again on November 28 1907—". . . I have received from the printer proof prints of the closed record. I send you one. Please return it with any corrections you may have to make, and say how many prints you want. We must, of course, observe the rules of Court"—And again on 3rd December—"Am I just to print off? If you have no adjustments to make I suppose I may do so. But if you have, please return the print sent you with them thereon. Please attend to this else we may be blamed by the Court"—And again on 7th December—"Why are you delaying returning the print? I will print off on Tuesday, assuming that, unless I have the print back on Monday showing any amendments you may have to make, you have none"—And again on 11th December—"I find I must lodge prints of the closed record on Friday. Be pleased to say if you have any amendments by return"—And again on 18th December—". . . You are to blame for the delay. I must print off and lodge prints to-morrow." On December 9, 1907, the defenders' agents had written to the pursuers' agent mentioning the return to town of one of their partners and promising that the proof print should be returned with adjustments the following day.

Prints of the closed record being tendered on December 19, 1907, were refused by the Clerk.

Argued for the pursuer (who was called on to show cause, there being no opposition to the motion)—The delay in lodging the prints had been brought about by the fact that the case was a complicated one and was being negotiated to a settlement. The fault of the pursuer's agent was in allowing time to the defenders' agents for returning the proof print with adjustments. This was, however, not contumacy, and, there being a discretion in the Court to repone the pursuer, the Lord Ordinary's interlocutor should be recalled — *Glen* v. *Thomson*, November 21, 1901, 4 F. 154, Lord Kinnear, 156, 39 S.L.R. 129. The same rule obtained in the case of appeals—*Donald* v. *Irvine*, March 17, 1904, 6 F. 612, 41 S.L.R. 420; *Boyd, Gilmour, & Company* v. *Glasgow and South-Western Railway Company*, November 16, 1888, 16 R. 104, Lord Justice-Clerk (Macdonald) at p. 108, 26 S.L.R. 84; *Liquidator of the Gael Iron Company, Limited*, v. *Orr*, December 18, 1884, 12 R. 345, 22 S.L.R. 198, *sub nom. Dickson* v. *Orr*.

The Court recalled the interlocutor of the Lord Ordinary, and remitted to him for further procedure.

Counsel for the Pursuer (Reclaimer)—Forbes. Agent—Robert Broatch, Solicitor.

Counsel for the Defender (Respondent)—Munro. Agents — Galbraith-Stewart & Reid, S.S.C.

Friday, January 10.

FIRST DIVISION.

[Lord Salvesen, Ordinary.

FORREST'S TRUSTEES *v.* MERRY & CUNINGHAME, LIMITED.

Mines and Minerals—Lease—Construction — Clause against Working Adjoining Minerals, with a Penalty for Contravention — Whether Clause an Absolute Prohibition.

A minute of agreement, between the proprietor (first party) of one portion of a coalfield, worked by means of pits on his ground, and the lessees (second parties) of the coalfield, provided — "The second parties hereby undertake and bind themselves and their foresaids that from and after the term of Whitsunday 1893 they will work the coal in the adjoining properties only to such an extent as to enable them to pay to the several proprietors thereof such sums of lordship as will amount to but not exceed the fixed rents agreed to by their existing leases to be paid to such proprietors respectively: Declaring that if in any year during the currency of this lease the sums payable to such adjoining proprietors shall exceed the said fixed rents (which amount *in cumulo* to £550 sterling per annum), then and in that event the second parties shall be bound, as they hereby agree and bind themselves and their foresaids, to pay to the first party and his foresaids the sum of 1d. per ton on every ton of coal worked from the lands of such adjoining proprietors in excess of the quantities necessary to make up or equal the said fixed rents payable to them as above mentioned: In consideration whereof the first party gives up and renounces from and after the term of Martinmas 1888 the right to exact the wayleave of 1d. per ton presently payable to him."

The minute of agreement had been signed contemporaneously with the lease of the minerals, and the leases with the different proprietors were parts of one general scheme. In a subsequent clause the years for making up "shorts" were restricted, but not "so long as" the adjoining output was restricted.

Held that the prohibition was not absolute, but might be contravened on payment of the 1d.

On February 18, 1907, Miss Jane Wilson Forrest, Woodhouse, Blantyre, and others, the testamentary trustees of the late John Clark Forrest of Auchinraith, Blantyre, who died on 28th August 1893, raised an action against Merry & Cuninghame, Limited, iron and coal masters, Glasgow, in which they sought declarator (with corresponding interdict) "that the defenders are not entitled while they continue tenants of the pursuers under the lease entered into between the said John Clark Forrest, on

the one part, and Merry & Cuninghame, carrying on business as iron and coal-masters in Glasgow, . . . and . . . the individual partners of that company, on the other part, dated 4th January 1889, and under relative minute of agreement between the same parties, also of the said date, to work the coal in the following lands in the parish of Blantyre and county of Lanark, namely, the lands of Birdsfield, sometime belonging to the trustees of the late Archibald Craig, Esq.; the lands of Springwell, sometime belonging to Mrs Janet Herbertson or Jackson, widow of Andrew Jackson, Esq., of Spittal, and part of the lands called Auchinraith, and a small field of about 4 acres called Aikenfin or Aitinfin, both sometime belonging to John Craig, Esq., of Bellsfield, to any greater extent than 21,215 tons annually in all, or such other extent as is required to enable them, the defenders, to pay to the several proprietors of the said lands such sums of lordship as will amount to but not exceed fixed rents, amounting *in cumulo* to £550 sterling per annum."

The lease referred to had conferred power on Merry & Cuninghame, whose successors the defenders were, to sink pits for the working not only of the lessor's minerals, but also of those on adjoining properties, and about the same date the lessees had made new, or adjusted old, leases of the minerals in the adjoining properties mentioned in the summons.

The minute of agreement referred to contained the clause quoted *supra* in rubric upon which the decision of the case turned, and also this clause—"Although by the foresaid lease it is expressly provided and declared that should the lordship in any year fall below the amount of fixed rent, the second parties shall be entitled to make up the deficiency from the excess of lordship, if any, above the fixed rent which may be payable in any three subsequent years, it is hereby expressly provided and declared that the second parties shall only be allowed one year to make up any such deficiency which may have taken place from the excess of lordship above fixed rent, if any, and that in the year immediately following: Declaring, however, that this restriction shall not apply while and so long as the tenants restrict their output from the said adjoining proprietors' land, so that the lordships payable to them do not exceed the fixed rents of £550 above mentioned."

The defenders, *inter alia*, pleaded—"(6) The defenders being entitled to work the minerals in the adjoining lands without restriction on payment of the wayleave provided in said minute of agreement of 1889, should be assoilzied."

The circumstances are given in the opinion, *infra*, of the Lord Ordinary (SALVESEN), who, on November 14, 1907, pronounced an interlocutor finding that the defenders were not entitled to work out the coal in the lands specified "to any greater extent than is required to enable them to pay to the several proprietors of said lands such sums of lordship as will amount to, but not exceed, fixed rents amounting *in cumulo* to £550 sterling per annum."

Opinion.—"The late John Clark Forrest was proprietor of the estate of Auchinraith, a property which contains valuable seams of coal. It adjoins certain small properties called Birdfield, Springwell, part of Auchinraith, and Aitkenfin, and since 1872 the coal in these adjoining lands along with the coal in Auchinraith has been let to the same tenants and wrought by pits in the lands of Auchinraith. The pursuers are the trustees of Mr Forrest and now own the estate of Auchinraith, and the defenders are a limited company who are the successors of the original tenants of the mineral field.

"On 4th January 1889 Mr Forrest granted a lease of the coal in his lands of Auchinraith to the defenders' authors for thirty-one years from the term of Whitsunday 1888 for payment of a fixed rent of £2000 per annum or lordships in the lessors' option. By this lease Mr Forrest conferred power on the tenants to sink pits for the purpose of working not merely the coal in the lands let by him but also any coal in the adjoining lands. The consideration for this privilege was the payment to Mr Forrest of a wayleave of a penny per 22½ cwts. provided for under a previous agreement which was referred to and adopted in the lease. About the same time that this lease was entered into leases were granted or existing leases modified and confirmed by the proprietors of the adjoining lands, and it is a fair inference that the whole of these deeds were the outcome of a general agreement between the various proprietors and the mineral tenants.

"Under the lease of 4th January 1889 it was provided that lordships which Mr Forrest was entitled in his option to exact instead of the fixed rent were to be paid to him according to a sliding scale, and that the wayleave of one penny per ton should be paid directly by the mineral tenants. The other proprietors also stipulated for a fixed rent, or in their option a lordship or a fixed sum of 7d. per ton of 22½ cwts. The sliding scale appears to have been very favourable to Mr Forrest, for it provided that he should be entitled to payment of two-fifteenths of the average yearly selling price of the coal in the event of that exceeding the lordship of 6 2-9d. per ton of 20 cwts. Whenever accordingly the selling price of coal at the pithead exceeded 4s. 6d. or 5s. a ton, it was the tenants' interest after they had taken sufficient coal from the lands of Auchinraith to pay the fixed rent, rather to work out the coal beneath the adjoining lands than to increase their output from the minerals of Auchinraith.

"Of even date with the lease the parties entered into a minute of agreement; and it is upon the construction of a clause in that deed that the main controversy turns. The clause is quoted at length in condescendence 4, and by it the defenders' authors 'undertook and bound themselves that from and after the term of Whitsunday 1893 they will work the coal in the adjoining properties only to such an extent as to enable them to pay to the several

proprietors thereof such sums of lordship as will amount to but not exceed the fixed rent agreed to by their existing leases to be paid to such proprietors respectively.' Had the clause stopped there, there would have been no room for doubt, as the language is not open to two interpretations. There follows, however, a declaration in these terms—'If in any year during the currency of this lease the sums payable to such proprietors shall exceed the said fixed rent, then and in that event the second parties shall be bound, as they hereby agree and bind themselves and their foresaids, to pay to the first party and his foresaid (that is, the pursuers) the sum of one penny per ton on every ton of coal worked from the lands of such adjoining proprietors in excess of the quantities necessary to make up or equal the said fixed rents payable to them as above mentioned.'

"The defenders contend that this clause read as a whole gives them the right to work out the coals in the adjoining lands as fast as they choose on payment of one penny per ton on all coal from such lands in excess of the quantities required to make up the fixed rents, and they referred to various cases in which prohibitions with somewhat similar qualifications had been so construed—*Woodward* v. *Giles*, 2 Vernon 119; *Aylet*, 2 Atkin, 238; *Leigh* v. *Lilley*, 30 L.J.Ex. 25; while the pursuers referred to *Gold*, 8 Macph. 1006; *Mackenzie*, June 18, 1811, F.C. affirmed 6 Pat. 117, and *Mackenzie*, December 13, 1811, F.C. In further support of their construction of the clause the defenders maintained that so small a sum as one penny per ton could not be treated as a penalty for violating a prohibition, and they also founded upon the clause in the same agreement under which a restriction as to making up a deficiency between the fixed rent and the lordships payable in respect of the coal actually worked in any given year is not to apply 'while and so long as the tenants restrict their output from the said adjoining proprietors' lands, so that the lordships payable to them do not exceed the fixed rents.' They further point to the admitted fact that ever since 1893 there has been an average excess of output from the adjoining lands over the amount required to meet the fixed rents and lordships of about 55,000 tons per annum; and that notwithstanding the pursuers and their author have accepted the sum of one penny per ton on this excess, although it would have been far more to their interests to have insisted on the output from their own lands being increased. Finally they contend that the pursuers' construction of the clause if given effect to would be contrary to the good faith of the agreement made with the adjoining proprietors.

"I am not much impressed with this last argument, because under the leases of the coal in the adjoining lands the defenders are not under any obligation to work the minerals so long as they pay the fixed rent. It may well be that the adjoining proprietors might have objected to being deprived of the chance of having their coals worked out more speedily, but that was a good reason why the minute of agreement should be entered into between the owners of Auchinraith and the mineral tenants alone; and if the mineral tenants are not violating any obligation which they undertook to the other proprietors, it does not seem improbable that they should have put themselves under this prohibition in a question with the pursuers. As regards the inference which is to be drawn from the actings, it must be noted that Mr Forrest, who was a party to the agreement, died on 28th August 1893, and that during his lifetime no question as to its construction could possibly have arisen. The argument would have been stronger if Mr Forrest, who no doubt had a clear view of what he was stipulating for, had consistently acted contrary to his own interests on the view of the agreement for which the defenders contend. But the fact that his trustees may either have misinterpreted the clause or not had their attention directed to it for fourteen years after his death does not seem to me to have much bearing upon the true construction. The other points which I noted first do at first sight seem to favour the interpretation on which the defenders found, for if the prohibition of working was to be enforced, one would have expected a higher penalty than a penny per ton to be exacted, even if to that be added the restriction to which I have already referred, and which in actual circumstances could have had no deterrent effect. I also recognise fully that a clause which is expressed as prohibitory may nevertheless be so qualified as to confer an option of contravening on payment of a stipulated sum; and the decisions quoted by the defenders contain illustrations of such clauses. In the end, however, the question comes to be one of construction of the particular clause; and I am of opinion that I cannot construe it as giving the mineral tenants a licence to work as much coal as they please from beneath the adjoining lands so long as they pay the stipulated one penny per ton. If that was the intention of parties I cannot understand why there was any prohibition at all. It would have been much simpler to have said that if the tenants worked coal in the adjoining properties, &c., then they should pay one penny per ton on the excess quantities so worked. On the other hand, it is possible to find a good reason for the clause being expressed as it is, for it would not always be easy to ascertain during the currency of any particular year whether the prohibition was being contravened; and in any event it practically gave the owners of Auchinraith the option either of enforcing the prohibition or of accepting the stipulated one penny per ton, whichever they might think most to their interest.

"Parties were agreed that all that I should decide at present was this question of construction, so that they might have an opportunity of getting my judgment submitted to review without any further expense being incurred. I have accord-

ingly limited my interlocutor to a finding in terms of the above opinion."

The defenders reclaimed, and argued—The clause in dispute was not an absolute prohibition, but an option to work the coal on the adjoining lands to an extent in excess of that required to bring the lordships up to the *cumulo* fixed rents if a penny per ton were paid on that excess. Taken broadly, the effect of the whole deeds, which together constituted a general agreement, was a discharge of the wayleave of one penny per ton exigible from the adjoining proprietors and its reimposition on the defenders. If the clause were an absolute prohibition, then the stipulation for a payment of one penny per ton must be aimed at a set of circumstances which never could arise. Examples of such clauses construed as permissive occurred in *Rolfe* v. *Peterson*, 1772, 2 Br. P.C. 436; *Woodward* v. *Gyles*, 1690, 2 Ver. 119, and in the opinions of the Judges in *Leigh* v. *Lilley*, 1860, 30 L.J., Ex. 25. The case of *Gold* v. *Houldsworth*, July 16, 1870, 8 Macph. 1006, 7 S.L.R. 646, was distinguished by its circumstances and also by the terms of the clause in question, "found guilty" of contravention, as also were *Mackenzie* v. *Craigies*, June 18, 1811, F.C. 304, where the prohibition was in the event of the tenants' "neglect," and *Mackenzie* v. *Gilchrist*, December 13, 1811, F.C. 419—see Lord President Hope at pp. 427-8. The interlocutor of the Lord Ordinary should be recalled.

Argued for the pursuers (respondents)—The real question was, what did the agreement mean. That was not affected by the prior history of the coalfield or the other documents. Assuming that the pursuers were bound to grant a wayleave for the adjoining proprietors' coals, there was no inconsistency in their having a right to limit the quantity of these coals which might be worked. The wayleave was granted not to the adjoining proprietors, but only to the defenders, the tenants. If their tenancy for any reason ceased, so would the right of wayleave. Turning to the agreement itself, it was signed contemporaneously with the lease by the pursuers' author to the defenders and meant to form part of it. Its most important provision (article 2) was giving the pursuers right to a lordship calculated on a sliding scale, if that was at any time larger than the rate of 7d. a ton—payable alike to the pursuers and the adjoining proprietors under their leases. It naturally resulted that if coal were dear it would be the tenants' interest rather to work the adjoining proprietors' coal than the pursuers. To provide against this was the object of the clause in question. Accordingly it began by prohibiting working the adjoining proprietors' coal in excess of an amount corresponding to their fixed rents. That was not unfair, as under the leases the defenders were expressly not bound to work at all. This prohibition was to take effect only as at Whitsunday 1893, when the original leases would have expired. The declaration which followed was not an option to the defenders to work more, but a provision for the event which well might happen without its being intended of a greater quantity being worked at any time. The language was significant:—"If in any year the sums payable to such adjoining proprietors should exceed the said fixed rents." That pointed to an inadvertent, not to an intentional, excess. Further, the declaration was applicable to the whole period of the lease before as well as after the prohibition took effect. That sufficiently accounted for its existence. Again the clause bore that the consideration given by the pursuers was the renunciation from the beginning of the lease of the right to a wayleave on the whole coal wrought. That was plainly more than a consideration for all that would be left to them if the defenders' construction was sound, viz., the right to a wayleave on the excess over what corresponded to the fixed rent. The declaration at the end of the fourth article was similarly accounted for by the fact that it applied to the whole lease, not merely to the period after 1893. On the whole, the pursuers' construction was the natural construction. The defenders' construction was most unnatural—to commence with a prohibition when what was intended was the grant of an option. No doubt the wayleave payable if more coal was worked was pactional, not penal, but that made no difference as to the landlord's right to an interdict. Nor was it material that it might appear small (Fry on Specific Performance, 3rd ed., secs. 142, 146, 148, 156). The English cases cited by the defenders were inapplicable. They turned on the question of whether a payment stipulated for was or was not capable of modification as being a penalty. But that had no bearing on the question of whether the lease contained a prohibition entitling the landlord to interdict or an option to the tenant to do some act on payment of an increased rent. The Scots authorities strongly supported the pursuers' contention (*M'Kenzie* v. *Craigies*, 18th June 1811, F.C., aff. 6 Paton 117; *M'Kenzie* v. *Gilchrist*, *cit. sup.*; *Cross* v. *Muirhead*, Hume's Decisions, p. 860; *Campbell* v. *M'Laurin*, Hume's Decisions, p. 864; *Gold* v. *Houldsworth*, *cit. sup.* In several of these cases the clause much more resembled an alternative, and in none was the act provided against of an irreparable character; yet in each case interdict was granted. The Lord Ordinary's judgment was sound.

LORD PRESIDENT—The Lord Ordinary has so well set forth the facts in this case that I do not think it is necessary to repeat in another form what he has already said. But I would call your Lordships' attention to two remarks made by the Lord Ordinary, with both of which I cordially agree. The first of these is—"It is a fair inference that the whole of these deeds were the outcome of a general agreement between the various proprietors and the mineral tenants." I think that is perfectly true, and it goes a long way towards the settle-

ment of the question with which I shall ultimately have to deal. The other remark of the Lord Ordinary is as follows:—"I also recognise fully that a clause which is expressed as prohibitory may nevertheless be so qualified as to confer an option of contravening on payment of a stipulated sum." With that statement I also agree. The question is one of construction, and of construction only of this particular clause. I do not think that other cases can be any authority in such a matter. They merely serve as illustrations. The true consideration, when the form of the clause is ambiguous, must always be this—is the leading object of the clause to prohibit a thing from being done, or is the leading object only, either not to have the thing done or to get a payment if it is done? The farming cases which were cited to us seem to rest on very clear principles. In farming, matters may be done which would cause an irreparable injury, and though you may covenant for damages for irreparable damage, as indeed this Court has often to award them, yet the sum received by way of penalty or damage may never adequately compensate for the injury done. In such cases you would be entitled to ask the Court, and the Court would be right in granting, interdict against the irreparable injury being done. Examples of what I refer to are the breaking up of old pasture or the cutting down of an ancient wood.

Now we come to the clause in question. Is it more likely that it was meant to be an absolute prohibition of the coal being worked, or is it more likely that it was meant to be a stipulation that if it was worked a royalty was to be paid at a certain rate? Upon the whole I prefer the latter interpretation. The only interest that the pursuers here can qualify is that it would give an indirect lever to compel more of their coal being worked, and if prices were at a certain rate that would be greatly to their advantage under the sliding-scale stipulation. So far as I can see, that is true, and I am not overlooking it, but I think it is overweighed by other considerations. In the first place, as I say, it is only an indirect lever, because it might not force Merry & Cuninghame to work the pursuer's coalfield at all. No doubt it is probable that having spent a certain amount on the pit they would work the coalfield, but that probability might to a large extent be upset, if I may use the expression, by a great many circumstances. In the first place, it obviously would be upset if any faults or such things arose in the pursuer's coalfield, which would make working in the pursuer's coalfield more than usually expensive. In the second place, it might be upset by the state of the market or the condition of Merry & Cuninghame's mining leases elsewhere. If they had to pay under this sliding-scale, and then prices rose to a very large extent, it might be good policy for them even to sacrifice their pit expenses in this field and to work their other pits in order to get such coal as they required for the market. All this is of course pure speculation, but at the same time it shows that this is only an indirect lever and not a true compulsitor.

The matter which really weighs upon my mind is this. Agreeing as I do with the Lord Ordinary that this was the outcome of a general scheme, it seems to me that the construction of the clause which is urged by the pursuers is, if I may say so, in utterly bad faith as regards the arrangement with the smaller proprietors. I cannot believe that the smaller proprietors would have entered into their agreements, which were *unico contextu* with the agreement founded on, if they had known that such a clause was to be put in force against them, and I cannot believe that Merry & Cuninghame would have assented to such an arrangement. Further, there is the phraseology of the clause itself, especially when taken along with the phraseology of the final words of clause 4, the clause which made provision for an alteration of the time for making up shorts from three years, which it had been before, to one year for the future. That clause concludes with this declaration—"Declaring, however, that this restriction shall not apply while and so long as the tenants restrict their output from the said adjoining proprietors' land." That is a most extraordinary expression to use if, as a matter of fact, the tenants have not the right during the whole currency of the lease to restrict their output or not as they choose. This equally applies in any year of the lease, and yet, according to the construction of the pursuers, during all the years of the lease except the first four the tenants had not an option at all to put their output above the amount of the fixed lordship. In other words, they would not be in a position to restrict their output from any action of their own. Upon the whole construction I come to the conclusion, opposite to that of the Lord Ordinary, that the meaning of the clause is that it is not to enforce prohibition but is to fix a scale of payment if the coal is worked above a certain amount.

The result of that view is to get rid of the action, because the action is not framed for recovery of any sums as in name of wayleave, and it is not said that Merry & Cuninghame have refused to pay any such sums. Therefore I am of opinion that the proper decree here is one of absolvitor.

LORD KINNEAR and LORD ARDWALL concurred.

LORD M'LAREN and LORD PEARSON were not present.

The Court recalled the interlocutor of the Lord Ordinary and assoilzied the defenders.

Counsel for the Pursuers (Respondents)—The Dean of Faculty (Campbell, K.C.—Chree. Agents—Menzies, Bruce-Low, & Thomson, W.S.

Counsel for the Defenders (Reclaimers)—Clyde, K.C.—Hunter, K.C.—C. D. Murray. Agents—Forrester & Davidson, W.S.