other materials from the sea beach or sea shore of the bay of Eyemouth, extending from the mouth of the harbour of Eyemouth northward to the Fort of Eyemouth. The defence was that under their Act of Parliament the trustees were entitled to take ballast from the sea shore for the purposes of navigation, as had been done from time immemorial.

Lord JERVISWOODE held that, as the parties were at issue in regard to facts material for the decision of the case, there should be a proof allowed. Against this interlocutor the pursuers reclaimed, and contended that the facts as to which the parties were at issue were not material, the question being one dependent solely on the construction of Mrs Home's titles and the defenders' Acts of Parliament.

To-day, after hearing Mr Millar for the pursuers, the Court adhered to the interlocutor of the Lord Ordinary, with this variation, that the proof to be allowed should be before answer, and under reservation to both parties of all questions of title. The pursuers were found liable in expenses since the date of the Lord Ordinary's interlocutor.

SECOND DIVISION.

SUSP. AND INTER.—THE DUKE OF PORTLAND *v.* MESSRS W. BAIRD AND CO.

Counsel for the Duke of Portland—Mr Patton and Mr Monro. Agents—Messrs Melville & Lindesay, W.S.

Counsel for the Messrs Baird—The Solicitor-General, Mr Gifford, and Mr Hope. Agents—Messrs Horne, Horne, & Lyell, W.S.

Counsel for Trustee—Mr Gordon and Mr Lamond.

This suspension and interdict is directed by the Duke of Portland against the Messrs Baird of Gartsherrie, and its object is to have them prevented from working the seams of coal and the ironstone in certain lands forming part of the estate of Kilmarnock, which were let by the complainer by a tack or lease, dated 29th and 30th November 1852, to Mr Lancaster and Mr Cookney. By the lease of the mineral field in question, the field is let "to the said William Lancaster and James Thomas Cookney, and their heirs and successors, or to their assignees and sub-tenants, but under this condition always, that if the tenants shall desire to assign this lease, or to subset the premises thereby let, the assignation or the subtack shall be, and shall only be, with the written consent of the proprietor, or his successors; and the tenants herein, and their heirs and successors, shall notwithstanding of any assignation or subtack continue bound, along with the assignees and sub-tenants, for the rent or loyalties, and implement of the whole stipulations of this lease." Lancaster & Cookney having carried on the business for some time, dissolved it, and assigned the lease, with consent of the landlord, to Messrs Lancaster & Freeland. This firm having got into difficulties, handed over their interest to a trustee for behoof of their creditors, who assigned the lease to the Messrs Baird—the present respondents. The Duke of Portland refuses to take them as tenants except upon a condition which the Messrs Baird decline—that they shall ship all the iron which they make to Troon, the Duke's port; and the question that arises in the case is whether, under the right which the landlord reserved to himself of withholding his consent in the original lease, he is entitled to annex such a condition as that which the Duke of Portland proposes to impose on the Messrs Baird.

The Lord Ordinary (Kinloch) found that, according to the sound legal construction of the deed of lease in question the consent of the landlord is a necessary condition precedent to any assignation of the lease taking effect; and that the landlord is entitled to give or withhold such consent at pleasure, and without assigning reasons, or having any reason of refusal subjected to the review or control of the Court.

The Messrs Baird reclaimed; and after argument, the case was advised to-day, the Court adhering to the judgment of the Lord Ordinary.

Friday, Nov. 10.

FIRST DIVISION.

CAMPBELL *v.* BERTRAM'S TRUSTEES.

Counsel for Pursuer—The Lord Advocate and Mr Tait. Agents—Messrs Tait & Crichton, W.S.

Counsel for Defenders—Mr Gifford and Mr Thoms. Agents—Messrs Scarth & Scott, W.S.

This action was raised by Sir Archibald Islay Campbell of Succoth, against the trustees of the late James Bertram, engineer and millwright in Edinburgh, for the purpose of declaring the irritancy, under the Act 1757, of a feu-contract of certain subjects in Leith Walk, in respect of the defender's failure to pay feu-duty for two years. The defenders pleaded *inter alia* that the pursuer had no title to sue the action, and the question thus raised was one purely of conveyancing.

It appeared that Alexander Wight, W.S., held the subjects in question under a charter from the town of Edinburgh, as trustees of Trinity Hospital, and that in 1796 he granted a sub-feu to a person named Cooper, and that the defenders were the successors of Cooper. But in 1811 Wight, being then the debtor of a person named Howie to the extent of £600, granted to Howie a deed by which, it was said by the pursuer, he had transferred his right of mid-superiority. If he had divested himself, then it was clear that the superiority had passed to Howie, whose successor Sir Archibald Campbell now was. Lord Jerviswoode repelled the objections to title, and the defenders reclaimed. To-day the Court altered the Lord Ordinary's interlocutor, sustained the objections, and assoilzied the defenders, with expenses.

LORD CURRIEHILL delivered the judgment of the Court. He said that the whole question turned on the nature of the deed of 1811. There was no question that this deed was granted in security of debt; but a person granting a conveyance in security may do so in two ways. He may either grant an absolute conveyance—receiving a back letter or other writing—or he may grant a deed which forms an incumbrance on his property, the radical right remaining in himself. The deed in question differs from the ordinary bond and disposition in security because it contains no personal bond and no power of sale. But it contains a full recital of a debt due by the granter to the grantee. On the narrative of that debt, and in consideration of the creditor agreeing to supersede payment of the debt till 1812, the deed states that the granter had agreed to grant the "disposition and assignation in security underwritten." Then the deed proceeds to sell, alienate, and dispose the subjects to the grantee, but *in gremio* of the dispositive clause are the words, "but under redemption by payment making of the aforesaid sums in manner underwritten." This refers to and incorporates with the dispositive clause a declaration in the precept of sasine that the subjects were to be held redeemably. This is, therefore, a qualification of the dispositive clause. Consequently this is not an absolute disposition, but a qualified one. The words "in security" do not occur in the dispositive clause, but I do not think they are necessary there as a *vox signata*. The obligation to infeft and the procuratory of resignation also refer to the redeemable nature of the right. Mrs Howie was infeft on this disposition so qualified, and that right was confirmed by the superiors. The question therefore is this—Had Wight, when he granted the deed of 1811, ceased to be the vassal of the town of Edinburgh, and the superior of Cooper, or did his right still continue, but burdened with this incumbrance? I am very