The *second* objection was, that this deed being *inter vivos*, and not *mortis causâ*, was void. That objection has already been answered.

The *third* objection was, that in substance there was an implied condition, that the succession should be in the same or in a similar state when it opened, as it was when the deed was executed. At that time it was necessary, that there should be two or more presumptive heirs female, in order to the due execution of the power, and it was contended, that there ought equally to be two or more when the succession opened, in order to give it effect. At the death of Miss Eleanora Kelso there were not three sisters surviving. The elder was dead, leaving a son, and he was heir in tail, and would be entitled at that time, as there were no heirs female, and the power, therefore, could not have been executed. I certainly have felt the same doubt upon this point which embarrassed some of the Judges of the Court of Session, and am not entirely free from it at this moment. But I think we ought to construe the words of the power according to their ordinary and grammatical sense, in obedience to the rule now, I believe, universally adopted in Westminster Hall, and to give them their full effect, unless that construction would lead to some absurdity or inconsistency with the meaning of the instrument to be collected from every part of it, and such evidence of surrounding facts as is admissible for the purpose of putting the Court in the situation of the framer of the instrument. Adopting this course, I say, that a condition which is clearly not expressed, ought not to be implied, viz., the condition that more than one female heir should exist not only at the time of the execution of the deed, but also at the time of the death of the person executing the power. According to the sound rule of construction, I think I have no right to impose such a condition. The clause in the original deed of entail is perfectly reasonable without it. It gives a present right to make a change which shall regulate future succession, (adopting the language of the Lord Justice Clerk,) and is itself a present act, final, and not dependent on the state of things at the time of the death of the grantee, save always that there is no power in the grantee to displace any heirs entitled in priority to the heirs female, for that would be to alter the succession of the other heirs of tailzie, which is expressly forbidden.

I therefore concur in advising your Lordships to affirm the judgment of the Court below; and I entirely agree with my noble and learned friend as to the effect of Lord Rutherfurd's Act.

Mr. Rolt.—As regards the costs, upon one or other of the points we raised, we had four of the five Judges in the Court below with us; and if the form had been strictly pursued, we ought, in reality, to have been respondents rather than appellants. In fact, we have assisted the respondents in getting a good title, for it can hardly be said that upon such a decision as that the title would have been a very satisfactory title without the decision of this House. I submit, therefore, that we should be free from costs.

Attorney-General.—We did not want these proceedings in order to get a good title. And as for the judgment, all the learned Judges were against the appellants, though for different reasons. You do not scan the reasons which are given for a judgment. Your Lordships will not in this manner deal with the costs of an appeal, when the decree of the Court below is affirmed.

LORD CHANCELLOR.—I think the losing party must pay the costs.

LORD WENSLEYDALE.—It must be so, I think.

Interlocutors affirmed with costs.

Appellants' Agents, Grahame, Weems, and Grahame; John Martin, W.S.—*Respondents' Agents*, Richardson, Loch, and Maclaurin; Hunter, Blair, and Cowan, W.S.

JUNE 5, 1857.

THE CALEDONIAN RAILWAY COMPANY, *Appellants*, *v.* LORD BELHAVEN and Others, Trustees of the deceased John Wilson of Dundyvan, *Respondents.*

Railway—Disposition—Reserving Mines under railway—Statute—Construction—*B., the owner of lands required by the W. Railway Company, conveyed them to the company, reserving the mines to himself, but stipulating that the company should have right to prevent him working the mines under the railway, till proper security be given for any damage that might be occasioned. The W. Co. was incorporated with the C. Co.*

HELD (reversing judgment), *That the C. Co. were entitled to prevent B. working the mines under the line, so as to endanger the surface.*[1]

---

[1] S. C. 3 Macq. Ap. 56 : 29 Sc. Jur. 380.

The Wishaw and Coltness Railway was projected in 1829, and, according to the original design, it was projected as a mineral line, to be worked by horse power or by stationary engines.

The projectors of the line, before going to parliament, obtained from a considerable number of landed proprietors leave to traverse the surface of their lands *gratis*, and, among the rest, Lord Belhaven agreed to allow the line to pass through certain portions of his estate of Wishaw without any compensation. The late Mr. Wilson of Dundyvan was his tenant of the minerals in the land, lying under and about the line of railway. In 1829 the act 10 Geo. IV. cap. 110, was passed, authorizing the construction of the Wishaw and Coltness Railway. The 14th section of the statute provided as follows :—"But provided always, that notwithstanding of anything herein contained, it shall be lawful and competent to any proprietor or proprietors whose lands are hereby authorized to be taken, to reserve and except from the bargain or sale to the said company, the whole minerals in the said lands, for and to his or her own proper use and behoof; and the said company shall have no right of property of or in such minerals which any proprietor or proprietors may desire to be reserved as aforesaid: But provided always, nevertheless, that it shall on no account be lawful to, or in the power of, any such proprietor, to work, win, or away take, any of the said minerals without giving previous good and sufficient security to the said company for all damages, interruption of traffic, and other injury which may thence in any way result to the said undertaking or the said company; and in the event of the said company and any such proprietor not agreeing in regard to the extent or sufficiency of such security, then the Judge Ordinary of the bounds shall regulate and determine thereupon as to him shall appear just."

By the 1st Vict. cap. 100, the time for completing the railway was further enlarged. And on the 10th of May 1841 the 4th Vict. cap. 11, was passed, whereby the railway company were enabled to raise a further sum of money for the purposes of the railway. By these statutes the various provisions of the original statute of incorporation were generally continued. The line was then constructed and opened, but no price was paid to Lord Belhaven, who executed a conveyance in 1842 in favour of the company. This conveyance contained 17 acres, and the mines were reserved to the disponer, agreeably to the company's act of parliament (§ 14).

The Wishaw Company was incorporated with the Caledonian R. Co., and the latter company, on receiving notice of Lord Belhaven's intention to work the mines within 40 yards of the railway, applied for an interdict to prohibit him. The Court of Session refused the interdict.

The railway company appealed, and pleaded in their *printed case*—1. The rights and obligations of parties, as fixed by the Statute 1829 and the disposition of 1842, are inconsistent with the interlocutor appealed from. According to a sound view of these rights and obligations, the appellants were entitled to be secured against all damages, interruption of traffic, and other injury to arise from the working of minerals under the lands belonging to the company, before the respondents should proceed to work, win, or away take any of the minerals; and the respondents were bound, before commencing operations on these minerals, to find caution to indemnify the appellants against the consequences of these operations. The respondents having failed in implementing this obligation, interdict should have been granted against them as craved. *Reg.* v. *Leeds and Selby R. Co.* 3 A. & E. 683; *Harris* v. *Ryding*, 5 M. & W. 60; Bell's Prin. § 965; *ibid.* § 970. 2. The original rights and obligations of parties touching the minerals under and near the line, are not affected by the statutes, special or general, passed subsequent to 1842. 3. Neither the contract, nor the rights and obligations under the contract, are rescinded or altered by reason of the increase of traffic on the line.

The respondents in their *printed case* maintained—1. That their right to work the coal and minerals was no longer regulated by the 14th section of 10 Geo. IV. c. 107, *which had been repealed*, but by the clauses relative to the "working of mines" in the Railway Clauses (Scotland) Act (1845), which forms part of the act of incorporation of the appellants, the Caledonian Railway Company, and also part of the Purchase Act (1849) amalgamating the Wishaw and Coltness Railway with the Caledonian Railway. 2. The conveyance in 1842, by which Lord Belhaven made a gift of his ground to the appellants, reserving his whole minerals, with a statutory power of working them, could not receive more extended application than the act (1829) under the terms, and in respect of which, it was granted. Besides, the conveyance was neither calculated nor intended to prevent the General Railway Act (1845) from applying to the portion of the line which was formed on the lands contained in said conveyance. 3. Even if the respondents' preceding pleas were overruled, the reserved power of working the minerals was no longer applicable to the circumstances of the case, which had been essentially altered; and as that alteration had been caused by the appellants, for their own benefit, and to the great prejudice of the respondents' power of working their reserved minerals, in terms of the said mining clause (1829), the appellants could no longer insist on enforcing the mining clause against the respondents, either by interdict or otherwise.

Sir F. Kelly Q.C., and *Rolt* Q.C., for the appellants.—The judgment of the Court below was wrong. It is well settled, that, if I have the fee of lands, and sell the surface thereof for a

specific purpose, as, for example, to construct a railway or build a house upon it, even though I reserve the minerals, I cannot work these so as to endanger the surface and defeat the purpose for which the surface was sold.—*Harris* v. *Ryding*, 5 M. & W. 60; *Humphries* v. *Brogden*, 12 Q. B. 739; *Roberts* v. *Haines*, 6 E. & B. 643. That view was confirmed last session by this House in *Sprot's* case, *ante*, p. 633; 2 Macq. Ap. 449; 28 Sc. Jur. 486, which was exactly the same as this case. There the original railway act gave power to the landowner to reserve his mines, and provided, that he should not work them without finding caution; so it was here. There the conveyance was for valuable consideration; here it was not;—but that point was immaterial. There the form of action was a declarator; here it was an interdict; but that also was immaterial. There, as here, the original railway was intended to be a mere tramroad, and it was held, that the subsequent conversion of it into a railway for locomotives did not alter the relative position of the parties. The General Railways Clauses Act did not apply to such a case, for the conveyance conclusively fixed the contract between the parties, and the subsequent statute could not, without express words, displace these relations. If it be said the landowner is injuriously affected, inasmuch as he cannot now work his mines, that should have been considered by him at first when he made his claim for compensation, or might have made it, for every kind of damage, however remote or contingent.—*R.* v. *Leeds and Selby R. Co.* 3 A. & E. 683.

Attorney-General (Bethell), and *Lord Advocate* (Moncreiff), for the respondents.—The Court below was right. The present case is not concluded by *Sprot's*. This was an application for an interdict to prevent a party doing something, until a sum of money was found for security against damage to be done. It is incompetent for any court of equity to entertain such an application. It amounts to this—that if Lord Belhaven were to give security against any damage to be done, the company will allow him to work his mines; but the company would be indictable for a misdemeanour, or some similar process, if they allowed such a thing, as it would endanger the lives of the passengers. This was not a case for an interdict at all. The original Garnkirk Railway Act, which might have authorized an interdict, is repealed. The contract founded on it, therefore, falls to the ground. The old railway company were amalgamated with the present appellants, and the General Railways Clauses Act is incorporated in the Caledonian Act, and governs the present parties. All the contracts made by the Wishaw Company were transferred to the Caledonian Company, and hence are to be treated as if originally made under the General Railways Clauses Act. Both acts cannot stand together. In *Sprot's* case everything turned on the doctrine that you cannot derogate from your own grant. Here Lord Belhaven's obligation was not to abstain from working his mines, but only to pay for any damage that may be done. Sprot's obligation was different.

Kelly, in reply, was stopped.

LORD CHANCELLOR CRANWORTH.—My Lords, I should feel extremely reluctant at any time, upon an appeal from the Court of Session in Scotland, to ask your Lordships to pronounce a decision favourable to that appeal, so far as to reverse the decision which had been given by those very learned Judges, without hearing the case fully out, even although I might have formed a very strong opinion in the progress of the argument, that the judgment of the Court below could not be sustained. And, unquestionably, I should not have taken that course in this case, were it not that I feel perfectly satisfied, that that which I am now about to ask your Lordships to do is, in truth, that which the Court of Session would itself now do, if this case were argued before it in 1857, which is substantially identical with the case that was argued in 1856. In that case, the matter having been very fully considered, the decision of this House ultimately, after great deliberation, was, that the Court of Session had come to an erroneous view as to the rights of the parties in reference to the Garnkirk Railway, which had become incorporated with the Caledonian Railway, and your Lordships gave judgment accordingly, and upon principles which, as I shall presently point out to your Lordships, must govern the present case.

The present appeal was an appeal which must have been presented long before the decision by your Lordships' House, in the last session. It has been stated at the bar, that since that decision has been pronounced it has been acted upon by the Court of Session, not only in the case itself, where, of course, the Court of Session would act upon it, but in some other cases of a similar nature. Whether that is so or not I do not know; but unless this case can be distinguished from the case in the last session which your Lordships have already decided, it must of course be governed by it. It has, however, been attempted to distinguish the two cases. Let us see what the distinction attempted to be made is.

In the case in the last session, Mr. Sprot, the proprietor of certain lands adjoining the Garnkirk Railway, which had been constructed under an act of parliament which was passed in the year 1826, had sold to that railway company in 1834 certain lands over which the railway was to run. He sold the lands to them upon the terms usual in making a railway, and he reserved to himself the right to the mines under the railway; and he reserved or retained to himself all the rights which under the 11th section of the act constituting the railway, any person reserving the mines, but selling the lands, was entitled to stipulate for, but subject to the condition, that no mines

should be worked until sufficient security had been given to the railway company for any damage which that working might occasion. Therefore, after the passing of the original act, and the conveyance of the land by Mr. Sprot, the case stood thus: The railway was in the course of construction. Mr. Sprot had conveyed to the company surface lands, which they would want for the making of the railway, reserving the right to the mines. The Garnkirk Railway, which was a small railway, was completed, and it was afterwards amalgamated with the Caledonian Railway. Mr. Sprot, after the amalgamation of this railway with the Caledonian Railway, proceeded to work the mines. It appeared to the railway company, that either from the nature of the soil, or from some other cause, the mines could not be worked without danger to the railway, and they therefore objected to Mr. Sprot working them. Some litigation or altercation took place, and eventually Mr. Sprot raised an action of declarator in the Court of Session, seeking to have it declared that he had a right to work the mines, whatever might be the consequence to the railway company, without giving them any security against the damage that might be occasioned, because, as he alleged, by the General Railway Act provisions were made enabling the owner of mines adjoining railways to work those mines, unless, subject to the stipulations of the act, the company should choose to purchase them. That question was elaborately argued, and the Lord Ordinary decided against the right of Mr. Sprot, and in favour of the company. The Court of Session, upon the case being brought before them on a reclaiming note, took a different view, and they decided that the stipulations of the contract entered into between the parties were at an end, and that Mr. Sprot had a right under the provisions of the General Act to work the mines, just as he would have had if there had been no such stipulation, and that all that regulated his right or the rights of the railway company was the General Act.

That question was very elaborately argued in your Lordships' House, and the conclusion at which your Lordships ultimately arrived was this: that from the moment Mr. Sprot had conveyed his lands to the railway company in 1834, the date of his conveyance, with the stipulations which had been referred to, the rights of the parties were these:—The company had a right to make their railway over the lands, the surface of which they had purchased; and they had a right to have in the line of the railway all the subjacent and adjacent lateral support which was necessary to keep their railway in a proper working state; and no mines could be worked until proper security had been given by the person working them for compensating any damage that might be occasioned. Those were the respective rights of the different parties in 1834. Your Lordships further came to the conclusion, that those rights were not altered by the subsequent conveyance by the smaller railway company, the Garnkirk Railway Company, under the provisions of the act of parliament, to the larger railway company, the Caledonian Railway Company; that the Caledonian Railway Company took all the rights that the Garnkirk Railway Company had acquired, but that they took no more; and that Mr. Sprot could maintain as against the Caledonian Railway Company all the rights, but no other than those, which he had as against the Garnkirk Railway Company. What was the consequence of that? The consequence was, that Mr. Sprot could not have it declared, that he was entitled to work the mines, unless he did that which was expressly and impliedly stipulated for in the contract of sale, namely, leave proper supports for the railway, and also not work the mines, until he had given sufficient security against any damage that might be occasioned.

It was agreed then, as it has been agreed now, that that was against the provisions of the General Railway Act. That question was very much considered by your Lordships, and the conclusion at which your Lordships arrived was, that the right of the company was not interfered with by the General Act. In truth, where the General Act stipulates for the right of the mineowner, it means the mineowner not subject to any previous contract which interferes with his rights. In Mr. Sprot's case there was a previous right on the part of the company to have proper support for their line of railway, and there was a right in the company to have the mines not worked at all, until proper security had been given by the party working them. Your Lordships held, that that right, which had originally existed in the Garnkirk Railway Company, was transferred to the Caledonian Railway Company, and consequently, that whatever rights were given by the General Act as to working mines under a railway, that must be taken as applying to mineowners not subject to any restriction, but that to mineowners who were subject to any restriction by previous contract, these stipulations, in point of fact, did not in terms apply, and were not intended to apply.

If this were not so, conceive to what extreme injustice the doctrine contended for by the respondent might give rise. Suppose a railway company, purchasing land from a party where there are mines underneath, chooses, for the benefit of the company, to make a stipulation in the contract of sale that none of the mines for a certain distance to the east of the line, or to the west of the line, should be worked. If there were such a contract entered into—and for entering into such a contract there might be very good reason—could it be contended, that, under the General Railway Act, which says that every mineowner may work the mines, the party entering into that contract with the railway company would be at liberty to get rid of the contract? Or suppose the contract entered into had been, that the mines should not be worked till a certain

length of time, say five or ten years after the railway had been completed, which might be a very reasonable stipulation for a railway company to make, could it be contended, that because the language of the act is, that every mineowner may work the mines, that stipulation could be got rid of? These are illustrations which occur to one at the moment, and I can conceive of 50 other stipulations of the same kind, which might be made by railway companies purchasing land with parties of whom they purchased it, and most reasonably made for the benefit of the railway company.

It seems to me now, as it did in considering the case in 1856, that it would be impossible to suppose that it could be meant, that the General Act should interfere with the contracts that had been previously entered into. There is nothing in the act of parliament to lead us to think, that it at all means that; and according to the true construction of the act, it applies only to owners of mines unfettered by anything which interferes with their general rights as owners.

That was the case of Mr. Sprot. Your Lordships there held that the Lord Ordinary was right; that, notwithstanding the provisions of the General Act, the previous conditions still continued which attached upon mines in the hands of the mineowners, viz., the express condition requiring the provisions of the 11th section of the act to be complied with before any working of the mines could take place, and the implied condition existing for the protection of the public, that proper supports should be given to the railway. That was what was decided then, and I have in vain endeavoured to find any distinction in the present case.

In this case, Lord Belhaven, the owner of the land, conveyed the land to the Wishaw and Coltness Railway Company in 1842, and the company stipulated, that they should have the right to prevent Lord Belhaven, or any other persons claiming under him, from working the mines under the railway, until proper security had been given for any damage that might be occasioned. That was an express stipulation between Lord Belhaven and the railway company. Those rights were therefore absolutely vested in the Wishaw and Coltness Railway Company, immediately after the execution by Lord Belhaven of the conveyance in 1842. Afterwards, in the year 1849, the act of parliament passed, whereby that company, with which Lord Belhaven had contracted, was incorporated with the Caledonian Railway Company. The Caledonian Railway Company thereupon became entitled to the same rights as had previously been possessed by the smaller company, the Wishaw and Coltness Railway Company, with which Lord Belhaven has contracted. Those rights, therefore, remained exactly the same, except that the parties to them were Lord Belhaven and the Caledonian Railway Company, instead of Lord Belhaven and the Wishaw and Coltness Railway Company.

It was argued, indeed, that there was found in the statute, under which the transfer took place of the Wishaw Railway to the Caledonian Railway Company, a stipulation not found in the Garnkirk Act. I doubt whether there is not, in substance, exactly the same provision in the Garnkirk Act that there is in the Wishaw Act; but whether that be so or not, I do not think it is in the slightest degree material. The stipulation is this. In the Wishaw Act it is found in the 21st section—"That so much of the acts relating to the Wishaw and Coltness Railway as is inconsistent with this act, or with the provisions of the Caledonian Railway Act (1845), and the acts therewith incorporated, as appended to this act, shall be, and the same is hereby repealed." And then it is said that this stipulation as to requiring security before working the mines is inconsistent with the act of 1849, which incorporates the act of 1845, because their powers were given to work mines without insisting upon that stipulation. My Lords, that argument is founded upon an entire fallacy. The right of the Wishaw Company, as the original contractors of the Caledonian Railway Company, as their purchasers, depends now, not upon the provisions of the act of parliament, but upon the contract entered into between the Wishaw and Coltness Railway company and Lord Belhaven in 1842. There is no doubt that the contract was entered into with reference to a prior act. Even if we take it, that that prior act is entirely removed, does that signify? The contract is entered into with reference to the state of things existing under the prior act. Under that contract so entered into, certain rights were acquired, and when it is said that the prior act is repealed, that does not repeal the contract entered into under that prior act, but the rights so acquired remain the same as they were.

Then it was argued that this was altogether inconsistent with the General Act, and the rights that the parties acquired under it. I do not see that. The stipulation which the company made to restrain Lord Belhaven from working the mines until he has given them certain security, is not at all inconsistent with the rights given to him as a landowner under the General Act. It is an additional right. Lord Belhaven is restrained by his contract from working the mines without giving certain security; but, subject to his doing that which he has contracted to do, his rights under the General Act remain untouched.

Now, I can only say that I have sought in vain to find any distinction between this case and that decided by your Lordships in the last session. It appears to me that the only distinction is, that the parties are reversed. In the other case the landowner was the party moving as plaintiff, and the railway company were the defendants. In this case it is the railway company who are moving as plaintiffs, and the landowner is the defendant; but there is no substantial distinction

between them. Even if I had doubted, which I confess I do not, the propriety of the decision which your Lordships arrived at after an elaborate argument, it is infinitely more important to the public, that your Lordships' decisions should be considered as final, and be final, than that they should always be abstractly right. Therefore, even if I had doubted the propriety of that decision, which I do not, I should have advised your Lordships to adhere to it, being unable to discover any substantial difference between the two cases.

For the reasons which I have stated, I move your Lordships that the interlocutors of the Court below be reversed, and that the case be remitted to the Court of Session, with a declaration as to the interlocutor which they ought to pronounce.

LORD WENSLEYDALE.—My Lords, I concur entirely in the motion of my noble and learned friend, and should recommend your Lordships to accede to it. I take it that the only question in this case is, whether any substantial distinction can be made between this case and the case of *The Caledonian Railway Company* v. *Sprot;* for it is, doubtless, of the utmost importance, that your Lordships should uphold the rule that decisions right in law should always be implicitly followed. According to the view I take, there is no substantial distinction whatever between this case of Lord Belhaven and the case of Sprot. The contract entered into between Sprot and the Garnkirk Railway Company was in terms, as nearly as could be, corresponding with the contract which was entered into between Lord Belhaven and the Wishaw and Coltness Railway Company. It was an agreement on his part to convey "all right, title, and interest, in and to the land, and every part thereof, to hold to the said company of proprietors, and their successors, for ever, by virtue, and to the true intent and meaning, of the foresaid acts incorporating said company:" "But declaring, that I shall have full power to take into my own hands the slopes or banks on that portion of the line betwixt the parish road and the crossing of the Cumbernauld road, at or near Stepps, for the purpose of fencing or otherwise, under such conditions always as shall not interfere with the due and regular operations of the said railway." Then it goes on to reserve to Mr. Sprot, his "heirs and successors, the whole mines and minerals, of whatsoever description, within the said lands hereby conveyed, and full power and liberty to us, or any person or persons authorized by us, to search for, work, win, and carry away the same, and to make aqueducts, levels, drains, roads, and others necessary for all or any of these purposes; but subject always to the provisions and conditions of the said acts of parliament in relation to the working of minerals, for the protection and security of the said company, and the said railway and works, and traffic thereto." That is a reference to the particular act under which the railway was made, and there is an express reservation to Mr. Sprot of the right to work the mines, subject to all the provisions and conditions of the said acts of parliament in relation to the working of minerals for the protection and security of the company.

Then, if we look to the act under which that railway was formed, we find, in the 11th sect. of it, precisely the same clause as occurs in the 14th sect. of the Wishaw Act. If we look at Lord Belhaven's contract, we find that it refers in terms to the 14th sect. It is, in truth, therefore, exactly the same as this contract, which refers by description to the section of the act, and there is no distinction whatever between the two. In that case the contract was subject to a condition on the part of the preceding owner of the land to give security against any damage which might be caused. The contracts are the same, and therefore the description must be the same as to the effect of the contracts.

It is true that this is the case of a suspension and interdict, and the other is the case of a declarator, but the point decided in the two cases is the same. In that case the pursuer states "that the said Caledonian Railway Company dispute and deny the pursuer's right to any compensation on account of these minerals, either by statute or by common law, and insist that the pursuer shall find security for any damages which the railway may sustain by working the said minerals." And then the conclusion of the declarator is, that "it ought and should be found and declared, by decree foresaid, that the defenders are not entitled to require or compel the pursuer to desist from working the said minerals, or any part thereof, without paying to the pursuer and his tenants the value of the minerals which they so require to be left unwrought, or compensating the pursuer and his tenants for the loss occasioned to him by leaving the same unwrought: And further, it ought and should be found and declared, by decree foresaid, that the *proviso* or enactment in the 11th section of the act 7 Geo. IV. c. 103, whereby it is declared that it shall not be lawful to, or in the power of, any proprietor to whom satisfaction has been made, as therein mentioned, and who has reserved his right to the minerals in the lands for which such satisfaction has been made, to work, win, or take away the said minerals, without giving previous security to the Glasgow and Garnkirk Railway Company or their successors, for damages, interruption of traffic, and other injury resulting to the said company and their said undertaking, does not in any respect apply to the minerals" of Mr. Sprot.

That was the prayer for a declarator, and the Lord Ordinary in that case decided this very point. He decided, amongst other things, "that the pursuer is not entitled to work the minerals reserved by him in his said conveyance to the Glasgow, Garnkirk, and Coatbridge Railway

Company, without, in the first instance, under and in terms of the 11th sect. of the said Statute 7 Geo. IV. c. 103, giving good and sufficient security to the defenders for all damages, interruption of traffic, and other injury which may thence in any way result to the railway in question, or to the defenders, as proprietors thereof." That was the question which the Lord Ordinary decided.

From that there was a reclaiming note to the Court of Session. The decision of the Lord Ordinary was reversed by that Court, and the judgment of the Court of Session was again reversed by your Lordships' House; and the Lord Chancellor, in pronouncing judgment, said, "as to the 11th sect. of the original act, whereby the owner of the reserved mines under the land conveyed is restrained from working at all until he has given security to the company, I see nothing in the act of 1844 to prejudice that right." Ultimately the House of Lords decided that the interlocutor of the Lord Ordinary was right, and that the decree of the Court of Session was wrong, and they reversed that decision. It appears to me that that case is exactly in point with this case. This exact point was there decided, and there is no substantial distinction which can be pointed out between the two cases. The only distinction is, that in the one case there was a declarator which declares what the law is, and in the other there is an interdict which is grounded upon that law. The law has been laid down by this House, and therefore it is impossible for us to depart from it.

I concur, therefore, in the opinion of my noble and learned friend, that the judgment of the Court below should be reversed.

Sir Fitzroy Kelly.—In this case your Lordships will perhaps follow the course adopted in *Sprot's case*, of reversing the interlocutor, with the expenses below.

Mr. Attorney-General.—That is a matter entirely for the Court below; but there are no expenses in a matter of this description. It comes again before the Court. The declarator in *Sprot's case* necessarily involved the decision of the action, and therefore the question of expenses arose; but that is not the practice in a case of suspension and interdict.

Sir Fitzroy Kelly.—My learned friend says it is not the practice in a case of suspension and interdict. We conceive, my Lord, that in this case the Caledonian Railway Company are entitled to the expenses of seeking to obtain the interdict, without which these mines would have been worked, as we contend, to the irreparable prejudice of the company.

Mr. Attorney-General.—That should be left to the Court below.

Sir Fitzroy Kelly.—It was not so in *Sprot's case;* but there my learned friend the Solicitor-General said, "Your order will begin by stating—Refuse the reclaiming note of the pursuer against the interlocutor of the Lord Ordinary, with expenses, and affirm the interlocutor of the Lord Ordinary." The expenses are given there, and I trust your Lordships will give them here.

LORD CHANCELLOR.—In *Sprot's case* we confirmed the interlocutor of the Lord Ordinary, but here it is reversed.

Mr. Attorney-General.—In *Sprot's case* you dismissed the action with expenses.

LORD CHANCELLOR.—I think before we can make any order on the subject, we must know, as a fact, whether any expenses have been paid.

Mr. Attorney-General.—No, my Lords, they have not paid any.

Sir Fitzroy Kelly.—There have been no expenses paid. All that we ask your Lordships to do, is to remit the case to the Court below, with a direction to them to do what your Lordships now say the Court below ought to have done.

LORD CHANCELLOR.—We reverse the interlocutor of the Court below, and remit the case to the Court of Session, with a declaration as to what the interlocutor ought to be, and leave them to deal with the costs as they think fit.

Sir Fitzroy Kelly.—I am quite content with that, my Lords.

Interlocutors reversed, and cause remitted, with a declaration.

Appellants' Agents, Grahame, Weems, and Grahame; and Hope and Mackay, W.S.—*Respondents' Agents*, Richardson, Loch, and Maclaurin; and Dundas and Wilson, C.S.

JUNE 11, 1857.

D. S. PEDDIE, *Appellant*, *v.* Messrs. BROWN, GORDON, and Co., *Respondents.*

Lease—Colliery—Railway—Jus Quæsitum Tertio—*B. was lessee of a colliery, the lease stipulating that where the coal was no longer workable at a profit, the lease was to be given up. During the lease B. obtained from a proposed Railway Co., a sum of £5000, for withdrawing opposition to a bill in parliament, and compensation for injury to the lease. The bill passed, and the railway was made. Afterwards B. surrendered the lease as unworkable.*