ence to its general provisions, from which we cannot fail to see that whilst numerous conditions are imposed on the feuar and his foresaids, and declared to be real burdens affecting the feu, the utmost care is taken to protect the superior from "obligation." Thus, for example, on declaring the feuar's obligations as to the roads when opened, we find interposed, and rather out of place "(but which shall not be opened, except in the option of the said Thomas Just or his successors, until the ground to the east and north thereof is feued on both sides);" and again, "but which drain shall not be made, unless in the option of the said Thomas Just or his foresaids, until the lots on both sides of said streets running north and south be feued; and it is hereby expressly provided and declared that the said Thomas Just and his foresaids shall have full power and liberty to vary and alter the said plan, or streets or roads delineated thereon, in so far as regards the ground not already feued, in such manner as they shall think fit." The same spirit and intention seems to pervade the whole contract, in which the actual obligations of the superior seem confined to the grant of the particular lot of ground and to warrandice of that lot.

My Lords, the superior having thus by the contract made "ish and entry" depend on the "opening" of the roads, and reserved to himself the right to determine when, if at all, that event was to take place, we cannot fail to adopt the conclusion of the noble and learned Lord opposite (Lord Watson) that the roads cannot be taken to have been "opened" by being merely laid out on the contemporaneous plan, and that "opened" must refer to some subsequent action on the part of the superior once and for all determining the lines and limits of the respective roads, and indicating their dedication to the use of the feuars.

My Lords, in my opinion the appellants fail because they had not in July 1872 any legal right or vested interest in the subject of controversy, the invasion of which would have then given them a right of action.

Lord Chancellor—My Lords, I have felt more difficulty than the rest of your Lordships as to this case, and I have been disposed to think that I could see my way to a construction of the feu-contract which would have led to a result more favourable to the appellants; but as your Lordships, after considering the reasons which I thought it right to submit to you in favour of that construction, all concur in opinion with the majority of the learned Judges in the Court below, and as no question of general principle is involved in the difference between that opinion and the view which I have myself been disposed to take, I do not think it necessary to say more than that your Lordships' judgment must necessarily be in accordance with the conclusion at which my noble and learned friends have arrived.

Interlocutors under appeal affirmed, and appeal dismissed.

Counsel for Appellant — Party. Agents — Simson, Wakeford, & Co.

Counsel for Respondents — Lord Advocate (Balfour, Q.C.)—Webster, Q.C. Agents—William Robertson for Thomas Thornton & Co.

Monday, March 19.

(Before Lord Blackburn, Lord Watson, and Lord Fitzgerald).

WHITES *v.* WILLIAM DIXON (LIMITED).

(*Ante*, 22d December 1881, vol. xix. p. 266, and 9 R. p. 375.)

Property—Mines and Minerals—Support—Surface Damages—Injury to Buildings—"Breaking Surface."

On a construction of the titles of the owner of the surface of certain property, and of the owner of the underlying minerals, both of whom derived right from a common author—*held* (*aff.* judgment of First Division) that the owner of the surface had not surrendered his right to require the owner of the minerals in working the same to leave sufficient support for buildings erected upon the lands.

A superior reserved the minerals in lands feued, with full power and liberty to work and win the same "so as not to break the surface of the said lands or injure the springs therein, upon paying to the feuar any damage that may be occasioned to the said lands by working of said . . . minerals." *Held* that this clause did not entitle the superior so to work as to cause subsidence of the surface on condition of paying for any damage thereby occasioned to the feuar.

In Court of Session 22d December 1881, *ante*, vol. xix. p. 266, and 9 R. p. 375.

The defenders appealed to the House of Lords.

At delivering judgment—

Lord Blackburn—My Lords, the respondents (pursuers below) are feuars of two plots of land on which they have erected extensive works near Rutherglen. The appellants, the trustees of the late William Smith Dixon, hold a feu of the minerals under certain lands, including those of which the respondents are feuars of the surface, and the other appellants William Dixon (Limited) are lessees of the minerals under them. The respondents (pursuers below) brought a summons of declarator. The First Division of the Court of Session have recalled the interlocutor of the Lord Ordinary, and remitted the case to him to dispose of other questions which may arise, but with this finding "that nothing contained in the titles of the parties, pursuers and defenders, has the effect of taking away or derogating from the right of the pursuers to insist that the defenders in working out the minerals under the pursuers' lands shall leave sufficient supports to sustain the surface uninjured." The only question before your Lordships is whether this finding is or is not right, and the answer to that must depend on what is the true construction of those titles. It is stated—and I see no reason to doubt the accuracy of the statement—that this question is of great pecuniary importance to each of the parties. There is no controversy now as to what is the law both of England and of Scotland as to the ordinary rights of the owners of the upper strata, and of the subjacent minerals when these have come into different ownerships. The owner of the upper strata has a right of support from the subjacent strata. The owner of the minerals has

a right to work out the minerals in such a way as to make the greatest profit to himself so long as he respects that right of support. But he has not a right to work out his minerals in such a way as to deprive the owner of the upper strata of that support to which he is entitled. These rights are given (to use a phrase familiar to pleaders of the old school in England, but not to Scotch lawyers) "of common right" that is, when it is established that the upper and lower strata are in different hands, it is not necessary either in pleading to allege, or in evidence to prove, any special origin for those rights. The burden both in pleading and in proof is on those who assert that the rights are different from those existing as of common right. But it may be shown that these rights are varied. It never could have been doubtful that the owner of the whole undivided soil, who had power to let down the surface as he pleased, might grant the minerals to another with unrestricted liberty to remove them without any regard to the effect on the surface retained by himself, either stipulating for compensation to himself and his successors in title or not as seemed to him most desirable, but it was thought by some that it was different where the owner of the land granted the surface reserving the minerals, as they thought that a reserved power to take the minerals so as to destroy the surface by taking away all support for it was void as being repugnant to and derogatory from the grant. The contrary has now been established, though not in England finally till *Rowbotham* v. *Wilson*, 8 H. of L. Ca. 348, in 1860, and not perhaps in Scotland till *Buchanan* v. *Andrew*, March 10, 1873, Sc. Ap. 286. But now in both countries it is established that the titles may show that the surface is held on the terms that the owner of the minerals is at liberty to remove the whole of them without leaving any support to the surface, either, according as may be stipulated, without making any compensation for the damage thus occasioned, or having the right to remove the support, but being bound to make compensation for the damage done by exercising that right. It is in every case a question of construction of the deeds to ascertain whether the intention so to contract appears on the titles. Lord Mure is reported as saying in this case "that nothing but the most express terms" would entitle the Court to hold that the proprietors of the surface have accepted them under a contract to give up the right to support. I think that is going further than I should like to follow. But I think that the burden is on those who say there is such a contract to show that there is an intention to that effect appearing on the face of the titles, and I agree with the Court below that the defenders have failed to make out that such an intention appears on the deeds here. I agree with them also in thinking that it is most convenient to begin by considering the effect of the feu-charter of the year 1800, on which the defenders' title to the minerals depends. It appears on the face of it that Robert Houston Rae of Little Govan had in 1794 agreed to let some land, and the minerals under the whole of his estate, consisting of about 500 acres, for 80 years, to a firm consisting of himself and his brother Andrew Houston, under certain restrictions, and that disputes about that agreement between the brothers had been referred to Mr Houston of Johnstone. Then follows this recital—"And whereas I, the said Robert Houston Rae, having found it expedient to bring my lands of Little Govan and others to sale, it becomes of importance to me, in order to promote the sales of my said lands, that the liberty of banking and building houses and erecting machinery and making roads should be further restricted, which restriction was agreed to by him, the said Andrew Houston, on condition that the said Govan Coal Company should be paid an equitable consideration therefor, and that I, the said Robert Houston Rae, should, instead of a tack, grant to him, the said Andrew Houston, and myself, as partners of the aforesaid coal company, a feu-right of the said coal for payment of a feu-duty equal to the rent that was to have been paid during the course of the said 80 years, and after the said 80 years for payment of one penny Scots per annum; and that I, the said Robert Houston Rae, should receive from the said coal company an equitable consideration for granting said feu-right instead of said lease, for ascertaining which consideration the parties have entered into a submission to arbitrators, of date

; and whereas the said Andrew Houston has executed a disposition to me of the foresaid 17 acres 1 rood and 25 falls, and also of the property coal in the foresaid lands of Little Govan, in order that, the same being vested in my person, I might be enabled to redispose the said coal and ironstone to him the said Andrew Houston and myself, in feu as aforesaid, under the foresaid restrictions." It seems rather strange, that though evidently quite alive to the importance, with the object of promoting the sale of the surface of the land, of securing the intended purchasers from the annoyance of open coal-pits near their feus, the parties should not have thought it desirable to say anything as to the method in which the working of the minerals from below should be managed in order that the purchasers might be secure that it should be so as not to destroy the surface. It is probably accounted for by the fact that in 1800, and till somewhere about 30 years later, minerals in this district, even when worked by the owner of the surface, who had full power to do what he pleased with it, were invariably worked by what is called "stoop and room," by which a quantity of the mineral was left undisturbed in stoops or blocks of sufficient strength to afford, as is alleged in the ninth condescendence, "absolute support to the surface," and though the answer does not admit that this was the effect of so working, I think we may take it that it was intended and supposed to have that effect, and that it was not anticipated by those who framed this deed that any other mode of working should be introduced. But whether this is the reason for it or not, there is no recital as to any agreement either to restrict or enlarge the right of support to the surface. It appears that Robert Houston Rae had already in 1800 granted feus of parts of the surface, and the feu of the minerals which he proceeds to grant is subject to those feu-rights. What they were as to support we have no means of knowing, except in the case of 6½ acres of Shawfield Brae given to John Goudie in 1799, five years after the agreement to let the minerals to the firm of Robert Houston Rae and Andrew Houston, and one year before this charter of feu. The interest in that is now vested in the pursuers, and

that feu-charter is before the House. More must be said afterwards on the construction of that charter of 1799. It is enough at present to say that it contains no express terms to deprive the grantee of the right to support.

Robert Houston Rae had full power to deprive that portion of the surface which remained his own of all support. He had not power to deprive the portions which had been feued away of support, unless that power had been reserved to him in the titles by which the surface was feued. There is nothing, however, that I can see to indicate that those who framed the deed of 1800 made any distinction between the minerals under the portion of his estate in which he still had the *dominium plenum* of both surface and minerals, and that portion in which he had parted with the *dominium utile* in the surface. Both are granted in terms which are quite consistent with the right of support to the surface, being that which in the absence of some stipulation to the contrary the law would imply—the terms being the same where the granter Robert Houston Rae was at the time of the grant of 1800 owner of the whole, and where he had already parted with the *dominium utile*, retaining only the superiority and the minerals. And without repeating the reasons given in the Court below, I quite agree in thinking that the provisions for referring to arbitration any question as to damage done by working the minerals are not sufficient to raise an implication that the right to support was abandoned.

The feu of the 25 acres of land of which the respondents now hold half was made in January 1801 to Hill, Young, and Grahame, as trustees for a purchaser at an auction or roup held immediately after the execution of the charter of feu of the minerals, which was laid on the table at the foresaid roup and was referred to in the said articles of roup, and which "is hereby referred to and held as here repeated; declaring that the rules and regulations and provisions contained in the said feu-right shall be the rule of proceeding and settlement between the said James Hill, Mr John Young, and Robert Grahame, and their foresaids, and the feuars of the said coal and ironstone, anything above written notwithstanding."

If I am right in thinking that the feu-charter of 1800 gave the authors of the appellants no right to remove the minerals without leaving sufficient support, it is impossible, I think, to hold that anything in a charter containing such a declaration could do so.

The feu-contract of 14th February 1799 was entered into nearly eighteen months before the feu-disposition of the minerals was executed, and four years after the agreement to let the minerals to Robert Houston Rae and Andrew Houston for eighty years. Neither the agreement then already made, nor that subsequently made, which very likely was then in contemplation, is referred to, and it may well be that John Goudie knew nothing about them. This deed, therefore, must be construed as it stands. The ground, it appears, was then occupied as a bleachfield, for which purpose the springs in it were important; and the portion of the deed which is material is so briefly expressed as to be obscure. Robert Houston Rae feus in perpetuity the lands, "reserving to him and his foresaids the whole coal and other metals and minerals in the said lands, with full power and liberty to him and them, by themselves, their tacksmen, or servants, to work and win the said coal, metals, and minerals, so as not to break the surface of the said lands, or injure the springs therein, upon paying to the said John Goudie youngest, and his foresaids, any damage that may be occasioned to the said lands by working of the said metals and minerals, as the same shall be ascertained by two neutral persons to be mutually chosen by the parties."

I do not know how the coal could be worked under these lands without injuring the springs; it would at least be very difficult to do so, and there must be some risk at all times, even when working by stoop and room, of some damage being done to the surface; the agreement to compensate for the damages may have reference to damages thus occasioned. I do not therefore think that there is enough in this passage to satisfy the burden that is cast on those who maintain that by this deed Goudie agreed for himself and his successors that the minerals might be removed by Robert Houston Rae and his heirs and successors without leaving sufficient support for the surface. And even if this was made out, I think that the appellants claiming only under the feu-charter of 1800, if it bears the construction which, as I have already said, I think it does, are not such successors as to have that right.

For these reasons I move that the interlocutor appealed against be affirmed, and this appeal dismissed with costs.

Lord Watson—My Lords, I have come to the same result as the noble and learned Lord who has just spoken.

The law applicable to cases of this description is not doubtful. If A conveys minerals to B reserving the property of the surface, or if A conveys the surface to B reserving the property of the minerals below it, A in the one case retains, and B in the other gets, a right to have the surface supported unless the contrary shall be expressly provided, or shall appear by plain implication from the terms of the conveyance.

In order to make my views intelligible I think it will be convenient to refer first of all to the mineral title of the appellants, and then to notice the separate titles by which the respondents hold the two contiguous parcels of land upon which their chemical works have been erected.

In July 1800, when the feu-disposition which forms the basis of the appellant's title was executed, Robert Houston Rae, who had at one time been proprietor in fee of the whole surface and subjacent strata of the lands of Little Govan and others, had feued out various portions of these lands reserving the minerals therein. The contracts of feu contained provisions relating to the reserved minerals and the assessment and payment of damage occasioned in working. It was plainly beyond the power of Mr Rae in granting the mineral feu-disposition of 1800 to alter for the worse the position of those feuars who had antecedent rights; but it was undoubtedly within his power to lay restrictions upon his mineral disponees to which he was not subjected by the terms of those prior feu-contracts, and so to create a *jus quæsitum* in favour of the feuars. I am, however, unable to discover in the terms of the feu-disposition of July 1800 aught to warrant the

inference that Mr Rae thereby created any new right in favour of those persons who had already obtained feu-rights, or that he intended to do so. The very specific provisions of that deed with regard to working and compensation appear to me to be limited exclusively to the unfeued lands then belonging to the granter. It was absolutely necessary to refer to the whole lands of Little Govan and others, whether feued or unfeued, for the purpose of defining the extent and boundaries of the minerals disponed; and accordingly these are described by the grantor as the "whole coal and ironstone" not in "my lands" or "lands belonging to me," but in "the whole lands of Little Govan," &c. When we come, however, to the special provisions of the deed with respect to working, it is manifest that the powers to set down coal-pits, make coal-hills, erect dwelling-houses, engines, and so forth, were never intended to apply to land which had ceased to belong to the granter, having been already feued under the condition that the surface was not to be broken; and the partial prohibition of such operations is not made applicable to the lands of Little Govan, but to "the surface of the land belonging to the said Robert Houston Rae." And, as might in these circumstances be anticipated, the compensation clause is also limited to the lands then held in fee-simple by the granter, the damages occasioned by the "foresaid operations" to the "foresaid lands" being payable to Mr Rae and his heirs and successors, a stipulation which would be simply absurd if the damaged lands were the property of a feuar. This construction of the deed of 1800 is borne out by the fact that the working rights and consequent liabilities of the disponees in regard to the coal and ironstone in those portions of Little Govan which had been already feued by Mr Rae are subsequently and separately dealt with. It is expressly provided that in working these minerals the disponees shall conform to the clauses and reservations contained in the feuars' titles. And, as one would naturally expect, damages arising in the course of these operations below the feuars' lands are made payable to the feuars themselves, the owners of the lands injured, and not to Mr Houston Rae and his heirs and successors.

That under the disposition of 1800 the feuars of the coal and ironstone are bound to give subjacent support to the surface of the then unfeued lands belonging to Robert Houston Rae, lying to the north of the line described in that deed, does not appear to me to admit of reasonable doubt. There is really nothing whatever to sustain the inference that the feuars were to have power to let down the surface of these lands, which they were not entitled to break, upon the condition of paying compensation. The deed authorises certain operations for mining purposes on the surface of part of the unfeued lands belonging to Mr Rae, and the exigencies of the compensation clause are thoroughly satisfied by referring it to these operations.

The 15 acre parcel now belonging to the respondents is part of the unfeued lands on the north side of the line for which Robert Houston Rae was entitled to support as in a question with his mineral feuars. It was acquired by the respondents' predecessors in January 1801 from Robert Houston Rae and his trust-disponee, not by a contract of feu, but by a deed of disposition and sale, which professes to vest in them all right, title, and interest in the lands which had previously belonged to Mr Rae. That being so, the right of support must be held to have passed to the respondents, unless it can be shown to have been excepted from the conveyance. But it is needless to dwell upon this point, because the feu-disposition of July 1800 is held as repeated in the disposition of January 1801, and it is declared that the regulations and provisions therein contained shall be the rule of proceeding and settlement between the disponees under the deed of 1801 and the feuars of the coal and ironstone.

The other parcel of land, 6½ acres in extent, which together with the preceding makes up the total area occupied for the purposes of the respondents' works, stands, in my opinion, in a somewhat different position. I venture to think that the superior when feuing his reserved coal and ironstone in the year 1800 did not make any new provision in favour of the feuar of those 6½ acres, and consequently it appears to me that the respondents' claim for support to that ground depends entirely upon the terms of the original feu-contract between Robert Houston Rae and John Goudie dated the 14th February 1799. By the terms of that contract the superior reserves the whole coal and ironstone and other metals and minerals in the lands feued, with full power and liberty to work and win the same, "so as not to break the surface of the said lands or injure the springs therein, upon paying to the said John Goudie and his foresaids any damage that may be occasioned to the said lands by working of the said metals and minerals, as the same shall be ascertained by two neutral persons to be mutually chosen."

By the terms of the clause which I have just quoted, the appellants contend that the superior must be held to have stipulated that he should have the right to cause subsidence of the surface by means of his underground workings, the only condition of his exercising the right being that he should pay for any injury thereby occasioned. Although the fact that the superior is prohibited from entering upon and breaking the surface of the feu for mining purposes, and the expression "upon payment," so far favour the appellants' argument, I do not think it is well founded. It appears to me to be impossible to hold that the somewhat ambiguous language of the clause impairs by implication the plain and positive prohibitions which it contains against breaking the surface. And I am certainly not prepared to hold that "breaking" the surface means simply digging into it from above, and does not also include every process by which the surface strata are disintegrated or disturbed, whether temporarily or permanently. If that be so, the implied right of the appellants, if they have any, must be to cause subsidence without any disturbance or breaking of the surface. Long-wall working, which is the system followed by the appellants, produces temporary dislocation of the surface, which may be very injurious, as well as subsidence, except in cases where the seams of mineral worked are at a considerable depth and amply covered by rock or other solid strata. It may be possible in such cases to cause subsidence without in any way breaking or disturbing the upper strata; and it is also possible that a

mineral owner in parting with the surface might reserve power to create subsidence of that kind, and no other, upon paying damages. But the reservation must either be expressed or very plainly implied. It is not expressed here, but it appears to me that it might be held as implied in the language of the reservation, if it were perfectly clear that the damage to be compensated was damage occasioned by the due and proper exercise of the reserved power of working. To my mind that is by no means clear; and keeping in view the fact that the superior is bound to work so as not to injure springs of water, I agree with the Lord President that the damage contemplated by the parties may be reasonably held to be damage arising from accident or negligence. I could not have agreed with his Lordship had the damage in question been described, as was the case in *Aspden* v. *Sedden* (L.R., 10 Ch. App. p. 394), as "done to the erections on the said plot by the exercise of any of the said excepted liberties,"—an expression which obviously refers to the proper use, and not to the abuse, of the liberties reserved.

I am therefore of opinion that the present appeal ought to be dismissed, with costs.

Lord Fitzgerald—My Lords, I concur in the judgments of the noble and learned Lords who have preceded me. The rights of the parties must be governed by the construction of the instruments on which their titles rest, and the application of a rule which harmonises with the law of all parts of the United Kingdom.

That rule has been already stated by the noble and learned Lord (Lord Blackburn). It rests on authority now beyond controversy, and is, in effect, that where the ownership of the surface and the ownership of the subjacent minerals have become separated and are vested in different proprietors, the owner of the surface has an apparent inherent right to necessary support from the minerals. If the owner of the minerals, on the other hand, alleges that he has not only the property in the whole minerals, but has also retained all proper means to make that property available, and amongst them a right to get at and remove the whole, though in doing so he may destroy the surface by removing its necessary supports, then he must show by his title that he has such a right.

It was asserted strongly in the argument that the burden lay on the defenders to establish that they had this right, and to show it in clear and express terms, but in a question of the construction of an instrument it does not seem to be a matter of much importance on whom the burden lies. It is our duty to put a fair and reasonable construction on the instrument, having regard to the subject-matter and to the surrounding circumstances so far as they are disclosed on the face of the instrument itself.

If anything turned on the *onus probandi*, it would be open to the defenders to insist that the *onus* was shifted in this particular case, inasmuch as the principal deed (the feu-charter of 18th September 1800, which is called the mineral deed) was a grant by the then owner in fee of both minerals and surface—of "All and whole the whole coal and ironstone, with full power to work and raise," &c.—to which the maxim "*concedere videtur et id sine quo res ipsa esse non potuit*" might be applicable. It seems to me, however, that whether the first deed was a grant of the surface reserving the minerals, or was a grant of the minerals retaining the surface, the question for your Lordships' decision remains the same.

The question, then, on the construction of the mineral deed of 1800 is, whether the ownership of the surface was thereby so subjected to the ownership of the minerals that the owner of the minerals might, if necessary, in order to get the minerals, destroy the surface of the land north of the boundary line by withdrawing all mineral support, and thus causing its subsidence? In dealing with this question I forbear to consider the provisions of the deed in detail. I could add nothing to the exhaustive criticism of the Lord President. I desire to express my general concurrence in his observations.

It seems to me that to give effect to the contention of the defenders would be to defeat the objects of Robert Houston Rae, the granter, in relation to that portion of his lands of Little Govan lying to the north of the boundary line, as expressed in that deed, and I am of opinion that there is no provision to be found in that deed which would give the defenders a right to remove the minerals without leaving a sufficient support.

My Lords, the view which the noble Lord (Lord Blackburn) has taken of the feu-charter of 1800 renders it unnecessary for me to take up further time by discussing the other feu grants; but I desire to say that I did not in the course of the argument entertain any doubt that Robert Houston Rae did not in the contract of 1799 except or reserve a right to remove the subjacent coal and minerals, so as to leave no sufficient support to the surface and cause its subsidence, nor did John Goudie agree that such a right should be retained.

Interlocutors appealed against affirmed, and appeal dismissed with costs.

Counsel for Appellant — Solicitor-General Herschell, Q.C.—Solicitor-General Asher, Q.C. —Mackay. Agents—Grahames, Currey, & Spens.

Counsel for Respondent — Lord Advocate Balfour, Q.C.—Benjamin, Q.C.—Davey, Q.C. —W. H. Bolton. Agents—Murray, Hutchins, & Stirling.

COURT OF SESSION.

Tuesday, March 20.

FIRST DIVISION.

[Lord M'Laren, Ordinary.

HALL (COLLECTOR OF POOR-RATES FOR THE CITY PARISH OF GLASGOW) *v.* THE NORTH BRITISH RAILWAY COMPANY.

Poor—Lands Clauses Consolidation (Scotland) Act 1845 (8 *and* 9 *Vict. c.* 19), *sec.* 127—*Deficiency of Poor-Rate, caused by Lands being Taken—Railway.*