these sleepers. It is a building of the kind to which the rule *accessorium sequitur principale* is generally applied. The ordinary type of house rests *in situ* mainly by its own weight, although it is quite true that for greater security the foundations go below the surface. Where, however, such a building can and does rest on the ground securely by its own weight without foundations penetrating the surface, and the ground on which it stands is more or less permanently dedicated to the purpose of a site for it, the absence of such foundations does not appear to me materially to affect the question.

The opinion of the Court was—"We are of opinion that the determination of the Valuation Committee as regards subjects A and B is wrong, and the subject A should be entered in the valuation roll at an annual value of £6, 10s. and subject B at £2, 10s. We are of opinion that the determination of the Valuation Committee as regards subject C is right."

Counsel for the Appellant—A. M. Mackay. Agents—Simpson & Marwick, W.S.

Counsel for the Respondent—D. P. Fleming. Agents—Cumming & Duff, W.S.

COURT OF SESSION.

Thursday, February 5.

FIRST DIVISION.

[Bill Chamber.

FARIE *v.* FARIE'S CURATOR.

Entail — Mines and Minerals — Heir in Possession — Application for Consigned Money — Money Consigned Following Notice not to Work Minerals below Water-works—Lands Clauses Consolidation (Scotland) Act 1845 (8 *Vict. cap.* 19), *secs.* 67, 68, *and* 72—*Water-works Clauses Consolidation Act* 1847 (10 *Vict. cap.* 17), *sec.* 6.

An heir of entail in possession of certain lands and his mineral tenants served a notice under section 22 of the Water-works Clauses Consolidation (Scotland) Act 1847 upon a municipal corporation that they intended to work certain seams of coal under a pumping station erected upon the lands under statutory powers. The corporation served a counter-notice that they desired the seams left unworked, and compensation money was thereafter assessed and consigned in bank. The heir of entail some years later presented a petition craving warrant to uplift and acquire the consigned money in fee-simple. Had no notice been given, in ordinary course the seams in question would have been worked out in shorter periods than the time which had elapsed between the notice of intention to work and the presentation of the petition. The Lord Ordinary on the Bills (Blackburn) having reported the case, *held* that the consigned money represented the loss sustained by the petitioner by being prevented from withdrawing the support of the pumping station, and did not represent either the purchase price of a part of the lands or of a right of support of the water-works; and the prayer of the petition *granted*.

Ruthven v. *Hamilton's Curator Bonis*, 1881, 18 S.L.R. 724, *followed*.

The Water-works Clauses Act 1847 (10 Vict. cap. 17) enacts—Section 22—"Except where otherwise provided for by agreement between the undertakers and other parties, if the owner, lessee, or occupier of any mines or minerals lying under the reservoirs or buildings belonging to the undertakers, or under any of their pipes or works which shall be underground . . . or within the prescribed distance, if any, and if no distance be prescribed within forty yards therefrom, be desirous of working the same, such owner, lessee, or occupier shall give the undertakers notice in writing of his intention so to do thirty days before the commencement of working; and upon the receipt of such notice it shall be lawful for the undertakers to cause such mines to be inspected . . . and if it appear to the undertakers that the working of such mines or minerals is likely to damage the said works, and if they be willing to make compensation for such mines to such owner, lessee, or occupier thereof, then he shall not work the same; and if the undertakers and such owner do not agree as to the amount of such compensation the same shall be settled as in other cases of disputed compensation."

The Lands Clauses Consolidation (Scotland) Act 1845 (8 Vict. cap. 19) enacts—"And with respect to the purchase money or compensation coming to parties having limited interests . . . be it enacted as follows:—Section 67—The purchase money or compensation which shall be payable in respect of any lands, or any interest therein, purchased or taken by the promoters of the undertaking from any . . . heir of entail . . . or person having a partial or qualified interest only in such lands, and not entitled to sell or convey the same, except under the provisions of this or the special Act, or the compensation to be paid for any permanent damage to any such lands . . . shall be paid into the bank, to the intent that such monies shall be applied, under the authority of the Court of Session to some one or more of the following purposes, (that is to say) . . . In payment to any party becoming absolutely entitled to such money." Section 68—"Such money may be so applied as aforesaid upon an order of the Court of Session, made on the petition of the party who would have been entitled to the rents and profits of the lands in respect of which such money shall have been deposited. . . ." Section 72—"When any purchase money or compensation paid into the bank under the provisions of this or the special Act shall have been paid in respect of any . . . right or interest in lands less than the fee thereof . . . it shall be lawful for the Court of Session on the petition of any party interested in such money to order that the same shall

be . . . paid in such manner as the said Court may consider will give to the parties interested in such money the same benefit therefrom as they might lawfully have had from the . . . interest . . . in respect of which such money shall have been paid, or as near thereto as may be."

Allan James Crawford Farie of Farme, *petitioner*, brought a petition craving the Court to grant warrant to and authorise him to uplift and acquire in fee-simple a sum of £1250, consigned in bank in terms of the Water-works Clauses Consolidation Act 1847, after service by the Glasgow Corporation of a notice that they desired left unworked certains seams of coal in the estate of Farme Westthorn lying below a pumping station erected by them.

Answers were lodged by Lord Kinross as curator *ad litem* for the two children of the petitioner, the next heirs of entail, *respondent*.

The petitioner *averred*—"The petitioner is the institute of entail in possession of the entailed lands and estate of Farme Westthorn and others, situated in the county of Lanark, conveyed by and particularly described in disposition and deed of entail by Mrs Sarah Crawford or Farie, widow of Allan Farie of Farme aforesaid and others, the trustees of the said Allan Farie, dated 26th October and 20th November 1907, and recorded in the Register of Entails on 10th June, in the Register of the burgh of Rutherglen on 24th June, in the Register of the burgh of Lanark on 11th September, and in the Divisions of the General Register of Sasines applicable to the counties of Lanark and barony and regality of Glasgow for publication, and also as in the Books of Council and Session for preservation on 29th October, all in the year 1908. That in virtue of the powers conferred upon them by Act of Parliament the Corporation of the City of Glasgow or their predecessors in 1871 entered upon and took possession, for the purposes of the Glasgow Water Act 1855 and subsequent Acts, of a portion of the said entailed lands and estate of Westthorn on which has been erected the said Corporation's pumping station at Westthorn. That the petitioner, on behalf of himself as the proprietor and of the Farme Coal Company, Limited, as the lessees of the seams of coal after mentioned, duly gave notice pursuant to section 22 of the Water-works Clauses Act 1847 to the said Corporation of the City of Glasgow of intention to work the seams of Virgin and Ell coal respectively under and adjoining the said Corporation's pumping station aforesaid. Following upon receipt of said notice the said Corporation of the City of Glasgow gave notice under and in pursuance of said section 22 of the Water-works Clauses Act 1847 that they desired the said seams of coal to be left unworked. That by nomination of valuators, dated 8th December 1913 and 22nd January 1914 the said Corporation of the City of Glasgow and the petitioner respectively nominated pursuant to the provisions of the Lands Clauses Consolidation (Scotland) Act 1845 David Rankin, civil and mining engineer, Glasgow, and Willam M'Creath, civil and mining engineer, Glasgow, as valuators to act for them and on behalf of them respectively in making a valuation in terms of the 9th section of the said Lands Clauses Consolidation (Scotland) Act 1845 with a view to the final determination of the purchase money or compensation to be paid by the said Corporation of the City of Glasgow to the petitioner as institute of entail aforesaid in respect of his interest as proprietor of the said minerals, and the said valuators fixed and determined the said purchase money or compensation at the sum of £1250, conform to valuation executed by the said valuators of dates 10th and 30th January 1914. That conform to discharge by the petitioner and the foresaid Farme Coal Company Limited, in favour of the said Corporation of the City of Glasgow, dated 9th and 18th, and recorded in the Division of the General Register of Sasines applicable to the county of the barony and regality of Glasgow 23rd February 1914, on the narrative, *inter alia*, that the said Corporation of the City of Glasgow had, on the 4th day of February 1914, paid into the Royal Bank of Scotland the sum of £1250 (the amount of compensation falling to the petitioner as institute of entail foresaid) pursuant to the said Lands Clauses Consolidation (Scotland) Act 1845, in name of the petitioner and the heirs of entail entitled to succeed to him in the foresaid entailed lands and estate, to be applied under the authority of the Court of Session in terms of the Act last mentioned, the petitioner and the said Farme Coal Company Limited, discharged the said Corporation of the City of Glasgow of, *inter alia*, all claims competent to them or either of them for and in respect of their right and interest as landlord and tenants respectively in and to the minerals described in said discharge as follows, viz.—[*Here followed a description of the seams of coal*]; which seams of coal before described from part of the said estate of Westthorn in the county of Lanark belonging to the petitioner as institute of entail aforesaid; and the petitioner and the said Farme Coal Company Limited further discharged the said Corporation of all claims competent to them for the loss or damage occasioned by the non-working of the seams of coal in said areas before described. That the said sum of £1250 referred to in the foresaid discharge is still lying in bank subject to the control of your Lordships and the consignation receipt is produced herewith. . . . That if the said Corporation of the City of Glasgow had not required and taken the minerals before described to be left unworked the said Virgin seam of coal would have been worked out within two years and the Ell seam within five years, both from October 1913, when the same were reserved to be left unworked. The petitioner produces herewith a certificate to that effect by the foresaid William M'Creath. The petitioner would accordingly have been absolutely entitled to the owners' rents or profits thereof, which are represented by the £1250 consigned as aforesaid. That the petitioner

desires to avail himself of the provisions of the Lands Clauses Consolidation (Scotland) Act 1845 before recited, and to obtain the authority of your Lordships to uplift and acquire in fee-simple the said sum of £1250 consigned as aforesaid together with the interest which has accrued thereon."

The respondent *averred*—"Explained that by the lease of the said seams of coal to the said Farme Coal Company, Limited, it is provided that 'should any railway company or other public body acquire any minerals hereby let for the protection of their lines or works, any sums to be paid by the said railway company or public body in respect thereof shall, less all necessary expenses, be divided equally between the landlord and the company.' In terms of this provision the said Corporation paid to the said lessees a sum of £1250 as compensation in respect of their being prevented from working the said seams of coal. 4. Admitted that by sections 67 and 68 of the said Lands Clauses Consolidation (Scotland) Act 1845 the said compensation may be applied under the authority of the Court in payment to any party becoming absolutely entitled to such money upon the petition of the party who would have been entitled to the rents and profits of the lands in respect of which the said sums were deposited. Denied that the petitioner is a person who within the meaning of said section 67 of the Lands Clauses Consolidation (Scotland) Act 1845 has become absolutely entitled to the said compensation. Denied that said sum of £1250 represents owner's rents or profits which would have been due to the petitioner if said seams of coal had been worked out. If said seams had been worked the owner would have received under said lease in respect of said working payment of a sum or sums as rents or profits bearing no relation to said sum of £1250. 5. The said sum of £1250 is a surrogatum for a portion of the lands and estate entailed by the disposition and deed of entail mentioned in the petition, and is entailed money which falls to be held for behoof of those interested in the entailed lands and estate until the heir of entail in possession becomes in consequence of a disentail absolutely entitled thereto. Further, the said seams of coal not having been worked, the petitioner is not entitled to anything in name of royalties thereon; *et separatim*, (1) there is no legal evidence that the seams of coal in question would have been worked out at the date of the petition, and (2) the said sum of £1250 does not represent the amount of the royalties which would have been due in respect of said seams of coal if the same had been worked out. The prayer of the petition should accordingly be refused."

The *certificate* of Mr M'Creath was—

"208 St Vincent Street,
Glasgow, 1*st March* 1919.

"Messrs Bannatyne, Kirkwood, France, & Coy., Writers, 145 George Street, Glasgow. *Farme.*

"Dear Sirs—With reference to the purchase from Major Farie in 1914 by the Corporation of Glasgow of the seams of Virgin and Ell coal under and adjacent to their pumping station at Westthorn, I estimated at the time that in ordinary course, had the Corporation not given notice, the coal so purchased would have been worked out in the following periods, viz.—

Virgin Seam, 2 years from October 1913.
Ell Seam, 5 years from October 1913.

From my knowledge of the workings since the date of my report in 1914, I have no hesitation in saying that that estimate was correct.—Yours faithfully, WILLM. M'CREATH."

A remit was made to Mr John Prosser, W.S., whose *report* set forth, *inter alia*—"It humbly appears to the reporter that the facts set forth in the petition have been adequately proved.... The essential question is as to the exact legal position of the sum of £1250 consigned as above mentioned:—1. Is it ordinary entailed money—capital—of which the institute and successive heirs of entail are entitled to the income, and which is applicable under the Lands Clauses Act to the capital purposes connected with the entailed estate there adverted to until disentailed? or 2. Does it occupy a special position, in view of its origin, so that the income arising from it belongs to the institute or heir of entail in possession of the estate from time to time until it is exhausted, but that the principal sum falls to be paid to the institute and successive heirs of entail, or such one or more of them as shall be in possession of the estate during the time which, according to estimate, would have been occupied in working out the minerals if this had not been prevented under the relative statutory powers? To the reporter it seems clear that the deposited money did not belong to the institute or heir who chanced to be in possession of the estate when the money fell to be deposited; and he does not think it could be held to belong entirely to the heir who happened to be heir of entail in possession on the expiry of the time which would (but for the statutory embargo) have been required for entirely working out the minerals in question. In the present case the petitioner has been institute in possession over the whole period. Hence no question arises in this case as to apportionment between successive heirs of entail. In support of the view that the deposited money in the present case is not ordinary entailed money as above specified in paragraph 1, *supra*, but is in the position specified in paragraph 2, *supra*, and thus now belongs to the petitioner, the petitioner's advisers have referred the reporter to the case of *Ruthven* v. *Hamilton's Curator Bonis*, 1881, 18 S.L.R. 724. The reporter is humbly of opinion that the case of *Ruthven* is a direct authority in favour of the present petitioner. The facts may be somewhat different, but the principle so far as the reporter can judge is the same. The decision although that of a single judge was pronounced after argument and was supported by an explanatory note. There was no reclaiming note. The reporter, however, with diffidence feels impelled to state—particularly in the special circumstances of the present petition, and there being so far, as hereinafter explained, no respondent

as to the merits of this petition—that but for the assistance derived from the case of *Ruthven* he would have regarded the deposited money as ordinary entailed money and the crave of the present petition as unwarranted. The question seems one of general importance, applicable to all deposited money paid as compensation for leaving unworked such minerals as are required by promoters to be left for the support of railways, water-works, and other works. Such minerals may often be of comparatively limited extent. But they may also be of considerable area, for example, if left to support a reservoir. If the minerals left for support were of great extent, the awarding of the principal of the deposited money or part of it to an heir of entail or to successive heirs of entail would be a matter of great difficulty. The ultimate disposal of the money would depend not on fact but upon opinion—perhaps conjecture—regarding the progress which would have been made in mineral workings during the period of possession of each heir of entail—a matter depending on a great variety of considerations, including some of an economic nature. The matter might be further complicated according as the mineral tenant paid lordships or fixed rent during the critical period or part or parts of it, and whether there were deficiencies in working in former years to be made up. If the deposited money be in the position of prospective lordships gradually accruing, questions of difficulty seem to arise as regards property tax and local rating. Moreover, in cases in which considerable areas of mineral are left unworked, the effect of leaving these may be to divert the efforts of the mineral tenant to another part of the mineral field, and not to diminish the output or the lordships on output which the heir in possession may derive. It would seem anomalous if an heir of entail were to receive in respect of minerals both (*a*) undiminished royalties during his tenure of the estate, and (*b*) the whole or part of compensation money deposited in respect of minerals not in fact worked and remaining physically part of the entailed estate. The reporter has not found that the case of *Ruthven* has been commented on in any subsequent case; and on inquiry at the office of the Bill Chamber he has not been able to learn of any subsequent case in which the principle laid down in *Ruthven's* case has been followed."

After hearing counsel the Lord Ordinary on the Bills (BLACKBURN) reported the case to the First Division.

The Lord Ordinary's *report* was as follows —"The question in this petition is whether the petitioner as heir of entail in possession of the lands of Farme and others, including the minerals under the said lands, is entitled to uplift a sum of £1250 deposited in bank by the Glasgow Corporation as compensation for minerals which they required should be left unworked under part of the surface of the entailed lands which they had acquired in connection with the water supply to the City of Glasgow. They obtained a conveyance to the surface in 1871, and in 1913 notice was given to the Corporation that the owner was prepared to work the minerals thereunder. The Corporation thereupon required that the minerals should be left unworked, and deposited the above sum as compensation for the owner's rights in the reserved minerals, all in terms of the Water-works Clauses Acts. Evidence has been produced to the satisfaction of the reporter to show that but for the exercise of their statutory power to prevent the minerals being worked the whole of them would have been won before the date when the petition was presented, and the owner's royalties or profits would have accrued to the petitioner.

"The entail is dated in 1898 subsequent to the acquisition of the surface by the Corporation, so that the minerals were under the liability of a statutory embargo against alienation at the date of the entail.

"Under somewhat similar circumstances Lord Fraser, in *Petition Ruthven*, 1881, 18 S.L.R. 724, directed the compensation money to be paid to the heir of entail in possession at the date when the reserved minerals but for the statutory embargo would have been worked out.

"It would appear, however, from the papers in the *Ruthven Petition* that the transaction between the company and the heir of entail in that case took the form of a sale, a conveyance to the minerals having been granted to the company. Under these circumstances I should have found great difficulty in arriving at the same conclusion as Lord Fraser did. The compensation money just represented the price paid for a part of the entailed estate which had been absolutely alienated, and although that part consisted of minerals these minerals remained *in situ*. I should have regarded the compensation money as a surrogatum for part of the *corpus* of the estate and subject to the fetters of the entail.

"The reporter in this petition drew my attention to the fact that no intimation of the present petition had been made to the next heirs of entail, and I ordered this to be done. Appearance has now been entered by the *curator ad litem* to the petitioner's two daughters, who objects to the prayer being granted.

"The transaction in the present case does not take the form of a sale, and it is now well settled that the statutory power to prevent minerals being worked confers on the Corporation no right of property in the minerals (*Bwllfa Steam Collieries*, 1903, A.C. 426) and does not entitle them to demand a conveyance—*Duke of Hamilton* v. *Caledonian Railway*, 1905, 7 F. 847, 42 S.L.R. 747. Founding on these cases and on certain *dicta* in the case of *Great Northern Railway Company* v. *Commissioners of Inland Revenue*, 1901, 1 Q.B. 416, it was argued for the petitioner that the exercise of their statutory power did not confer on the Corporation any right or interest whatever in the *corpus* of the entailed subjects, and that the true effect of the transaction was merely to lay a personal embargo on the owner of the minerals which prevents him from working them. I am unable to accept this construction of the statutory

transaction. It is true that in the case last referred to, which dealt with a claim by the Inland Revenue under the Stamp Act 1891 for stamp duty on the transaction between the company and the owner of the minerals, Collins, L.J., said at p. 427—'No "property" and no "estate or interest in any property" was transferred to or vested in a purchaser (see sec. 54). All that happened was that the mine owner came under a statutory obligation not to work or get a certain defined portion of coal which continued to be his own property'; and Stirling, L.J., uses language to the same effect. These dicta apparently support the petitioner's contention, but I think they must be read in connection with the question under consideration in the case, which was whether the railway company were entitled to a deed or conveyance on which stamp duty was chargeable in terms of the Stamp Act. Lord Dunedin in the case of *Duke of Hamilton* v. *Caledonian Railway*, at p. 851, quotes the dictum of Collins, L.J., as being very applicable to the question then being considered, namely, whether the company were entitled to demand a conveyance, but he does not commit himself to the extent of accepting the dictum as being of universal application. Lord M'Laren, however, indicated his opinion that the company had obtained a right of support on the minerals although the existence of this right did not necessarily entitle them to a conveyance. This also appears to have been the view of Lord Watson, who, in the case of the *Lord Provost and Magistrates of Glasgow* v. *Farie* (1888, 15 R. (H.L.) 94, 26 S.L.R. 229), refers to the Water-works and Railway Clauses Acts, and after pointing out that the owner who is forced to part with the surface of his land is not compelled to sell his minerals whilst he is not in a position to ascertain their market value, says (p. 99)—'On the other hand, those who deprive him of the right to a portion of the surface and its uses by compulsory purchase enjoy the benefit of subjacent and adjacent support to their works without payment so long as the minerals below or adjoining these works remain undisturbed, but it is upon the condition that if they desire such support to be continued they must make full compensation for value and intersectional damage whenever the minerals required for that purpose are approached in working and would in due course be wrought out.' If this is an accurate description of the statutory right of the Corporation—and it was so described by Lord Macnaghten in the case of *Eden* v. *North Eastern Railway Company*, [1907] A.C. 400, at p. 406—then it seems to me to follow that from the date when the Corporation acquired the surface they were vested in a right to burden the subjacent mineral estate with the support of their undertaking, payment for this right of support being merely postponed until its value could be accurately ascertained. Now a right of support appears to me to fall clearly within the category of a 'right or interest' in land referred to in section 9 of the Lands Clauses Consolidation Act in distinction to a right of 'property' in land or 'permanent injury' done to land, and I do not think that it is inconsistent with the existence of such a right that the holder of the right may not be in a position to demand a conveyance thereto.

"Further, it appears to me that to regard the exercise of the statutory right as merely creating a personal embargo restraining the owner of the minerals who gives notice against working them would in the case of entailed minerals lead to a result plainly not intended by the statute. I do not see how such a personal embargo could transmit against a succeeding heir of tailzie who does not represent his predecessor, and accordingly each heir as he succeeded would be entitled to serve a fresh notice of his intention to work the minerals.

"Now if the true effect of the transaction be as stated by Lord Watson, I see no reason why the compensation money paid by the Corporation should be treated otherwise than as an addition to the original price paid by them for the surface of the lands in respect that it has been ascertained that the right of support to which they have all along been entitled is more valuable than it was known to be at the date of the purchase of the surface. If this is a true conclusion, then the compensation money must be as much subject to the fetters of the entail as the price paid for the surface would have been had the lands been entailed when the surface was acquired. In other words, the petitioner is only entitled to payment thereof if he can show right thereto under the provisions of the Entail Acts.

"But in addition to his argument based upon the dicta of L.JJ. Collins and Stirling, the petitioner appeals to the method in which the amount of the compensation money is calculated as indicating that it cannot be regarded as a price paid for any right acquired by the Corporation, but it is in reality awarded to compensate personally the individual owners who but for the embargo placed upon the working of the minerals would have worked them and drawn the royalties. The basis on which the compensation is valued was finally settled by the case of *Eden* v. *North Eastern Railway Company*, [1907] A.C. 400, where the argument of the Railway Company that in spite of the embargo upon working the reserved coal both lessor and lessee drew their usual profits by working other coal in the mineral field, and that therefore the measure of their loss was the diminution in the value of the reversion caused by service of the statutory notice, was rejected. The compensation was fixed at the actual value of the coal reserved to the lessor and lessee of the minerals respectively, on the assumption that but for the embargo the coal would have been worked out immediately. Thus the value in the case of the lessor is the value of the immediate prospective royalties. There is no doubt that the judgments in the case seem to proceed on the footing that immediate payment of the compensation is to be made to the owner of the minerals who is deprived of the power of working them, and it is upon this that the petitioner founds as

indicating that the person laid under the embargo is the person entitled to the compensation money. But it must be remembered that in the case there under consideration the owner was an unrestricted owner who would be entitled to immediate payment. Lord Macnaghten refers to the case of a limited owner and says (p. 409)—'But then the only person who can give the notice may have merely a temporary or precarious interest. What is to happen in that case? And how is the compensation to be dealt with? But these difficulties are, I think, more apparent than real, and would probably disappear in practice.' The noble Lord probably had in view minerals held under restricted forms of English tenure rather than under Scotch entails, and I was referred to several English cases which illustrate how these difficulties have been met in practice, *e.g.*, *Kelland*, 1877, 6 Ch. Div. 491; *in re Barrington*, 1886, 33 Ch. Div. 523; *Robinson's Settlement*, [1891], 3 Ch 129. The decisions in these cases depend upon the construction of sections in the English Lands Clauses Act appropriate to English forms of tenure, and are therefore not of much assistance in dealing with a Scotch entail. But it appears to be accepted that in no case is the limited owner who serves the notice entitled to immediate payment of the whole of the compensation money, but in any event only to such portion of the amount as represents the value of royalties which he would have received during his life had the reserved coal been worked in ordinary course.

"Now even if I am wrong in thinking that the compensation money is to be treated in the same manner as an addition to the price paid for the surface in respect of the ascertained increased value of the right of support, I should find great difficulty in holding that the petitioner has established his right to the money under the sections of the Lands Clauses Acts upon which he founds. It may be that the terms of section 68, which provides that a petition may be presented by 'the party who would have been entitled to the rents and profits of the lands in respect of which such money shall have been deposited,' justify the application, because but for the embargo upon working he is the person who would by now have worked out the minerals and have become entitled to the royalties. But the language of section 67, which provides for the application of the money, is in very different terms. The petitioner claims under the terms of the last paragraph of section 67, which provides that the money may be applied 'in payment to any party becoming absolutely entitled thereto.' This I think clearly anticipates payment of the whole sum to one person, because no provision is made for apportionment of the sum among successive owners, which would be necessary in a case where the heir of entail who served the notice had died before the date at which the reserved minerals would in the ordinary course have been worked out. Mr J. Chitty held in *Robinson's Settlement*, [1891], 3 Ch. 129, that a tenant for life without impeachment for waste could never become the 'person absolutely entitled' to the payment of the compensation money in terms of section 69 of the English Act, because that section contained no power to apportion the compensation money between successive tenants for life. In this respect section 67, which applies to entailed owners, corresponds to section 69 of the English Act, and differs materially from the terms of section 72 of the Scotch Act, which gives the Court power to apportion the compensation money among persons who have 'any right or interest in lands less than the fee thereof,' in such manner as may be thought just. In my judgment the last paragraph of section 67 clearly contemplates in the case of entails an heir who is free from the fetters of the entail. I should have found it very difficult to hold that an heir of entail was 'absolutely entitled to' money which at the best represents royalties on coal which has never been separated from the entailed estate and remains *in situ*. In my opinion the Act did not contemplate that an heir of entail still subject to the fetters of the entail could become 'absolutely entitled' to such compensation money as has been deposited in this case, and has made no provision for its payment to such heir.

"It was stated in the course of the discussion that the decision in *Petition Ruthven* has been followed constantly in practice, and that petitions under the Lands Clauses Consolidation Act by heirs of entail for leave to uplift sums consigned in respect of reserved minerals are granted as a matter of course. I have been unable to get this statement confirmed by the Bill Chamber staff, but if, as in the present case, no intimation or service were asked on the next heirs and the petition went through unopposed, it might be difficult to trace. The only petition which has been brought to light in the Bill Chamber is *Petition Bannatyne* in 1886, when Lord Trayner, on his attention being drawn to the matter, by the reporter Mr Donald Mackenzie, W.S., insisted that the next three heirs, who did not oppose the petition, should put in a deed of consent before the prayer was granted. This seems to have been an attempt, for which there is no authority in the Lands Clauses Act, to assimilate the procedure to that under an entail petition. No reference was made in the report to Lord Fraser's decision in *Petition Ruthven*, and the two decisions are hardly consistent with each other. In this divergence of practice I think it is desirable that the question should be settled authoritatively, and I propose to report the petition to the Division."

Argued for the petitioner—The prayer of the petition should be granted. The consigned money might possibly represent part of the entailed estate, *i.e.*, as entailed money when the petitioner had only an interest in the income, or compensation to the person or persons entitled to work the minerals for being prevented from working them and so earning the profits. The latter was the correct view. It might involve questions of allocation as between successive heirs of

entail, *e.g.*, where the minerals could not be worked out in the lifetime of the heir who had given notice of working, but no such question arose in the present case in view of the letter of Mr M'Creath, and of the fact that the heir had survived the period stated therein. The Corporation of Glasgow obtained no right of property in the minerals unless they purchased them, which they had not done—Water-works Clauses Consolidation Act 1847 (10 Vict. cap. 17), section 18. They had merely paid compensation under section 22 of that Act, and questions as to the compensation money were by section 6 of that Act brought under the Lands Clauses Consolidation (Scotland) Act 1845 (8 Vict. cap. 19). Section 9 of that Act set up machinery for fixing the compensation, and for its consignation for the parties interested. The petitioner was entitled to the consigned money under sections 67 and 68 of the Act of 1845 as being a person becoming absolutely entitled to the money. The money consigned was not purchase money of any part of the lands, neither was it compensation for permanent damage, for the embargo might be removed at any time. It was simply compensation to the heir for being prevented from exercising a right which he undoubtedly had, *i.e.*, in respect of an interest in land. The fetters of the entail did not touch his right to work those minerals. Consequently there was no reason why the compensation money should be entailed for the benefit of the heirs of the entail. The sole reason for consigning the money was that the petitioner was an heir of entail who might or might not become entitled to the money. The persons who were injured were the persons who were prevented from working the coal—in this case the petitioner. The petitioner could also obtain the money under section 72 of the Act of 1845. *Ruthven* v. *Hamilton's Curator Bonis*, 1881, 18 S.L.R. 724, was rightly decided and ruled the present case. The same view had been taken in England—*In re Barrington*, 1886, 33 Ch. D. 523. *In re Robinson's Settlement Trusts*, [1891] 3 Ch. 129, was distinguished. The amount of the compensation depended on what the mineral owners if they had not been prohibited from working would have made out of the coal during the time it would have taken them to get it—*Bwllfa and Merthyr Dare Steam Collieries* (1891) *Limited* v. *Pontypridd Water-works Company*, [1903] A.C. 426. No sale of property or any interest in property was involved — *Great Northern Railway Company* v. *Commissioners of Inland Revenue*, [1901] 1 Q.B. 417, *per* A. L. Smith, M.R., at p. 427, and Stirling, L.J., at p. 429—and no conveyance could be demanded — *Duke of Hamilton's Trustees* v. *Caledonian Railway Company*, 1905, 7 F. 847, 42 S.L.R. 747. *Eden* v. *North-Eastern Railway Company*, [1907] A.C. 400, *per* Lord Macnaghten at p. 406 *et seq.*, was not an authority to the effect that the undertakers acquired a servitude right of property. Apart from the Clauses Acts an heir of entail could appropriate compensation for surface damages, and was not under any obligation to restore the surface—*Gould* v. *Gould's Trustees*, 1899, 2 F. 130, 37 S.L.R. 89. Section 26 of the Rutherfurd Act 1848 (11 and 12 Vict. cap. 36) had no application, for the Clauses Acts formed a complete and self-contained code. Rankine on Landownership, p. 986 *et seq.*, was referred to.

Argued for the respondent—The equities were in the respondent's favour, for *esto* that the petitioner was prevented from winning the minerals below the works in question, he suffered no prejudice unless (which was not averred) those minerals were the only minerals under the lands. The petitioner drew his royalties by mining elsewhere. He would get those, and if the respondent was right the interest on the consigned money also. There was no practice following on *Ruthven's* case except the case referred to by the Lord Ordinary, which did not assist the petitioner if the decree proceeded upon consents. The English practice was against the petitioner—*Robinson's* case. Section 72 did not apply, for the case fell under the plain terms of section 67. The consigned money really represented the price of a positive servitude of support which had to be implemented by not working the minerals — *Caledonian Railway Company* v. *Sprot*, 1856, 2 Macq. 449, *per* Lord Cranworth, L.C., at p. 455; *Great Western Railway Company* v. *Bennett*, 1867, 2 E. & I., App. 27, *per* Lord Chelmsford at p. 38; *Magistrates of Glasgow* v. *Fairie*, 1888, 15 R. (H.L.) 94, *per* Lord Watson at p. 99, 26 S.L.R. 229. If so, then as an heir of entail was not a singular successor, but took the estate subject to all adverse rights which had been validly made to affect the land—*Earl of Galloway* v. *Duke of Bedford*, 1902, 4 F. 851, *per* Lord Kinnear at p. 867, 39 S.L.R. 692—the petitioner held the lands subject to that servitude right which ran with the lands. The price ought also to go with the lands. The embargo affected every heir of entail who succeeded to the lands. The consigned money fell under the opening words of section 67. If not, it was a payment for permanent injury. The petitioner had failed to show that he was absolutely entitled to the money. [Lord Skerrington referred to *Ball, Petitioner*, 1850, 12 D. 913.]

The LORD PRESIDENT and LORD SKERRINGTON being absent, LORD MACKENZIE intimated that the decision of the Court was in favour of the petitioner, and that the opinions would be handed to the parties. The opinions were—

LORD PRESIDENT—I have not found the question raised by the report of the Junior Lord Ordinary here to be attended with difficulty. It appears to me to have been correctly decided by Lord Fraser, nearly forty years ago, in the case of *Ruthven* v. *Hamilton's Curator Bonis* (18 S.L.R. 724). His judgment was acquiesced in and has never since been called in question. I think it should be followed in the present instance, for in principle it seems to me to be sound. The petitioner is the institute of entail in possession of a certain estate in Lanarkshire, part of which was, anterior to the date of the entail, taken by the Corporation

of Glasgow for the purposes of their Water Acts. On the ground so taken the Corporation erected a pumping-station, but of course they did not acquire the coal and other minerals in the lands. These were reserved and were included in the entail, subject to the Lands Clauses Act and the Water-works Clauses Act. The minerals under the pumping-station were let on lease, and the field was being wrought by a coal company as tenants of the petitioner. He gave notice for himself and his mineral tenants that, pursuant to section 22 of the Water-works Clauses Act, he intended to work the coal under the pumping-station. The Corporation being apparently advised that the withdrawal of support would endanger their pumping-station gave notice under the same section that they desired the minerals to be left unworked. There is no challenge of the *bona fides* of the petitioner in giving the notice. He can only give it when the workings are approaching the protected area and he is in a position to get the minerals within it. The need for support was therefore imminent, and the petitioner, and he alone, was in a position to give support by refraining from working the minerals. The Corporation had a statutory right to secure support by preventing the petitioner from working the minerals. To this their statutory right was confined; they had no right to purchase the minerals or to work them. But as a condition of obtaining the support they require for their pumping-station they must pay to the petitioner compensation for depriving him of his right to work the minerals within the prescribed area. That compensation they have paid. It is consigned in bank and amounts to £1250. That sum I think plainly belongs to the petitioner and should be paid to him now. For it is not disputed, and is indeed the foundation of his claim, that had the Corporation not laid their embargo on the working of the minerals they would have been completely wrought out by October 1918, and the petitioner would accordingly have obtained for himself the whole rents thereof. In other words, by leaving them unworked, as he was bound to do, the petitioner lost £1250. That is, therefore, the measure of the compensation to which he is entitled. Payment of that sum will indemnify him for being prevented from working the minerals. It was, however, maintained on behalf of the *curator ad litem* that this is not the true view to take of the £1250 and that in reality it is "a surrogatum for a portion of the lands and the estate entailed by the disposition and deed of entail mentioned in the petition, and is entailed money which falls to be held for behoof of those interested in the entailed lands and estate until the heir of entail in possession becomes, in consequence of a disentail, absolutely entitled thereto." Or, as it is put by the Lord Ordinary, it was here a right of support which was bought and paid for by the Corporation, and such a right or interest is correctly described as "a right or interest in land." I am unable to accept this view. Both principle and authority seem to me to be adverse to it. It is true that the Corporation have paid for a right of support and have obtained it, but they have done so by preventing the person who had a right to do so from withdrawing support by working his coal. And the £1250 represents the loss which the petitioner has incurred by refraining from withdrawing that support to which the Corporation had a right if they paid for it. That this is the true quality of the petitioner's right is now well established. The question was thoroughly canvassed and authoritatively decided in the House of Lords judgments referred to in the Lord Ordinary's report. In the case of *Bwllfa Collieries Limited*, ([1903] A.C. 426) the true nature of the inquiry was thus described by the Lord Chancellor, adopting the words of Phillimore, J.—it is, "not what is the value of the coal field or of the coal, but what would the colliery company, if they had not been prohibited, have made out of the coal during the time it would have taken them to get it." Lord Macnaghten puts it thus at p. 431—"The undertakers acquire no property in the minerals. The property remains where it was. The mine owner is prohibited from working, and the undertakers are bound to make full compensation. That is all." And Lord Robertson says at p. 432—"The coal in question was not taken and acquired (and could not be taken and acquired) by the respondents, but on the contrary remained the property of the appellants. After the notice . . . . the appellants were disabled from working the coal. The resulting pecuniary obligation on the respondents was to pay compensation to the appellants for being thus prevented from working the coal. It follows that what is due to the appellants is not the price on a transaction of sale, but compensation for a continuing embargo on working." Similar views were expressed in the case of *Eden* ([1907] A.C. 400). If the question of the nature of the compensation money in such a case as the present ever was in any doubt, then I think that doubt has now been finally set at rest.

The procedure followed in this petition appears to me to be correct. Under the circumstances as disclosed in the proceedings, it is clear that the consigned money represents the gain which would have been made by the petitioner had he been free to work the coal under the pumping-station. Of that he has been deprived, and consequently he ought to have the consigned money.

LORD SKERRINGTON—It is impossible to form an opinion as to whether the petitioner has made out that he is "absolutely entitled" to the sum of £1250 deposited in bank by the Corporation of Glasgow in pursuance of section 22 of the Water-works Clauses Act 1847 (10 and 11 Vict. cap. 17) and section 67 of the Lands Clauses Consolidation (Scotland) Act 1845, without first ascertaining the precise legal character of that money. If there were no authority on the point one might regard such a deposit either (1) as the "purchase money" paid by the Corporation for

an "interest" in, viz.—a statutory negative servitude acquired by them over, the mineral estate subjacent and adjacent to their water-works, or (2) as compensation paid by the Corporation for "permanent damage" done by them to that estate, or (3) as compensation paid by the Corporation for an injury done by them to a person interested in that estate, whatever may be the nature or duration of such interest. Eminent judges have incidentally described a transaction of this kind as a purchase by the undertakers either of the minerals under and adjacent to their water-works or of a right to have these works supported, but it has in my opinion been authoritatively decided that a counter notice by the undertakers following upon a notice by the owner, lessee, or occupier of a mine does not operate to make a contract of sale, and that what is paid by the undertakers in pursuance of section 22 of the Water-works Clauses Act 1847 is not the price of something purchased but is compensation which they are required by sections 6, 22, and 25 of that statute to make to any person interested in the minerals whose interest, whatever may be its nature or duration, has been injuriously affected by the imposition of a general and continuing embargo against working—*Bwllfa and Merthyr Dare Steam Collieries* (1891) *Limited* v. *Pontypridd Water-works Company*, [1903] A.C. 426. The same view had been expressed by Lord Cairns, L.C., in *Smith* v. *Great Western Railway Company* (1877, 3 A.C. 165), a case depending on the corresponding sections of the Railways Clauses Consolidation Act 1845. The following passage from his opinion, p. 179, has a direct bearing upon the question which we have now to decide—"It appears to me that what is intended by the Legislature with regard to mines under a railway is this—the railway company is to be under no obligation to compensate any person until there is someone who has a right to work, and who is prepared to work, the mines. When that person gives the notice of his intention to work the mines, the directors are to come to an agreement or settlement with that person, and to come to a settlement with that person according to what his rights may be; if the rights of that person are to take away the coal, to exhaust it entirely, and if he has a tenure the length of which will enable him to take away the coal and to exhaust it entirely, the railway directors may be bound, and I should think would be bound, to compensate that person to an extent equal to the whole value of the minerals. If his right is not so great, if he cannot take away the whole, or if the extent of his tenure is not such as would enable him to take away the whole, the directors would have to compensate him to an extent less than the value of the whole."

In the case of *Bwllfa and Merthyr Dare Steam Collieries*, already cited, it was laid down that where the compensation is for any reason assessed *ex post facto*, that must be done in the light of the actual facts as they existed at the time when the minerals would have been worked but for the embargo. Accordingly if the petitioner had waited to make his claim against the undertakers until shortly before the presentation of this petition he would have been entitled to have the compensation payable to himself individually assessed in the light of the fact that he lived for five years after the date of the notices in October 1913, and that during these five years the whole of the coal therein referred to would have been worked out but for the embargo. That is sufficiently proved by the letter of Mr M'Creath, M.E., dated 1st March 1919. If the petitioner had adopted this procedure the amount of the compensation in respect of the injury to his individual interest as heir of entail in possession would *prima facie* have amounted to the sum now deposited in bank, which represents the lordships payable by the mineral tenants under their lease if they had actually worked all the coal in the area referred to in the notices. I do not think that it makes any difference that the compensation having been assessed *de futuro* in January 1914 no attempt was made to estimate the duration of the petitioner's life, but that so far as the owner's interest was concerned the valuation was made in the same way as it would have been if he had been a fee-simple proprietor, the total amount being deposited in bank to the credit of the petitioner and "of the heirs of entail entitled to succeed him in the said entailed lands and estate." The respondent alleges in his answers that the £1250 deposited in bank "does not represent the amount of the royalties which would have been due in respect of said seams of coal if the same had been worked out." By this I understand him to mean that the valuators did not really value the profit, *i.e.*, the lordships which the heirs of entail would have received from the coal in the area in question if it had been actually worked, but that acting on a provision in the lease they fixed a conventional sum, viz., one-half of the total compensation due both to the landlord and to the mineral tenants together. This allegation, if proved, might have raised a serious question if the petitioner had died within the five years, and if the succeeding heir of entail had claimed additional compensation from the Corporation. As matters stand, however, it is immaterial in my opinion whether in a question with the mineral tenants the £1250 is less or more than the owner's fair share of the total compensation.

But for the decision in the case of *Eden* v. *North-Eastern Railway* ([1907] A.C. 400) I might have had difficulty in coming to the conclusion that the petitioner necessarily became entitled in a question with the other heirs of entail to receive payment at the end of the five years of the whole amount of the lordships which he would have received if the coal in question had been worked. For all that we know the imposition of the embargo did the petitioner no harm either by diminishing the former output of the colliery or by interfering with its natural growth. His success in the present application may mean that his total income from the colliery for the five years in question will largely exceed the normal or indeed the possible royalties from the colliery in

its actual condition; and that he will thus under the guise of "compensation" receive a profit at the expense of the succeeding heirs of entail, whose mineral rental will in consequence of the embargo be brought to a premature termination. Though the decision of the House of Lords in *Eden's* case is not actually an authority in the present case, seeing that the question arises under somewhat different circumstances, the reasoning of the noble Lords seems to me to be applicable in so far as it requires the compensation to be assessed very much on the same basis as in the case of a sale, and in so far as it forbids any reference to the minerals outside the prohibited area except for the purpose of assessing such additional compensation (if any) in respect of interference with the working of these minerals as may fall to be awarded in terms of section 25 of the Act of 1847.

Sections 67 and 68 of the Lands Clauses Consolidation (Scotland) Act 1845 seem to me to be primarily machinery sections and not materially to assist the petitioner, but section 72 of the same Act appears to help him at least by analogy. I respectfully agree with the result which Lord Fraser reached by a shorter and simpler road in the case of *Ruthven* (18 S.L.R. 724).

LORD MACKENZIE concurred in Lord Skerrington's opinion.

LORD CULLEN—The claim for compensation in respect of the embargo placed on the working of the coal in question arose under the 22nd section of the Water-works Clauses Act 1847. The petitioner as heir of entail in possession had been working the adjacent coal, and gave notice of his intention to work the coal in question through his lessees. He had full power to exhaust it by working if his possession lasted long enough, and also to take the fruits as his own. The amount of the compensation payable in respect of the embargo was the value of the coal to be left unworked, less the expense which would have been incurred in working it. Out of it the petitioner, as I read the said Act and the authorities referred to, is entitled to be compensated for the injurious effect *quoad* the coal in question, regarded by itself, which the embargo has had in preventing him from effectuating his intention of working it and acquiring for himself the fruits of working. The proper mode of dealing with the petitioner's interest, had the question arisen at the period when the compensation was fixed and paid, would have presented more difficulty than arises on his present claim. For at that period, while the time required for working out the coal could be determined, the duration of the petitioner's possession as heir of entail was not ascertainable in point of fact. As matters stand, however, the petitioner's possession has outlasted the time which would have been required for working out the coal. That being so, the result of the embargo *quoad* the said coal, regarded by itself, has been to deprive the petitioner of the fruits which would have accrued to him personally from the total working out of it in pursuance of his announced intention. These fruits are represented by the consigned fund to which the petition relates. I accordingly agree with your Lordships in thinking that the petitioner has, on the facts as they stand, shown that he is, in the sense of the 67th section of the Lands Clauses Act, absolutely entitled to the said fund, and that he should obtain warrant to uplift it as craved.

The Court granted the prayer of the petition.

Counsel for the Petitioner—Brown, K.C. —Gentles. Agents—Webster, Will, & Company, W.S.

Counsel for the Respondent—Maitland. Agents—Guild & Shepherd, W.S.

Counsel for the Corporation of Glasgow—Russell. Agents—Campbell & Smith, S.S.C.

HIGH COURT OF JUSTICIARY.

Thursday, February 5.

(Before the Lord Justice-Clerk, Lord Dundas, and Lord Guthrie.)

STRATHERN *v.* M'KILLOP.

Justiciary Cases—War—Liquor Control—Spirits—Simultaneous Sale on Different Parts of Licensed Premises—The Spirits (Prices and Description) Order 1919, *Dated 30th April* 1919, *sec.* 3 (*a*).

The Spirits (Prices and Description) Order 1919, dated 30th April 1919, section 3 (*a*) provides—"A person shall not sell or offer to sell in any part of any licensed premises having a public bar, any spirits . . . unless spirits . . . are on sale by measure in the public bar of such premises."

In a restaurant which consisted of four departments, viz., a public bar, a saloon bar, and luncheon and dining rooms, on the ground and first floors respectively, the proprietor allocated between 12 a.m. and 2·30 p.m. one gallon of whisky to each department, making four gallons in all. At 12·50 on a week day two inspectors who applied for whisky at the public bar, where the authorised price was lower than what might be charged in the other parts of the restaurant, were told that no whisky was then on sale there, but on proceeding to the first floor and repeating their order they were supplied with whisky. *Held* that the proprietor had been guilty of a contravention of the Spirits (Prices and Description) Order 1919, section 3.

The Spirits (Prices and Description) Order 1919, dated 30th April 1919, section 3 (*a*), is *quoted supra in rubric.*

James M'Killop, *respondent*, was charged at the instance of John Drummond Strathern, Procurator-Fiscal, Glasgow, *appellant*, in the Sheriff Court at Glasgow, upon a summary complaint in the following terms;—