as well as of lands, but it by no means follows that all the incidents of an agricultural lease will apply to a mineral lease. Now, no case has been referred to where it has ever been held that the doctrine of sterility applies to a lease of minerals, and all the cases quoted are merely cases where the subject-matter of the lease was non-existent, or had become exhausted. Here the lease shows that the parties had provided their own remedy for what has happened, and that is, that there are periodical breaks which the tenant may take advantage of if he is so disposed.

Lord Cairns—I agree with your Lordships. This case began on the view that the tenant was induced by misrepresentation to enter into the lease, but that ground entirely broke down. Then he sought to get rid of the lease on the ground of sterility, but that doctrine is obviously inapplicable. In fact, it is not quite correct to speak of a lease of minerals; it is nothing but a sale out and out of the part of the soil occupied by the minerals, and an authority to the tenant to go on the lands and take those minerals away. This is a very different thing from the ordinary mode of the cultivation of the surface of the soil by means of crops. The doctrine of the civil law about sterility extended only to cases where the land, the subject of the lease, was non-existent; it did not apply to the operations of modern agriculture, which are spread over a large surface, and often produce profits only after a great lapse of years. There is therefore no such doctrine as the appellant relies on applicable to this case; and though the Court below relied chiefly on the ground that the parties had contracted themselves out of the law, I prefer to rest my judgment on the ground that there is no common law on which the appellant could get rid of this lease.

Affirmed, with costs.

Agents for Appellant—Lindsay & Paterson, W.S.
Agents for Respondents—Hamilton, Kinnear, & Beatson, W.S.

Tuesday, February 18.

UNION BANK *v.* M'MURRAY.

(*Ante*, vol. vii, p. 596.)

Agreement—Bankruptcy.

M. & Co. being involved in the affairs of a bankrupt firm, purchased for £45,000 certain subjects from the trustee of the firm. To enable them to do so, they borrowed this sum from the Union Bank, and, by an agreement with the Bank, £7500 of the price was to be paid into the trustee's account for behoof of the personal creditors, and the balance of £37,500, less £2500, into a separate account for behoof of the heritable creditors. Thereafter, D. & Co. agreed to purchase the property from M. & Co. for £47,000, the Bank agreeing to advance this sum to D. & Co., and to credit the sum to M. & Co. in part payment of a large debt due by them to the Bank. *Held* (affirming the judgment of the First Division), that the second agreement had not superseded the first, and that M. & Co. were still indebted to the Bank in the sum of £45,000.

Bill—Principal Debtor—Cautioner—Giving Time.

Circumstances in which *held* (affirming the judgment of the First Division) that a party to a bill was principal debtor in the obligation and not cautioner, and consequently had not been liberated by the fact that time had been given to the other debtor.

There were two questions raised in this case,—(1) Whether these agreements, executed of the same date, were all valid and subsisting deeds; and (2) Whether the defender, a party to a bill, was principal debtor, or only a cautioner.

The circumstances in which these questions arose were as follows:—The defender M'Murray had, in the year 1856, become much involved in the affairs of Messrs Cameron & Co., papermakers. That firm having had their estates sequestrated, the trustee in the sequestration set up to public sale the paper-mill at Springfield, belonging to the Company, with the moveable machinery.

The defender became purchaser at the cost of £45,000. To enable him to pay for this purchase, the pursuers, the Union Bank, agreed to advance to him this sum of £45,000, of which £7500 were to be paid into the trustee's account, as the value of the moveable machinery, for division among the personal creditors; and the balance, of £37,000, less a sum of £2500, the value of certain annuities proposed to be continued on the property, into a separate account for behoof of the heritable creditors.

All this was duly carried out, and a new transaction supervened. Messrs Durham & Sons agreed to purchase the mills from the defender at the advanced price of £47,500, besides agreeing to take on themselves the annuities, estimated at £2500 more,—making in whole a profit to the defender of £5000. The Bank agreed to advance this sum of £47,500 as a loan to Messrs Durham, who were to make repayment by instalments. The sum so advanced was to be credited by the Bank to the defender in part payment of a large debt owing by him in connection with the affairs of Cameron & Co., being a debt wholly separate from that incurred by him in connection with his purchase of the property. This was accordingly done. The defender had this sum of £47,500 put to his credit in the books of the Bank, and a corresponding amount of his liabilities wiped out. The Bank took Messrs Durham as their exclusive debtors in this sum, except for a portion of it amounting to £5000, for which they agreed to take their bill endorsed by the defender, and ultimately took the joint-promissory-note of both. The three agreements concerning (1) the purchase of Springfield by the defender; (2) the resale to Durham; and (3) the arrangement for the settlement of the defender's obligation in connection with Cameron's affairs were executed on the same day, viz., on 11th November 1856; and it was in reference to them that the first question in the case arose.

The second question arose as to the balance of the bill of £5000, granted as above narrated. On this the defender pleaded that he was simply cautioner for Messrs Durham, with the fact of his being so fully known to the Bank; and that the Bank having given time to Messrs Durham for payment of this bill without his (the defender's) consent, had thereby liberated him from his obligation.

The Lord Ordinary found that the three agreements were valid and subsisting deeds, and that

the first was not superseded by the other two; and as to the bill, he sustained the plea of the defender above stated.

The defender reclaimed, and the First Division adhered to the first part of the Lord Ordinary's judgment, but reversed as to the bill.

The defender appealed.

For the appellant, the Attorney-General contended that agreement No. 1 was superseded by No. 3, and that the agreements must be construed not by themselves, but in the light of the banking transactions between the parties, and particularly of certain minutes of the directors of the bank which really led to them. After a lengthy examination of the accounts and correspondence, he proceeded to the other and minor point of the case—viz., whether a promissory note for £5000, granted jointly by the appellant with Messrs Durham & Sons, was still due to a limited extent with interest. His contention was that the appellant was merely a cautioner for the principal debtor to the promissory note, and was liberated by the respondents having given time to the Durhams, the principal debtors. He admitted that this sum was included in the account docquetted in July 1862, and the circumstance that this docquetted account was so far accepted by the appellant, or at all events not at once repudiated by him, operated against him in regard to both branches of the case, but the circumstances as explained were exceptional, and it must not be held as conclusive.

For the respondent, the Dean of Faculty maintained the entire validity of all three agreements, and directed the attention of the House to the whole course of the transactions from first to last, as showing the meaning and intention of parties to be in harmony with the only true reading of these regular and formal deeds. Moreover, accounts framed upon the same principle upon which the present claim rests were regularly rendered to the appellant, and payments received and credited on that footing. Such accounts were rendered in 1858 and 1859, and then in 1862 there was the formal general account of the appellant's liabilities shown to him, adjusted with him, docquetted by him as approved, and afterwards sent to him with a formal letter.

On the second branch of the case the Dean of Faculty contended that not only must the document be read by itself as making the appellant clearly a principal and not surety, but the agreement under which it was granted showed that it was really M'Murray who got the benefit of the sum contained in it, which, in fact, represented the amount of profit obtained by him on the re-sale of Springfield to the Durhams. Any leniency shown or time given to the obligant Durham was given, as the correspondence showed, with the knowledge and consent of the appellant.

Lord Chelmsford, in moving judgment, remarked that the case was perfectly clear, and might have been brought easily within a very small compass. His Lordship had no doubt whatever that the agreements 1, 2, and 3 were fully distinct and separate from and independent of each other. They bore to be so in their headings, in their substance, and in their objects. No. 1 had to do simply with the purchase of Springfield by the appellant; No. 2 simply with the re-sale to Durham; and No. 3 with the arrangements for the settlement of the appellant's obligations in connection with Cameron's affairs. In order to come to any other conclusion you must hold that the parties to these agreements, which *ex facie* stated the contrary, deliberately entered into them all on one day, with the intention and object that the one should nullify and supersede the other. And how had the appellant dealt with his liabilities since the date of these agreements? Accounts were regularly rendered to him all framed on the footing that the agreements were distinct and separate. No objection ever taken; there was some occasional grumbling—as Counsel remarked, not an uncommon thing when a creditor presses for payment of a debt—but no specific repudiation; and in 1862 a general account was settled, adjusted, and docquetted as approved and signed with the appellant's own hand. On the second question, he (Lord Chelmsford) had just as little hesitation. The appellant was clearly and unmistakeably a principal in the promissory-note for £5000, and not a surety, and the sum contained in it was actually applied to his benefit by being placed to his credit in account with the bank, his debt to that extent being wiped off.

Lord Colonsay thought it unnecessary to add much to what had fallen from his noble and learned friend. The case involved no general principle, but a mere examination of the transactions between the parties. The three agreements were quite distinct, and the idea of the one being intended to merge in the other was an entire misapprehension. On the second question, he was equally clear that the judgment appealed against should be confirmed.

Lord Cairns also concurred. The amount of irrelevant matter introduced tended to produce confusion, but when the accounts were looked into it appeared that perfect justice had been done to the appellant. The contest on the second branch seemed still more hopeless. It was M'Murray, and not Durham, who had the benefit of the £5000, and beyond all doubt he was a principal and not a surety, although he had a claim against Durham as vendor against purchaser.

The appeal was dismissed with costs.

Counsel for the Appellants—The Attorney-General and Mr Bagshot. Agents—A. & A. Campbell, W.S., and Messrs Bevan & Whitting.

Counsel for Respondent—The Dean of Faculty, Q.C., Mr Anderson Q.C., Sir John Karslake, Q.C., and Mr John Marshall, Agents—Messrs Bell & M'Lean, W.S. and Messrs Murray & Hutchins.

Monday, March 10.

HENDERSON & DIMMACK (MINERAL TENANTS) AND COLONEL BUCHANAN (MINERAL OWNER) *v.* ANDREW (FEUAR OF BUILDING GROUND).

(*Ante*, vol. viii, p. 376.)

Superior and Vassal—Feu-Contract—Construction—Minerals.

A superior bound his vassal by feu-contract to build and maintain in all time thereafter a house of a particular description, and also