the first was not superseded by the other two; and as to the bill, he sustained the plea of the defender above stated.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For the appellant, the Attorney-General contended that agreement No. 1 was superseded by No. 3, and that the agreements must be construed not by themselves, but in the light of the banking transactions between the parties, and particularly of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

reserved the minerals to himself, with full power to work, win, and away carry the same at pleasure, "and that free of all or any damage which may be thereby occasioned to the said second party or his foresaids." *Held* (reversing a decision of the Second Division of the Court of Session) that the superior was entitled to conduct the workings in such a way as to exhaust the coal and leave no support to the surface.

This was an appeal from a decision of the Second Division. Mr Andrew was the owner of a house in Coatbridge, which he had bought in 1865 from one Porteous, who had built it. The feu-contract between Porteous and Mr Buchanan, the superior, contained an obligation on the feuar to build a house of a certain size and style on the piece of ground feued, and the superior expressly reserved to himself power to work the minerals under the feu. The words in the contract were, "Reserving always to the said superior the whole coal, &c., with full power to work, win, and away carry the same at pleasure. And it is expressly agreed that the said superior shall not be liable for any damage that may happen to the said piece of ground or buildings thereon, by or through the working of the coal in or under the same, or in the neighbourhood thereof, by long wall working or otherwise." The lessees of the Drumpelier coal-fields were working the mine near the feu of Mr Andrew, and there was a well-founded apprehension that the house would shortly be destroyed by the subsidence that would follow when all the coal was worked out, as the lessees were in course of doing. Mr Andrew accordingly applied for an interdict, which he obtained, three of the Judges construing the feu-contract so as to protect him against the working of the coal within 100 yards of his house, while the Lord Justice-Clerk dissented, holding that the feuar had taken the risk of subsidence on himself.

The LORD ADVOCATE appeared for the appellants, and Sir RICHARD BAGGALEY for the respondent.

At advising—

LORD CHANCELLOR—My Lords, in this case the pursuer, (who is the respondent here,) is the feuar of certain land at Coatbridge in Scotland, under one of the defenders, (who is the appellant here,) who is the superior and the owner of the subjacent minerals. The Second Division of the Court of Session have pronounced an interlocutor, from which Lord Justice-Clerk MONCREIFF dissented, interdicting the appellant and his lessees from removing or working a particular seam of coal, called the Kiltongue seam, under the feued land in question at any point or points underlying the surface within 100 yards of any part of the respondent's dwelling-house, erected upon that ground. The ground, as I understand it, of the interlocutor thus pronounced, from which, as I have said, the Lord Justice-Clerk dissented, was, that in the judgment of the Court any working within the prohibited distance would be dangerous to, and would probably destroy, a dwelling-house belonging to the pursuer, which under certain covenants in the feu-contract he had erected upon the land in question; and that the mine owner was not at liberty, under the terms of the feu-contract, or having regard to its proper legal effect, to work the mines in any way which would, at least by the operation of causes which could be foreseen and guarded against, be likely to produce the effect of letting down or injuring the buildings upon the surface of the land.

Now my Lords, with respect to the law, I apprehend that there is no difference between the law of England and law of Scotland in this respect. There is no doubt that, generally speaking, when a man grants the surface of land, retaining the minerals, he is guilty of a tortuous act if he so uses his own right to obtain the minerals as to injure the surface or the things upon it, and he would be answerable in damages for doing so. And as the act would be wrong, and as he would be answerable in damages for it, and as prevention in such a case is a better remedy than any damages, the Court would be justified in granting, and probably would be called upon to grant, an interdict to prevent him from doing so. And if this were an ordinary case of that character, assuming that the evidence justified, as I think probably it might be found to justify, the particular limits of prohibition, the interdict would undoubtedly be right. But, on the other hand, I apprehend it is the clear law of England, and also of Scotland, that when two persons meet and contract together and settle together the terms of a contract for the purchase, or sale, or letting of a property, they are at liberty to enter into such terms as they may think fit, provided always of course that they do not agree to do anything contrary to the public law of the land; and if the owner of surface lands, in buying those surface lands from the person who was previously the owner of the soil, is willing to take the risk of any injury which may be done and any damage which be sustained by the working of the subjacent minerals, and contracts accordingly, it is perfectly lawful for him to do so. Nor, as I apprehend, can any Court hold such a contract to be unreasonable, for that would be to make the Court, instead of the parties, the judge of what it is reasonable or not for them to do with their own. It is to be presumed, if such a contract is made, that the risk is taken into account in settling the terms of the entire bargain between the parties. If it is considered to be a serious risk, it is to be presumed that the feuar or the purchaser gives less for the surface than he otherwise might have been willing to give. If it is not a serious risk, it will not have the same influence upon the price and the terms; but still it is a risk which he contracts to undertake—the whole contract being voluntary and for valuable consideration between both the parties, and the person who was previously the owner of the entirety of the land being under no antecedent obligation whatever to part with any portion which was previously his own except upon such terms as are mutually agreed upon.

In such a case, therefore, everything depends upon the construction of the contract, and the whole question between the parties resolves itself into a mere pure and simple question of construction. No doubt upon doubtful words in this or in any other contract there may be grounds for saying, that of two open constructions that which is the more consistent with the general scheme of the whole instrument, or the more apparently reasonable under all the circumstances of the case, is to be preferred. But no views of a conjectural kind as to what is or what is not reasonable can be admitted if the construction of the contract is plain and free from any real ambiguity.

With respect to the state of the property, as I collect from the evidence of both parties to this

contract, which we are called upon to construe, all that is material appears to be this—It was in a populous neighbourhood, or, at all events, in a neighbourhood in many parts of which there were inhabited dwellings; and, on the other hand, there were various seams of coal under it, of which the two upper seams had been already worked out upon what was described in the evidence as the old stoop and room system of working, which seems to be a system of working which leaves thin and not very permanent walls to support the surface, the entire coal being taken out with the exception only of those thin walls or supports which remain, those supports being under possible circumstances liable to decay and to give way without the use of any means to remove them, and being still more liable, indeed certain, to fall in and break down, thereby letting down the surface, if any seams lying either immediately below or in the neighbourhood of them should be to any material extent worked. That was the condition of the two upper seams, and there was below them a lower seam called the Kiltongue seam, which may or may not have been partially worked before the date of the lease of this particular property, but which appears to have been a seam of considerable value and thickness, and which, if it had been at that time worked at all, had been worked upon what is called the modern or the improved stoop and room system. The nature of that system is this—that more important and solid pillars are left as the coal is worked out, but when the coal has been taken out from the excavated spaces called rooms, then the mine owner comes back, and by degrees works out the whole of the pillars which had been left, so that, if no regard is to be paid to the support of the surface above, the effect will ultimately be that the entirety of the coal will be removed.

I may mention that the same effect would be produced if another known system, called the long wall system, were adopted, according to which no supports are left at all in the course of the working, except such as may arise from the accidental accumulation of rubbish in the spaces from which coal has been taken out, and which rubbish, at all events under the circumstances of the mine, if left, would not be sufficient to prevent an extensive subsidence of sufficient importance to cause the injury which the interdict granted in this case would obviate.

Now, that being the state of the mine under the property, the parties meet together, and the owner of the land severs the surface from the mine, and sells it to the pursuer upon the terms which are expressed in the feu-contract before us.

I will first consider what is the effect of the portion of the feu-contract which expressly refers to the particular subject, and then, whether there be any legitimate inference, consistent with sound principles of construction, to be drawn from any other portion of the contract, so as to vary the interpretation which we should otherwise have arrived at.

After the usual terms of "feu," these words follow at page 155—"Reserving always to the said first party, and his heirs and successors whomsoever, the whole coal, fossils, fire-clay, ironstone, limestone, freestone, and all other metals and minerals in the said piece of ground, with full power to work, win, and away carry the same at pleasure, as also to remove as much stone and other matter as may be necessary for the proper working of the said coal, ironstone, and others, and that free of all or any damage which may be thereby occasioned to the said second party and his foresaids."

I pause there, my Lords, for a moment, and will consider, first, what the effect of those words by themselves might be if the last clause which I have read—"and that free of all or any damage which may be thereby occasioned to the said second party and his foresaids"—had not been contained in the instrument. Without those words it would have been a mere reservation of the minerals, with full power to work, win, and away carry the same at pleasure, and also to remove as much stone and other matter as might be necessary for the proper working of the minerals. The effect of such a reservation, standing alone, according to the law of both countries, would have been this—the whole property in the mineral strata would have been reserved to, and would have remained in, the previous owner, and he would have had an unlimited power of dealing with that as his own in the way of working, but he would have been subject to the general restriction which every owner of property is under, expressed in the maxim *Sic utere tuo ut alienum ne lædat.* When one man's property stands in such a position to another man's that by certain modes of using it he might destroy the property of the other, his own rightful use over his own property is limited by the obligation which he is under not to destroy the property of his neighbour. Therefore, although he would have been at liberty to take away, if he could do so without injuring his neighbour, everything reserved to him, yet he was not at liberty in taking it away to injure his neighbour. Consequently, the interdict which has been granted would have been right and proper had the matter rested there.

But then come in the words "and that free of all or any damage which may be thereby occasioned to the said second party and his foresaids." Now, those words, even if they had stood alone, might, perhaps, have made a very important difference in the case, because your Lordships will see that the only thing which had been reserved was the whole minerals—the power to work was the power to work the same, that is, the whole minerals; and when it is superadded that that may be done "free of all or any damage which may be thereby occasioned,"—these words being put in for some purpose—it is very difficult to understand what they can mean, except this, that to the full extent of that which is reserved the working may take place, though it occasions damage, and that he is not to be responsible for damage.

However, it is not necessary to dwell further upon that clause, standing alone, because the parties appear to have been anxious to make their meaning more clear than it would have been had the contract rested there; and they go on to state their express intention in these words—"It is expressly agreed that the said first party and his foresaids shall not be liable for any damage that may happen to the said piece of ground, buildings thereon, or existing hereafter thereon, by or through the working of the coal, fire-clay, ironstone, freestone, or other metals or minerals in or under the same, or in the neighbourhood thereof, by longwall workings or otherwise, or (another kind of damage) which may arise from or through the setting or crushing of any coal waste, or other excavation presently existing, or which may exist hereafter, within or in the neighbourhood of the

ground hereby disponed, through the said first party or his foresaids working or draining the said metals or minerals, or others, as aforesaid." Your Lordships will see that this express agreement to exclude claims for damage is not confined to some particular description of damage, but that it extends to any damage—the words being, "and shall not be liable for any damage."

And, secondly, it particularly takes notice of the buildings, and of the liability of those buildings to damages through the workings; and it says that the superior shall not be liable for any damage which may happen to any buildings then upon the property, or afterwards to be there. The importance of that reference to buildings will be seen presently, when we come to refer to the latter part of the deed, which relates to that particular subject. Thirdly, it takes notice of the modes of working by which such damage may happen, and puts foremost "long-wall workings,"—which is a remarkable thing, because that was not the mode of working actually in use, or which ever had been in use there, and it was a mode of working which would completely extract, if it were followed, the whole of the coal without leaving any supports whatever, except, as I have said, such limited supports as might arise by rubbish left in the mine, and which, according to the evidence relating to this mine, would have been clearly insufficient to prevent damage by subsidence.

I ought further to remark, that it notices the two kinds of damage,—the one a direct kind of damage, by the working of the seams remaining to be worked; and the other—what I may describe as indirect damage—by the subsiding of the wastes in the two seams already worked, in consequence of those excavations. It deals with the damage arising from the loss of collateral support, occasioned by workings in the neighbourhood, as well as with the damage arising from the loss of support, occasioned by workings immediately under the surface in question. Can anything possibly be more clear than that the intention of the parties on both sides was that the landlord was to have the unrestrained right of taking out the whole and every part of the reserved minerals, the whole risk of any damage being undertaken under the contract by the feuar?

It has been suggested that the exclusion of damage may not exclude the right to an interdict. But, my Lords, I apprehend that a right to an interdict is founded only upon this, that the act is already ascertained to be injurious and wrongful. Every act which is injurious and wrongful is an act for which there must be a liability to damage; and it is only therefore because it is such an act as would carry with it a liability to damage that the better remedy of interdict can be applied. The moment the damage is renounced it becomes a *damnum sine injuriâ*, and to a *damnum sine injuriâ* neither interdict nor action for damages applies. Therefore it appears to me to be as clear as possible, upon the application of any ordinary principles of construction to this clause, that the intention of the parties was upon the one side to renounce, and on the other to save themselves from any liability whatever to damage that might occur from getting out the entire of the minerals.

But it is said that this construction may be limited by assuming a proper mode of working, and to that, if the word "proper" is rightly understood, I entirely agree; and I observe that no controversy is raised upon that subject in the appellant's printed papers. The landlord in entering into this contract only contracts for power to work and get the coal, and to be exonerated from any damage which may arise through the working of the coal. The very words, "proper working," occur incidentally in one place, although not in the principal clauses in this part of the contract; but that only means that if he does that which is not needful or proper to the getting of the coal, and if the act so done—not being needful or proper for the getting of the coal—leads to the subsidence of the surface, it is an act not within the scope or intention of this contract, and therefore the landlord is not protected by this clause in such a case. To let down the surface is not the thing which he contracts for—he contracts for power to work his reserved coal, and he is not to be answerable for damage by subsidence arising in that way. Wanton, reckless, or improper working, therefore, is a thing which is not in the view of either of the parties. If this working, which is prohibited by the interlocutor, were wanton, reckless, or improper, doubtless there is nothing here which would prevent its being interdicted. But is it so?

The question is, what is the meaning of "proper working" for the purpose of the application of that principle? I apprehend such working as is right and proper for the purpose of getting out the minerals in the ordinary and proper course of mineral working—such a mode of working as would be proper between a landlord and a mineral tenant if the landlord had let the mine to the mineral tenant with an express declaration that he was not to be answerable for any surface damage in a case in which there were no buildings, and the whole surface was also let to the mineral tenant himself. The word "proper," so used, has reference only to the subterraneous working—the mineral working—it has nothing whatever to do with the maintenance of the surface. The obligation to maintain the surface is independent of the right of working where it exists; and however proper the mode of working might be, if it let the surface down—and that was a thing which the mineral owner was not at liberty to do—the mineral owner would be answerable in damages for so doing. Of course there is a very intelligible sense of the term "proper working," which refers, where it exists to the upholding of the surface, but that, I apprehend, is not the sense in which it could be introduced into a contract which expressly stipulates that the mineral owner shall be exonerated from damage arising either to the surface or to the buildings upon it.

So far, my Lords, I have to observe that the construction which I am advising your Lordships to place upon this contract is exactly the same as that placed by Lord Hatherley, when Vice-Chancellor, upon a contract in this respect precisely similar in its substance, in the case of *Williams* v. *Bagnal*. His Lordship there had to deal with arguments very similar to those which have been suggested in this case: and when it was said that you could possibly suggest some description of damage which might be provided against, short of subsidence by ordinary workings, he said that that was not consistent with the language of the contract, which said that the party was not to be liable for any damage. He said, also, with regard to the suggestion of working so as to uphold the surface, that to introduce such a limitation would simply

be to defeat the whole object of those stipulations. And I cannot but observe that the suggestion which has been made—that this may be limited to such damage as, through causes incapable of being reasonably foreseen or provided against, might happen to the surface or to the buildings thereon, either from the working or from the subsidence of other excavations, whatever care might be taken to keep up the surface and to work the minerals so as to maintain the surface, and notwithstanding that the parties proceeded in view of that obligation to work in that manner—that suggestion really appears most unreasonable, for, in the first place, the parties, if that had been their meaning, might have expressed it, and would have expressed it, in appropriate terms, utterly unlike the terms which we find here. The very suggestion of such a limitation also suggests the manner in which it could have been and ought to have been expressed, if it was intended. But, secondly, the thing is so remote and so improbable—it so reduces the stipulations practically to a mere nullity as to make it quite unreasonable to suppose that that can be what the parties meant.

Then, I say, if we rest on this portion of the contract, there really is no ambiguity and no uncertainty. The feuar has deliberately taken upon himself this risk, and this interdict imposes upon the landlord an obligation which it was the express object of the contract to relieve him from.

I assume in the respondent's favour that the effect of the interdict is not to take away the whole right of working any part of the reserved minerals. The evidence is a little obscure upon that subject, but still it has been contended, and perhaps rightly, that after the date of this feu-contract some portions of the coal were removed by the old stoop and room system, leaving the stoops standing; and the whole question is now as to the right of taking those stoops away. Taking that to be so, of course the argument would reduce the entire reservation of all these powers to an absolute nullity. But in all other respects the view which I have submitted to your Lordships as to the effect of the contract remains the same.

But then it is said that cannot be the meaning of the contract, because we find in the later portions of it what did not exist in the case of *Williams* v. *Bagnal*, or in any other case, namely, an express stipulation that the feuar is to build a dwelling-house or a building of a certain description and value, to be worth three times the feu-duty, which is £5 a-year, and to maintain and keep that house in repair upon the property, the building being erected according to a plan rather elaborately defined, the whole of that stipulation being an onerous and obligatory stipulation so far as relates to the feuar. It is said, How can it be possible that you can construe this contract so as at once to impose upon the feuar the obligation of putting a building upon this land, and maintaining it there, and at the same time so as to say that he is not to receive compensation, or is not to have a right to any damage if the superior proceeds to do in the course of his mineral working that which will destroy that building, and which may afterwards, on its being reinstated, destroy it more than once? To those who have not before them the materials upon which these parties determined for themselves what it was for their mutual interests to agree to, it may seem that this was perhaps an improvident contract. But what I am at a loss to understand is, when the feuar does contract to build and repair—whatever may be supposed to be the legal effect of that obligation to repair (that may be a question)—how that fact can alter the construction of the previous words, which expressly relate to the right of the mineral owner to work the minerals, and contain an express stipulation that he shall be exonerated from all liability for damage arising from subsidence to any buildings that may hereafter be erected upon the property in consequence of such working. One thing is quite plain, that although the feuar agreed with the superior to erect buildings, both parties did contemplate that the buildings so erected might be damaged or destroyed by the mining operations of the superior, in respect of which he was not to be responsible, and for which he was not to make compensation. Buildings being expressly in contemplation, it seems to me that that is quite enough, whether it be that he contracts to build them himself, or whether it be that he is at liberty to do it by contracting with another party. In *Williams* v. *Bagnal* it is clear that the land was sold as building land, and that buildings were in contemplation—they were buildings, I think, of rather a more valuable kind than those which are in view here—namely, ironworks and machinery. But in that case the Vice-Chancellor did not think that that circumstance prevented the parties from being capable of contracting that the whole risk of any damage by subsidence should be with the owner of the buildings, whatever were his obligations in respect of them, and that the mineral owner should have as free and unfettered a right to work out the whole of his minerals, without being liable for any damage whatever, as he would have had if he had not granted the surface to any other person.

This, then, is the agreement which the parties have made, and in the latter portion of it there is not a single word which has a legitimate bearing upon the construction of the words which are to be found in the earlier clause which I have referred to; and therefore the interdict which has been granted is in truth an interdict relieving the feuar from his contract, without any action of reduction, or any cause that I can perceive why he should be so relieved. Therefore, my Lords, the motion that I shall make to the House is, that these interlocutors be reversed, and that the appellant be assoilzied from the conclusions of the action.

Lord Chelmsford—My Lords, The question upon this appeal turns entirely upon the construction of the feu contract, by which a piece of ground, of which the respondent is now the proprietor, was feued by Mr Buchanan with a reservation of the minerals within it.

Mr Buchanan is the proprietor of the estate of Drumpeller, and of the coal and minerals therein. In 1847 he let the coal under part of the lands to Mr Wilson of Dundyran, by whom, and afterwards by his testamentary trustees, it was worked; and at the expiration of this lease the coal remaining unworked was let to the appellants, Henderson and Dimmack.

The lease binds the tenants to work the coal in a regular, systematic, and proper manner. The piece of ground, of which the respondent is the owner, lies within the coalfield in the lands of Drumpeller.

Before the date of the feu-contract in 1859 a new mode of conducting the mining operations,

called stoop and room, had been introduced. The former method of stoop and room was to leave permanent pillars; but under the modern system the coal is completely excavated and removed; the mode of working being to leave large pillars in the forward working from the place where the operations begin and then to work back and remove all the pillars which had previously been left standing.

The evidence shows that at the time of the feu contract Wilson's Trustees had been working forward on the modern stoop and room system, leaving stoops or pillars for back working. They had taken out some of the stoops which they had thus left, and Henderson and Dimmack, when they succeeded, proceeded to remove the remaining stoops, beginning at the place where Wilson's Trustees left off. There can be no doubt that, although the workings had not arrived at the piece of ground of the respondent, they had approached sufficiently near to occasion damage to the house which had been built upon it. The respondent thereupon petitioned the Sheriff for an interdict to restrain Mr Buchanan and his tenants, Henderson and Dimmack, from working and removing the coal so far as the same might be necessary to be left unwrought for the safety and support of his ground and buildings. The case was advocated to the Court of Session by the present appellants, and after proceedings before the Lord Ordinary, he by his interlocutor interdicted the advocators from removing or working the coal at any point within 100 yards of any part of the respondent's piece of ground. This judgment was reclaimed to the Court of Session; and the Judges adhered to the interlocutor, subject to the alteration that they limited the interdict to working the coal within 100 yards of the respondent's dwelling-house, instead of to within 100 yards of the piece of ground.

The question upon appeal from these interlocutors turns (as I have already said) on the construction of the feu-contract between Mr Buchanan and Porteous, and more especially upon the clause of reservation of the minerals contained in it. By the feu-contract, which is dated in March 1859, Mr Buchanan sold and disposed to James Porteous and his heirs a piece of ground containing 1 rood 18 poles and 2 yards, and thereby the feuar bound and obliged himself to build a dwelling-house which should yield a rent equal to triple of the feu-duty (being £5), and to maintain and uphold the building in a proper and sufficient state of repair, so as always to yield such yearly rent, and of an equally good style of architecture, in all time thereafter. Very minute provisions are made in the feu-contract as to the character and description of the house to be built, and the feuar is thereby bound to bear one-half of the expense of keeping up and maintaining streets to be formed at the expense of the superior, ten feet of which streets were included in the contents of the ground feued; and the feuar also bound himself to make and keep in repair a footpath, and to contribute to the expense of the main sewers. The reservation of the minerals is in the most general and comprehensive terms. They have been read by my noble and learned friend, and therefore I will not trouble your Lordships by reading them again.

It is admitted that if the reservation is to be construed according to the ordinary meaning of language, there can be no restraint upon the right of the mineral proprietor to remove every particle of the coal under the piece of ground feued, though the inevitable consequence must be the total destruction of the respondent's dwelling-house. But it is contended by the respondent that the object of the feu-contract being to have a dwelling-house of a particular description built and maintained, the generality of the words of the reservation is to be restrained by reference to this object, and that the only proper working of the coal must be intended to be such as shall consist with an upholding of the surface and building.

This construction is maintained by the Judges who decided the case in the respondent's favour, on the assumption that the feuar would never have entered into a contract obliging him to build and maintain a house which at any time might be destroyed by the exercise of rights belonging to the person who imposed the obligation upon him. Lord Cowan puts this very strongly. He says—"Suppose it had been in express words stated that the superior and his mineral tenants were to have full power at their pleasure to put the pursuer's property into this certain peril, and it were asked whether the feuar would have entertained such an unreasonable and disastrous proposal? He certainly never would." But, with great submission, this appears to me to be determining what has been done by a conjecture of what was likely to have been done. And, then, in even stronger language, Lord Cowan says—"It appears to me that to enable the advocators to maintain their construction, the clause behoved to have in express terms provided that the feuar was to submit to have his property destroyed without redress, should the superior or his mineral tenants resort to the modern system of stoop and room working." It is difficult to see in what more precise language the feuar could have submitted to this contingency than by agreeing to a reservation by which the whole of the coal is reserved to the proprietor, with full power to work, win, and away carry the same (*i.e.* the whole of the coal) at pleasure, it being expressly agreed that he shall not be liable for any damage that may happen to the piece of ground and buildings thereon by or through such working. Lord Cowan, in the passage which I have read, seems to consider that the destruction of the property will be the necessary consequence of resorting (as he calls it) to the modern system of stoop and room working. But this system seems to have superseded the former one (of course in cases only where there was no obligation to uphold the surface) at the time of the feu-contract. Porteous, when he became the owner of the piece of ground, and the respondent at the date of the disposition from him, must be taken to have made themselves acquainted with the nature of the underground operations, and to have entered into their contracts with reference to them, and the modern system of stoop and room working was not resorted to after the feu-contract, but was the mode of working in use at the time by Wilson and Wilson's Trustees, and was continued by Henderson and Dimmack when they succeeded as the mineral tenants.

It cannot, then, be said that this, which was the ordinary mode, was not a proper mode of working, supposing the proprietor of the minerals had a right to get the whole of the coal, and was not bound to leave a support to the surface. Of course he must be liable for any damage which may happen to the surface from unskillful or negligent working, but I am at a loss to understand how working in the

ordinary way upon an established system can be properly characterised (as it is by Lord Benholme) as "a reckless mode of working."

Lord Benholme puts the propriety of the interdict upon a ground which it appears to me, with great respect, cannot be supported. He supposes the mineral proprietor to say, "You must not look for any reparation in the shape of damages. If you were to attempt any such thing, the absolute clause in your feu-contract would put you out of Court, and that is the reason why you shall not be allowed to protect yourself by interdict from the doing of the deed, against the consequences of which you have no redress against me." And then his Lordship goes on—"Prevention is ever preferable to cure. But prevention becomes absolutely indispensable when the threatened injury admits of no redress." What is this but to say to the person asking for the interdict, You have weakly and foolishly entered into an agreement whereby you have given to another person the liberty to do you damage without being answerable for it. We will interpose to protect you from the consequences of your folly by preventing that being done which you have agreed that the other party to the agreement shall have the right to do. This would be, if not to make a new contract, at least to annul the provisions of the existing one.

Lord Neaves, following Lord Benholme's view, held that if it is plain and demonstrable that the consequence of the mode of working would be a destruction of the surface, that would not be proper working. And he adds that he cannot presume such to have been intended without words far more explicit than are contained in the clause of reservation. He even doubts whether a clause of this kind explicitly made could be enforced. No doubt of this nature, however, was expressed in the course of the argument. On the contrary, I put the case to the learned counsel for the respondent, of land feued with an obligation to build a house and keep it in repair, with a reservation to the superior of the power to remove the house at any time if it interfered with the exercise of rights which he possessed. And he admitted that such an agreement would be perfectly valid. Indeed to deny this would be to adopt the dictum of Lord Denman in *Hilton* v. *Lord Granville*, which was frequently doubted, and at last has been distinctly overruled.

Sir Richard Baggaley, in his clear and able argument, did not rely upon the improbability of the respondent having entered into a contract which left his property at the mercy of the mineral proprietor, nor deny that the words of the reservation, taken by themselves, would be sufficient to give the mineral proprietor the right to remove the whole of the coal from under the piece of ground belonging to the respondent, but he contended that the clause must be read in connection with, if not in subordination to, the object of the feu-contract, which was to provide for the building and keeping up a house on the ground feued. And therefore he insisted that the words "the proper working of the coal" contained in the reservation, must be construed with reference to this primary object of the contract. He endeavoured to show that Wilson's trustees had worked so as to leave pillars as a support to the surface; and he therefore contended that if Henderson and Dimmack were removing these pillars they were not pursuing a proper mode of working.

But the operations of Wilson's Trustees were not such as that described. On the contrary, it is proved that they were getting the coal on the modern stoop and room system, and accordingly in their forward working they had left large pillars; but they had commenced in working back to remove some of these pillars when their lease came to an end, and Henderson and Dimmack succeeded them. Mention is made of a pillar of coal of larger size than usual left under a house called Dr Wilson's feu—what reason that particular house was to be saved is not stated, nor whether the support to it was to remain permanently. But there is no evidence of any intentional protection given to any other house. And when a witness said "We leave masses of coal to protect any important building, but if it is a trifling house we let it down," he is speaking of cases in which there is the surface to be attended to as well as the coal.

If the respondent is right in saying that under the reservation the working of the coal must be carried on with reference to the security of the building, then the mineral tenants must not come within 100 yards of the dwelling house, which the witnesses say would be a reasonable distance to keep off to ensure absolute safety. So that the mineral tenants would be deprived of a quantity of coal beyond the limits of the rood of ground feued to the respondent. In this view it is not an inaccurate description of the argument of the respondent given by the Lord Advocate that the protection to be afforded to him is to prevent the mineral proprietor working to within such a distance of the respondent's house as a skilled person would say he ought not to come.

The whole argument of the respondent is involved in the asserted restriction of the generality of the words of the reservation in order to render it subservient to the obligation to the feuar to build and maintain the dwelling-house. But this mode of dealing with the reservation seems to be adopted, although not avowedly, on account of the assumed impossiblity of any person entering into a contract which it is taken for granted is a highly imprudent one. But this is resorting to conjecture instead of resting upon construction. For how can it properly be assumed that there is imprudence in the contract? It may have suited Porteous' purpose to become the owner of the piece of ground upon the agreed terms; or, assuming that his entering into such a contract was an act of imprudence, is that any reason why full effect should not be given to it? There is no ambiguity in the reservation; it plainly and clearly reserves to the mineral proprietor the whole of the coal within the piece of ground feued, and empowers him to work it without being liable for any damage which may happen to the ground or building thereon through such working. Why should this plain, unambiguous language he construed to mean—You shall not take away the whole of the coal, but only so much of it as you can get without damaging the ground and building?

It is the safest and best mode of construction, upon all occasions, to give the words free from ambiguity their plain and ordinary meaning; and, following this course, it appears to me that the reservation gives to the mineral proprietor the power to work the mines in the proper and accustomed mode of working, and to remove the whole of the coal without leaving any support to the surface, and without being answerable for any damage which may be thereby occasioned to the ground and dwelling-house of the respondent, except such

as may occur through unskillful or negligent working.

It is unnecessary to advert to the cases of *Rowbotham* v. *Wilson*, and *Wakefield* v. *The Duke of Buccleuch*, as authorities upon this occasion; because, as the learned Counsel for the respondent observed, they are distinguishable from the present case inasmuch as in neither of them was there any burden laid upon the owner of the surface. But the case of *Williams* v. *Bagnal*, cited from the Weekly Reporter and the Weekly Notes, approaches very nearly to this, because, although there was in that case no obligation on the plaintiff, the purchaser, to build, yet it appears from the statement in the Weekly Notes that the grant was made to him for building purposes. The reservation of the minerals, with the power of working them without being answerable for any damage, was as large as in the present case. And the lessee of the minerals having by his workings caused a subsidence of the land, the purchaser sought to restrain his further working, on the ground that a grant of the surface included by implication of law everything necessary for its support, and that a man could not derogate from his own grant. But the Vice-Chancellor held that the implication of law was swept away by the express terms of the contract, which were plain, clear, and simple; and dismissed the bill with costs.

I cannot better conclude my opinion of this case than in the words of the Lord Justice-Clerk,—"I look on these obligations to the mineral owner as part of the consideration for the feu, and I can see no reason for permitting the feuar, while he retains the benefit, to repudiate the conditions of his right."

I think the interlocutors appealed from ought to be reversed.

Lord Colonsay—My Lords, I cannot say that this case is free from difficulty, looking to the difference of opinion which has existed upon it in the Court below. I think there has been in some degree a misapplication of a very well known doctrine, namely, the general obligation upon a mineral owner to leave vertical and lateral support for the surface, even where that is not expressly stipulated for. It is an implied obligation. That point was very fully put, and with very good illustrations, by Lord Cranworth in the case of *The Caledonian Railway Company* v. *Sprot*. His Lordship there pointed out that the construction of such a clause might be materially affected, and in many cases would be materially affected, by the nature of the ground, and the particular purpose for which the surface was granted away. In applying the last part of his Lordship's observations to this case, I think too much effect has been given to the obligation to erect buildings and to maintain them, because in doing so that observation, and the effect of it, have been applied, not merely to a case in which there was a simple reservation of minerals, and the right to work them, but also to a case in which there were express stipulations providing for events which were expected, or were in the contemplation of the parties as possible, if not probable, at the time when the feu was granted.

Now, my Lords, I think that this reservation clause, or, I should say the stipulation as to the right of working the minerals, is of a kind that is not common. It is a peculiar stipulation, and one especially applicable to the condition of these mineral fields at the time that the feu-contract was entered into. We know from the evidence in the case that at that time the seams which existed above the one now under consideration had been wrought out for a considerable time. I think there were three—the Pyot Shaw Seam, the Main Seam, and the Splint Seam. Those seams had been worked in the ordinary stoop and room manner, that is to say, stoops or pillars had been left in order to support the roofs. But this new seam, which was going to be worked when Mr Wilson took the contract to work it, had not previously been worked, and at the time when Mr Porteous came to take his feu Mr Wilson had been in possession of that seam for a considerable number of years. I think that Wilson's lease was in 1846, and that Porteous' feu was in 1859.

We have it in evidence that the working by Wilson and Wilson's Trustees in that seam was a working by the new or modern system of leaving large pillars of coal in going forward, and taking them out in return. That is evidenced by the fact that the pillars which remained were of that class and size which were adapted for that kind of working, and by the further fact that Wilson's Trustees had commenced to remove the pillars on their return. It might not have been well ascertained or known what was to be the consequence to the wastes above of this mode of working below. It was a comparatively new mode, but it was a mode recognised, and it was a mode in use in this particular seam at the time when Porteous took his feu. And, accordingly, we find in the clause of reservation that very matter expressly provided for, namely, the wastes above being affected and brought down by the working by the new mode in the seam. There would be no danger of their coming down except by the ordinary action of crumbling, or by the action of water, if there was any, which there does not seem to have been to any extent—but by the working below it was possible that the wastes might be brought down. Accordingly, in the feu which Mr Porteous took in 1859, there is not merely a reservation of minerals—not simply a right to work without being liable for damage—but an express provision with reference to any evil which might result from the giving way of the pillars above, in consequence of the workings which might take place under Mr Wilson's lease.

My Lords, it appears that the danger which was contemplated as possible has arisen. The fact has occurred that crushings have taken place in consequence of this mode of working below, and it is by reason of that that the damage has occurred of which the respondent complains, and which has extended itself to other houses in the neighbourhood—I think to the houses of persons of the names of Martin and M'Lachlan. It is plain to me that under this clause of reservation the parties protected themselves against that very and precise result which is now the subject of complaint on the part of the pursuers; and although I think that if there had been no such express reservation of the right to work without damage—if it had been merely a right to work the minerals, as occurred in the case of the *Caledonian Railway Company* v. *Sprot*, there would have been a clear ground for requiring this party to leave a proper support; yet where there is a stipulation such as we have here, introduced plainly on purpose to protect the mineral owner or his tenants from any consequences which

might result either to buildings erected upon the surface, or to the surface itself, devoted to other purposes, by subsidence, I think it is impossible to deny effect to that clause; and I cannot see how effect can be given to that clause without rejecting the pleas of the respondent.

I see that it is said in the Lord Ordinary's judgment that it would be absurd (I think that is the expression) to suppose that it could have been in the contemplation of the parties that there was to be an obligation to rebuild, and an obligation to maintain houses—the feu being taken for the purpose of building—if it was to be in the power of the mineral owner to do that which would destroy the buildings. He says that there may have been some other injuries ("destroy" is the word used there) for which the mineral owner would not be liable, and against which he has protected himself. But his Lordship does not illustrate this, and I do not think that a greater or smaller amount of injury to the buildings would affect the principle of the case.

The ground upon which the majority of the Court below proceeded was a very broad one, namely, that the workings were not proper workings, and that they could not be proper workings, because they produced the result that is complained of. I venture to think that that is a mode of reasoning in a circle. If the fact that they produced the injury is enough to determine the character of the workings as to whether they are proper workings or not, there is no effect given to this clause at all, and there is no occasion for going further into any examination of the contract. But I think that those words—"proper working," have reference, in the first place, mainly to the mineral owner. I think they are inserted principally for his sake, as between him and his tenant. But, also, I can conceive that there may be some very irregular proceedings which would be unnecessary for taking out the coal, and which would go further than merely taking out the coal, and cause injury of another kind, for which there would be no excuse under a reservation of the right to get the coal. But I do not see that there is any allegation here that the modern mode of working by stoop and room has not been pursued with all propriety by these tenants as far as the mode of working is concerned.

It is said, further, that it is impossible to suppose that the feuar would have taken the feu if the landlord or the mineral owner was to have the power to do what he purposes doing here. Now, we do not know all the circumstances under which the feu was granted. We do not know what was in the contemplation of Mr Porteous. Mr Porteous was probably not a good engineer, and he may have been under the belief that no working at that depth would affect the surface above; or, he may have been of opinion that it would not be carried to an extent which would affect the surface. At all events, he did not protect himself; but, on the contrary, the landlord protected himself against any consequences resulting from the working of the whole of the coal. If Mr Porteous was under any misapprehension of that kind, or, if he thought that the risk was so small that it was worth his while, for a feu-duty of £5 a-year, to have a house there until some unfortunate result should come at some distant period of time, I can easily comprehend it. He soon got rid of the matter, and then came his successor. Mr Porteous only had it for a short space of time. At all events, we cannot go into this question. We cannot tell the motives which influenced the parties—they had their own views of their interests, and they bargained freely.

I cannot concur in the view of one learned Judge in the Court below, that because the superior has protected himself against the claim for damages for working, therefore it is the more necessary to grant an interdict against his doing so. It does not appear to me that that is the right view of the case. I think the very stipulation of not being liable for damages contemplates the power of working so as to occasion injury, otherwise there was no use in making such a stipulation. Upon the whole, although I see that there is a strong ground for holding in a case where the stipulation is not so clear as it is here, that the feu being made for the purpose of building, with an obligation to maintain buildings upon the property feued, the working must be consistent with that purpose. I do not see in a case like this, where the stipulation is express, that it is possible to get over it. I may say as to the obligation to rebuild, which seems to have been in the view of both parties, that I am not disposed to express any opinion upon the point. I am not quite prepared to say that the obligation to rebuild in a contract of this kind could be enforceable. That is not a question which it is necessary for us to decide, and I give no opinion upon it.

I therefore concur in the judgment.

Ordered—That the appellants be assoilzied from the conclusions of the action, with expenses in the Court of Session and the Sheriff-court; and that the expenses ordered to be paid by the Court below be repaid to them.

Counsel for the Appellants—Lord Advocate and Sir George Jessell and Mr Trayner. Agents—Messrs Dewar & Deas, W.S., and Messrs Grahames & Wardlaw, Westminster.

Counsel for Respondent—Sir R. Baggalley, Q.C., and Mr Cotton, Q.C. Agents—Messrs J. & R. D. Ross, W.S., and Mr W. Robertson, Westminster.

COURT OF SESSION.

Tuesday, March 11.

SECOND DIVISION.

[Lord Mure, Ordinary.

TREVELYAN *v.* SIMCOE OR TREVELYAN.

Marriage-Contract—Legitim—Collation—Domicile.

A, who was a domiciled Scotchman at the time of his death, and who had been twice married, left one son, B, the issue of the first marriage, and made no provision for him in his will. *Held* (1) that B was not barred from claiming legitim by the terms of the ante-nuptial contract entered into between his father and mother, in the English Style, and in England. (2) That in a question with the second wife, B was not bound to collate or impute in satisfaction of his legitim the provisions contained in his mother's marriage-contract in his favour, or certain outlays made in his behalf, notwithstanding that the will of A contained a clause to the effect that the son had been amply provided for by the provisions in his mother's contract of marriage, and by the value of his commission in Her Majesty's army.