an illegal manner, and he therefore brought this action for declarator, interdict, and damages—[*His Lordship read the conclusions*]. The proprietors of the estate and the owners of the minerals did not say that the tenants were working in a manner not allowed by their lease, and the question therefore came to be, whether, looking to the terms of the disposition, and the averments of fact as to the method of working customary in the neighbourhood, the defenders, the mineral tenants, were working in an illegal manner or not. The Lord Ordinary began by allowing parties a proof. There was no dispute that damages for injury caused by legal working were to be settled by arbitration. But the Lord Ordinary allowed a proof of the defenders' averments as to the custom of the district, and as to the practicable method of working the minerals. As the result he interdicted the defenders in terms of the conclusions of the summons, and found them liable in expenses. We have recalled that interlocutor and assoilzied the defenders.

The question now is, whether the parties whom the pursuer called in this action, and whom he found it necessary to call in order to attain his object, were both and each entitled to appear by their own counsel and agents, and if successful to get the expense of doing so from the pursuer who brought this action against them. I take the case of the tenants. They had at large expense started these workings. They had a large interest. The result of the Lord Ordinary's interlocutor was that they were interdicted from carrying on their operations in the only way in which they could do so at a profit. This caused all that they had expended to be thrown away, and their business, however profitable, was stopped. I cannot say that they were to blame for selecting their own counsel and agents. Can we say, in the exercise of our discretion, that they acted unreasonably, and ought to have contented themselves with the counsel and agents selected by the owners of the minerals.

On the other hand, the mineral owners' interest was also considerable — even greater than the tenants — because the tenants' interest would have ended with the expiry of the lease, whereas the owners as the result of the interdict could never have let the minerals again at the same rent. Therefore they were also entitled to appear. It is not doubted that they were entitled to appear. That is conceded. But it is said that they ought, in a reasonable regard for the legitimate interests of the pursuer who has called them here, to have agreed with the tenants to conduct their defence jointly by the same counsel and agents. Are we to inquire as to which of the defenders was to blame for their not having agreed to have a joint defence? Are we to say that a man is to blame for not agreeing with another man who will not agree with him? I cannot assent to any practice, for it is not a rule, which would have that result.

It was suggested that the matter might be regulated by Act of Sederunt, but that would be illegal. The Court of Session has no authority to make rules to govern the Court or the Lord Ordinary as to allowing or not allowing expenses in certain cases. The law is that the Court or judge shall decide according to his discretion, and any Act of Sederunt prescribing rules on the subject would be beyond the powers of the Court of Session.

The question then is, whether there is a practice which compels us to allow only one set of expenses here. I think there is not. I think both sets of defenders were entitled to appear. The owners and the tenants were both entitled to resist this action, and as they have been successful, I think they are both entitled to all expenses reasonably and properly incurred by them in defending themselves. I think the expenses reasonably incurred are the ordinary legal and customary fees and expenses. I think they are both absolutely entitled to such expenses, unless we in our discretion think they were to blame and therefore not so entitled. I think there is no practice which prevents us from giving both of them full expenses. If there is such a practice, then it is a bad practice and ought to be reformed. If it is right to do what your Lordships propose, then it should be done independent of practice. If it is wrong, and we think it is wrong, then whether it is the practice or not we ought not to do it. I think we have a discretion in such matters, and I repeat even an Act of Sederunt could not extend or limit the discretion which we have.

LORD TRAYNER—I understand the rule and practice of the Court in giving expenses against an unsuccessful pursuer who has convened more than one defender to be this—Each defender is entitled to lodge separate defences under the assistance and advice of his own agent and counsel. When the record has been closed, and it appears that the defenders have not any different interest, and that as regards both the same question is raised, then the Court regards it as the reasonable course that the defenders should combine, and by arrangement be represented by the same agent and counsel. If they do not do so, the pursuer is only found liable to the defenders in expenses as for one appearance. Full expenses are allowed as for one defender, and only a watching fee allowed as for the other, the Court regarding it in the circumstances as unnecessary that there should

be separate agents and counsel to represent what is practically one interest, and refusing to lay the burden of such unnecessary expense upon the pursuer. The correctness of this view of the practice of the Court was admitted by all the counsel at the bar. I do not enter upon the question whether the practice is a good practice. It is enough for the present case to say that it is the practice, and that one Division of the Court should not at its own hand alter a recognised and established practice.

I think that rule is applicable to the case before us, and applying it, the pursuer should, in my opinion, be held liable in expenses (since the closing of the record) to the defenders, but only as for one appearance, and in a watching fee to the other defender. The proof and hearing before the Lord Ordinary occupied two days, and the debate on the reclaiming-note two days. I think the watching fee may be fixed at £16, 16s.

As regards the question raised between the defenders themselves, I think the expenses allowed to one defender and the watching fee should be added together, and the *cumulo* amount equally divided, because I see that at the proof the burden of leading evidence was equally borne by the parties.

LORD MONCREIFF was absent.

The Court pronounced this interlocutor:—

"Recal the said interlocutor [9th November 1899] reclaimed against: Assoilzie the defenders from the conclusions of declarator and interdict: Find the pursuer liable in expenses, but that only as for one appearance from the date of closing the record; and in addition in a watching fee of £16, 16s. sterling, the amount of the said expenses hereby found due falling to be divided equally between the two sets of defenders: Remit the said expenses to the Auditor to tax the same, and to report to the said Lord Ordinary, to whom remit the cause to proceed therein, with power to him to decern for the taxed amount of the said expenses hereby found due."

Counsel for the Pursuer—W. Campbell, Q.C. — Wilson. Agents — Drummond & Reid, S.S.C.

Counsel for the Defenders M'Cracken Brothers — G. Watt — A. M. Anderson. Agent—William Balfour, S.S.C.

Counsel for the other Defenders—Ure, Q.C. — Hunter. Agent — W. B. Rankin, W.S.

Tuesday, March 20.

FIRST DIVISION.

[Lord Stormonth Darling, Ordinary.

SMEATON *v.* SMEATON.

Husband and Wife—Separation and Aliment—Cruelty—Condonation—Effects of Acts of Cruelty Condoned.

An action of separation at the instance of a wife on the ground of her husband's cruelty was settled, and decree of absolvitor was pronounced. Cohabitation was resumed. In a subsequent action by the wife on the same ground, *held* that the alleged acts of cruelty prior to the first action might be looked at, not as substantive grounds of separation, but as giving colour to later acts of cruelty which would, taken alone, not be of a character sufficiently gross to entitle the wife to decree, the issue in the case being whether the wife can, with safety to her person and health, live with her husband. Evidence on which *held* that the proof of cruelty considered on this principle was insufficient.

In 1896 Mrs Elizabeth Margaret Smeaton or Smeaton, wife of Thomas Wright Burgh Smeaton, of Easter Coul, Auchterarder, Perthshire, brought an action of separation and aliment against her husband. In this action decree of absolvitor was pronounced on 22nd October 1896 in pursuance of the following joint-minute:—"Graham Stewart for the pursuer and Grainger Stewart for the defender concurred in stating that the parties had resumed cohabitation, and that they withdrew all imputations made on either side on record. Counsel therefore craved the Court to discharge the diet of proof, to assoilzie the defender from the conclusions of the summons, and to find no expenses due to or by either party."

In January 1899 Mrs Smeaton brought another action of separation also on the ground of cruelty. In her condescendence she averred a general course of violent conduct on the part of Mr Smeaton from the date of their marriage in 1882, and particular acts of cruelty in 1895, 1896, and 1898. The averments of cruelty in 1895 were the same as those contained in the previous action.

Mr Smeaton lodged defences, in which he denied having been guilty of cruelty.

A proof was taken, the import of which sufficiently appears from the opinion of the Lord Ordinary (STORMONTH DARLING) and Lord Adam.

On 19th January 1899 the Lord Ordinary assoilzied the defender from the conclusions of the summons.

Opinion.—"This is a painful and in some respects a narrow case, but I am of opinion that the pursuer has failed to prove cruelty of such a kind as to justify judicial separation.

"It is always necessary in these cases to consider the station and mode of life of the