presence on the Bench of a person who has not been present during substantially the whole hearing of the case has the same result. I agree with the Lord Ordinary that there can be no distinction in law. The decision is the decision of the whole Court, and as it cannot now be ascertained how far the votes of the other members of the Court were influenced by the arguments or example of the disqualified persons, it appears to me that the whole judgment is vitiated by their taking part in its deliberations. It was suggested that if this were affirmed any decision might be vitiated by a Justice who had heard only a part of the case insisting on sitting on the bench and discussing the case with his colleagues. There appears to me to be no real substance in this argument, because the Court can readily protect itself against the intrusion of such disqualified persons, and indeed can much more readily do so than in the case of a person who is disqualified by bias. I am accordingly of opinion that the Lord Ordinary's third ground of judgment, which is expressed by his sustaining the fifth plea-in-law for the pursuer, ought also to be affirmed.

LORD M'LAREN and LORD PEARSON, who were present at the advising, gave no opinion, not having heard the case.

The Court recalled the Lord Ordinary's interlocutor in so far as he sustained the third plea-in-law for the respective pursuers [*viz.*, "The said appeal having been taken and insisted in for and on behalf of the said Citizens' Vigilance Association, and certain members of and subscribers to said Association having taken part in the discussion and determination thereof, the decision of the Appeal Court should be reduced as concluded for"], and *quoad ultra* adhered.

Counsel for Pursuers (Respondents)—Clyde, K.C.—Horne. Agents—Alex. Morison & Co., W.S.

Counsel for Sir William Bilsland and Others, Defenders (Reclaimers) — Lord Advocate (Shaw, K.C.) — Cooper, K.C. — W. Thomson—Lyon Mackenzie. Agent—Norman M. Macpherson, S.S.C.

Counsel for John Green and Others, Defenders (Reclaimers)—Morison, K.C. — J. Duncan Millar. Agents—Clark & Macdonald, S.S.C.

Friday, March 12.

FIRST DIVISION.

[Lord Mackenzie, Ordinary.

DUKE OF ABERCORN *v.* MERRY & CUNINGHAME, LIMITED.

Mineral Lease—Reparation—Subsidence—Second Action for Same Cause of Injury — Nemo debet bis vexari pro eadem causa.

In February 1907 a landowner raised an action against his mineral tenants, who were under their lease liable for damages caused by their operations, to recover damages in respect of 62·028 acres injured by their workings. This action was settled, the pursuer recovering substantial damages. Thereafter, in February 1908, a new action was raised by the same pursuer against the same defenders claiming further damages, in which the pursuer averred that "subsequent to the raising of" the first action he had "ascertained" that a further larger extent of ground had been injured by the defenders' operations.

The Court *allowed* a proof before answer.

Opinion per Lord M'Laren—"If it is found as the result of the inquiry into the facts of the case that the pursuer's advisers knew, or ought to have known, that the subsidence was in progress, we might hold that the pursuer had elected to make the claim in the first action as representing the measure of what he was content to recover. But if it appears from the proof that no further extension was expected, and that the pursuer was excusably ignorant of the fact that the excavation was not exhausted, then I see no reason why he should not bring a new action for what is substantially a new claim."

The Duke of Abercorn raised an action against Merry & Cuninghame, Limited, carrying on business as coal and iron masters in Glasgow and elsewhere, to recover damages from them for subsidence caused by their mineral workings.

The defenders pleaded, *inter alia*—"(1) The pursuer's averments being irrelevant and insufficient to support the conclusions of the summons, the action should be dismissed. (2) The action is incompetent in respect that the damages claimable by the pursuer in respect of the defenders' mineral workings have been assessed and paid for in the former action. (4) The pursuer is in the circumstances barred from maintaining the present action."

The facts of the case and the nature of the pursuer's averments sufficiently appear from the opinion of the Lord Ordinary (MACKENZIE), who on 30th June 1908 sustained the first plea-in-law for the defenders and dismissed the action.

Opinion.—"This is an action by the owner of land against the mineral tenants to recover damages for subsidence caused by their mineral workings.

"The pursuer let the coal in his lands and farms of Linclive, Barskiven, and the South and East Candrens, in the Barony Parish of Paisley, to the defenders for fifteen years from Martinmas 1900, with certain breaks. The defenders terminated the lease at Martinmas 1906.

"By the lease it was provided, *inter alia*, as follows—'And further, the said tenants hereby bind and oblige themselves to pay all damages of what kind soever that may be occasioned in any way by their opera-

tions or works and manufactures, whether such damage be done to the said Duke, as proprietor, or to the agricultural tenants of the lands, or to any other person or persons to whom the said Duke may be liable.'

"In February 1907 the pursuer sued the defenders for £4474, 10s. 3d., in respect of 62·028 acres alleged to have been damaged by them. This sum was afterwards restricted to £2877, 4s. 8d., in consequence of the payment of £1597, 5s. 7d. The result of that litigation was that the defenders ultimately tendered £1652, 14s. 5d., and expenses, which was accepted.

"The averments upon which the present action are based are these—'Subsequent to the raising of the said action the pursuer ascertained that a further large extent of ground had been damaged by the defenders' operations. By letter dated 27th November 1907 the pursuer's agents intimated to the defenders' agents acceptance of the tender in respect of the damage which formed the subject of the said action, and also a claim in respect of the said further damage. A plan showing this additional ground so damaged, and amounting to 58·621 acres, was enclosed in the said letter. A tabular statement showing in detail the additional areas of ground damaged will be produced at the calling hereof. The amount of such damage is moderately estimated at £1500, which is the sum (first) sued for.' A claim is also made for £100 in respect of a 'sink' affecting the Candren Road, but it was not contended that the averment in regard to this (contained in cond. 8) raised any different question from that which turns on the averments in cond. 7, to which attention may therefore be confined.

"The question is whether these averments are relevant. It is a well-settled rule of law that damages resulting from one and the same cause of action must be assessed and recovered once for all. *Nemo debet bis vexari pro eadem causa.* The defenders contend that they are being sued for damages arising from the same cause of action in respect of which they have already paid damages in the previous case. If this is so, they cannot be sued. If a fresh cause of action has emerged since the previous litigation, then they can.

"It is settled by *Bonomi* v. *Backhouse*, 9 H.L.C. 503, and *Darley Main Colliery Company* v. *Mitchell*, 14 Q.B.D. 125, 11 A.C. 127, that it is the subsidence and not the excavation which is the cause of action. The excavation, though the *causa causans*, is not the cause of action, though there may result from it successive subsidences, which may each be a separate cause of action.

"If the subsidence in respect of which the present action is brought is not a fresh subsidence since the previous action, but the same subsidence in respect of which damages have been already paid, then the pursuer is suing the defenders twice in respect of the same cause of action. A reference to the plan founded on in cond. 7 shows that the 58·621 acres now claimed for either surround or are adjacent to the 62·028 acres previously paid for. It is not said they have been damaged by a fresh subsidence. The pursuers' counsel were given an opportunity to amend, but stated they were unable to aver that the damage had been done by a subsidence which had occurred subsequent to the last case. If the present action were allowed to go on it would mean that the pursuer could bring a separate action for the damage done to each field, or even each acre. Unless he can aver, which he has failed to do, that the damage in respect of which he now sues was the result of a new subsidence I am of opinion the action is irrelevant. The action will therefore be dismissed with expenses."

The pursuer reclaimed, and argued—The Lord Ordinary was wrong in holding that his averments were irrelevant and that it was necessary to aver that a new subsidence had occurred subsequent to the date of raising the former action. The damages claimed in the present action were in respect of lands different from those in respect of which he had received damages in the former action. The damage and not the removal of support was the cause of action, and there was therefore no *eadem causa* here. The lands being different, all that the pursuer required to aver was that damage had been occasioned by the defenders' operations, and not the date of the subsidence—*Mitchell* v. *Darley Main Colliery Company*, 1884, 14 Q.B.D. 125; *West Leigh Colliery Company* v. *Tunnicliffe & Hampson, Limited*, [1908] A.C. 27, 45 S.L.R. 970; *Crumbie* v. *Wallsend Local Board*, [1891] 1 Q.B.D. 503; *Brunsden* v. *Humphrey*, (1884) L.R., 14 Q.B.D. 141, *per* Bowen, L.J., at p. 147.

Argued for defenders (respondents)—The pursuer must show a new ground of action, and he had not done so. If the ground of action was bringing down the surface, he must show that the subsidence had occurred since the date of raising the former action. Once subsidence had occurred the ground of action emerged, and a second action on that ground was incompetent—*Stevenson* v. *Pontifex & Wood*, December 7, 1887, 15 R. 125, 25 S.L.R. 120; *Brunsden* (*cit. supra*), *per* Coleridge, C.J.; *Crumbie* (*cit. sup.*); *Seddon* v. *Tutop*, 1796, 6 T.R. 607, 3 Rev. Rep. 274; *Great Laxey Mining Company* v. *Clague*, (1878) L.R., 4 A.C. 115. Emerging damage was not a new ground of action. If the pursuer relied solely on a separation in point of place and not of time, he must show such separation as to make it clear that the damage complained of was caused by a different subsidence. He had not done so, as the ground now said to be injured was immediately adjacent to the ground for which compensation had previously been obtained.

At advising—

LORD M'LAREN—This is an action at the instance of the proprietor, directed against mineral tenants, and claiming damages for subsidence. In February 1907 the pursuer sued the defenders for £4474, 10s. 3d. in respect of 62·028 acres alleged to be damaged by the mineral workings, under which

action he recovered £1652, in addition to a sum of nearly £1600 paid to account. In the present action the pursuer sets forth that subsequent to the raising of the first action he had ascertained that a further large extent of ground had been damaged by the defenders' operations, and for this additional damage he claims two sums, being £1500 and £100.

The Lord Ordinary has dismissed the action, on the ground that a pursuer of an action of damages must bring forward all his claims at once, or, as he puts it, that damages resulting from one and the same cause of action must be assessed and recovered once for all.

This is a sound principle, but I am not sure that it is correctly applied to the present case. The Lord Ordinary refers to decisions under which it has been determined that it is the subsidence and not the excavation, which is the cause of action, and I infer from his Lordship's opinion that if this had been a fresh subsidence he would not have held that the decree in the first action was a bar to the present claim. It is not said in the condescendence that this is a new subsidence, but only that the pursuer had "ascertained" since the raising of the first action that further damage had arisen. Now I think it is consistent with the pursuer's averments that this is an extension of the original subsidence to lands surrounding or adjacent to the lands for which compensation has been recovered, and that at the time when the first action was brought the land now in question had either not subsided at all, or that the subsidence was so inconsiderable that it had not been noticed, and that it had not caused any sensible damage to these lands. I am the more disposed to hold this to be the true case, because in the first action a plan was put in, prepared by an engineer, which showed the land actually affected at that date. If the land now in question had sensibly subsided at the date of the first action, it is, to say the least, very unlikely that it would not have been included in the original claim.

The defenders' case then comes to this, that when a claim is formulated the pursuer must consider whether the subsidence due to underground workings has attained its full natural limits, and that if his engineers are mistaken, and the subsidence continues and extends to other lands, the proprietor has no remedy. The result of such a rule would be that a proprietor of lands which are undermined would never be in safety to bring his action for surface damages unless he waited for such a length of time as would make it certain that the subsidence would not extend. I am not prepared to accept this view of the law, and I think there ought to be a proof before answer. If it is found as the result of the inquiry into the facts of the case that the pursuer's advisers knew, or ought to have known, that the subsidence was in progress, we might hold that the pursuer had elected to make the claim in the first action as representing the measure of what he was content to recover.

But if it appears from the proof that no further extension was expected, and that the pursuer was excusably ignorant of the fact that the effect of the excavation was not exhausted, then I see no reason why he should not bring a new action for what is substantially a new claim. The adverse view would really mean that the excavation is the cause of action, which would be contrary to the law laid down in *Bonomi* v. *Backhouse* and *Darley Main Coal Company* v. *Mitchell*.

I do not think that the rule which governs claims for personal injury can be applied without discrimination to actions for injury to real property. The person is an indivisible unit, and the damages obtained cover all heads of injury whether known or apprehended. But it does not follow that damage recovered for injury to one parcel of land necessarily and under all circumstances covers injury to other lands from the same general cause. It is not necessary to go further for the decision of the present case, but it may very well be that sufficient effect is given to the rule against multiplicity of actions if it were held, first, that the damage recovered covers all injury to the lands described and claimed for; and secondly, in regard to adjacent lands, that the claim for injury to these lands would only be allowed if the injury were one that was not foreseen and which skilled persons might excusably be unable to anticipate.

LORD KINNEAR—I concur.

LORD JOHNSTON—I find that in *Brunsden* v. *Humphrey*, L.R., 14 Q.B.D. at p. 147, Bowen, L.J., said—"It is a well-settled rule of law that damages resulting from one and the same cause of action must be assessed and recovered once for all. The difficulty in each case arises, upon the application of this rule, how far is the cause which is being litigated afresh the same cause in substance with that which has been the subject of the previous suit." The difficulty, is I think, the more pronounced where the damage alleged relates to real property, for I agree with your Lordship that the rule which governs claims for personal injury cannot be applied without discrimination to actions for injury to real property. Until the facts are clearly ascertained and understood, that discrimination cannot be made. Without therefore committing myself further, I think that a proof before answer should be allowed.

At the same time I have felt considerable doubt whether the pursuers have made a sufficient averment in condescendence 7 which is their main, if not only, averment of fact. This statement gives no indication of why the 62·028 acre area was selected to be subject of the first action, to the exclusion of the area regarding which action has now been brought, or of what has occurred since to justify a second and separate action. I should have myself been prepared to require from the pursuer

greater specification. But as your Lordships think that the record is sufficient as it stands I am satisfied.

The LORD PRESIDENT and LORD PEARSON were absent.

The Court recalled the Lord Ordinary's interlocutor and allowed a proof before answer.

Counsel for the Pursuer (Reclaimer)—Macphail—Burn Murdoch. Agents—Mackenzie & Kermack, W.S.

Counsel for the Defenders (Respondents)—Constable, K.C.—Hamilton. Agents—Forrester & Davidson, W.S.

Thursday, March 18.

SECOND DIVISION.

[Lord Guthrie, Ordinary.

MACKISON'S TRUSTEES *v.* MAGISTRATES OF DUNDEE.

Master and Servant—Burgh Surveyor—Recompense—Services Outwith Scope of Employment—Claim for Extra Remuneration—No Specific Claim to Date of Action—Mora—Proof—Onus.

In an action by a burgh surveyor against his employers for payment for work done by him, which he alleged was outwith the scope of his official duties, the evidence showed that no express contract to give him extra remuneration had been made; that he was never instructed to do any work except in his capacity as burgh surveyor; that on three occasions he accepted honoraria from his employers for special services without reservation of any claims; that his period of service lasted for thirty-eight years; that with these three exceptions he did all the work remitted to him without any extra remuneration, and that he took no definite steps to make good his claims, although he knew that his employers all along denied liability.

Held that the pursuer's delay, though not an absolute bar to his claim, threw on him the *onus* of proving that the work was done by him otherwise than as burgh surveyor, and that he had failed to discharge the *onus*.

On 4th September 1906 William Mackison, civil engineer and architect, Dundee, and formerly burgh surveyor, brought an action against the Magistrates of Dundee in which he sought decree for £15,000 for work done by him outwith the scope of his duties as burgh surveyor.

Mr Mackison having died on 24th November 1906, his trustees were sisted as pursuers.

The circumstances in which the action was raised are fully set forth in the opinions (*infra*) of Lords Low and Dundas.

On 11th January 1908 the Lord Ordinary (GUTHRIE), after a proof, the import of which sufficiently appears from his Lordship's opinion (*infra*), assoilzied the defenders.

Opinion.—"This action was instituted by the late Mr William Mackison, who was Burgh Surveyor of Police for Dundee from 1868 to 1906, and is now insisted in by his trustees. Mr Mackison died on 24th November 1906, before the proof was led. The summons concludes for a sum of £15,000. But that sum does not represent what the late pursuer estimated as the full measure of his rights. According to Condescendence XII, he was entitled to £49,601, made up of £3800 for arrears of salary as sanitary inspector and £45,801 for alleged extra work done in the burgh surveyor's department but said not to be covered by the burgh surveyor's salary, this latter sum of £45,801 representing 'the ordinary charges made by engineers and architects for similar work.' Although maintaining legal right to the above-mentioned sum of £49,601, the late pursuer restricted his claim in the summons to £15,000, but on what basis his son, Mr J. W. Mackison, is unable to explain. Mr Carter, C.E., with whom Mr Bennett, C.E., substantially concurred, priced the claim for extra work at £19,584, which being added to the arrears of sanitary inspector's salary makes a total now claimed to be legally due of £23,384, as against the above sum of £49,601, subject to a certain deduction from the claim for extra work, to be afterwards referred to.

"I.—Arrears of salary as Sanitary Inspector, from date of appointment on 16th July 1868 to date of summons, amounting to £3800.

"The defenders admit that the late pursuer was appointed on 16th July 1868 sanitary inspector for the United Parish of Liff and Benvie, within which the burgh of Dundee is situated; that the said appointment was never recalled; and that in some of the defenders' annual Government returns Mr Mackison was entered as one of the sanitary inspectors.

"*Prima facie*, therefore, apart from amount, the late pursuer made a good claim under this head, which it lay on the defenders to displace. In my opinion they have done so. They have proved (1) that, as in a question between the Police Commissoners and Mr Mackison, his salary for the two offices of police surveyor and sanitary inspector was fixed at £400, which salary, or an increased amount, was regularly thereafter paid to him; and (2) that no work as sanitary inspector separate from his work as burgh surveyor was ever done by Mr Mackison, the whole separate duties having been discharged with a separate staff, and separate books, in a separate office, by Mr Thomas Kinnear, who had been inspector of nuisances from 1867, and who was also appointed sanitary inspector for the same area within five months of the late pursuer's appointment, and who was regularly paid a salary therefor. The late pursuer's appointment was always treated, and was in fact, nominal. With the arrangements in 1868 between the Police