at the outset a position which boded ill for the management of a trust where there were diverse and possibly conflicting interests. Accordingly, I think the other two gentlemen were right in not retiring from the trust, and in resisting the course taken by their colleagues, which was of an arbitrary nature and not likely to inspire confidence in their management. I think Mr Morrison and Mr Alexander were further justified in not leaving this estate, in which there are, as I have said, diverse interests, in the hands of gentlemen who are undischarged bankrupts, and whose interests are identified with those of the presumptive fiars of the estate. I should not therefore contemplate the resignation of Mr Morrison and Mr Alexander as a satisfactory solution of the difficulty which has arisen, and on the whole matter I think the best course is to sequestrate the estate and appoint a judicial factor.

LORD ADAM, LORD M'LAREN, and LORD KINNEAR concurred.

The Court sequestrated the trust-estate and appointed a judicial factor.

Counsel for the Petitioner—Sym. Agents—Cumming & Duff, S.S.C.

Counsel for the Respondents Morrison and Alexander—C. N. Johnston. Agents—Cumming & Duff, S.S.C.

Counsel for the Respondents Bowie and Others—Wilson. Agents—James Forsyth, S.S.C.

Friday, July 15.

FIRST DIVISION.

[Lord Low, Ordinary.

GREAT NORTH OF SCOTLAND RAILWAY COMPANY *v.* MANN.

Trade Name — Hotel — Distinguishing Variation of Name.

Held that a person who had come as tenant to the "Palace Hotel" after it had been so named by the landlord, and had occupied it for thirteen years, was not entitled, to the prejudice of the business to be carried on there by the landlord's representatives, to take that name with him to other hotel premises in the same city; and that the prefixing of his own name did not constitute a sufficiently distinctive addition.

The late John Keith, merchant, Aberdeen, erected a block of buildings upon ground situated at the corner of Union Street and Bridge Street there. These buildings were called Palace Buildings, and a portion of them has been all along occupied as an hotel, and known by the name of the "Palace Hotel," which name was given to it by John Keith, and was laid in tiles in the main lobby of the hotel. Upon 4th June 1878, on the bankruptcy of the then tenant, Charles Mann obtained from the proprietors a lease of the premises which, after renewal, expired at Whitsunday 1891. At the time when he took the lease Mr Mann purchased from the proprietors of the premises the goodwill, furniture, fittings, and stock-in-trade, and purchased and took over the business as a going concern. During his tenancy the hotel was called the "Palace Hotel," and also "Mann's Palace Hotel." Of the four large signboards, placed one on each of the four sides of the building, two bore "Mann's Palace Hotel," and the other two "Palace Hotel." Large and prominent brass plates affixed to each side of the hotel's two windows opening from Union Street and Bridge Street respectively bore each "Mann's Palace Hotel," and the note-paper supplied for the use of the residents in the hotel was headed "Mann's Palace Hotel." Mr Mann's telegraphic address in Aberdeen was "Palace Hotel."

The Great North of Scotland Railway Company purchased from Mr Keith's trustees, with entry at Whitsunday 1890, the whole of the Palace Buildings, for the purpose of carrying on the said Palace Hotel and hotel business upon the expiry of Mr Mann's lease. Previous to Whitsunday 1891 Mr Mann took a lease of the Bath Hotel, as from that date, and prior to his removal he took down from that hotel its name and sign and put up on the front and gable respectively two signboards which he had removed from the Palace Hotel, bearing the words "Mann's Palace Hotel" on three separate pieces, one below the other. In removal notices also he advertised his new premises as "The Palace Hotel" and as "Mann's Palace Hotel."

Upon 6th May 1891 the Great North of Scotland Railway Company lodged a note of suspension and interdict against Mr Mann complaining of the respondent's actings, and praying the Court "to suspend the proceedings complained of, and to interdict, prohibit, and discharge the respondent Charles Mann, and his agents, servants, and all others acting for him, from publishing, or causing to be published, notices or advertisements of removal in terms set out in statements hereto annexed, or terms of a like import and effect, and from exhibiting or using the name 'Palace Hotel," or 'Mann's Hotel,' or any name framed so as to be a colourable imitation of the name by which the complainers' said hotel is commonly known, or mislead the public, as the name of any hotel carried on or to be carried on by him in the premises lately occupied by the Bath Hotel Company, Limited, or in any premises situated in Aberdeen, and from using the name 'Palace Hotel' as his registered telegraphic address in Aberdeen, except while tenant of and in connection with the Palace Hotel in Palace Buildings, owned by the complainers; and to ordain the respondent forthwith to take down and remove the two signboards bearing the name 'Palace Hotel,' put up by him on the front and gable respectively of the said

Bath Hotel premises, and to grant interim interdict and decree of removal.

They stated—"(Stat. 10) The said actings or threatened actings and representations of the respondent Mann are intended and calculated by him to mislead and deceive the public into the belief that the hotel premises to be occupied or now occupied by him in Bath Street are the same as those formerly tenanted by him as aforesaid, and to deprive the complainers of the benefit accruing from the said distinctive name, and to divert or attract custom to a material extent from the 'Palace Hotel' to his own hotel premises by pirating the said distinctive name, or using some merely colourable imitation of it. In particular, the addition of the name 'Mann to the name 'Palace Hotel' is not sufficient to distinguish the respondent's hotel from the complainers' hotel, but is intended and certain to mislead and deceive the public to the injury of the complainers. In these circumstances his said actings and misrepresentations are illegal. They have already caused, and will continue unless prevented to cause serious injury to the complainers' rights and interests in the said property, and to mislead and deceive the public. Accordingly the present application is rendered necessary. The complainers reserve all claims of damage competent against the said respondent."

The complainers pleaded—"(1) The complainers being proprietors of and holding a licence for their said hotel known by the distinctive description or designation of the 'Palace Hotel,' are entitled to interdict against the use or exhibition of the name 'Palace Hotel,' or any colourable imitation thereof by the respondent Charles Mann, as the name of his said hotel premises in Bath Street or as his telegraphic address. (2) The addition of the name 'Mann' to the name 'Palace Hotel' not being distinctive, but framed by the respondent in order to mislead the public, and unfairly attract custom to his hotel premises, the respondent should be interdicted from exhibiting or using 'Mann's Palace Hotel' as the name of his said hotel premises. (3) The respondent's said actings or threatened actings and representations being intended or calculated to mislead and deceive the public and wrongously attract custom from the complainers' Palace Hotel to the respondent's hotel prrmises, interdict should be granted in terms of the prayer of the note."

The respondent explained that "the name 'Palace Hotel' was given to the hotel in question by the respondent's predecessor in the tenancy, who originated the business therein carried on. The respondent purchased the goodwill of that business, and by his own efforts and expenditure of money he very greatly increased its size and reputation; and inasmuch as the complainers had not purchased the goodwill of the said business, but merely the premises as described in their title-deeds, the respondent considered that he was entitled to appropriate the said name for his new hotel."

He offered (Ans. 8) "to abandon the use of the name 'Palace Hotel' standing alone, and to confine himself to the use of the name 'Mann's Palace Hotel,' under reservation of all his pleas."

He pleaded—"(1) The complainers' averments are irrelevant and insufficient to support the prayer of their note. (2) The complainers' averments being unfounded in fact, the note ought be be refused. (3) In respect that the complainers are not the proprietors of the goodwill of the said hotel business, and have no right to use the name 'Palace Hotel,' interdict ought to be refused. (4) The respondent's actings complained of being legal and not in violation of the complainers' rights, the note ought to be refused. (5) In respect of the offer contained in Ans. 8 this action should be dismissed."

Upon 22nd May 1891 the Lord Ordinary (Low) passed the note, and on caution as offered interdicted the respondent from "publishing or causing to be published notices or advertisements of removal in the terms set forth in statements appended to the note, or in terms of like import and effect, and from exhibiting or using the name 'Palace Hotel,' or Mann's Palace Hotel,' by signboards or otherwise, and from using the name 'Palace Hotel' as his registered telegraphic address in Aberdeen."

The respondent reclaimed to the First Division, who on 2nd June 1891 pronounced the following interlocutor—"Interdict the respondent from exhibiting or using by signboards or advertisements the name 'Palace Hotel' without some distinctive addition, also from using the name 'Palace Hotel' as his registered telegraphic address in Aberdeen: *Quoad ultra* recal the interim interdict, and decern."

A record having been made up, Lord Low upon 28th November 1891 allowed the parties a proof of their respective averments.

"*Opinion.*—The complainers have purchased, with entry at Whitsunday 1890, a block of buildings at the corner of Union Street, and Bridge Street, Aberdeen, which have been called 'Palace Buildings,' and which were built by the late John Keith, merchant, Aberdeen. The complainers aver that 'a portion of these buildings has been all along occupied as a hotel, and known by the distinctive name of the 'Palace Hotel,' which name was given to it by the said John Keith, and was laid in tiles in the main lobby of the hotel.' The complainers acquired the property for the purpose of carrying on a hotel business in the hotel, and in the Licensing Court held in April 1891 they obtained a hotel licence.

"The respondent was tenant of the hotel under a lease which expired at Whitsunday 1891. He then removed to the Bath Hotel, which is in the immediate vicinity of the Palace Hotel. The respondent has altered the name of the Bath Hotel, which he now calls the 'Palace Hotel,' and 'Mann's Palace Hotel.' It appears there were signboards on the Palace Hotel with the words 'Palace Hotel' painted on some of them, and the

words 'Mann's Palace Hotel' on others. The respondent has removed these signboards and has put them up on the Bath Hotel. The respondent is also said to be advertising his hotel as 'The Palace Hotel,' and to have registered the words 'Palace Hotel' as his telegraphic address.

"I must hold it as settled, by the terms of the interlocutor of the First Division of 20th June 1891, that the respondent is entitled to use the name 'Mann's Palace Hotel,' and the question which I have to decide is whether the respondent is entitled to use the name 'Palace Hotel' without any distinctive addition.

"It was conceded, I understand, by the respondent's counsel that a distinctive name of a hotel may in certain circumstances be protected. For example, if a hotelkeeper is carrying on busines in a hotel with a distinctive name such as the 'Palace Hotel,' a rival would not be allowed to set up another hotel in the neighbourhood under the same name, because to do so would amount to a fraudulent personating of the hotel-keeper's business, with the object and effect of misleading his customers and diverting his trade. But the ground of interference in such a case, it is said, would be fraudulent personation of the business of the hotel-keeper, and not any right to call the house by a particular name apart from the business which was being conducted in it. In the present case it was contended that the complainers had no business which was or could be personated. All that they had acquired right to was certain heritable property, not even described in the titles by any descriptive name, but merely as 'all and whole that piece of ground or building area,' &c. To interdict the respondent in such circumstances would be, it was maintained, to affirm that apart from a business of any kind a person could have exclusive right to the name of a house, a proposition which was contrary both to principle and authority.

"I agree with the respondent that apart from a business of some kind, there is no exclusive right of property in the name of a house, any more than in the name of a person, but I do not think that that is conclusive of the present case. A hotel acquires a reputation, and a large custom is attached to it, not merely because the management is good, but on account of qualities belonging to the building itself. The public hear of a hotel, known by a distinctive name, as being in a convenient situation, and as having ample accommodation and good sanitary arrangements. These advantages belong to the building, are inseparable from it, and necessarily pass with the building to anyone who acquires it. Now, assume that a person builds a hotel possessing advantages such as those to which I have referred, calls it by a distinctive name and lets it to a hotel-keeper. That hotel-keeper's lease comes to an end, and the owner at the same time sells the hotel to a third party, who purchase it for the purpose of carrying on business there as hotel-keeper. Is the outgoing tenant entitled to take a house in an adjoining street and, by calling it by the distinctive name by which the hotel is known, induce the public to believe that by going to his house they will get the benefit of those advantages of situation and structure which the hotel possesses? I do not think that such a proceeding would be allowed, because it would truly amount to a representation by the outgoing tenant that the premises which he had taken were the hotel premises. Such a representation would be injurious to the business for the purpose of carrying on which the hotel had been purchased, because it would have the tendency to divert customers who would otherwise resort to the hotel. The outgoing tenant would be entitled to tell the public in any terms he chose that he was the person who had previously carried on business in the hotel, but he would not, in my judgment, be entitled to make what amounted to a representation that his premises were in fact the hotel premises.

"It was contended, however, that the proprietor of a hotel who had not acquired any right to the business or the goodwill of the business which was carried on in it could never prevent the use by another of the name of the hotel. I am not prepared to assent to that proposition without considerable qualification. If a person invests his capital in the erection of a hotel he has a material interest in the business which is carried on in it, because upon the prosperity of that business the success of his investment depends. If the hotel is known by a special name, I think that it would be conceded that the tenant carrying on business in it could prevent another starting a rival hotel by the same name. Why should not the proprietor, who has an equal interest with his tenant, also be entitled to prevent such a proceeding? He has *ex hypothesi* built a house for the purpose of having a special business carried on in it; he has given it a distinctive name by which it may be distinguished from other houses in which a similar business is carried on, and it has become known to the public under that name, can he not protect the adventure in which he has embarked his capital by preventing another deliberately and for his own advantage misleading the public as to the identity of the house? I am of opinion that he can, and that upon equitable principles akin to those under which a trade-mark or a trade-name is protected.

"If therefore the present case is one of the nature which I have figured, the complainers would, in my opinion, be entitled to be protected by an interdict. But I am by no means sure that it is of that nature. The respondent avers that the name 'Palace Hotel' was given to the hotel by his predecessor in the tenancy, that when he took a lease of the premises he purchased the goodwill, furniture, fittings, &c., and that among the fittings so purchased were the signboards and brass-plates having upon them the name of the hotel. The respondent certainly appears

to have removed the signboards and brass-plates without objection on the complainers' part, and they themselves state that during the respondent's tenancy he called the hotel 'Mann's Palace Hotel' as well as the 'Palace Hotel.' Now, if the proprietor of a building suitable for use as a hotel lets it to a hotel-keeper and allows the latter to call it by any name he chooses, it may well be that the tenant at the expiry of the lease would be entitled to transfer the name to new premises. He might say—'I did not take the house as a known hotel, but merely as a building suitable for my business, and the name which I gave it designated nothing more than the house in which I carried on business, and was in no way connected with any business of yours, or in which you were interested.'

"Therefore, although I have doubts of the relevancy of the complainers' averments, I think that it is safer to ascertain the precise facts. I shall therefore allow a proof before answer. I must add, however, that I fail to appreciate the interest which the complainers have in pressing the case. The respondent no doubt maintains that as matter of right he is entitled to call his new hotel the 'Palace Hotel,' but he offers upon record to confine himself to the use of the name "Mann's Palace Hotel,' which according to the interlocutor of the First Division, as I read it, is a name which he is entitled to use."

The respondent reclaimed to the First Division, who agreed in thinking that a proof should be allowed, and appointed it to be taken before Lord Kinnear.

The proof was led upon 9th March 1892. The facts given above were brought out. It was proved that the first tenant who preceded Mann had nothing to do with the choice of the name "Palace Hotel," which was chosen by the proprietor. It was made clear that since Whitsunday 1891 visitors intending to go to the complainers' hotel had gone to that of the respondent; that visitors had gone to the one hotel and their luggage to the other; that letters had gone to the wrong hotel; and, in short, that frequent confusion and mistakes had occurred by the existence of the two Palace Hotels.

At the hearing on evidence the complainers argued—1. Mann had come to the Palace Hotel after it had received its name. That name was part of the heritable subject, and passed with the heritable subject to the complainers. Mann was entitled to the "goodwill" so far as it was personal—he was entitled to the credit of having managed the Palace Hotel well for thirteen years—but he could not carry "heritable" goodwill with him. The trustee of the bankrupt tenant had no power to sell the name as part of the goodwill, for that name was the landlord's and not the tenant's. The name "Palace Hotel" was not a merely local name, but a trade name, being the name of a place of entertainment, and therefore protectable—*ex parte Punnett* (*in re Kitchin*), November 18, 1880, L.R., 16 C.D. 226. It was not necessary to show any fraud on the respondent's part. The fact that their business was being seriously affected by his actings was sufficient to entitle them to interdict. The cases were collected in Sebastian on Trade-Marks (3rd ed.), pp. 293-297. The law was correctly laid down in Allan on Goodwill, p. 111. The case of *Mason*, *infra*, was not in point, because Mann was not seeking interdict against the complainers. 2. The addition of Mann's name was not a distinguishing variation. People thought it gave them additional information. On this point the case of "Young's Glenboig" bricks (*Dunnachie, &c.* v. *Young & Sons*, May 22, 1883, 10 R. 874) was in point.

Argued for the respondent—He had purchased the "goodwill" from a bankrupt tenant; accordingly the only "goodwill" was the name. The Palace Hotel owed its good name to his good management. He had established a personal goodwill in the name which he was entitled to take with him—*Woodward* v. *Lazar*, January 1863, California Supreme Court, reported as case 212 in Sebastian's Digest of Trade-Mark Cases, p. 119, was strongly in his favour—see also *Levy* v. *Walker*, February 5, 1879, L.R., 10 C.D. 436, where assignment of goodwill and business included right to use the name of the old firm. The complainers had no exclusive right to the name "Palace Hotel" to designate a particular building. Names of buildings were not protected—*Day* v. *Brownrigg*, December 4, 1878, L.R., 10 C.D. 294. In the converse of this case interdict was refused—*Mason* v. *Queen* ("*Waverley Hotel*," *Glasgow*, case), April 8, 1886, 23 S.L.R. 641. 2. The addition of Mann's name made a sufficient distinction—*cf.* *Charleson* v. *Campbell* ("*Royal*" *Station Hotel*, *Forres*, case), November 17, 1876, 4 R. 149.

At advising—

LORD M'LAREN—In this case the Great North of Scotland Railway Company apply for interdict against Mr Charles Mann, formerly tenant of the company's hotel at Aberdeen, restraining him from using the name "Palace Hotel" in connection with the business which he now carries on in other premises on his own account. On 22nd May 1891 the Lord Ordinary (Low) granted interim interdict in terms of the note of suspension as amended. On 20th June 1891 the Court varied the interlocutor to the effect of interdicting the respondent from using the name "Palace Hotel" without some distinctive addition. The respondent then designed his establishment by the name of "Mann's Palace Hotel;" and one of the questions for consideration is, whether this is a sufficient distinctive addition.

The case having been remitted to the Lord Ordinary, his Lordship allowed a proof, and the case having again come before your Lordships on a second reclaiming-note, the proof was appointed to be taken before Lord Kinnear, and consideration of the legal questions was resumed. We are now to dispose of the case on the record

and evidence, having also before us the Lord Ordinary's opinion on the law applicable to the case.

Before approaching the actual question between the parties, it may be useful to consider what are the rights arising from the use of a particular name in connection with trade, and who is the person who is entitled to assert such rights?

This much is clear, that there is neither property nor exclusive privilege in the use of a descriptive name. This point was very authoritatively settled in the "Ashford Villa" case (*Day* v. *Brownrigg*), December 4, 1878, L.R., 10 C.D. 294, on grounds which we should consider altogether sufficient had the case arisen in Scotland. On the other hand, it may be assumed, as was pointed out by Lord Kinnear in the "Waverley Hotel" case (*Mason* v. *Queen*), April 8, 1886, 23 S.L.R. 641), that where pecuniary interests are concerned the party injured is entitled to protection, on the principle that a hotel-keeper or tradesman is entitled to prevent his rivals from deceiving his customers by personating his business. It appears to me that in all such cases the question is, whether the respondent by the use of a name which has been employed to designate a particular commercial business or place of business, thereby represents that he is in right of that business or establishment to the injury of the true proprietor or trader. I am not sure that it is necessary to aver or to prove that the use of the name is fraudulent. My individual view would be that a case for interdict is made out if the Court be satisfied that the use of the name in question amounts to a representation which is untrue in fact, and is injurious to the party whose trade-name has been appropriated, because the injury is independent of the fraudulent intention. The absence of fraudulent intention might be a good answer to an action of damages, but it will not entitle the party who has done the wrong to persist in using the trade-name after it has been brought home to him that the use of the name is injurious. It seems to follow that the wrongdoer, if he will not give a voluntary undertaking to abstain from using the name, must submit to interdict against what would probably amount to a fraudulent representation if it were continued after its injurious tendency had been proved.

The next question is, who is the person entitled to protect himself against such representations? It appears to me that this is purely a question of fact, and that in such case the same evidence which establishes the injurious representation necessarily points out the person against whose interests that representation is directed.

The case of the name of a hotel has some specialties, but these appear to depend mainly on matter of fact. We may suppose the case of a small private hotel carried on in a dwelling-house to which a name is given by the hotel-keeper. In such a case, if the tenant removes to other premises, and continues to use the trade-name which he had given to his hotel, it is difficult to see how he could be chargeable with misrepresentation or interference with the rights of other persons. But again if a building specially designed for the purposes of a hotel is erected by a proprietary company, and this building comes to be sold, everyone would admit that the purchaser of the building (in the absence of agreement to the contrary) would be entitled to use the name by which the hotel was known, and that in so doing he would not be guilty of misrepresentation. In such a case the tenant of the first proprietor could not very well make use of the name of the hotel in any new establishment to which he might migrate without laying himself open to a charge of misrepresentation. On this point also I may refer to the case of *Mason* v. *Queen*. I agree with the view there taken, that the Caledonian Railway Company having purchased the licensed premises and the goodwill were entitled by themselves or their assignees to the use of the name "Waverley Hotel," by which the premises were known, and that the ex-proprietor could not transfer the name to other premises consistently with fair dealing towards the purchaser of the hotel known by that name.

There is this distinction between the case of a hotel and that of a shop or warehouse (but again I say it is only a distinction of fact and not universally true) that in the case of a purchaser of goods a trade-name represents to his mind the commercial firm with whom he is in the habit of dealing, and there is no misrepresentation to him in the continued use of this name by the same commercial firm in connection with different premises occupied by the firm in succession, the place where the goods are sold being really a very unimportant incident in the contract of sale.

But the contract which is made by the guest in a hotel is a contract of location. He contracts for sleeping and living accommodation in a house that suits him, and beyond doubt the situation of an hotel, and the character and style of the accommodation which it offers, are very important elements in the contract. Moreover, the chief part of the capital of the undertaking is the money expended on the building, and it is the proprietor of the heritable property who has the chief pecuniary interest in the success of the house. As was observed in an English case by Sir George Russell, the goodwill of a licensed house is the "habit of customers resorting to the house," and this, as I think, is an interest which has a claim to the protection of the law.

In the present case it is proved that the name "Palace Hotel" was originally given to the premises now owned by the Great North of Scotland Railway Company by the first proprietors, and that the house or hotel has always been known by that name. It may be assumed that Mr Mann, the respondent, contributed to the success of the hotel by his good management, and he is quite entitled to advertise himself as the late tenant (or 'landlord' in the special sense) of the Palace Hotel. To give that name to his new premises is in my opinion

a mere evasion. The advertisement of his name in connection with the trade-name Palace Hotel would, I am satisfied, on the evidence and from the nature of the case, be understood as meaning that he was hotel-keeper in the building which had come to be known as the Palace Hotel. Such advertisement accordingly amounts to a representation injurious to the proprietary interests of the railway company. On this general ground my opinion is that the interim interdict originally granted is well founded and ought to be made perpetual.

There remains for consideration the question whether the respondent has brought himself within the qualifying words of the interdict by altering his trade-name to "Mann's Palace Hotel." In other words, is the prefixing the respondent's own name a "distinctive addition," or is it an addition which would not suggest a distinction to travellers and customers?

Now, it is part of the respondent's case that he was well-known, and had gained a reputation with the public as the person who carried on the Palace Hotel belonging in property to the railway company. On that hypothesis the name "Mann's Palace Hotel" would not convey an obvious distinction—would indeed rather suggest that he was carrying on business in the old premises. But further, it has been proved that the prefix Mann's has not in fact served the purpose of a distinctive addition; that customers intending to go to the railway company's hotel have been taken to Mann's; and that in other cases the passenger and his luggage have been taken to different hotels. This may not be the fault of Mr Mann, but the case against him is not founded on delict, but on the right of the company to be protected against effects of the representation implied in the use of their trade-name. It is therefore not a satisfactory answer to say that passengers were taken to the wrong hotel because they did not attend to the difference between the names, because this only proves that the name adopted by the respondent is not sufficiently distinctive.

I would therefore suggest that we should continue the interdict formerly pronounced, and should also grant interdict in express terms against the use of the name "Mann's Palace Hotel," on the ground that it is not sufficiently distinguishable from the name "Palace Hotel" which the complainers have been in the habit of using to describe their hotel at Aberdeen.

The LORD PRESIDENT, LORD ADAM, and LORD KINNEAR concurred.

Interdict was granted in terms of the prayer of the note.

Counsel for Complainers—D.-F. Balfour, Q.C.—Jameson—Kennedy. Agents—T. J. Gordon & Falconer, W.S.

Counsel for Respondent and Reclaimer—Dickson—Ure. Agents—Auld & Macdonald, W.S.

Friday, July 8.

FIRST DIVISION.

[Sheriff of the Lothians and Peebles.

ROBERTSON *v.* ROSS & COMPANY.

Contract — Agricultural Lease—Claim by Tenant of Farm against Mineral Tenant for Severance Damage.

In the lease of a farm the proprietor reserved full power to work the minerals, and to resume the land necessary for that purpose, subject to the condition that he should allow the tenant an abatement of rent in respect of any land resumed.

The proprietor subsequently let the minerals under the farm to tenants, to whom he assigned the rights and reservations contained in the agricultural lease, and he bound the mineral tenants to settle with the agricultural tenant for all ground taken from his farm according to the conditions of the agricultural lease. The mineral tenants having taken ground from the farm for the construction of a railway, *held* that the agricultural tenant had no claim against them for severance damage, in respect that the rate of compensation to be paid for land taken in connection with the mineral workings was fixed by his lease.

Opinion by the Lord President that a claim of severance damage is truly a claim for part of the value of the ground taken, namely, its value as an access to the adjoining lands. *Doubt* expressed on this point by Lord M'Laren.

By lease dated in 1876 the Earl of Hopetoun let to William Robertson the farm of Gateside, in the county of Linlithgow, for a period of nineteen years from Martinmas 1874. The lease contained the following clause—"Reserving always to the proprietor, his heirs and assignees, from the subjects hereby let, as follows, *videlicet*—Reserving always the whole mines, metals, minerals, and fossils, coal, marl, clay, gravel, sand, sandstone, limestone, and slate quarries on the subjects hereby let, with full power to search for, work, win, smelt, burn, and manufacture, and to carry off the same, and sink pits, form levels, make roads, railroads, canals, erect buildings and machinery, and carry on all works within the subjects hereby let which they may think proper, and to resume the land they may think necessary for these purposes: Reserving also full power at all times to take off land from any part or parts of the subjects hereby let for the purpose of planting, or for the purposes of feuing, or letting on building leases, or for making, altering, or widening roads, or for making railroads or canals, or pieces of water: Declaring that the proprietor, or his aforesaids, shall be bound always to keep enclosed properly any lands resumed for any