of opinion that your Lordships should proceed to consider the Lord Ordinary's interlocutor upon its merits.

Now, the Lord Ordinary in his note says—"I think that that reference to the whole specification is, in the circumstances, sufficient to incorporate its clauses regarding the contract under consideration as truly a part of the general contract." It does not appear to me that that way of stating the question is really completely accurate. For some purposes there is no doubt that the arbitration clause is incorporated. It is, I think, quite clear that for anything in dispute between the Brands and the Caledonian Railway Company the arbitration clause has effect, and the result arrived at under that arbitration clause is binding on the pursuers. In that respect it is just like all the other clauses in the specification. But the point is not whether it is incorporated at all, but whether it is incorporated in regard to another matter altogether, namely, the dispute about prices between the pursuers and the defenders. That is a matter outside the relations of the defenders and the Caledonian Railway Company. What is binding on the one is not binding on the other. Accordingly on this part of the case I do not agree with the Lord Ordinary. I think the contract incorporated was the contract so far as it existed between the principal contractor and the employer, that is to say, the Brands and the Railway Company, but that you cannot over and above cut out of the provisions of that contract one clause and make it apply, *mutatis mutandis*, to the rights *inter se* of the principal contractor and the sub-contractor, that is, the pursuers and the defenders, in a matter in which the employer never had and never can have any concern.

I am therefore for recalling the Lord Ordinary's interlocutor and remitting the case to him for proof.

LORD M'LAREN — I think it is clear enough that no principal contractor for a Railway Company would ever enter into a contract with a sub-contractor except on the condition that whatever the engineer or the referee decided as to the fulfilment of the contract between the principals should be binding on the sub-contractor. If it were not binding on him it would probably be a losing concern on the part of the principal contractor. The relations between the principal contractor and the company are such that the railway company's engineer, if dissatisfied with any of the material supplied either as to quality or dimensions, might require them to be altered, leaving for future consideration whether any allowance was to be made in respect of such alterations. It would be impossible to work a sub-contract unless an order of this kind was binding on the sub-contractor, as he alone supplies the materials. But then I think it follows that with regard to allowances to be made for extra work or for variations which in the course of the work have been found to be necessary, the decision of the arbiter upon such a point must always be binding on the sub-contractor who supplies the materials, the sufficiency of which is under consideration. For these purposes I should hold that the clause of arbitration was incorporated as one of the conditions that are necessarily binding in such cases. But then there may be other questions which concern only the relations between the principal contractor and the sub-contractor—as, for instance, the rate of payment as between them, or the commission or discount; and again, where delay has occurred and there has been responsibility for delay, whether that delay is to be charged against the sub-contractor. I only mention these as examples of possible questions between the principal contractor and the sub-contractor which are in no way covered by the clause of arbitration, because they affect only these two, and do not cover the relations between them and the Railway Company.

I therefore agree with your Lordship that it is necessary to distinguish between these things, and while we do not hold the clause of arbitration universally binding, if proof is to be allowed, it will no doubt show that there are many things that are substantially covered by the clause of arbitration, because whatever was to be decided as to working material between the Caledonian Railway Company and the principal contractor would also affect the question of the calculation of prices with the sub-contractor.

LORD ADAM and LORD KINNEAR concurred.

The Court pronounced this interlocutor—

"Recal the said interlocutor, allow the parties a proof of their respective averments on record, and remit to the Lord Ordinary to take said proof," &c.

Counsel for the Pursuers and Reclaimers—Clyde, K.C.—Hunter. Agents—Webster, Will, & Company, S.S.C.

Counsel for the Defenders and Respondents—Campbell, K.C.—C. D. Murray. Agents—Alexander Morison & Company, W.S.

Thursday, July 20.

SECOND DIVISION.

[Lord Low, Ordinary.

DRYBURGH *v.* FIFE COAL COMPANY.

Mines and Minerals—Subsidence—Damage—Mineral Tenant Bound to Work by Methods of Complete Excavation and to Make Good all Damage Caused to Surface—Feuar to have no Claim against Superior for Damage Caused by Mineral Workings—Reservation of Claims Competent to Feuar against Mineral Tenants in so far as Liable without having Recourse against Superior.

A was the proprietor of a certain piece of land under a feu-disposition, which

reserved to the superior the whole coal and minerals under the ground with full power to work the same. It was expressly provided by the feu-disposition that the feuar should have no claim against the superior for any damage done to the ground feued and buildings erected or to be erected thereon by the operations of the superior or his tenants in working the minerals, but there was reserved all claim competent to him against mineral tenants in so far as such tenants might be liable without having any right of recourse against the superior. Before A's feu-disposition was granted, the minerals under the ground had been let by the superior to B, who was bound under his lease to work the whole saleable coal by methods of complete excavation, and was further bound to make good all damage which in his lawful business he might occasion to any lands, crops thereon, houses, &c., whether due to the lessors of the colliery or to feuars, &c. A raised an action against B, in which he sought to recover damages caused to buildings on his feu by subsidence admittedly brought about by B's workings. *Held* (*aff.* judgment of Lord Low) that B was liable in the damages sued for.

Lease — Mineral Lease — Mineral Tenant Bound to Make Good all Damage Caused to Feuars on Surface—Increase of Feuing Consequent on Development of Mineral Field.

Certain mineral tenants were bound by their lease to work the whole saleable coal by methods of complete excavation, and to make good all damage caused by their workings to the lessor's feuars. Seventeen years after the granting of the tenant's lease the lessor granted a feu-disposition of certain land on the surface of the mineral field, by which it was provided that all loss or damage done to the ground feued or buildings thereon should be borne by the feuar, reserving all claim competent to him against mineral tenants. Ten years after the granting of the feu-disposition the feuar raised an action against the mineral tenants in which he sought to recover damages for damage done to buildings erected on his feu by subsidence admittedly brought about by the operations of the defenders. During the years that had elapsed since the granting of the mineral lease successful working of the coal had led to an increase of feuing and a consequent increase of building on the surface of the mineral field in the locality of the pursuer's feu. The defenders maintained that such an extension of building as had taken place was not contemplated by parties at the date of their lease, and was excessive, and that consequently their obligation to make good the damage in question could not be enforced. *Held*, after a proof (*reversing* judgment of Lord Low), that the defenders were liable in the damages sued for.

This was an action at the instance of Andrew Dryburgh, Burghlea Villa, Leven, against the Fife Coal Company, Limited, in which the pursuer sought to recover damages for injuries caused to certain buildings of which he was proprietor, the injuries being caused by subsidence admittedly brought about by the defenders' operations. In addition to the conclusion for damages the summons contained a declaratory conclusion which need not be further referred to.

The pursuer was proprietor of a piece of ground in the parish of Wemyss, near Methil. It was originally feued in 1894 to Andrew Swinton, mason, Methil, and was acquired from his successors by the pursuer at Whitsunday 1903. The original feuar was taken bound to erect and maintain on the feu certain buildings. These buildings were erected and were acquired by the pursuer with the ground on which they stood.

The feu-disposition in favour of Swinton was granted by certain trustees, the authors of the pursuer's superior Mr Randolph Erskine Wemyss, subject to a reservation of minerals in the following terms:—"Reserving always to us and our successors in the said lands and others the whole metals and coal, limestone, freestone, and minerals, and fossils of every description within the piece of ground before disponed . . . declaring, as it is hereby expressly provided and declared, that the said Andrew Swinton and his foresaids shall have no claim whatever against us as trustees foresaid, or our successors as aforesaid, for any damage that may be done or caused to the piece of ground hereby disponed, and buildings erected or to be erected thereon, . . . by any of the operations in time past or to come, of us or our predecessors or successors and tenants, in working and removing or draining the metals, coal, stone, minerals, and others hereby reserved, or in the neighbourhood of the piece of ground hereby disponed . . . and declaring that, as regards us and our foresaids, all loss, risk, or damage in any of the events foresaid shall be borne and sustained by the said Andrew Swinton and his foresaids themselves: But reserving always to the said Andrew Swinton and his foresaids all claims which may be competent to them in respect of any such damage as aforesaid, against our tenants or tacksmen of the minerals and others in or near the said piece of ground, in so far as such tenants or tacksmen may be liable for such damage, without having any right of recourse or relief or any other remedy against us, as trustees foresaid, and our foresaids."

The defenders were Mr Wemyss' mineral tenants under a subsisting lease which was entered into by them in 1877, under which the lessees were taken bound, with reference to the working of the coals, "to work the same in a regular and systematic manner, according to the rules and methods followed in well regulated collieries, and in particular, to work the whole saleable coal of each seam from roof to pavement, by the

longwall or other method of complete excavation, and so as to insure at once the greatest output and the present and future advantageous working of the coalfield."

The lessees were further taken bound as follows:—"And further, and over and above making payment of the said fixed rents or lordships or royalties, the said lessees bind and oblige themselves and their foresaids during the currency of this lease to make compensation to the land tenants where the land is let, or to the owner where the land is not let, for all the ground which the lessees under these presents may use or injure in any of their operations under this tack, and to make good and discharge all the damages of what kind soever which the said lessees or their servants in their lawful business under their control may in any way occasion to any lands, crops thereon, houses, or woods, or fences and drains, wells or water courses, and whether such damage shall be due to the lessors of the colliery or to the landlord, or land tenants, feuars or others." It is unnecessary to refer further to the terms of the lease, which are sufficiently disclosed for the purposes of this report in the opinion of the Lord Ordinary *infra*.

The pursuer pleaded—"(3) The defenders as tenants of said minerals being bound in the event of their operations causing subsidence in the pursuer's property to compensate or pay damages for the same, are liable to the pursuer in damages in respect of the subsidence condescended on."

The defenders pleaded—"(1) No title to sue. (3) The operations of the defenders being within their legal rights, they are entitled to absolvitor. (4) The lessors (the pursuer's authors) having granted feus for building in excess of what was fairly in contemplation of the parties to the said lease, the pursuer is not entitled to decree."

Proof was allowed. The nature of the evidence led is disclosed in the opinion of the Lord Ordinary.

On 6th December 1904 the Lord Ordinary (Low) assoilzied the defenders.

Opinion.—"This is an action by the proprietor of a house near Leven in Fifeshire, for damages for injury done to the house through subsidence of the surface caused by the coal workings of the defenders. It is admitted that the defenders have taken out a seam of coal under the house; that subsidence of the surface and consequent injury to the house have resulted; that the subsidence would have occurred even without the additional weight of the house; and that there has been no fault or negligence or improper working on the defenders' part.

"The pursuer's house is built upon a piece of land forming part of the Wemyss estate, which his predecessor (Swinton) acquired from certain trustees who then held the estate, conform to feu-disposition granted by them. Mr Randolph Erskine Wemyss of Wemyss is now the superior. The defenders are lessees of the coal in the land upon which the house is built, under a lease granted in 1877 by Mr Erskine Wemyss and others.

"In the feu-disposition there is a reservation of the coal and minerals, and it is provided that the feuar shall have no claim against the superior for any damage which may be caused by the working of the coal. There then follows this clause—'But reserving always to the said Andrew Swinton and his foresaids all claims which may be competent to them in respect of any such damage as aforesaid, against our tenants or tacksmen of the minerals and others in or near the said piece of ground, in so far as such tenants or tacksmen may be liable for such damage, without having any right of recourse or relief, or any other remedy against us, as trustees foresaid, and our foresaids.'

"I confess that I do not know what is referred to in the closing words of that clause, 'without having any right of recourse,' and so on, because so far as the then existing lease of the coal to the defenders was concerned I cannot discover any damages for which the tenants would be liable, but in regard to which they would have recourse, or a right of relief, against their landlord, the superior of the feu. Perhaps the words were inserted because there might be future leases under which the tenants might have rights of relief against the superior, or simply with the intention of making it clear that under no circumstances should the feuar have any claim against the superior.

"That, however, is not material, because it is plain that the feu-disposition bars any claim upon the pursuer's part against Mr Erskine Wemyss, who was the superior and the proprietor of the minerals, but reserves to him any claim which he might have a title to enforce against the mineral tenants, that is, the defenders.

"Upon what ground then can the pursuer claim damages for the injury done to his house from the defenders? I am of opinion that damages cannot be claimed from them *ex delicto*, because it is admitted that they have worked the coal properly, and have done no more than they were not only entitled but bound to do under the lease. Indeed, I did not understand the pursuer's counsel to base his claim upon delict, but solely upon an obligation undertaken by the defenders in the lease.

"The clause in the lease upon which the pursuer founds is in the following terms:—'And further, and over and above making payment of the said fixed rents or lordships or royalties, the said lessees bind and oblige themselves and their foresaids during the currency of this lease to make compensation to the land tenants where the land is let, or to the owner where the land is not let, for all the ground which the lessees under these presents may use or injure in any of their operations under this tack, and to make good and discharge all the damages of what kind soever which the said lessees or their servants in their lawful business under their control may in any way occasion to any lands, crops thereon, houses, or woods, or fences and drains, wells or water-courses, and whether such damage shall be due to the lessors of the

colliery or to the landlord, or land tenants, feuars, or others, all as the same shall be determined by two mutual persons to be mutually chosen or by an oversman to be named by these persons if they shall differ in opinion.'

"The first question which arises is, whether the pursuer has a title, in a question with the defenders, to sue upon the lease, to which his author was not a party, nor in any way privy? I think that he has a title to do so, as a third party who is given a *jus quæsitum* by the lease. I read the clause which I have quoted as obliging the defenders to settle for any damage which they may occasion directly with the party injured, and I think that the description of the parties whose claims they are to 'make good and discharge,' namely, the lessors of the colliery, the landlord, land tenants, and feuars, sufficiently designate the *tertii* in whose favour a *jus quæsitum* is conferred, to entitle anyone falling within the category specified to sue upon the contract.

"The next question is whether the clause is applicable to the present case?

"The defenders' counsel did not contend that the language of the clause was not wide enough to include the present claim, but he maintained that, looking to the other stipulations of the lease, the clause must be construed as being confined, at all events in so far as houses were concerned, to those existing at the date of the lease.

"What was mainly founded upon was the obligation laid upon the defenders 'to work the whole saleable coal of each seam from roof to pavement by longwall or other method of complete excavation.'

"That obligation was only qualified by the provision that the defenders should leave sufficient masses of coal to support the shaft bottom, certain lands which had been feued and which were known as 'Kirkland Works,' and also any other houses or buildings on the lands before specified.'

"It was conceded that the houses and buildings there referred to were houses and buildings existing at the date of the lease, and therefore, with the exception of such an amount of coal as was required to support such buildings, the Kirkland Works and the shaft bottom, the defenders were under an absolute obligation to take out the whole of the coal. To carry out that obligation involved—especially considering that there were eight separate seams let to the defenders—that the surface of the ground should, to a greater or less extent, be brought down. The parties must have known that that would be the case, and the lease seems to me to show that they had it in view, because it is provided that the defenders 'shall cause the gob or waste to be properly stowed so as to prevent unequal sits in the surface.' The object of that provision seems to me to have been, not to prevent subsidence which was inevitable, but unequal subsidence.

"While the lessees were thus taken bound to excavate the whole coal, the lessors were in no way restricted in the use they might make of the surface, but were left free to erect as many houses as they chose. In such circumstances I agree with the defenders that one would not expect to find liability imposed upon and accepted by the lessees to pay for all damage which might be caused to the surface and buildings thereon by subsidence arising in consequence of the proper working of the coal in terms of the lease. If, however, the defenders have accepted such liability, then, however improvident it may have been for them to do so, they must be held to their contract.

"In this case I do not think that they can escape liability on the ground that the clause only deals with matters as they existed at the date of the lease. The clause provided, in the first place, that 'during the currency' of the lease the defenders shall make compensation to the tenants or the owner of the land for all ground used or injured by them in any of their operations under the lease. That in terms refers not to the state of matters existing at the date of the lease, but to what may be done during its currency. Then the defenders are taken bound 'to make good and discharge' all damages of whatever kind they may occasion, *inter alia*, to crops. I think that that plainly refers to crops which may be upon the ground during the currency of the lease, and the same may be said in regard to such things as fences and wells. In short, I think that the natural meaning of the language used is that the defenders shall make good all damage caused to subjects of the kind described which may be upon the ground during the currency of the lease, and that it is impossible to restrict the generality of the obligation as regards any of the subjects without reading into the clause words which it does not contain.

"There is, however, another possible construction of the clauses which would exclude the pursuer's claim, and which has occasioned me much difficulty.

"The granters of the lease were the present Mr Erskine Wemyss (and his curators) and the testamentary trustees of a deceased Mr Erskine Wemyss. What was let to the defenders were certain seams of coal under (1) lands of which Mr Erskine Wemyss was heir of entail in possession; (2) under the feu known as Kirkland Works; (3) under lands called the Haugh, the surface of which belonged to Mr Christie of Durie; and (4) under the sea.

"The last-mentioned coal, of which the trustees were lessees from the Crown, may be left out of view. As regards the other coal, Mr Erskine Wemyss was proprietor both of the surface and minerals of the entailed lands, the trustees were superiors of the Kirkland Works and proprietors of the coal thereunder, and they were also proprietors of the coal under Mr Christie's lands of the Haugh. The trustees, therefore, were not proprietors of the surface of any part of the coalfield let to the defenders, but Mr Erskine Wemyss was proprietor of the surface of the coalfield, in so far as it lay in the entailed lands. The pur-

suer's house is built upon these lands.

"The defenders were empowered to sink pits, to build workmen's houses, workshops, and the like, and to make roads and railways, and, in particular, a railway connecting their pits with an existing railway on the one hand, and the harbour of Leven on the other, and it was provided that the lessors should give land for such purposes on payment of surface damages. Now, so far as appears, the only one of the lessors who was in a position to give land for these purposes was Mr Erskine Wemyss.

"Further, the lease contains certain special provisions for payment by the defenders of damages for injury to land taken or used for those purposes.

"Now, my understanding is that all these special provisions are applicable only to the lands belonging to Mr Erskine Wemyss, because he of all the lessors possessed land which could be given for the purposes mentioned, and so far as I can judge, the special provisions practically covered all the damages which it might be anticipated the defenders would cause to these lands, except damage necessarily consequent upon the complete excavation of the coal.

"That being the case I was inclined to think that the clause in question might be construed as applying only to that portion of the coalfield the surface of which was not the property of the lessors, and not to that of which Mr Erskine Wemyss was proprietor both of surface and minerals, and in regard to which there were special clauses in regard to surface damage. As regards the former lands it was quite reasonable that the defenders should pay for any damage which they caused in any way, but as regards the latter it was not very consistent that they should both be taken bound to excavate the whole of the coal and to pay all damage caused thereby through inevitable subsidence.

"Upon consideration, however, I have come to be of opinion that the clause is not capable of being so construed. In terms it includes the whole lands and every sort of damage, and the language used does not appear to me to be ambiguous. In order to restrict the scope of the clause in the way I have suggested it would be necessary to read in words which are not used. Further, there is one provision in the lease which seems to me to show that the clause was intended to apply to lands belonging to Mr Erskine Wemyss as well as to the Kirkland feu and Mr Christie's lands. It is in these terms—'And it is hereby provided that over and above fulfilling the obligations and provisions as to compensation and damages after mentioned, the said tenants and their foresaids shall be bound at their own expense to fence and keep fenced all roads and railways which they may make.' Now, it seems to me that the context shows that the words 'the obligations and provisions as to compensation and damages aftermentioned' can only refer to the general damages clause under construction. Accordingly, seeing that, so far as appears, all the railways which the defenders were authorised to construct were to be upon the lands belonging to Mr Erskine Wemyss, the provision which I have last quoted shows that the general damages clause was intended to apply to these lands.

"I am therefore of opinion that the clause obliging the defenders to make good all damage caused by their operations must be construed as covering and including the claim which the pursuer now makes.

"There remains, however, the question which is raised by the fourth plea-in-law for the defenders, which is as follows—'The lessors (the pursuer's authors) having granted feus for building in excess of what was fairly in contemplation of the parties to the said lease the pursuer is not entitled to decree.'

"Now, when the owner of both the surface and the minerals lets the latter, especially if, as here, he takes the tenant bound to completely excavate the minerals, I do not think that he retains any right to have the surface supported by the minerals unless, and to the extent to which, he reserves such right. Of course I am assuming that the tenant works the minerals in such a way as to cause as little injury as possible. If he works improperly a claim will arise *ex delicto*.

"If, however, the lessor takes the tenant bound to support the surface the burden imposed is of the nature of a servitude, because a long lease of minerals with an obligation to work them gives practically a right of property in the minerals. Now, it is a well-established rule that if a proprietor of lands dispones part of them, and burdens the part disponed with a servitude in favour of the part retained, he is not entitled so to use the latter as to increase the burden upon the former. I think that a similar principle applies to such a case as the present, where the tenant is upon the one hand bound to excavate the whole minerals, and upon the other to pay damages for any injury which may be done by his workings. In such a case the landowner is not, in my opinion, entitled so to use his land as materially to increase the onerosity of the obligation imposed upon the tenant, or perhaps it would be more correct to say that in such circumstances he cannot enforce the obligation. That principle has been frequently recognised, although I am not aware of any case in which it has actually been carried into effect.

"The question therefore appears to me to be whether Mr Erskine Wemyss has, by extensive feuing of his lands for building, increased the burden upon the defenders to such a material extent that he, and those taking right from him, cannot claim compensation for injury caused to the buildings by the regular working of the minerals as required by the lease.

"I put the question in that form because Mr Erskine Wemyss was in no way restrained in his use of the surface, while the defenders were bound to make good any damage which they caused, and under somewhat similar circumstances the decision in the case of *Dunlop* v. *Corbet*, 20th June 1809, F.C., was to the effect that the

owner of the minerals was not entitled to interdict the owner of the surface from erecting buildings, but that if the latter did so he might not be entitled to damages for injury to the buildings. No judgment, however, was given upon the latter question, although opinions to the effect which I have indicated appear to have been given.

"Again in *Neill's Trustees* v. *William Dixon, Limited*, 7 R. 741, a similar view was taken. The circumstances were these. In 1802 the minerals in a piece of ground of fifty-eight acres in extent were sold to one person and the surface to another; power was given in the first disposition, and reserved in the second, to the purchaser of the minerals to win and work them on paying 'all surface damages if any shall be thereby done to the ground of the said lands.' In 1878 the pursuers, who were then owners of the surface, brought an action against the defenders, who were owners of and were working the minerals, for damages for injury caused to a dwelling-house and offices by subsidence consequent upon the mineral workings. It was proved that the house, which was of considerable size and value, had been built subsequently to 1802, but about sixty years before 1878, but the judgment did not turn at all upon the fact that the house had been in existence for more than the prescriptive period. The two questions which the Court had to determine were (1) whether injury to the house was 'surface damages' within the meaning of the disposition; and (2) whether the fact that the house was erected subsequently to the date of the dispositions relieved the defenders from liability for damages? The first question was answered in the affirmative and the second in the negative, but all the Judges based their opinions upon the latter point to a considerable extent upon the fact that the house was just such as it might have been anticipated would be built at the time when the dispositions were granted.

"Thus Lord Adam said—'The buildings in this case are just such buildings as might naturally and reasonably be expected to be erected on the ground. If there was anything of an extraordinary or unusual nature about the buildings the result might have been different.' In like manner the Lord Justice-Clerk (Moncreiff) said—'I am very far from implying any opinion as to what the respective rights of the landowners and mineral owner might be in the event of the landowner altering substantially the use to which the surface was to be put at the date of the contract,' but 'the existing buildings at present on the surface are not of a greater extent nor of a more valuable character than are fairly suitable for the use of the ground at the date of the original separation of the surface and mineral rights.'

"There was not in *Neill's Trustees* any more than in *Dunlop* v. *Corbet* any judgment pronounced to the effect that if the landowner covered the ground with buildings in excess of what might reasonably be supposed to be contemplated at the date of severance, he could not recover damages for injury to such buildings, but it is clear that the learned Judges in these cases recognised that that might be the result. And I am humbly of opinion that that ought to be the result, because it is, as I have said, contrary to a well-established principle that one who has imposed an obligation upon his disponee or tenant should be allowed to substantially and materially increase the burden of that obligation for his own pleasure or profit, and should nevertheless be entitled to enforce it to the loss and injury of his disponee or tenant.

"Whether there has been such a material increase of the burden as to deprive the landowner of his right to compensation for injury must, of course, be a question of circumstances, and I shall accordingly consider what are the circumstances in this case.

"The subjects let to the defenders included the coal lying under the town of Methil, and extending for a considerable distance to landward. At the date of the lease in 1877 Methil was a small fishing town with a population of a little over six hundred persons, and the ground in the neighbourhood was entirely agricultural, although there appear to have been one or two small villages, and there was a spinning mill on the Kirkland feu. Further, the export of coal from Methil by sea was then inconsiderable in amount and was confined to small sailing-ships. It was, indeed, contemplated that increased facilities for the export of coal by sea should be given, but as the lease itself shows it was thought that Leven and not Methil would be the suitable port for that purpose. The harbour of Leven was in fact improved, but it was a tidal harbour, and it was found that the entrance silted up, and accordingly the intention that it should be used for the export of coal could not be carried out.

"It was in consequence of that that works were entered upon, namely, the construction of docks at Methil, which largely changed the character of that town and its neighbourhood. There was first a dock constructed by Mr Erskine Wemyss at his own cost, which was opened in 1887. Then the North British Railway Company obtained an Act of Parliament authorising them to build further docks, which they did. The pursuer's witness, Mr Watson, says that the docks were opened in 1894, but Mr Carlow, the managing director of the defenders' company, says that they were not opened until 1897, and then only partially. I have no doubt that the latter is right upon that point, but I gather that the Act had been obtained and the works begun prior to 1894, when Swinton obtained his feu-disposition. The result of the construction of the docks was that a very large export trade in coal sprang up at Methil. It is now the port of export for the East of Fife coal, and it also shares with Burntisland the West of Fife trade. Naturally that increase of trade has been accompanied with a large amount of building in Methil and the neighbourhood. A glance at the map shows that since 1895 streets and rows of new houses have been

erected. I have already said that in 1877 the population of the town of Methil was about six hundred, but in 1901 it was 2686, and the increase in the number of houses has been in proportion. Thus, in the area marked B there were no houses in 1877, but 142 have been built since 1893. In like manner in the area marked C there was only one house in 1877, and there are now 212, the greater part of which have been built since 1893; while in the area marked D there was no house in 1877, but 64 have been built since 1893. I should explain that in these figures houses do not mean separate tenements, but distinct dwelling-houses of which several may be contained in one tenement.

"It is therefore plain that the character of Methil has entirely changed since 1877. From being a small and apparently not very prosperous fishing town, it has become the centre of a great export trade in coal.

"It seems to me that it is not reasonable to suppose that such a change in the character of the place could have been in the contemplation of parties in 1877. No one could then have foreseen that some fifteen years later a railway company would intervene and build extensive docks for the accommodation of the coal trade of Fife at Methil. I may add that there are various provisions in the lease which seem to me to shew that what the parties contemplated was that the land around Methil would continue to be in the future, as it had been in the past, entirely devoted to agricultural purposes.

"If the question had arisen in regard to a house in one of the new streets which have been added to Methil, and if it had been shewn that if the defenders were liable in damages for injury to that house, they would also (at all events in the absence of special circumstances) be liable for injury caused to all the new houses, I should have thought that the case was certainly one for the application of the principle to which I have referred.

"But the pursuer's house is not in Methil, but is situated at a place called Crossroads, distant about a quarter of a mile from Methil. Further, it is admitted that there are some of the new houses for injury to which the defenders would not be liable. It appears that up to 1898 or 1900 the form of feu-disposition which Mr Erskine Wemyss used was the same as that in Swinton's case, in which the feuar's right to claim damages from the defenders was reserved. Mr Wemyss, however, seems then to have recognised that it was not just to the defenders to continue to grant feu rights in such terms, and recently he had taken his feuars bound not to claim damages for injury done by mineral workings from anyone. I do not know how many feus have been granted under the new form of charter, but I do not think that there can be many, because one witness said that the result of the new form being adopted was almost to put an end to feuing. But however that may be, it was admitted by the pursuer's counsel that there have been at least thirty feus granted (and built upon) with titles in the same terms as that of Swinton. It seems to me that that is a material number, and shews that the question which is raised is a serious one for the defenders. It is no light matter for mineral tenants who are bound both to excavate the whole minerals, and to make compensation for any buildings which they may injure in so doing, to have thirty new tenements built upon the land, and it is to be remembered that there are several seams which the defenders are bound to work, and that with the working of each seam there will probably be fresh subsidence and fresh injury to the buildings.

"In regard to Crossroads, it is situated, as the name implies, at a place where four roads meet, and at the date of the lease there were only two buildings there, the parish school and the schoolmaster's house. These were no doubt placed there because it was a convenient central position.

"The next building which was erected at Crossroads was a co-operative store in 1888. Even if all these buildings had been erected subsequent to the date of the lease I should not have thought that the defenders could have objected, because they were such as might have been anticipated for the use of the estate even if its character had not been altered. But in 1894 feus began to be taken at Crossroads, and buildings of a different kind erected. There were no fewer than six feus taken there in that year, the reason obviously being that the construction of the Methil docks had then begun. The taking of the feus seems to have been a speculation on the part of the feuars, because they built workmen's houses, in the expectation (which was justified) that the construction of the docks would raise a demand for such houses in the neighbourhood. And no doubt Crossroads was chosen just because it was in a central position and houses there would be available for men working in different parts of the district. The result has been that Crossroads from being simply the site of the parish school has become a village of workmen's houses. In 1877 the sole residents were the schoolmaster and his family, but now the population is 319, which is more than half the population of the town of Methil in 1877. I do not know precisely how many tenements have been erected, but there are sixty-five distinct dwellings.

"The pursuer founded upon the fact that some persons who reside at Crossroads are in the defenders' employment. Mr Carlow, however, says that the defenders have ample accommodation for all their workmen in houses which they have erected under the powers conferred in the lease, and that if they had required more houses they would not have built them above unworked coal as was the case at Crossroads, but at a place where they would not interfere with the working of the coal in regular course.

"If, however, the houses at Crossroads had been all the houses erected after the date of the lease, it would have been a comparatively small matter, and the defenders would not, I think, have been freed from

their obligation to make compensation for injury done to the houses. It seems to me, however, that the building at Crossroads cannot be regarded as an incident separate from the very extensive building which has taken place at Methil. The building in both places was part of the same movement, and the cause was the same, namely, the construction of the docks, and the consequent increase of trade and population. If such extensive building could have been foreseen, or had been contemplated when the lease was made, I think that it is most unlikely that the defenders would have undertaken the obligation to give compensation for injury to buildings. As matters stood at the date of the lease, the obligation was not an onerous one, judging from the fact that apparently the defenders have never until now been called upon to pay any compensation under it. But in view of the changed condition of matters the obligation has become very onerous, and I do not think that it is a good answer to say that the amount of coal which would require to be left to support all the houses is small compared with the total amount in the mineral field. The defenders are bound to work out the whole of the coal, and are not entitled to leave a sufficient amount to support the buildings. That differentiates this case from the ordinary one in which the tenants are entitled to leave a sufficient amount of coal for the support of new buildings, and thereby to avoid becoming liable for compensation. Further, the fact that the defenders are bound to take out the whole of the coal and also to pay compensation for injury to new buildings seems to me to render the case peculiarly favourable for the application of the principle which I have stated, and as, in my opinion, building operations which could not have been in the contemplation of the parties when the lease was granted, have been carried on to an extent which has materially increased the onerosity of the obligation laid upon the defenders, I do not think that that obligation could be enforced by Mr Erskine Wemyss, and if that is the case it was not maintained that the pursuer was in any better position.

"I shall therefore assoilzie the defenders."

The pursuer reclaimed. Counsel for the pursuer referred the Court to letters which had passed between parties' agents, embodying an agreement that in the event of the defenders being held liable in the damages sued for, they would purchase the pursuer's property at a specified price. The arguments presented for parties on the question of liability are disclosed in the opinions of the Lord Ordinary and of the Judges in the Inner House. The following authorities were cited:—For the reclaimer—*Dunlop* v. *Corbet*, June 20, 1809, F.C.; *Hamilton* v. *Turner and Others*, July 19, 1867, 5 Macph. 1086, 4 S.L.R. 202; *Neil's Trustees* v. *Dixon Limited*, March 19, 1880, 7 R. 741, 17 S.L.R. 496; *Shaw Stewart* v. *Macaulay*, November 3, 1864, 3 Macph. 16; *Aspden* v. *Seddon*, 1875, L.R., 10 Ch. 394; *White* v. *Dixon Limited*, March 19, 1883, 10 R. (H.L.) 45, 20 S.L.R. 541; *Andrew* v. *Henderson & Dimmack*, February 24, 1871, 9 Macph. 554, 8 S.L.R. 376; *Buchanan, &c.* v. *Andrew*, March 10, 1873, 11 Macph. (H.L.) 13, 10 S.L.R. 320. For the respondents—*Buchanan* v. *Andrew*, *cit. sup.*, 11 Macph. (H.L.), Lord Chancellor at p. 13; *Shafto* v. *Johnston*, 1863, 8 Best & Smith at p. 252; *Taylor* v. *Shafto*, 1867, 8 Best & Smith at p. 228; *Kidd* v. *Byrne*, December 16, 1875, 3 R. 255, 13 S.L.R. 170; *Cadzow* v. *Lockhart*, May 19, 1876, 3 R. 666, 13 S.L.R. 441; *Morton* v. *Graham*, November 27, 1867, 6 Macph. 71, 5 S.L.R. 59; *Hallpenny* v. *Dewar*, May 24, 1898, 25 R. 889, 35 S.L.R. 696.

At advising—

LORD KYLLACHY—The first question in this case, the answer to which may go a long way towards solving the other questions, is as to the construction of the clause in the pursuer's feu-contract, which defines his position with respect to the minerals under his feu.

Apart from that clause and its special provisions, the pursuer's position as surface owner would have been clear enough. He would have been entitled at common law to stop by interdict any workings in the subjacent or adjacent minerals which brought down his surface or injured his buildings. He would also have been entitled to recover damages in respect of such workings. And those rights, thus belonging to him at common law, he could have enforced against the actual wrongdoer, whether the owner of the minerals or the mineral tenant.

But the question is, whether and to what extent the pursuer, or rather his predecessor, did, by the clause in question, renounce or restrict his common-law rights (*a*) as against the superior who retained the ownership of the minerals, and (*b*) as against the superior's mineral tenants, including the present defenders.

Now, there can be no doubt upon the construction of the clause that as against the superior the feuar's right of support was renounced. It was not so expressly. But it was so by plain implication. For the feuar was in terms taken bound to make no claim against the superior or his successors for any damage resulting to the feu by the excavation of the minerals, the excavation contemplated being plainly complete excavation, but of course excavation assumed to be executed in a proper manner.

On the other hand, it seems equally clear that as against third parties, and in particular the superior's mineral tenants, the feuar's common-law rights were *not* renounced. They were, on the contrary, expressly reserved—reserved subject only to a single condition, viz., that they should not be asserted so as to involve as against the superior any right of recourse by his mineral tenants.

In short, as I understand it, the effect of the clause in the feu-contract was simply this—that the feuar retained unimpaired his whole common-law rights as owner of the surface, except in so far as their enforcement affected, or might be made to affect, the superior or his successors. It is

vain, I think, to suggest that the clause throughout relates only to *improper* workings, or that while the first part of it—that in favour of the superior—relates to *proper* workings, the second part—that in favour of the feuar—relates only to *improper* workings. Improper workings, it seems to me, are not *in intuitu* of the clause at all. Nor is it possible upon its language to draw any distinction between the kind of damage for which all claim was renounced, and the kind of damage for which all claim was reserved.

This being so, the next question is—whether to any, and if so to what extent in existing circumstances, this exclusion of all claim by the feuar, involving recourse against the superior, limits the feuar's rights as against the present defenders, who are mineral tenants of the superior, and have been so since before the date of the pursuer's feu. It is admitted that these defenders have by their longwall workings brought down or at least injured the pursuer's buildings; but it is also admitted that they have done so working quite properly and without negligence.

It is, I think, manifest that the answer to this question depends and must depend upon this—What under the terms of the defenders' lease is the extent of the authority which, with respect to their longwall workings, the lease confers on them? If the authority is absolute and unconditional, *cadit questio*. Any adverse proceedings by the pursuer must in that case involve the superior in a claim of recourse—recourse under the warrandice in his lease. And *ex hypothesi* that would at once exclude the title of the pursuer to take the proceedings. If, on the other hand, the authority is not absolute and unconditional, but is limited by stipulations as to payment of damages—payment of damages to the feuar—no claim of damages by the feuar could possibly involve any recourse. A demand for interdict might do so, but a demand simply for damages could not do so.

It becomes therefore necessary to examine the defenders' lease, and in particular the clause printed in appendix, which may be called for shortness the "damages clause"—the clause which has been so much discussed. Several views have been presented to us as to the just construction of that clause.

The pursuer's view is short and simple. He says that the damages there mentioned include all damages caused, *inter alia*, to his (the pursuer's) feu by the defenders' operations, not merely damages caused by improper workings, but also and mainly damages caused by the complete excavation of the minerals—excavation by the longwall working which is authorised by the lease. In short, he contends that when the defenders' lease is examined it is made clear that so far from being unconditional, the defenders' right to work is expressly conditional—conditional on their paying to him (the pursuer) exactly what he (the pursuer) claims in this action. He admits that when the lease is examined, it excludes his declaratory conclusions—conclusions which, if affirmed, would justify interdict. But he says that that is of no moment as he does not now press those conclusions, and indeed ceased to do so so soon as, in defence to his action, the defenders' lease was produced.

The defenders, on the other hand, maintained two points—They say (1) that the damages stipulated in the clause apply only to improper workings — workings unauthorised or improperly carried on. And then they say (2) that in any view the clause only applies to existing feus and to existing buildings, and not to feus and buildings like the pursuer's—feus granted and buildings erected after the date of the lease.

With respect to these opposing constructions which I have thus summarised, I think it enough to say that I agree with the Lord Ordinary, and do so upon the grounds which he has expressed. I am not able to hold (what would result from the opposite view) that the defenders, being *prima facie* liable to the pursuer as having invaded his common law rights, have elided that liability upon the ground that they have from the pursuer's superior an unconditional authority to work longwall—an authority which, by reason of the recourse which it carries with it, protects them against the assertion of the pursuer's rights. I do not consider that, upon the just construction of their lease, that is the defenders' position.

It remains, however, to deal with what is the last question in the case, viz., whether the Lord Ordinary can be supported in holding, on a ground altogether different, that the pursuer's claim is excluded. That ground, as I understand it, is this—that since the date of the defenders' lease, and to a partial extent since the date of the pursuer's feu, there has been a great extension of feuing, and by consequence of building, upon the Wemyss estate, that that extension has gone greatly beyond what could have been contemplated at the date of the lease, and that therefore Mr Wemyss, the pursuer's superior and the defenders' lessor, is barred from demanding from the defenders, either directly or through his feuars, damages which, although stipulated in the lease, have been so enhanced by his subsequent action as practically to make the working of the leasehold impossible. That is, I think, speaking generally, the ground on which the Lord Ordinary, who is otherwise favourable to the pursuer, decides ultimately for the defenders.

I am afraid that there are several difficulties in the way of the Lord Ordinary's view.

In the first place, I have great difficulty in holding that the facts proved are really sufficient to raise the kind of case which the Lord Ordinary figures. The pursuer's feu is distant about a mile from the village of Methil, and there can be no doubt that of late years there has been and is still proceeding a very considerable extension of feuing and building in and about that village. Nor can it be doubted that

if held liable to the pursuer and persons in his position in payment of damages as now claimed, the defender's profits from the working of the coalfield will be at least materially reduced. But there are two points upon which, in this connection, I am not satisfied. The one is that, so far as the feuing has yet gone or is likely to go in the near future, it does not appear that worse will happen to the defenders than a reduction, perhaps material, of their profits. The other point is that I am unable to see how the defenders could have failed to anticipate, even in 1877, when they took their lease, that the success of their operations and the opening up and successful working of this great coalfield might, and probably would, have the effect of greatly adding to the importance of the harbour of Methil, and stimulating the growth of that village, and more or less of the neighbouring hamlets.

Further, and in the next place, I am unable to see why, even as against their lessor, it should be assumed that the defenders' remedy includes the right, while continuing to work under the lease, to refuse implement of the conditions which the lease provides. If by the accumulation of uncontemplated burdens the coalfield becomes unworkable to profit, the defenders' remedy would, *prima facie*, appear to be that they should throw up their lease, or rather (in the present case where there are "breaks" every four years) take advantage of one of those breaks. But how, even as between them and their lessor, they could claim to re-form the lease and go on with it minus essential provisions, I confess I as yet fail to see.

Lastly, and in any view, I am unable to understand what the present pursuer has to do with such questions and controversies. He is not here suing as an assignee of the superior to the latter's rights under the defenders' lease. He is suing, as I have endeavoured to show, in his own right as owner of the surface embraced in his recorded title. As already explained, he appeals to the defenders' lease not as constituting his title to sue but as affording *in gremio* a reply to a defence based on it. And how in such circumstances his position could be affected by disputes due to occurrences subsequent to his feu, arising between his superior and the latter's mineral tenants, has not been explained. It could only be so upon the theory that, as the result of the controversy, the defenders' lease must (as before indicated) be re-formed by the excision of the damages clause and its limitations. And as to that, it may, I think, be enough to say, first, that matters have not yet reached that stage; and next, that if they should do so, it will have to be then considered how far, even in that event, the pursuer could be prejudiced by modifications of the lease made after the date of his feu-contract, and after also his claim of damages had emerged.

LORD KINCAIRNEY — The pursuer is a feuar of a piece of ground at Crosslands, near Methil in Fife, lying above the extensive Wemyss coalfield, and he has raised this action for damages or compensation for injury done to his feu, and to a house built on it, by the subsidence of the surface caused by the workings of the defenders, the Fife Coal Company, tenants of the coalfield. The case involves questions of much general importance, and has been considered by the Lord Ordinary with very great care. The greater part of his opinion is in favour of the pursuer, and in that part of it I concur. At the close of his judgment the Lord Ordinary has proceeded on a special plea, in respect of which he has assoilzied the defenders, and in that conclusion I am not able to agree.

The agents for the parties have exchanged letters to the effect, that it had been arranged that neither party would lead any evidence as to the amount of damage done to the pursuer's property by the defenders' operations, on the understanding that in the event of the pursuer being successful in the action, or (as the defenders express it) in the event of it being proved to the satisfaction of the Court that the company is liable for damage done, the defenders would purchase the property at the price of £620. There seems to be no minute embodying this arrangement, but at the debate I understood that it was to be taken as settled.

The Lord Ordinary states in his note—"It is admitted that the defenders have taken out a seam of coal under the house; that subsidence and consequent injury to the surface has resulted; that the subsidence would have occurred even without the additional weight of the house; and that there has been no fault or negligence or improper working on the defenders' part, and I understood these points to be admitted." The case is to be considered on the footing expressed in these letters and in that part of the Lord Ordinary's note.

I think that the argument starts with a certain onus or presumption against the defenders arising from the principle that owners or lessees of minerals are not entitled in working them to injure the surface above if belonging to another person, and must justify their proceedings if they do so, or otherwise must pay compensation or damages.

The question therefore is, whether the defenders are liable for the admitted damage caused by their workings. Now, there seem to be only two deeds which bear materially on that question, namely, the lease of the minerals dated in 1877, and the disposition creating the feu dated in 1894; and the first question seems to be whether the injury done to the pursuer's property by the defenders' mineral workings can be justified by either of these deeds.

The feu-disposition which made the minerals and the surface separate estates was granted by the trustees of the Wemyss estate in 1894. In that feu-disposition the minerals were reserved under the declaration that the disponee (one Swinton, predecessor of the present pursuer) should have no claim against the disponers as trustees of the

Wemyss estate, or their successors "for any damage that might be done to the piece of ground disponed and buildings erected or to be erected thereon . . . by any of the operations in time past or to come of us or our predecessors or successors or tenants" in working the minerals reserved. But reserving "to the disponee and his foresaids all claims which may be competent to them in respect of any such damage as aforesaid against our tenants or tacksmen of the minerals and others in or near the said piece of ground in so far as such tenants or tacksmen may be liable for such damage without having any right or recourse or other remedy against us as trustees foresaid or our foresaids."

It thus appears that all claims competent to the present pursuer, Dryburgh, against the defenders for damages caused to his feu by their mineral workings are clearly reserved, and that the defence derives no benefit or assistance from the feu-disposition.

The lease which was granted in 1877 is a much more elaborate and complicated deed, and raises questions of construction not free from difficulty. It is fully examined by the Lord Ordinary, but it may be convenient to transcribe the more important clause bearing on this question.

The Fife Coal Company thereby bound themselves "to work the minerals in a regular and systematic manner, according to the rules and methods followed in well-regulated collieries, and in particular to work the whole saleable coal of each seam from roof to pavement by the longwall or other method of complete excavation, and so as to ensure at once the greatest output and the present and future advantageous working of the coalfield . . . and the lessees also oblige themselves and their foresaids to leave sufficient masses of coal to secure the shaft bottom, and also to leave solid unworked masses of coal where it may be necessary for the support of the Kirkland Works, or of any other houses or buildings on the lands before specified. And it is hereby provided, that where the longwall method of working is followed, the said lessees shall cause the gob or waste to be properly stowed so as to prevent unequal sits of the surface, and if the room and pillar method of working be adopted, the pillars shall be cut of sufficient dimensions in the first instance to ensure their ultimate extraction."

The defenders further undertake as follows:—"And further, and over and above making payment of the said fixed rents or lordships or royalties, the said lessees bind and oblige themselves and their foresaids during the currency of this lease to make compensation to the land tenants where the land is let, or to the owner where the land is not let, for all the ground which the lessees under these presents may use or injure in any of their operations under this tack, and to make good and discharge all the damages of what kind soever which the said lessees or their servants in their lawful business under their control may in any way occasion to any lands, crops thereon, houses or woods, or fences and drains, wells or watercourses, and whether such damage shall be due to the lessors of the colliery or to the landlord or land tenants, feuars or others, all as the same shall be determined by two neutral persons, to be mutually chosen, or by an oversman to be named by these persons if they shall differ in opinion."

These clauses of the lease are, as has been noticed, somewhat complicated; and they seem to lay a considerable burden on the mineral tenants. For while they are laid under the obligation to work out the whole minerals which could hardly be fulfilled without letting down the surface, they are also laid under stringent obligations to support the surface, and very distinctly engage to discharge all the damage which their works occasion.

The Lord Ordinary states the question whether the pursuer can plead this lease to which he was not a party, and which was granted thirty years before he took his feu; and he answers that question by expressing the opinion that he had a *jus quæsitum* in the lease. I do not dissent from that opinion, but concur in it. But it does not seem to be absolutely necessary to invoke the aid of a *jus quæsitum*. I think the true question is different, and is not whether the lease imposes obligations on the defenders, but rather whether it relieves the defenders from their obligations at common law; and I am of opinion that it does not. I concur, then, in the conclusion which the Lord Ordinary has reached, that the liability of the defenders for the damage they have occasioned is established by or consistent with the documents founded on, and if there were no counter consideration, it follows that the condition had been fulfilled on which the agreement referred to at the outset would take effect, and the defenders would fall to purchase the pursuer's feu on the terms arranged.

But the Lord Ordinary has not come to that conclusion, because he holds that the defenders' fourth plea should be affirmed. That plea is that the pursuer is not entitled to the decree to which he would otherwise be entitled, because the pursuer's authors, the proprietors of the mineral field, had granted feus for building in excess of what the parties to the lease had in view at its date. Now, I do not think there are in the process materials for affirming that plea. There is very little proof on the subject. It is proved or admitted that the subsidence of which the pursuer complains was at least in part occasioned by the defenders' workings apart from the weight of the buildings placed upon it; indeed, it is admitted that it would have been caused although no building had been placed on the ground at all. Now, I think that it follows, both at common law and under the provisions of the feu-contract and of the lease, that the defenders are bound to compensate the pursuer for the damage they have themselves caused. The loss may have been increased by the erection

of other buildings, but I am unable to see how that can afford a defence against a demaud for payment of the damage previously incurred. There is no proof at all that the subsidence has been one whit increased in consequence of the erection of the new buildings. The amount of the loss caused by the subsidence may have been increased if the foundation of the new buildings were disturbed and they were rendered insecure; but I do not perceive how that could affect this question. If the weight of the new buildings had brought down the surface materially, that might have raised a different question, but that has not been proved.

Further, I do not find the evidence clear about the position of the new buildings, and I do not see clear proof that they have been placed on the pursuer's feu. No doubt there have been a great many buildings put down in the immediate neighbourhood, but I am not able to see how that circumstance can affect the pursuer's right to recover the damages which the defender's workings have caused to his property. He seems to have nothing to do with the damage to neighbouring properties.

I am therefore of opinion that the interlocutor of the Lord Ordinary should be recalled, and that it should be found that damage has been done to the pursuer's property through the operations of the defenders in working the minerals under the pursuer's feu, for which damage the defenders are liable.

LORD STORMONTH DARLING—The Lord Ordinary has decided this case mainly upon the mineral lease granted to the defenders in 1877. He holds that while that contract would, if matters had remained in the situation contemplated by the parties when it was granted, have given the pursuer, whose feu was acquired in 1894, a right to claim damages for injury by subsidence on the principle of *jus quæsitum tertio*, there was subsequent to 1877 so great an increase in the number of feus for building purposes that the defenders' obligation to pay damages no longer remains binding. For this alteration of circumstances his Lordship holds the lessor responsible, and as the pursuer's claim on the footing of *jus quæsitum* (being made by virtue of the lessor's contract) can give him no higher right than the lessor would have had, the result in the Lord Ordinary's view is absolvitor.

I do not find this a satisfactory ground of judgment. The pursuer's claim rests mainly on the terms of his own title, and when he came into Court he founded on nothing else. Now, what does the feu-disposition of 1894 provide? First, it reserves the minerals; second, it excludes all claims by the feuar against the granters for any damage that may be caused to ground or buildings, erected or to be erected, by past or future mineral operations by themselves or their tenants; third, it declares that as regards the granters all such damage shall be borne by the feuar himself; but fourth, it reserves to him all claims that may be competent to him "in respect of any such damage as aforesaid" against the mineral tenants in so far as such tenants may be liable for such damage without having (which plainly means without "their" having) any right of recourse or relief, or any other remedy against the granters. It is thus anxiously stipulated that the feuar is to have no claim of damages for injury arising out of mineral workings against the persons with whom he contracted, but that he may make what he can out of the mineral tenants so long as the success of such a claim does not raise a right of recourse against the granters of the feu. The existence of this clause of reservation, no doubt, gave the pursuer a right to call for exhibition of the mineral lease of 1877 to see what the rights and obligations of the tenants were under it. Probably the pursuer was entitled to see the lease, even apart from this clause.

When the lease was disclosed it was found to contain a clause obliging the tenants to work the whole saleable coal of each seam from roof to pavement by the longwall or other method of complete excavation, except in certain specified places where pillars were to be left under existing buildings, and a further clause obliging them to "make good and discharge all damages of what kind soever" which they or their servants might in any way occasion to any lands, crops thereon, houses or woods, fences or drains, wells or watercourses, and whether such damage should be due to the lessors of the colliery, or to the landlord or land tenants, feuars or others, all as the same should be determined by arbitration.

This is the clause in the lease which is now founded on as creating a *jus quæsitum* in the pursuer. It seems to me that its true effect as regards the pursuer is not positive but negative. In other words it is consistent with, and therefore does not exclude, the claim of damages which the feu-disposition reserves; and in particular it does not show that such a claim of damages can be excluded by reason of its inferring any right of recourse by the mineral tenants against the lessors.

There may be a certain hardship in the mineral tenants being at the same time taken bound to work out the whole saleable coal by complete excavation, and to make good and discharge all damages of whatever description which may result from such working. If the lessors were to insist in their own right on both of these obligations the tenants might have an answer. We are not called upon in this action to consider that question. This is an action by a feuar who is not interested in the complete excavation of the coal, but is interested in a claim of damages which his title reserves and the lease does not exclude.

When I say that the lease does not exclude the claim I am not overlooking the argument that the damages clause in the lease is, on its just construction, limited to houses existing at the date of the lease. The Lord Ordinary is, on that part of the case, with the pursuer, and I agree with him. The crop, woods, fences and drains

mentioned in the same clause cannot be so limited, and I see no reason why the houses should be. Again, when the word "damage" or "damages" is used in either the feu-disposition or the lease it is plainly used in the most general sense, and makes no distinction between damage arising *ex delicto* and damage for which, strictly speaking, "compensation" is due.

That only leaves to be considered the question on which the Lord Ordinary has found for the defenders. It appears that recently the superior, recognising the hardship to the mineral tenants to which I have referred, has altered the form of his feu-contracts so as to take his feuars bound not to claim damages from anybody. The result is that there are at present not more than about thirty feu-dispositions over a large area of surface, extending to 250 acres or thereby, in terms identical with the pursuer's. I suppose there is no assurance that this change of policy will continue, and nothing, therefore, can be founded on that. But, taking the situation as it stands, and admitting all that the Lord Ordinary says about the increase in size and importance of the port of Methil, I greatly doubt whether the change is such as to justify a court of law in reading out of a contract one of its express stipulations, on the ground that when it was inserted a different state of things was in the contemplation of the parties. Such a principle can only be applied with the greatest caution, particularly to a contract like this, with frequent breaks in it. But the Lord Ordinary's ground of judgment assumes that the pursuer's claim of damages is wholly dependent on the *jus quæsitum* which the lease gives him. If I am right in holding that his claim is not so dependent, but is primarily founded on the terms of his own title, then the ground of judgment fails.

I am therefore of opinion that we should recall the Lord Ordinary's interlocutor, decern in terms of the second part of the declaratory conclusions, and, in respect of the conditional agreement between the parties set out in the letters of 24th October 1904, find it unnecessary to deal with the petitory conclusions of the summons. The pursuer does not now insist on the first part of the declaratory conclusions, which are plainly unsuitable to a case like this where the defenders cannot be restrained from complete excavation, but are liable in damages for bringing down the surface.

The LORD JUSTICE-CLERK concurred.

The Court recalled the interlocutor reclaimed against and pronounced an interlocutor in the following terms:—

> "Find and declare that the defenders are bound in the event of any injury being caused to the ground or buildings mentioned in the summons by their operations as tenants of the mineral field referred to in the record, and to the extent of said injury, to make payment to the pursuer in respect of the loss, injury, and damage thus sustained," &c.

Counsel for the Pursuer and Reclaimer—Clyde, K.C. — M'Clure, K.C. — MacRobert. Agents—Macpherson & Mackay, S.S.C.

Counsel for the Defenders and Respondents—Campbell, K.C.—Graham Stewart. Agents—Davidson & Syme, W.S.

Saturday, July 15.

FIRST DIVISION.

[Sheriff Court at Dunfermline.

DUNCAN *v.* FIFE COAL COMPANY, LIMITED.

Reparation — Master and Servant — Employers' Liability Act 1880 (43 *and* 44 *Vict. c.* 42), *secs.* 4 *and* 7—*Notice of Injury—Service of Notice—Notice in Envelope Addressed to Cashier in Charge of Company's Office and not to Company.*

The Employers' Liability Act 1880, section 4, enacts:—"An action for the recovery under this Act of compensation for an injury shall not be maintainable unless notice that injury has been sustained is given within six weeks, and the action is commenced within six months from the occurrence of the accident causing the injury. . . ." Section 7—"Notice in respect of an injury under this Act . . . shall be served on the employer, or if more than one employer, upon one of such employers. . . . Where the employer is a body of persons corporate or unincorporate, the notice shall be served by delivering the same at, or by sending it by post in a registered letter addressed to the office, or if there be more than one office, any one of the offices of such body."

Held, on a bill of exceptions, that a notice of injury which was addressed to the company, but was enclosed in an envelope directed *nominatim* to the cashier who had charge of the local office at which it was delivered, was properly served.

Process—Reparation—Master and Servant—Employers' Liability Act 1880 (43 *and* 44 *Vict. c.* 42), *secs.* 4 *and* 7—*Notice of Injury—Proof of Notice—Appeal for Jury Trial—Plea on Notice a Prejudicial Plea to be Decided before Allowing Proof on Merits and to be Decided in Sheriff Court.*

Held, after consultation with the Judges of the Second Division, that questions of defective notice under the Employers' Liability Act 1880 were of the nature of prejudicial pleas, and fell to be dealt with before allowing proof on the merits and in the Sheriff Court, and that if a party appealed for jury trial on the allowance of proof of notice, such party should (on the principle of the case of *Sharples* v. *Walter Yuill & Company*, May 23, 1905, 42 S.L.R. 538) be sent back to the Sheriff Court to have the plea on the notice decided.