But all the sons, although they survived the testator, have now deceased, two of them without issue, and the third son leaving two children. I am of opinion that, by the death without issue of the two sons who left no issue, the special subjects destined to them have lapsed and fallen into residue. The fee of these two special subjects was intended for and given to grandchildren who have never existed, and who now can never exist. The condition therefore has failed, the provision is simply a lapsed legacy, and the subject of it falls, not into intestacy, for there is a general and universal settlement, but into residue, just like other lapsed legacies. As to the third subject, as David the third son has left issue, I am of opinion that the trustees must continue to hold for David's children, and in exact terms of the deed they must convey to these children or sell for their behoof when the youngest of them attains majority, and not till then. The result is that, in my opinion, two of the special subjects have fallen into residue, and belong with it one-third to those in right of each son. The third special subject must be held still for David's children. To this extent I regret to be obliged to differ from your Lordships, and this difference would lead to a different answer to some of the questions put. In other respects I agree with your Lordships.

Lord Neaves was absent.

The Court pronounced the following interlocutor:—

"The Lords having heard counsel on the Special Case, with the questions as amended, being No. 9 of process, are of opinion, and find—(1) That under the settlement of James Henderson senior the residue of his estates vested at his death; (2) That the three subjects specially destined vested in the testator's sons respectively *a morte testatoris;* (3) That the children of David Henderson senior are entitled only to one-third of the surplus revenue—the rest falling into residue—and that the division under the minute of agreement, so far as applicable to the residue, has been correct; (4) That the legacy of furniture, &c., to John Gray Henderson vested in him on the testator's death; and find it unnecessary to answer any further queries, and decern."

Counsel for First, Second, Third, and Fourth Parties—M'Laren—Innes. Agents—M'Ewen & Carment, W.S.

Counsel for Fifth Parties—Moncreiff. Agents—Wilson & Dunlop, W.S.

Counsel for Curator *ad litem*—Lee. Agent—P. Murray, W.S.

Saturday, January 8.

SECOND DIVISION.

[Lord Curriehill.

HOULDSWORTH *v.* BAIN AND OTHERS.

Landlord and Tenant—Lease—Minerals—Reparation—Violent Profits—Bona fide *Possession.*

A proprietor let the coal and fire-clay in his estate to a tenant under a lease and minute of agreement, whereby he (the proprietor) was empowered, in the event of the tenant's death during the currency of the lease, to resume possession of the colliery, "if he should at any time thereafter be dissatisfied with the working thereof by the representatives" of the tenant. The tenant died during the currency of the lease, which was transferred to his representatives. Thereafter the proprietor, being dissatisfied with the management of the colliery by the said representatives, intimated to them his intention of resuming possession thereof. The representatives refused, and denied the proprietor's right, and he accordingly brought an action against them for declarator that he was entitled to resume possession of the colliery, and that they were bound to remove therefrom, and for decree ordaining them to concur with him in having the plant and machinery valued. In this action the Lord Ordinary gave decree in favour of the proprietor, and the Inner House, on a reclaiming note, adhered. The proprietor then brought an action against the representatives, concluding for a sum of money, which he explained in the condescendence represented the amount due by the defenders as violent profits from the date of the intimation that he was about to resume possession, or as damages caused by their wrongous retention of possession since that time. In defence the representatives pleaded that their opposition to the action of declarator and removing was made and continued in the *bona fide* belief that the lease could not be put an end to without their consent, and that as the questions raised were attended with difficulty, their retention was not wrongous, and that they were not liable either for violent profits or for damages.—*Held* that the claim which the pursuer had against the defenders was not one for violent profits, but for breach of contract by the defenders having retained possession of the colliery after the period at which they were bound to remove, and that they were therefore liable to the pursuer in reparation for such injury as had thereby been occasioned to him.

Opinion per Lord Justice-Clerk, that in the circumstances, in so far as the action was for violent profits, the defence of *bona fide* possession was sufficient to protect the defenders until their title was the subject of judicial decision.

Opinion per Lord Ormidale, that in the circumstances, the *bona fides* of the defenders must be held to have ceased, and their liability to have commenced at the date of citation in the action of declarator and removing.

Question per Lord Justice-Clerk, how far, in a question as to *bona fide* possession and fruits in *bona fide* received and consumed, the analogy of a proper agricultural lease will extend in all its effects to a lease of a subject which yields no periodical produce, which has no reproductive power, and under which the tenant appropriates, not the increment or fruits of the property, but the property itself.

Observations on the principles upon which the defence of *bona fide* possession against a claim for violent profits must be decided.

This was an action raised by James Houldsworth of Coltness against William Bain, innkeeper, Wishaw, and others, tutors-nominate to James Brand, eldest son of Alexander Brand, miner there. In November 1867 Henry Houldsworth, the pursuer's father, let on a lease of nineteen years, from Martinmas 1865, all the coal and fire-clay underlying a portion of the lands of Coltness, with breaks at Martinmas 1870, 1875, and 1880, in favour of Robert Brand and Jonathan Hyslop. These tenants, however, having disagreed, it was arranged, after some litigation, that Hyslop should retire from the joint-tenancy, and a minute of agreement between the pursuer (who had then succeeded to his father) and Robert Brand was entered into on 5th October 1869.

By this minute, on the narrative of the lease, and of the tenants having disagreed, and that Robert Brand was desirous of obtaining the pursuer's acknowledgment of him as sole tenant, it was agreed between them as follows:—*First*, That in the event of the death of Brand during the currency of the lease, the landlord was empowered, if he should so wish, to enter on and resume possession of the colliery and other subjects of lease at a valuation, if he should at any time thereafter be dissatisfied with the working thereof by the representatives of Brand; but that if the said representatives should not wish to carry on the operations of the colliery, they should, after first offering it for not less than thirty days to the pursuer or his successors in Coltness estate, at a valuation thereinafter provided for, have power to dispose of it to any other party approved by the landlord. *Second*, in the event of Brand falling into a state of health incapacitating him from giving his usual personal attendance during the space of any six months, and the lordships payable to the pursuer falling below the rate of £2000 sterling per annum during any such period, the landlord was then empowered, if he should so wish, to enter on and resume possession of the colliery and subjects connected therewith, at a valuation, as thereinafter provided for; and if the landlord should not exercise the power thereby conferred, that Brand should, after first offering it for not less than thirty days to the landlord at a valuation, as thereinafter provided for, be entitled to dispose of the colliery under the conditions of the lease to any other party approved of by the landlord. It was further stipulated that in the event of the pursuer entering on possession of the colliery in either of the foregoing contingencies, he should have right to acquire from Brand or his representatives full possession of the colliery without any process of law being necessary, together with the whole pits, plant, &c., connected with the same.

Under this agreement and the lease Robert Brand continued to possess the colliery till his death on 26th January 1873. He left a trust-disposition conveying his whole estate to trustees for behoof of his only son Robert Brand junior, until he should attain majority. Robert Brand junior died on July 3, 1873, still a minor and unmarried, and he left a settlement conveying his whole estate to trustees for certain purposes therein mentioned. Alexander Brand, the heir-at-law of Robert Brand junior, claimed the heritage *ab intestato*. Before any arrangement had been arrived at, Alexander Brand died on 5th November 1873, leaving to the defenders in the present action as trustees his whole means and estate, and also nominating them tutors to his only son, James Brand, who at the date of this action was still a pupil. Ultimately an agreement was come to, and the lease of the colliery was made over to the defenders, who entered into possession in January 1874.

The pursuer, being dissatisfied with the working of the colliery, gave notice on February 3, 1874, of his intention to resume possession under the powers contained in the minute of agreement of October 5, 1869. The defenders denied the pursuer's right to resume possession, and in April 1874 the pursuer raised an action against the defenders for declarator that he was entitled to resume possession of the colliery, and that the defenders were bound to remove therefrom, and for decree ordaining the defenders to concur in having the valuation of the plant and machinery proceeded with, and Lord Shand pronounced decree in terms of the conclusions of the summons, to which decree the Second Division adhered on 18th May 1875. The defenders had not removed from the colliery at the date of the present action, but they stated their willingness to remove on the valued price of the plant and machinery being paid to them.

The pursuer averred that the retention by the defenders of possession subsequent to notice of 3d February 1874 was wrongful and without right or title, and that through the same the defenders have been enabled to make large profits by the working of the colliery. He therefore claimed £10,000 as violent profits or as damages sustained through the defenders' wrongful retention of possession. The defenders, on the other hand, maintained that they acted throughout with perfect *bona fides*, believing that there were no grounds for dissatisfaction on the part of the landlord, and that he was not entitled to put an end to the lease.

When intimation of the pursuer's intention to resume possession was made in February 1874 to the defenders, the pursuer agreed to let to the widow of Robert Brand senior the colliery in question. Mrs Brand was accordingly a concurring party to this action.

The pursuer pleaded — "(1) The defenders having wrongfully retained possession of the said colliery after their right to do so had ceased, and after being duly called upon to cede possession to the pursuer, are liable for violent profits to the amount sued for. (2) *Separatim*, the pursuer having suffered loss and damage to the amount sued for by the defenders' wrongful retention of possession, he is entitled to decree as concluded for.

The defenders pleaded, *inter alia*—"(2) The question of the pursuer's right to terminate said lease having been one attended with difficulty,

and the defenders having retained possession of the subjects let in the *bona fide* belief that the lease could not be terminated without their consent, the defenders should be assoilzied."

The Lord Ordinary (CURRIEHILL), on 26th January 1875, pronounced the following interlocutor:—"The Lord Ordinary having heard the counsel for the parties in the procedure roll, and considered the closed record, Finds that from and after the 15th day of January 1875, being the date of the judgment of the Lord Ordinary (Shand) decerning in terms of the declaratory conclusions in the action of declarator and removing at the instance of the pursuer against the present defenders and others, the defenders have wrongfully retained possession of the pursuer's colliery, of which they were the tenants: Finds that the defenders are liable for violent profits in respect of the retention of possession as aforesaid from the said 15th January 1875 to the day of their removal, due allowance being made in estimating such profits for the time occupied by the valuation of the plant and machinery, in terms of said interlocutor of Lord Shand, provided the valuation had not been or shall not be unduly protracted or obstructed on the part of the defenders; and before further answer appoints the cause to be enrolled for further procedure, reserving in the meantime all questions of expenses: Grants leave to both parties or either of them to reclaim against this interlocutor if so advised.

"*Note.*—The late Henry Houldsworth, the father of the pursuer, was proprietor of the estate of Coltness, and he let to the late Robert Brand and Jonathan Hyslop, and their heirs, but excluding assignees and sub-tenants, the Greenhead ell coal and fireclay in part of said estate for 19 years from and after Martinmas 1865. In 1869 Hyslop retired from the concern with the permission of the pursuer, who had by that time succeeded to the estate; and an agreement was entered into between the pursuer and the said Robert Brand, dated 5th October 1869, in which it was *inter alia* agreed that 'in the event of the death of the said Robert Brand during the currency of the lease, the landlord is hereby empowered, if he so wishes, to enter on and resume possession of the colliery and other subjects of lease at a valuation, as afterwards provided for, if he should at any time thereafter be dissatisfied with the working thereof by the representatives of the said Robert Brand.' Robert Brand died on 26th January 1873, and the lease ultimately came to be transferred to the defenders, as trustees of the late Alexander Brand, a brother of the said Robert Brand, as tutors of James Brand, the eldest son of Alexander, and in January 1874 they entered into possession of the colliery, which they still retain.

"On 3d February 1874 the pursuer, who had been dissatisfied with the management of the colliery from the time of the death of the said Robert Brand intimated his dissatisfaction to the defenders, and his intention of resuming possession thereof; and at the same time calling upon them to nominate a valuator in terms of the agreement of 5th October 1869, in order that the plant and machinery, &c., might be valued over to the pursuer. The notice was repeatedly renewed, but the defenders denied the right of the pursuer to resume possession; and the pursuer, in consequence, on 25th April 1874, raised an action against the defenders and all other parties who might have interest in the lease, concluding for declarator that he was entitled to resume possession of the colliery, and that the defenders were bound to remove therefrom, and for decree ordaining the defenders to concur in having the foresaid valuation proceeded with, and instantly to remove from the colliery and cede possession to the pursuer. The defenders opposed that action, on the ground that the pursuer was not truly dissatisfied with the working of the colliery — that he was therefore not entitled to resume possession thereof. The action came to depend before Lord Shand (Ordinary), who after a proof found, by interlocutor dated 15th January 1875, that the defenders had failed to instruct that the pursuer was not at the date of his notice duly dissatisfied with the working of said colliery by the representatives of the said Robert Brand, and that the said notice was not given by the pursuer in *bona fide*, and he therefore decerned in terms of the declaratory conclusions of the summons, and ordained the defenders to concur with the pursuer in having the plant and machinery valued. The defenders, however, were not satisfied with that judgment, and they reclaimed to the Inner House, but on May 18, 1875, the Second Division of the Court adhered to the interlocutor of the Lord Ordinary. The defenders have not yet removed from the colliery, but they state that they are willing to remove on the valuation of the plant and machinery being completed, and on the amount thereby fixed being paid to them.

"In the present action the pursuer sues the defenders for £10,000, which, he says, represents the amount due by the defenders as violent profits from the date of the notice on 3d February 1874, or as damages caused by the wrongous retention of possession since that time. The defenders plead that their opposition to the action of declarator and removing was made and continued in the *bona fide* belief that the lease could not be put an end to without their consent; and that as the questions raised were attended with difficulty, their retention was not wrongous, and they are not liable either for violent profits or for damages.

"The authorities referred to both by the pursuer and by the defenders are the well-known cases of the *Queensberry* leases and the *Durris* leases, and one or two others of similar character, which are all cited in a note to Mr Nicolson's edition of Erskine, ii. vi. § 54. The result of these cases appears to be that the liability of a tenant for violent profits depends upon his *bona fides*, and is always a question of circumstances; and in such questions it is not material whether the validity or subsistence of the lease depends upon the title of the landlord to grant the lease or upon the construction of the lease itself. See the opinion of the Lord Chancellor in the case of *Carnegie* v. *Scott*, 9th December 1830, 4 W. and S. 431.

"The rule which seems to have been applied in all these cases was, that where the judgment of the Court of Session sustaining the leases was appealed to the House of Lords and reversed, the liability for violent profits did not begin till the date of the judgment of the House of Lords; but where the Court of Session had reduced the leases, and their judgment was affirmed by the House of Lords, the liability was held to begin at the date of the judgment of the Court of Session.

I can see no good reason why a similar rule should not be applied to cases like the present, where the Lord Ordinary has decided that the landlord was entitled to terminate the lease, and the Inner House have affirmed the judgment. I am therefore of opinion that the *bona fides* of the defenders must be held to have ceased at the date of the adverse interlocutor of the Lord Ordinary on 15th January 1875, and that they are liable for violent profits—in other words, for damages for wrongous retention of possession from that date. On the other hand, I do not think that, in the circumstances of this case, the pursuer is entitled to claim violent profits from the date of his notice in February 1874. The Lord Ordinary who decided the declarator found considerable difficulty in giving the pursuer the decree he asked; and I think the defenders, in their fiduciary and tutorial capacities, were fairly entitled to try the question, but they were not bound to carry the litigation into the Inner House. What shall be held to be the amount due by the defenders as violent profits or damages must be the subject of proof, and I think that in fixing the amount the time occupied by the valuation, if conducted without unreasonable delay or obstruction on the part of the defenders, must be taken into account. I do not think that the defenders are bound to cede possession until the plant and machinery are valued and paid for, and accordingly decree of removing has not been pronounced by Lord Shand; but, on the other hand, they are not entitled to be unnecessarily tardy in proceeding with the valuation."

The pursuer reclaimed, and argued:—"The defenders must be held to be in *mala fide*. The Lord Ordinary only found the defenders liable for violent profits from 15th January 1875 instead of from 3d February 1874, the date of the notice. Under the agreement of October 5, 1869, the proprietor must resume possession if "dissatisfied with the working of the colliery by the representatives of Robert Brand," so that there was from February 1874 a retention "wrongful and without right or title." The pursuer wrote to the defenders, who never replied, but were purposely silent.

Authorities quoted—*Carnegie* v. *Scott*, December 4, 1827, 6 S. 206, aff. 9 December 1830, 4 W. and S. 431; *Earl of Wemyss* v. *Queensberry Executors*, 10 March 1824, 2 S. App. 70; Erskine, ii. 1, 29, and ii. 6, 54; *Duke of Gordon's Trustees* v. *Innes' Representatives*, 19 June 1828, 6 S. 370; *Laurie and Husband* v. *Spalding*, 21 June 1769, M. 1764; Hunter on Landlord and Tenant, ii. 282 and 493-5; *Mackintosh* v. *Playfair's Trustees*, 20 May 1841, 3 D. 893; *Wellwood* v. *Wellwood*, 12 July 1848, 10 D. 1480; *Turner* v. *Watson*, 3 March 1820, F C.; *Cairns* v. *Howden*, 15 Dec. 1870, 9 Macph. 284; *Brisbane's Trustees* v. *Load*, 26 Nov. 1826, 7 S. 65.

At advising—

Lord Justice-Clerk—This is a case which is the sequel of a former one, in which we found that the defenders, as mineral tenants under the pursuer, were bound to remove, in terms of a minute of agreement entered into between the pursuer's father and the defenders' author. We held that the pursuer, as landlord, had exercised his right legally and effectually. Mr Houldsworth now concludes against the defenders for £10,000. He does not say in his summons precisely on what grounds his demand is made. But in his pleas in law he says that the defenders, having wrongfully retained possession, are liable in violent profits to the amount sued for; and, *separatim*, that having suffered damage to the amount sued for, by reason of the defenders' wrongful retention of possession, he is entitled to decree as concluded for. The Lord Ordinary has found the defenders liable in violent profits from the date of the Lord Ordinary's interlocutor in the former action at Mr Houldsworth's instance, but not before that date. The question is attended with considerable difficulty. I find myself in the position of agreeing entirely in the exposition of the law contained in the note of the Lord Ordinary, and even in his application of it to the defence here stated, in some of its aspects, and yet being unable to concur in the result at which he has arrived.

The doctrine by which one who has no right to possess is protected, by his reasonable and honest belief in the validity of his right, from a demand by the true owner for fruits reaped and consumed, is primarily applicable to rights in land and the produce of the soil. "*Bona fide possessor fructus facit perceptos et consumptos suos*" is the expression of the rule on which the doctrine proceeds, and it is obviously directed to fruits which are periodically produced, and which from their nature are consumed as they arise. The rule has, however, received a wide effect, but the branch of it which we are here considering is the application of it as a defence by a possessor against a demand by an owner for violent profits—that is, a claim at the instance of the owner for a penal accounting for fruits reaped and profits obtained by a possessor who has refused or failed to remove at his stipulated term, or who has possessed throughout without a valid title. Violent profits are profits acquired by violence—by an intruder without colour of law, who must account on the strictest footing.

Since the well-known judgments of the House of Lords in the *Queensberry* leases, and the series of decisions which followed, there has really been no uncertainty as to the law on this subject or the rules laid down by authority for our guidance. They may be stated thus—*First*, When the possession has commenced in good faith, it lies with the true owner to show when it ceased to be so, before the right to demand violent profits can prevail; *secondly*, when possession has been continued during a litigation regarding the title of the possessor, it is sufficient to support the possessor's plea of *bona fides* that he had "*probabilis causa litigandi;*" and *third*, that the principle is equally applicable, whether the possession be challenged in respect of want of title in the possessor's author or of the nature and conditions of his own right. In regard to the first of these rules as to the burden of proof, it was clearly announced by the House of Lords as the ground of decision in the cases regarding the *Queensberry* leases, and I cannot better express the rule itself, or the import of the judgment of the House of Lords as universally accepted, than by quoting the words of Lord Justice-Clerk Boyle in the case of *Carnegie* v. *Scott* in 1827. "None of your Lordships can doubt," he said, and with the entire acquiescence of the Court, "the general principle now unalterably fixed by a

series rerum judicatarum in this Court, and deliberately confirmed in the *Queensberry* and *March* cases (which proceeded on the general principle), and the party pursuing therefore must show that his opponent was in *mala fide*." As to the second rule, it is laid down in specific terms by Erskine that in a prosecution for violent profits the decree will be restricted to the yearly tack-duty if the tenant has had a *probabilis causa litigandi*, and this rule has been uniformly followed. In regard to the third of these rules, a struggle was made in several cases which occurred shortly after the decisions in the *Queensberry* and *March* cases to limit the application of this principle of *bona fide* possession to cases in which the title of the tenant's author was challenged; but these attempts were uniformly unsuccessful, and the reverse has now been conclusively fixed by a uniform series of judgments, especially the case of *Brisbane's Trustees* v. *Load* in 1828, and the judgment of Lord Brougham in the case of *Carnegie* in 1830, which has set the question at rest. The case of *Brisbane* is of itself conclusive, for the challenge there proceeded on a condition contained in the tenant's own tack, by which the landlord reserved right to feu portions of the farm; and the *bona fides* of the tenant was sustained to protect him from a demand for violent profits, although he had four consecutive judgments against him, and had continued in possession until the expiration of the tack. Lord Brougham's judgment in the case of *Carnegie*, however, leaves no room for question. He says, after speaking of objections to the author's title—"But there is also another head on which the lease is not valid to convey the interest sought to be established by it, and that is, that the construction of the lease itself in point of law does not give the right contended for to the lessee; but I do not see, on principle, any distinction whatever between those sources of invalidity in the title of the lessee"—(4 W. and S. 440). As regards the application of these principles to the plea of *bona fides* in this case, I see no reason whatever to doubt that the defenders had a *probabilis causa litigandi*. Their defence, although one in its result, consisted of three branches—*First*, They pleaded that the disputed clause in the lease put on the landlord the obligation of proving a reasonable ground of dissatisfaction, and this they maintained on the legal effect and construction of the condition; *secondly*, they maintained, in point of fact, on the proof, that there was no reasonable ground for his dissatisfaction; and *lastly*, they maintained that the landlord's dissatisfaction was feigned, and not genuine, and this ground they supported partly as a necessary consequence or corollary from the absence of reasonable ground of dissatisfaction, and partly on the fact that a similar notice had been served on them some months before, at a time when no dissatisfaction had been expressed, and when, as appeared afterwards, it was at least doubtful whether any was entertained by the landlord.

We repelled these pleas after argument, and for reasons expressed in a very anxious advising, in which we all delivered full opinions. I was of opinion, on the first ground, that the landlord was not bound to allege or prove any reason for his dissatisfaction, although the precise scope and construction of the condition was far from being free of difficulty; on the second, I thought the landlord had good reason to be dissatisfied; and on the third, that the landlord had entirely vindicated his good faith in the transaction. But in common with the Lord Ordinary, and, as I understood, the rest of your Lordships, I thought, and still think, that the case deserved and required the full consideration it received. The Lord Ordinary expressed the difficulty he had experienced. One of your Lordships, in speaking of the condition of the lease, said in emphatic terms that the clause was very peculiar, and that it was not easy to understand exactly what the parties intended; and another of my brethren stated that he arrived at his conclusion latterly without any doubt. In short, it never occurred to me to regard the litigation otherwise than as raising questions of moment, which the parties were well entitled to try.

The Lord Ordinary has given the defence of *bona fide* possession the most restricted effect of which it is capable, in limiting it to the period prior to the judgment of the Lord Ordinary in January 1875. It can be of no moment as regards this period that there were no conflicting decisions subsequently. These, had they occurred, might have extended the period to which the plea applied, but they could have no other effect. In the well-known case of the *Durris* leases, as in many others, the losing party never had a judgment in his favour; nevertheless he was only found bound to account from the date of the decree of the Court setting aside his lease.

I am therefore of opinion that, in so far as this is an action for violent profits, the defence of *bona fide* possession is sufficient to protect the tenant until his title was the subject of judicial decision. But I had an impression throughout the argument, and am now quite satisfied, that the true claim of the landlord here is not one for violent profits in any sense; that it is not necessary for him to assail the tenant as a mere intruder, but that his demand truly rests on a breach of a mercantile contract of which the defender has been guilty, and to the consequences of which *bona fides* never can be a defence. The pursuer's claim therefore arises on his second plea in law, and is limited to the actual loss which he can show that he has sustained by the defender's failure to remove in terms of his contract. To such a claim for reparation it is irrelevant to allege that the defenders read the contract otherwise. It is enough that their reading of it was wrong, and that they acted on this error to the injury of the other party to the contract. I forbear to inquire—for it is not necessary to do so—how far the analogy of a proper agricultural lease will extend in all its effects to a lease of a subject which yields no periodical produce, which has no reproductive power, and under which the tenant appropriates, not the increment or fruits of the property, but the property itself. Questions of difficulty under this head may arise, and I reserve my opinion on them. But here the true interest, which alone the landlord has any just claim to assert, is so obvious that it requires no subtle distinctions or analogies to establish it. He was deprived of the advantage of being able to let the mineral fields on a new lease, which indeed seems to have been provisionally con-

cluded, and the intended tenant is a consenter to the action. For the amount of any increased lordship or rent which he might thereby have obtained, I think his claim is unanswerable, and that in truth is the measure of any legitimate interest he has in the action. I propose therefore that we should recal the Lord Ordinary's interlocutor; find that the pursuer is entitled to recover from the defender damages for such injury as he may have sustained through the wrongful retention of possession by the defender; and before further answer allow a proof to both parties in regard to the amount of such damage.

Lord Ormidale—The present action is a sequel to the judgment pronounced by this Court in May last (2 Rettie, p. 683) in a former suit between the same parties, in which it was found that the present pursuer Mr Houldsworth was entitled to terminate the mineral lease in question by his intimating to the tenants his dissatisfaction with the working thereof; and it is not disputed that such intimation was given on 3d February 1874. It was accordingly held by the Lord Ordinary in the former action, by interlocutor, dated 15th January 1875, affirmed by the Inner House on 18th May thereafter, that the lease had come to an end, and that the defenders were bound to cede possession to the pursuer, and also to make over to him the whole plant of the colliery as soon as the value thereof could be ascertained.

In the present action the pursuer, Mr Houldsworth, founding upon the judgment in the former suit, concludes against the defenders for £10,000, which, as he explains in article 15 of his condescendence, is the amount of violent profits or loss and damage to which he is entitled in respect of the defenders' retention of the colliery subsequent to the intimation given to them on 3d February 1874.

The defenders resist this conclusion, and maintain that they are not in the circumstances liable in violent profits or damages for the time they retained possession, or at any rate not prior to the judgment by the Inner House, of date 18th May 1875, when, at the soonest, according to their view, it can be held that their *bona fides* in retaining possession ceased.

The Lord Ordinary, by his interlocutor now under review, has found that the defenders have wrongfully retained possession of the pursuer's colliery since 15th January 1875, the date of the Lord Ordinary's judgment against them in the former suit, and has found them liable in violent profits accordingly. In this interlocutor the defenders have acquiesced, but the pursuer has reclaimed, and contends that he is entitled to violent profits or damages as from the 3d February 1874, when the formal intimation of his dissatisfaction with the working of the colliery and his resolution to resume possession was given.

In determining the question thus raised, it is necessary to keep in view the relative positions of the parties and the nature of their respective rights. The pursuer is landlord, and the defenders are his tenants, and they are both parties directly to the agreement or contract of lease under which they stand in that relative position. The dispute has also arisen directly between themselves in reference to their respective rights under their contract, and not in consequence of the emergence of any third party with some other and better right. Neither does the claim of the pursuer relate to the fruit of a subject which has been allowed without objection by the rightful owner to be reaped and consumed in good faith on a colourable title by another. The pursuer's claim has reference exclusively to the time subsequent to the termination of the only right the defenders had—a right which the pursuer was entitled to terminate at the time and in the manner he did. It was so determined by the judgment of the Court in the former action on a consideration of the import and effect, or, in other words, the true meaning and construction, of the contract or agreement of the parties.

In one, and I think I may say the ordinary and *prima facie* view, therefore, of the question now to be determined, arising, as I have explained, it does not readily occur why on the one hand the pursuer should not be entitled to the full benefit of his agreement or contract with the defenders, and why, on the other hand, the defenders should not be subjected to the consequences of their failure to implement that agreement or contract. Such, undoubtedly, is the ordinary law and rule of contracts. At the same time, I am not to dispute that the defenders might possibly have a good defence to the claim in whole or in part now made against them by the pursuer. But the only ground on which they maintain they have such a defence is the difficulty which attended the question, whether the pursuer was or was not entitled to terminate the lease at the time and in the manner he did. It rather appears to me, however, that the difficulty which arose on that point in the former litigation was attributable in some, if not a great measure, to the defenders themselves. Their contention was maintained on two grounds—(1) on the ground that the working of the colliery had been conducted by them in a regular and satisfactory manner; and (2), and chiefly, on the ground that the pursuer was not in truth dissatisfied, but had stated he was so in *mala fide*, for the purpose of serving a sinister object. The pursuer denied the accuracy of these averments, and the Lord Ordinary and the Court held that they were ill founded. It is obvious indeed from the report of the case that had it not been for the defenders' allegation of *mala fides* against the pursuer, judgment would have gone against them without any proof, and in a comparatively short time.

Having regard, then, to a defence so put forward and so disposed of in the former suit, I cannot help thinking that it was one which, to say the least of it, is not now entitled to be regarded with much favour. The defenders could not fail, I think, to have known the nature of their operations in the management of the colliery, and that they were not of a description to give satisfaction to the pursuer; and as their allegation to the effect that they had "ascertained" that his intimation of the termination of the lease was made in bad faith proved erroneous, they must be held to have made it, if not recklessly and wantonly, without due inquiry and knowledge.

In this state of matters, I must own my inability to see how the defence to the present action can be sustained. The *Queensberry* and *Durris* lease cases referred to by the Lord Ordin-

ary do not appear to me to be in point, for in these cases the tenants held leases which were not only in themselves *ex facie* regular and unobjectionable, but had been allowed to subsist for a series of years, during which they expended their capital and paid their rents without complaint or notice of objection from any one. Not only so, but in a reduction of the *Queensberry* leases (2 Sh. App. 43 and 70) on the grounds that they had been granted by heirs of entail in excess of their powers, in respect of their extraordinary duration, grassum, diminution of rental, and other objections, this Court by a large majority sustained the leases; and it was only on appeal to the House of Lords that they were reduced. In these circumstances, which contrast in a remarkable manner with those of the present case, it is not surprising that it should have been held, both by the Court and the House of Lords, that the tenants were protected by *bona fides* from payment of violent profits prior to the judgment of the House of Lords. I cannot therefore hold that the *Queensberry* leases give the requisite or indeed any support to the defenders' contention in the present case. *Carnegie* v. *Scott* (1 Sh. Appeals, 114, and 6 Sh. Court of Session Reports, 206) involved a question of great difficulty —of such difficulty that it was only ultimately determined against the tenant in the House of Lords when a previous judgment in his favour by the Court of Session was reversed, and therefore he was subjected in violent profits only from the date of the removal. And with reference to the case of the *Duchess of Roxburgh*, 17 February, 1817, F.C., it has to be remarked that it was not that of a lease at all, and did not arise betwixt landlord and tenant. It was the case of a widow drawing the rents of certain quarries situated within her locality lands for several years without objection, but who at once ceased to do so on a challenge being intimated. It was therefore held that she was protected against bygones in respect they were *bona fide percepti et consumpti*. In the present case all the pursuer asks is that the defenders should account to him from the date when intimation of the termination of their lease was made to them. There was, besides, another peculiarity in the *Roxburgh* case which appears to have made a strong impression on the Court, viz., that the Duchess had drawn the profits of the quarries through the sub-factor on the estate, and was therefore, in the language of one of the Judges, entrapped into doing so.

I am unable therefore to see anything sufficient in the authorities which were chiefly relied on by the defenders to support their defence to the present action, to the extent at least to which it has been urged. On the contrary, it appears to me that their defences have no solid foundation to rest upon, either as regards the facts or the law. They have been wrong throughout. They were wrong in the former action in asserting that the working of the colliery was in all respects unobjectionable, and that the pursuer had in *mala fide* stated he was dissatisfied in order to accomplish a sinister purpose. And those grounds of defence having been found to be ill founded in the former action, a new and different one is for the first time brought forward on the defenders' second plea in law in the present action, to the effect that "they retained possession of the subjects let in the *bona fide* belief that the lease could not be terminated without their consent." But this plea the defenders did not even attempt to support at the debate. The result therefore is that the defenders must be held to have been unsuccessful in every plea or point put forward or attempted to be made by them throughout the litigation.

In these circumstances, and for the reasons I have now stated, I am of opinion that the defenders ought to be held liable since the date of citation in the former action, which appears from the messenger's execution of the summons to have been the 29th of April 1874, when, if not previously, the *conscientia rei alienæ* on their part must, I think, be held to have commenced, and their *bona fides* to have ceased (Ersk. ii. 2, 28).

In this way, the defenders are allowed nearly three months after the date of the pursuer's intimation to them that their lease had terminated to make all necessary preparations for ceding possession. In place, however, of the defenders being subjected in violent profits, which, in its strict technical sense is I think inapplicable to the present case, it would in my judgment be more consistent with the true circumstances and justice of the case that they should be found liable merely in damages, leaving of course the amount to be afterwards ascertained in the course of the process; or, in other words, that they should be found liable in the loss which the pursuer may be able to instruct has been sustained by him in consequence of his having been kept out of possession of the subjects in question since the above-mentioned date of citation.

Lord Gifford—As this case has been presented in argument it involves some questions of nicety and difficulty. In particular, we have had a very elaborate and ingenious argument upon that rule of law which entitles a landlord to exact from his tenant penal damages under the name of violent profits in cases where the tenant has wrongfully refused to remove from the subject let, and where in the eye of the law he has wrongfully or violently retained possession. There has also been much ingenious discussion upon another rule of law under which, in certain cases, a possessor of a subject to which he has no right is nevertheless allowed to retain as his own the fruits of that subject upon the ground that, although he had no right to the subject, yet he on reasonable grounds believed that he had a right, and in that belief received and used as his own the fruits which the subject produced. From considerations of equity the law holds that although a *bona fide* possessor must give up the subject possessed when the true proprietor thereof, or when one having a better title than himself comes forward, yet as to the bygone fruits or profits thereof which the possessor has received and expended while his *bona fides* continued, these the *bona fide* possessor is entitled to retain. Nice questions also arise, and these also to a considerable extent have been discussed in the present case, as to the date or period when *bona fide* possession shall be held to cease, and when the full fruits or profits must be paid or restored to the party really entitled thereto.

The argument on these questions was most interesting, and to some extent the Lord Ordinary

has entered upon and decided the questions argued, but after very full consideration I have come to be of opinion with your Lordships that none of these questions really arise in the present case, but that the true rights of the parties, pursuers and defenders in this action, are governed, and fall to be regulated, by rules much simpler and much better defined—that is to say, by the rules which apply to the enforcement and breach of mutual contracts. The whole questions depend upon the terms and construction of a mineral lease between the late Mr Houldsworth and the defenders' author, dated in 1867, and relative agreement, &c. Although to certain effects a right of tenancy was thereby created, the real transaction, as has often been remarked, was an actual sale of the minerals, with a right to carry them away, and not a mere right to use an heritable subject *salva in substantia*. At all events, the special stipulations upon which the present questions turn are really stipulations in a commercial or mercantile contract, and do not arise from the ordinary or common-law relation of landlord and tenant.

The summons in the present case concludes for a slump amount, which the pursuers say the defenders are bound to pay to them. The amount claimed is stated on record alternatively to be either the amount of violent profits in which the defenders are liable for having illegally maintained possession of the colliery under the lease after the lease had really come to an end, or otherwise, the amount of damages in which the defenders are liable for having in breach of the contract of lease refused to cede possession when the landlord, in terms of the contract itself, had brought the lease to an end. Accordingly the pursuers have two alternative pleas—(1) that they are entitled to the sum claimed as violent profits, or (2) that they are entitled thereto in name of damages for breach of contract.

Now, I am of opinion that the second of these alternative pleas embodies the true ground upon which the pursuers' action must rest. I think the only claim which the pursuers can make in the circumstances stated is substantially a claim of damages for breach of contract. I think that the pursuers have relevantly stated such a claim of damages. I am also of opinion that the pursuers have proved the breach of contract by the judgments which have been already pronounced between the parties, and by the admissions on record—I mean of course the admission that the defenders have continued to possess and work the coal subsequent to the period when, as the Court have now finally found, the lease had been validly and effectually terminated by the landlord, and in this view it appears to me that the only question now remaining for decision is the assessment of the damages, if any, which the pursuers have sustained in consequence of the defenders' refusal to give up possession at the date when in law the lease came to an end.

By the agreement between the parties, dated 5th October 1869, the landlord, the late Mr Houldsworth, stipulated, and the defenders or their authors assented to the stipulation, that in the event of the death of Robert Brand (the tenant), the landlord should have power to resume possession of the colliery at a valuation of the stock and plant if he should at any time thereafter (that is, after Mr Brand's death) be dissatisfied with the working thereof by Mr Brand's representatives. Admittedly this was a valid and binding contract between the parties, and there never has been any dispute between the parties, nor could there be, that this stipulation is binding upon both parties according to its true intent and meaning, whatever that may be. The only difference between the parties, which indeed has formed the subject of the past litigation, is as to the true meaning of this stipulation, and as to whether the landlord did or did not truly terminate the lease in terms thereof. The first question, the construction of the stipulation, is a question of law; the second question is whether the landlord was really dissatisfied with the working when he gave notice to terminate the lease, and this is a question of fact.

The landlord, acting under the agreement, gave notice of his dissatisfaction on 3d February 1874, and intimated that he was to resume possession, and he called upon Brand's trustees to concur in having the plant and machinery valued and handed over. Brand's trustees resisted this demand, and after some correspondence, the landlord, on 25th April 1874, raised an action of declarator and removing to enforce his rights.

A great deal of litigation followed, but ultimately it was held, both by the Lord Ordinary and in this Division, that the landlord had right to terminate the lease as he did in February 1874, that the pleas of the defenders were ill-founded, and that the defenders were bound to have ceded possession of the colliery in February 1874, or as soon thereafter as the necessary valuations could be completed. In point of fact, however, and in consequence of the defender's resistance and ill-founded pleas, the pursuer did not get possession of the colliery till November 1875, the whole works having been carried on till then by the defenders, and the question now is, on the assumption that the pursuer has suffered loss and damage by being excluded from possession—are the defenders liable in reparation.

I am very clearly of opinion that they are, on the simple ground that they have committed a breach of contract by not ceding possession at the time when they were bound to do so. They have deprived the landlord of his stipulated rights—rights which he specially contracted for—and if this has caused loss, the defenders must make it good.

It is quite true that the contract in this case was expressed in somewhat doubtful and ambiguous terms, and I am not surprised at the dispute and difference which arose regarding it. Its legal meaning and effect was only determined after a serious litigation and after very full discussion, but the meaning of the contract has now been judicially determined. The Court has decided that the landlord was entitled to terminate the lease at any time after Mr Robert Brand's death, if he, the landlord, from whatever cause, or even causelessly, should become dissatisfied with the working of the colliery. We have finally decided that the landlord was not bound to show that the colliery was being or had been improperly worked, or that the conduct of the lessees was in any degree blameable or remiss, or that he, the landlord, had any ground whatever for dissatisfaction. The bare fact that the landlord was dissatisfied was enough, and whenever that dissatisfaction arose he was en-

titled to terminate the lease. This was the question of law between the parties, and this was finally decided against the mineral tenants.

In like manner, the other question between the parties—the question of fact—was whether the landlord was really dissatisfied or not, or whether he was only pretending or feigning a dissatisfaction which he did not really feel? whether, in short, for it came to that, the landlord was fraudulently, and in *mala fide*, alleging that he was dissatisfied, when in truth he was nothing of the kind, but was in fact perfectly satisfied and perfectly pleased with the whole working of the colliery, and with the whole actings of his tenants? This question of fact was keenly contested also, a long proof was led, an extensive recovery of private documents and correspondence obtained, and the point was finally decided both by the Lord Ordinary and by the Court. It is now fixed by final judgment of the Court, that the landlord was not merely not pretending dissatisfaction, but was actually and really dissatisfied, that he was acting throughout in *optima fide*, and that he was well entitled to terminate the lease in February 1874, and that he validly and effectually did so. Thus both branches of the former litigation terminated in favour of the landlord, and we must now assume that, by refusing to cede possession of the colliery in February 1874, the defenders were guilty of breach of contract. This is clear.

Now, it is no defence whatever against an action of damages for breach of contract to say that the contract was a difficult contract to read, or that it reasonably required a litigation to fix its true meaning. Parties have themselves to blame for making contracts of difficult or doubtful interpretation, and the party who is found to be in the wrong must take the consequences. It would never do to allow a party to commit a breach of contract and then to exempt him from reparation or damages merely because there was a dispute, reasonable or unreasonable, about the contract's meaning. Such a doctrine would lead both to confusion and to injustice, and if we were to sustain the defenders' pleas in the present case it would afford a very good instance of such injustice, for in the present case we are told, and in the present argument we may assume, not only that the landlord, the pursuer, has suffered great loss by being excluded from his colliery for nearly two years, but also that the defenders have made great gain and very large profits by having wrongfully continued to work the colliery during all that period. The landlord may be liable, for aught we know, in serious claims of damage to new tenants against which he would have no defence. Now, who is to suffer that loss? Surely not the landlord, who has been right throughout in all his contentions both in law and in fact, but the defenders, who have been wrong in all their contentions—who have relied upon bad law and upon false, or at least unproved, averments in point of fact. It would be giving a premium to litigation, perhaps even to dishonest litigation, to allow the unsuccessful litigant not only to throw the whole loss of a broken contract upon his successful opponent, who from the first was truly reading and rightly observing the contract, but also to pocket the unjust gains which, by means of a groundless litigation, he had succeeded in getting by defying and breaking his obligations. This would be to reward the man who is wrong at the expense of the man who is right, and to offer a temptation to every contractor to get up questions, under cover of which he might, not only without loss, but to his own great gain, repudiate his contract.

I do not think I am trenching in the least upon the doctrine of *bona fide* possession and fruits in *bona fide* received and consumed. I am not aware that that doctrine has ever been applied as between contracting parties, and in cases of mutual, and especially of mercantile, contracts, and I shrink from giving the doctrine the extension which is now contended for, an extention of which it would be difficult to define either the limits or the consequences. I think the doctrine is totally inapplicable to the present case.

I really do not think it is necessary or relevant to consider whether the defenders in resisting the landlord's demand (a demand now found to be just) were acting in *bona fide* or not. Almost all litigants think they are right, and litigants often maintain the most extravagant views in *optima fide*; so far as their own conscience is concerned, they honestly think they are right, but this is nothing to the purpose. If they have bound themselves to do something, and fail to do it, they will be liable in damages, however honestly and innocently they have been mistaken or misadvised as to what their litigation was. Honest mistake or misapprehension is no defence to an action for breach of contract, and the honesty of a bad defence does not even save the litigant from having to pay the whole expenses of the litigation. *Bona fides* therefore seems to me to have nothing to do with the question. It is now fixed that the defenders were bound, legally bound, to have ceded possession of the colliery in February 1874. They resisted doing so till November 1875. They were wrong, legally wrong, and, whatever they thought, they must make good the actual loss and damage which their wrongful act has caused to the pursuer.

At the same time, I cannot help adding, that looking to the nature of the pleas upon which the defenders relied in maintaining possession of the colliery, I do not think they are in a very favourable position, to say the least of it, for now alleging *bona fides*. Their main plea was that the landlord was in *mala fide* in resuming the colliery, They said that he was only pretending dissatisfaction with the working, but that he was not really dissatisfied. In short, they maintained that the landlord was making a fraudulent use of the provision which enabled him to resume possession. and this allegation of fraud against the landlord—for it was nothing else — is the allegation by means of which they have succeeded in keeping the landlord out of his rights for nearly two years. It is rather strong in the defenders to say, after entirely failing in the allegation of fraud, Ah! we made the allegation in *bona fide*, and therefore we shall not only keep the *lucrum* and profits which our false allegation has enabled us to make in the meantime, but we will leave the landlord himself to bear the loss which he has sustained by our wrongful breach of contract.

Suppose the landlord, after giving the notice to the defenders which it has now been held validly

terminated the lease, had let the colliery to a new tenant, and undertaken to give possession to the new tenant at the next term. If he failed to do so he would be liable in damages to the new tenant, and it would be no defence that he was prevented from doing so by the *bona fide* resistance of the present defenders. It seems plain also that if the present defenders were wrong in maintaining possession, however much they acted in good faith, they must relieve the pursuer of the damages which he would be subjected in to his new tenant, who had been wrongously kept out. In short, I think I may say that when breach of contract has been committed and damages result, the *bona fides* or honest belief of the party who commits the breach can never excuse him from making good the loss.

Lord Neaves was absent.

The Court pronounced the following interlocutor—

"The Lords having heard counsel on the reclaiming note for the pursuer against Lord Curriehill's interlocutor of 26th July 1875, Recal the said interlocutor: Find that the defenders having wrongfully retained possession of the colliery in question after the period at which they were bound to remove; are liable to the pursuer in reparation for such injury as has been thereby occasioned to him; and, before further answer, allow a proof to both parties in regard to the amount of damages thereby incurred; Find the defenders liable in expenses since the date of the interlocutor reclaimed against, reserving in the meantime all other questions of expenses: Remit to the Auditor to tax the expenses now found due, and to report."

Counsel for Pursuer — Asher — Moncrieff. Agents—Murray, Beith, & Murray, W.S.

Counsel for Defenders — Balfour — Mackintosh. Agent—Alexander Morrison, S.S.C.

Saturday, January 8.

SECOND DIVISION.

[Lord Curriehill.

WILSONS *v.* WADDELL.

Property—Minerals—Reparation.

Circumstances in which *held* that the lessees of a colliery had no claim against the lessees of an adjoining colliery on a higher level for damages caused by surface-water, which collected in subsidences in the surface caused by the workings in the higher mine, found its way into said workings, and from thence into the lower mine, nor for the expense of pumping or otherwise removing the water from the lower mine.

Reparation—Property.

Opinions that the owner of a mine on a higher level than an adjoining mine has a right to work the whole of his mine in the usual and proper manner, for the purpose of getting out the minerals from every part of the mine, and that he is not liable for damage caused by any water which as a consequence of his workings flows by gravitation into the adjoining mine.

This was an action at the instance of John & James Wilson, coalmasters, Glasgow, against James Waddell, also a coalmaster in Glasgow, concluding for £2000 damages, and further, that the defender should be ordained to make such operations in or on the ground in which he carried on his coal-workings as to carry off the surface-water from the ground, and thereby prevent its passing through the same into the defender's workings, and thence into the pursuers' coal-workings; or otherwise, that the defender should be ordained to remove the surface-water from the pursuers' coal-workings by pumping or in some other way.

Both parties held leases from Mr Houldsworth of Coltness, of co-terminous parts of the same coalfield. The defender's lease had extended from 1855, while the pursuer's began in 1860. The portion of the coalfield tenanted by the defender was upon the rise, and that tenanted by the pursuer upon the dip. The Caledonian Railway passed between the two collieries. The pursuers were taken bound by their lease not to work "within five yards of the boundary of the subjects let, or of the Caledonian Railway," and the defenders were likewise bound not to work "within five yards of the boundaries of the subjects." This limitation insured at least forty yards of ground between the two collieries. The pursuers, by agreement with the landlord, exceeded the limitation in the lease, and worked nearly through the barrier.

The following were the material averments of the pursuers, and the defender's answers:—

"(Cond. 3) The defender's operations in working out his coals have caused the ground above the same to subside over an area of about five acres, and the said subsided ground forms a basin into which surface-water from an area of about twenty acres falls; and the said water having no other escape, owing to the failure of the defender to make provision for its passing on, passes down through the said ground by means of breaks, holes, or sits in the same, caused by its having subsided as aforesaid into the coal-workings or wastes of the defender, in which it collects, and thence through the barrier or wall foresaid into the foresaid mines or coal-workings of the pursuers. The said surface water consists to a large extent of water which, but for the said breaks, holes, or sits, would not come upon the said five acres. The defender has no right of servitude or otherwise in respect of which he is entitled to pass on the water as foresaid into the workings of the pursuer, and he is bound to provide for its passing over the surface of the said five acres, by making surface repairs, constructing surface drains, or other means, and providing pillars or other supports of the said surface in his mines. Further, the defender is bound under the terms of his tenancy to work out his coals as near the outcrop as can be done consistently with keeping up the surface, to work his pumps and bring them on air daily,