surface under a dwelling-house, in order to work out the whole of the minerals beneath.

Their case is, that they are not bound to more care under houses than away from houses. I cannot think this according to law, or reason, or humanity. There must be a reasonable obligation to work with due care and caution in the circumstances, and more care where danger is greatest. Nor can I admit the proposition of the defenders, that the mineral lessees are only bound to sustain the surface without buildings, or with the buildings at the date of the lease; and that if there were at that time no buildings, then only to sustain the ground without the buildings. I cannot accept that as good law.

I do not think that the granting a mineral lease operates as a prohibition against all building or feuing on the surface, except under the peril of destruction of the buildings without redress.

There is no question here of the building contributing to the subsidence, nor of an unfair or extravagant addition to the amount of damage by a building of an unusual and inappropriate description. Nothing was done here beyond what was in the contemplation of parties.

On the question of evidence, I have only to say that I agree with your Lordship, that the pursuer's claim, on the ground of fault or carelessness in working, has been sufficiently established.

It appears to me that the defenders, knowing that they were working under, and very near, dwelling-houses, did not take all the precautions within their power, and according to their duty, for securing against the injury, and, it may be, against the sudden and entire destruction of the dwelling-houses. That is, I think, a sufficient ground for holding the mineral lessees responsible.

There is no joint liability.

There may be questions of relief between these parties. They are, I understand, reserved.

Lord Deas concurred in holding both the superior and the mineral tenants liable in reparation to the pursuer. He was not sure if the liability of the one rested entirely on contract, and the liability of the other entirely on delict; but the main thing was that both were liable. As to the tenant, the question was a very general and important one. There was nothing unusual in the terms of the mineral lease, which seemed to have been prepared by some one quite familiar with the form of such instruments. Further, there was nothing illegal in the "longwall" system of working which the mineral tenants had adopted. That was the natural and usual mode. Still the question was, whether there was not some obligation on the mineral tenants with regard to the owner of this feu? This mineral lease comprehended a considerable extent of field. The rent under it was about £500 or £600 a-year. It was in the neighbourhood of a mining village, where houses were rapidly increasing. It was, therefore, a lease of minerals in a property as respects which it could not be held that the granter of the lease was giving up to the mineral tenants his right to deal with any part of that ground. It was not to be supposed that the lessor was not to build on any part of this estate under which the minerals were let;—that, for example, he was not to put up a farm-house or offices, or to build a lodge at the entrance of the avenue to his house. The superior did not give up that right. If he himself had built, the mineral tenant would have been bound to take care. There might be a difference as regarded the erection of large buildings, and perhaps all that was to be built was some colliers' houses. In the mineral lease there was an obligation to build twenty such. It might fairly be expected that such houses would be built, even by the superior. The question was just this, is there to be no use of the surface on account of the minerals? Suppose the minerals had been sold, the result would have been that the owners would still have been owners of the estate, subject only to such restrictions as are imposed by the rights of neighbourhood. He could not be debarred from exercising his usual right of property because there was another estate below. There was no authority for the contrary doctrine. Therefore, although the mineral tenants were entitled to work their minerals, yet, when they saw these houses, they were bound to take all the precaution they could not to bring them down, and if no other precaution would do, they must simply not work under the houses. But it was very plain, in the present case, that the mineral tenants had taken no precautions at all. They were at least bound to take all reasonable care, but they did not profess to have taken any; and such they maintained to be their right. That was clear from many parts of the evidence, and, though it was true that all the proof was not in one direction, the fair result of it was that they had done nothing at all to prevent injury to the surface.

Agents for Pursuer—J. Paris, S.S.C.

Agents for Mineral Tenants—Maconochie & Hare, W.S.

Agents for Mineral Tenants—Davidson & Syme, W.S.

Friday, July 19.

ZIZINIAS AND MANDATORIES, PETITIONERS.

Petition—Leave to Enrol. Circumstances in which a petition for special authority to enrol in the roll of undefended causes, refused.

The petitioner, Stamatius Paul Zizinias, merchant in London, and his mandatories, presented this petition, stating that on the 27th June 1867 they had raised and signeted a summons against Francesco Fioretti, presently in Greenock, master of the Italian vessel the "Daniele Manin," and Leon Serena, shipowner in London, against whom arrestments had been used, *ad fundandam jurisdictionem*, concluding for payment of the sums contained in two bills of exchange: That the said summons was executed edictally against both defenders, of the said date, and was also served personally on the defender Fioretti, on July 3, 1867: that the *induciæ* expired on the 18th of July 1867, and the summons had accordingly been lodged for calling on that day, before Lord Ormidale.

That by section 29 of the Act of Sederunt, 11th July 1828, it was provided, *inter alia*, that "no cause shall be enrolled earlier than on the second lawful day after it shall have been called, unless special leave shall be given by the Inner-House." The time allowed for the defenders entering appearance would expire on Friday the 19th July 1867, at seven o'clock p.m.; but if no appearance was made (and the petitioners had reason to believe that no appearance would be entered) it would be too late to get the case enrolled in the Roll of Undefended Causes for the day following (Saturday), which was the last day of

Session, whereby the pursuers would be prevented obtaining decree in absence till the meeting of the Court in November. That in the action raised by the petitioners any delay would materially affect their interests and chance of recovering the sums claimed; and the present application had been rendered necessary in the circumstance above set forth.

The petition prayed the Court to grant special leave and authority to the clerk or keeper of the Outer-House Roll of Defended and Undefended Causes, in the event of no appearance being made in said action for both or either of said defenders, to enrol said cause in the Roll of Undefended Causes for Saturday first; or to do otherwise, &c.

The Lord President asked if there was any precedent for this motion.

Maclean, for petitioners, admitted there was not.

The Court refused the petition.

Agent for Petitioners—John Leishman, W.S.

Friday, July 19.

SECOND DIVISION.

JAMES DREW, PETITIONER.

Trust—Trustees—Non-acceptance—Judicial Factor—Discretionary Power—Beneficiaries. Circumstances in which the Court refused to pronounce upon a petition presented by a judicial factor asking instructions in regard to a discretionary power reposed in trustees, upon whose failure he had obtained his appointment.

Mr Drew was in 1861 appointed judicial-factor on the estate of the late Robert Lawrie, Esquire, residing at Whitburn, upon the failure of the trustees under his settlement to accept office. The deceased left a trust-disposition and relative letter of instructions, both dated 20th December 1851, and he added thereto three codicils, dated respectively 2d December 1852, 28th October 1854, and 23d May 1857. The residue of the estate was appointed to be divided upon the lapse of fifteen years from the date of the letter of instruction, that is, upon 20th December 1866. The factor, in 1863, presented a petition for instructions relative to the disposal of the revenue of the estate and of a sum of £2000, referred to in the codicil to be afterwards noticed. Lord Barcaple, then Junior Lord Ordinary, gave the required instructions, in terms of an agreement into which the whole parties interested had entered, relative to the revenue, and *quoad ultra* superseded consideration of the petition. The factor now applied by Note lodged with Lord Mure, Junior Ordinary, for directions relative to the disposal of the £2000 under the following clause in the codicil of 23d May 1857:—"The said trustees, as soon after my death as they shall see convenient, and after provision has been made for the different legatees and legacies before mentioned, *unless they see cause to the contrary*, may invest in government stock or otherwise the sum of £2000 sterling, the interests or profits of which shall be drawn by my daughters or their husbands; but the stock shall be held in the name of the trustees for the benefit of my daughters and their children, should their mother predecease them, or to the survivor of my said daughters failing issue." The factor stated that he did not consider himself to have the discretionary power conferred upon the trustees not to make this investment; but that if he had any discretion in the matter, he considered the investment inexpedient. He prayed the Court to find that the direction given to the trustees in the codicil was permissive merely, to be carried into effect only if the trustees saw fit, and that by their non-acceptance of office this permissive power had lapsed, and the investment was not to be made. Or otherwise he requested such instructions as to the terms of the investment as the Court might see fit. He stated that his reason for now moving in the petition was, that he had executed the trust except as regarded the said investment, and that he wished to wind up the estate and obtain his discharge. Intimation of this Note was ordered to the truster's daughters, who were also the residuary legatees. One of them was married five years ago, but there were no children of the marriage. These ladies, along with the husband of the married daughter, returned a Note to the effect that they concurred with the factor in thinking no investment should be made. The petition was reported to the Second Division by Lord Mure, who referred to the case of *Hepburn*, 19th July 1866, 4 M., 1089.

R. V. Campbell for the factor.

Their Lordships unanimously refused to pronounce upon the petition, intimating that the proper course to have the question determined was for the beneficiaries to apply to the Court for a warrant upon the factor to pay over to them the £2000.

Agents—Messrs Maitland & Lyon, W.S.

Friday, July 19.

PAUL *v.* HENDERSON.

Suspension—Unextracted Decree—Conditional Offer of Payment—Assignation—Refusal—Consignation. A party made a conditional offer of payment of the sum contained in an unextracted decree. The condition was refused, and he then consigned the whole amount and brought a suspension. Held that consignation is equivalent to payment, and that suspension was a competent remedy.

Henderson held an unextracted decree of the Inner-House against Paul and another, as debtors conjunctly and severally liable. Paul offered payment of the sums in the decree, on condition of Henderson granting an assignation thereof to a third party, and under protest of Paul's right to appeal. Henderson refused the assignation as asked, intimating, however, that before extracting the decree he would give due notice. He further intimated that he would apply for payment of a sum consigned in the process in which the decree had been obtained, and in respect of the consignation of which arrestments on the dependence had been recalled. Paul, upon this, consigned the sum in the decreet, and raised a suspension thereof, and in respect of this consignation in the suspension, asked to get up the money consigned in the process in which the decree had been obtained.

The Lord Ordinary on the Bills (Mure) refused the note of suspension, as premature and unnecessary, in respect there was neither charge nor threatened charge, the decree not being extracted.

The Lord Ordinary (Ormidale) in the action in which the decree had been obtained refused Paul's motion to get up the consigned money.

Paul reclaimed against both interlocutors.

Pattison and Macdonald for him.