some other illegal act, he should be required to swear that he has made a full disclosure, and has not granted or promised any preference or security, nor made or promised any payment, nor entered into any secret or collusive agreement to obtain the concurrence of any creditor to his discharge. That is an appeal to the bankrupt's individual knowledge and his conscience, and I think that we cannot well substitute a declaration by a *curator bonis*, or by any person in a similar capacity, seeing that such a person would not naturally know anything about the matters to which the declaration would relate. But it appears to me that the bankrupt should not be deprived of the benefit of his discharge when he has fulfilled all the requisites of the statute in so far as it is possible for a man in his position to do so, and if we have to exercise the *nobile officium* of the Court to enable him to obtain that discharge, I think the preferable course is to dispense with the declaration or oath required by section 147.

LORD ADAM—I am of the same opinion. The bankrupt here has, so far as any third party can find out, made a full and fair disclosure of his estate, and all that the Act still requires is a declaration or oath by the bankrupt that he has made a full and fair disclosure, and has not made any secret arrangements with his creditors. Now, the bankrupt here is in a state of mind which makes it impossible for him to make such a declaration, and the question is, whether we should in these circumstances dispense with the declaration required by the statute, or whether some-one else should make the declaration for him. It seems to me preferable that the declaration should be dispensed with rather than that it should be made by a person not specified by the Act, and who, in a hundred cases out of a hundred and one, would know nothing about it. I think that would be a greater and unnecessary exercise of the *nobile officium*, and I agree that we ought in the present circumstances to dispense with the declaration.

LORD KINNEAR concurred.

LORD M'LAREN was absent.

The Court pronounced this interlocutor:—

"The Lords having considered the petition by the bankrupt Henry Albert Edward Roberts on the report of Lord Pearson, Ordinary, with the medical certificate of A. E. Henderson, M.B., C.M., and the motion of Stanley Roberts, *curator bonis* to the bankrupt petitioner: Dispense with the declaration or oath required by section 147 of the Bankruptcy (Scotland) Act 1856, and Acts amending and explaining the same: Remit to the Lord Ordinary to discharge the petitioner of all debts and obligations contracted by him for which he was liable at the date of his sequestration in terms of the prayer of the petition."

Counsel for the Petitioner—Cunningham. **Agents—Gillespie & Paterson, W.S.**

Thursday, May 16.

SECOND DIVISION.

[Lord Kyllachy, Ordinary.

JACKSON'S TRUSTEE *v.* WILLIAM DIXON, LIMITED.

Mines and Minerals — Lease—Working—Breach of Conditions of Working—Obligation "Fairly and Properly to Work"—Liberty to Work in Mode Tenant Might Deem most Advantageous—Damages.

A tenant in a lease of minerals bound himself "fairly and properly to work the said minerals," with liberty to adopt such mode of working the same as he might deem most advantageous for the complete excavation thereof. After the expiry of the lease the landlord brought an action of damages against the tenant, on the ground that the latter had not worked the minerals fairly and properly. He averred that the defender, having adopted the long-wall method of excavation, had improperly worked the upper portion first instead of the bottom portion, with the result that the latter was left covered with debris and broken strata, and thus rendered unworkable, and a large quantity of coal was lost to the landlord. The pursuer averred further that the defender had improperly left two ranges of pillars in a certain seam unworked, and had left these workings in such a condition that the coal therein could not be extracted. *Held* (*rev.* Lord Kyllachy, Ordinary) that the action was relevant.

By lease dated 22nd June and 20th July 1870, John Jackson, proprietor of Little Udston, Lanarkshire, let to William Smith Dixon, Govan Colliery, Glasgow, and his heirs, assignees, and sub-tenants, the whole coal, ironstone, limestone, fireclay, and all other mines, metals, and minerals in the lands of Little Udston for the period of thirty-one years from and after the term of Martinmas 1867. In 1873 a limited company under the name of William Dixon, Limited, was formed for the purpose of acquiring the whole business and undertakings of William Smith Dixon, including the said lease, which was duly assigned to the company. The company worked the coal, &c., in said lands until Martinmas 1898, when the lease came to an end and notice to remove was given. By the lease it was provided, *inter alia*, "With reference to the working of the said minerals, the second party [the lessee] hereby binds and obliges himself and his foresaids fairly and properly to work the said minerals, with liberty to him or them to adopt the long-wall, stoop-and-room, or any other mode of working the same, as he or they may deem most advantageous for the complete excavation of said minerals, and also at the expiry or other termination of this lease to leave the workings of such pits as are then in operation in good order and condition; declaring further, that the said

first party and his foresaids shall have full power and liberty to inspect the workings of the said minerals in the said lands either by themselves or by others to be employed by them for that purpose, and to make plans thereof for their own use, but that always at their own expense, and in such way and manner and at such times as shall not interfere with the operations of the said second party and his foresaids." . . .

The lease further provided that the second party should be bound, notwithstanding any and every assignation or subtack and intimation of the same, in payment of the rent and performance of all the obligations thereby undertaken by him during all the years of the lease.

On 7th February 1900 Arthur Jackson, the sole surviving trustee of the late John Jackson, under his trust-disposition and settlement, and others, who had succeeded to the estates of Barnhill and Little Udston under burden of certain provisions by virtue of the said settlement, raised this action against William Dixon, Limited, and the testamentary trustees of the late William Dixon, in which they concluded for the sum of £3521, 6s. 8d. in name of damages.

The pursuers averred—"(Cond. 3) By the said lease the tenant was taken bound 'fairly and properly to work the said minerals, with liberty to him or them to adopt the long-wall, stoop-and-room, or any other mode of working the same as they may deem most advantageous for the complete excavation of said minerals.' The first-named defenders in working the splint coal seam at first adopted the stoop-and-room system, by which the whole seam would have been exhausted had the stoops been extracted. But the system of working was soon after altered to the long-wall method. The change in the method of working took place after the lease had been assigned to the first-named defenders. No work was done in this portion of the mineral field by the said William Smith Dixon. Instead, however, of working the bottom portion of the seam first, and making the top portion of the seam a second working back towards the pit, the first-named defenders wrongously, improperly, and negligently worked the upper portion first, leaving the bottom portion of the seam unworked in the pavement, covered with *debris* and broken strata, rendering it in future perfectly unworkable. The first-named defenders did not work the said minerals fairly and properly, and the system they adopted, as above condescended on, was one which they knew, or ought to have known, was not advantageous for the complete excavation of said minerals. The first-named defenders worked the said minerals in the said improper and unfair manner with a view and result of making greater profits than they could have done had they worked the minerals fairly and properly. The defenders well knew that in working the minerals in the way they did a large quantity of coal would be lost. (Cond. 4) The system of working above condescended on was not a fair and proper working of the said minerals, and in consequence of said improper working of the said minerals the bottom portion of the seam has been left quite unworkable. This bottom portion is 3 feet 6 inches thick, and its area extends to 32·976 acres. The quantity of coal lost to the trust estate in respect of this improper working amounts to 150,284 tons of coal and dross. On various occasions the first-named defenders' attention was drawn to the way in which they were working the said minerals, and to the loss which would ensue to the landlords thereby. (Cond. 5) In addition, the first-named defenders wrongously and improperly left two ranges of pillars unworked in the splint seam on the Udston Colliery march. It was their duty to have removed the said pillars, or at anyrate to have left the workings in such a condition as would enable the pursuer to extract the said coal. It is now impracticable to win the coal contained in the said pillars. The quantity of coal and dross contained therein amounts to 39,792 tons, which with the tonnage condescended on in article 4 amounts *in toto* to 198,076 tons. The pursuers believe and aver that if the said coal had been extracted there would have been lordship payable upon 105,640 tons of 22½ cwts. Calculating the royalties at the rates stated in the lease of 8d. per 22½ cwts., brings out a sum of £3521, 6s. 8d., which has been lost by the failure of the first-named defenders to work the said coals in a fair and proper manner." . . .

The pursuers pleaded, *inter alia*—"(1) The defenders William Dixon, Limited, being bound in terms of the said lease to work the coals in a fair and proper manner, and having failed to do so, with the result that the trust estate administered by the pursuer Arthur Jackson has suffered loss and damage to the extent condescended on, the said pursuer, as trustee foresaid, is entitled to decree in terms of the conclusions of the summons."

The defenders pleaded, *inter alia*—"(2) The pursuers' averments being irrelevant and insufficient in law to support the conclusions of the summons, the action should be dismissed."

The Lord Ordinary (KYLLACHY) by interlocutor dated 8th December 1900 sustained the defenders' second plea-in-law and dismissed the action.

Opinion.—"In this case I have considered the record with reference to the recent argument on relevancy, and I have come to the conclusion that the defenders, having by the lease been made the judges as to the method of working most advantageous to the complete excavation of the minerals, the pursuers have not made averments relevant to entitle them to the proof which they ask. It is not, in my opinion, the just construction of the lease that the defenders were bound to adopt a mode of working which should in fact, or in the opinion of the Court, be most advantageous for complete excavation. Their obligation was to adopt the mode which they deemed most advantageous; and even assuming that their judgment might be reviewed on the ground that their professed judgment

was not their real judgment, or in other words that they were dishonest, I find no averment, or at all events no averment sufficiently specific, to support an inquiry on that ground. Further, assuming that it is the just construction of the lease that, within the mode or method adopted, the defenders were bound without qualification to work 'fairly and properly,' I am unable to find in this record any averment, or at all events any sufficiently specific averment, of such unfair or improper working.

"I propose, therefore, while repelling the defenders' plea to no title, as to which I heard no separate argument, to sustain the defenders' second plea—the plea to relevancy, and dismiss the action."

The pursuers reclaimed, and argued—The action was relevant. Assuming that the tenants were by the terms of the lease to be the judges of what was the proper system of working the minerals, they were bound, whatever system they might adopt, to work it "fairly and properly." The pursuers' case was that the tenants had not worked the system which they adopted fairly and properly, and they had specifically set forth the grounds of their contention. The question in dispute was a question of fact to be determined by evidence, and the case was thus distinguished from *Houldsworth* v. *Brand's Trustees*, May 18, 1875, 2 R. 683, and *Guild* v. *M'Lean*, November 20, 1897, 25 R. 106, where the sole criterion was the opinion of the landlord.

Argued for the defenders — The Lord Ordinary was right in dismissing the action. No objection was taken to the defenders' method of working during the currency of the lease, and they were entitled to assume that the pursuers were satisfied with what was being done. The fact that the pursuers had the right to inspect the workings during the lease had a material bearing on the relevancy of their claim for damages made after the lease had expired —*Faill* v. *Wilson*, July 20, 1899, 36 S.L.R. 941, *per* Lord President. In the circumstances they must be held to have waived their right to complain. Moreover, evidence which might have been available while the defenders were working the minerals in the manner complained of could not now be obtained. The question in dispute was one really of skilled opinion and not a question of fact.

LORD JUSTICE-CLERK—I think the interlocutor of the Lord Ordinary cannot be supported. The tenants obtained leave from the landlord to use any mode of working that they thought best, but whatever mode they adopted they were bound to work it fairly and properly in the interest of the landlord. It is alleged that the method which the defenders adopted was not fairly and properly worked. That is not a question of which we can judge. It is a question of skill and experience, and therefore I think there must be inquiry. Mr Salvesen argued that the pursuer had acquiesced by allowing the method which the defenders had adopted in working the coal. I think that is also a question regarding which there must be inquiry. There may be cases where the landlord by his actings or by his silence has barred himself from saying that the system which is adopted is objectionable. But that question depends upon facts to be ascertained, and it will be impossible until they are ascertained to determine whether they amount to acquiescence. The interlocutor of the Lord Ordinary should therefore be recalled, and the case remitted to his Lordship to allow a proof.

LORD YOUNG — I do not see that there is cause for dismissing this case. The rights and obligations of the tenants are set forth in condescendence 3. They were taken bound "fairly and properly to work the said minerals." That is the obligation on them. But then it is assumed—I think we have sufficient experience of such cases to know—and rightly assumed, that there may be various modes of working, any of which may be adopted as a fair and proper mode of working the minerals. The lease goes on, "with liberty to him or them to adopt the long-wall, stoop-and-room, or any other mode of working the same as they may deem most advantageous for the complete excavation of said minerals." If there are several modes of working "fairly and properly," they may adopt any mode they choose on the ground that that is the most advantageous to them. Now, long-wall may be a fair and proper mode of working in certain places, and stoop-and-room in another, and so on. But then the case presented by the pursuers here is, that the objection is not to the mode of working — long-wall or stoop-and-room — but to the way in which that mode was worked out. I should think it within the landlord's right under the lease to object to long-wall or to stoop-and-room or to any mode adopted if that was not a fair and proper mode of working at a particular place. But it is unnecessary to consider that, for it appears to me clear enough in this case that what the pursuers mean to say is—"We are not objecting to the mode you adopted — that might have been worked fairly and properly — but we are objecting to the manner in which you practically worked out that mode of working — to the way in which you worked it." I have no hesitation in agreeing with your Lordship in the conclusion that the Lord Ordinary's interlocutor should be recalled, and the case remitted to him with instructions to allow inquiry.

LORD TRAYNER — I am of the same opinion. I think the Lord Ordinary has perhaps erred by applying to this case the principle recognised in the cases of *Houldsworth* and *Guild* which have been referred to. I do not think these cases apply here at all. The provision of the lease which gives the defenders the right to work the minerals imposes on them the obligation to work them "fairly and properly." It gives the tenants the right to select the mode of working—that is, it may be long wall, or stoop-and-room, or any other

mode they think most advantageous. But the obligation remains untouched, that whatever mode they adopt that mode must be worked "fairly and properly." Now, the pursuers aver, I think, quite sufficiently, that the defenders have failed to fulfil that obligation—that they did adopt a certain mode of working, but that they did not work it fairly and properly, and that the improper way of working which they adopted resulted in damage to the pursuers, for which they seek reparation. I am therefore of opinion that the pursuers have stated a relevant case. The defence of acquiescence which was urged upon us may be a complete answer to the pursuers' case, but at the present stage we cannot determine that question. That defence is entirely reserved to the defenders.

LORD MONCREIFF — I am of the same opinion. The case must be decided on the terms of the clause of the lease which is quoted in condescendence 3, the true meaning of which your Lordships have stated. I do not think the case is touched by the decisions in the cases of *Houldsworth* and *Guild*.

The Court recalled the interlocutor of the Lord Ordinary and remitted to him to allow a proof.

Counsel for the Pursuers and Reclaimers —W. Campbell, K.C.— Deas. Agents— Carmichael & Miller, W.S.

Counsel for the Defenders and Respondents—Salvesen, K.C.—Hunter. Agents— W. & J. Burness, W.S.

Saturday, May 18.

FIRST DIVISION.

[Railway and Canal Commission.

JOHN WATSON, LIMITED *v.* CALEDONIAN RAILWAY COMPANY.

Railway—Railway and Canal Commission —Rates—Increase of Rates—Diligence to Recover Documents—Documents to show Extent and Profits of Applicant's Business—Railway and Canal Traffic Act 1894 (57 *and* 58 *Vict. cap.* 54), *sec.* 1 (1).

Section 1, sub-section (1), of the Railway and Canal Traffic Act 1894 enacts that "Where a railway company have . . . since the last day of December 1892 directly or indirectly increased, or hereafter increase directly or indirectly, any rate or charge, it shall lie on the company to prove that the increase of the rate or charge is reasonable.

Held, in an application by certain coalmasters to the Railway and Canal Commission for an order declaring certain "increased rates" on coal to be unreasonable, that the respondent Railway Companies were not entitled to a diligence to recover the business-books and accounts of the applicants in order that excerpts might be taken therefrom to show the amount of coal sold by the applicants, the cost of working it, and the profits made.

John Watson, Limited, coalmasters, made an application to the Railway and Canal Commission, *inter alia*, for an order declaring that certain "increased rates" on coal charged by the Caledonian Railway Company and the other Scottish railways were unreasonable. Similar applications were made by certain other coalmasters.

In the application at the instance of John Watson & Company, Limited, the Railway Companies applied to the *ex officio* Commissioner (LORD STORMONTH DARLING) for a diligence to recover certain business books and other documents. The specification contained the following articles, besides certain other articles which were ultimately withdrawn — "(1) All books, accounts, abstracts, statements, reports, returns, and other documents or writings made or kept by or on behalf of the applicants or their predecessors in business from 1871, that excerpts may be taken therefrom for each of the years from 1871 to 1900 both inclusive, of all entries showing or tending to show—(*a*) The quantities of coal, coal nuts, coke, culm, gum, duff, peas, beans, dross nuts, or other descriptions of small coal or dross, and the different descriptions and qualities thereof, sold by the applicants or their said predecessors from each of their collieries and pits, and the prices (pit and otherwise) charged and received by the applicants and their said predecessors for such minerals. (*b*) The quantities and prices of such minerals despatched from said collieries by the railways of the respondents, or any of them, as distinguished from the remainder of such minerals, and by whom the railway rates and charges were borne and paid. (*c*) The quantities and prices of such minerals despatched to the stations and places set forth in the schedules to the application, as distinguished from the remainder of such minerals, and by whom the railway rates and charges were borne and paid; and (*d*) The quantities and prices of such minerals despatched for shipment, as distinguished from the remainder of such minerals, and by whom the railway rates and charges were borne and paid. (2) All books, accounts, abstracts, statements, reports, returns, balance-sheets, and other documents or writings made or kept by or on behalf of the applicants or their predecessors in business from 1871, that excerpts may be taken therefrom for each of the years from 1871 to 1900, both inclusive, of all entries showing, or tending to show, the total expenditure, including lordships, royalties, wayleaves, oncost, and cost of working and raising the minerals incurred by the applicants or their said predecessors in carrying on their business as coalmasters at or from the collieries mentioned in the application, and in working, winning, and marketing their foresaid coal and other minerals. (3) All books, accounts, abstracts,