necessary being left to the judgment of Mr Joseph Hutchison: Finds that Mr Hutchison has deponed, when examined as a witness *in causa*, 'I received instructions from the trustees to supply defender with stob and rail to repair the fences. I did so punctually. The supply was ample for the purpose —a great deal more than ample. I don't think it was all used for fences. I think there are plenty of them on the ground yet. The defender never applied to me for more stob and rail; there was plenty of wood on the farm for the purpose:' Finds that it is no answer to this evidence for the defender to prove that the fences were in some places deficient and in bad repair, it being his own fault if he did not make proper use of the material supplied: Finds, farther, that the defender was upwards of a year in the farm before he wrote the letter, No. 19/8, in which he for the first time asked for a supply of stob and rail; and, according to the evidence of the party Hutchison, to whom the amount of the supply was 'to be left,' he subsequently obtained what would have been abundant if properly used: Finds that, even if the supply had been insufficient, the defender should have made up the deficiency at his own cost, in the first instance, and debited the pursuers with it, instead of claiming a random sum of consequential damage: Finds, in the whole circumstances, *sibi imputet*, if the defender failed to make the fences sufficient, he is not entitled to the deduction of £40 allowed him under this head by the Sheriff-Substitute," and recalls accordingly. Having considered all the evidence applicable to this part of the case, I am of opinion with the Sheriff-Substitute. I think the obligation of the landlord, as it was to be performed by Mr Joseph Hutchison, was an obligation the performance of which the landlord or some one in his behalf was bound to attend to. On the other hand, I am not disposed to throw out of view the consideration that the tenant was bound to look after his own interests in this matter, and not to allow his claim to be forgotten, and then raise a claim of damages. I think there was some negligence on the part of the tenant down to 1864, three years before his removal; but I think that in that year he made a very formal and distinct demand in writing on this matter, and continued to repeat that demand from time to time, and to complain energetically that his application had not been attended to. Therefore I think that for the last three years the tenant is entitled to some damages for the failure to implement this obligation. But while I hardly see my way to give an allowance as the Sheriff-Substitute has done, I think the result at which he arrives is not inappropriate, and therefore I am inclined to suggest to your Lordships that we ought to restore the finding of the Sheriff-Substitute, and allow the tenant £40.

As to the claim of damage for the road, I agree with the Sheriff-Depute. I don't think the tenant has made out that part of his claim. I have some hesitation in believing that there was any damage at all, but if there was any it was of the most trifling description. But, apart from that, I think the making this road is not an act for which the landlord is liable. No doubt this mineral tenant is tenant of the minerals under the same landlord as the agricultural tenant, and of course the landlord would be answerable for any wrong done by the mineral tenant within the powers of his lease. But this was not done by him under the powers of his lease. This appears to be a road made by the mineral tenant for access for his colliers to a bit of mineral working on a different estate; and whether it was for that separate mineral working or not, it was one which he had no authority from the landlord to make. Therefore I cannot hold the petitioners liable for this damage.

The other Judges concurred.

Agent for Advocator—W. B. Glen, S.S.C.

Agents for Respondent—MacGregor & Barclay, S.S.C.

Friday, December 18.

MILNE, PETITIONER.

Heritable and Moveable—Parish Church—Church Seats. Seats in a parish church, which were not specially destined, *held* heritable.

In the accountant's report in this case, a question arose as to certain seats in the parish church of Montrose. The heir claimed them as heritage, while the accountant held them to be moveable.

The parish of Montrose is partly landward and partly burghal. The church was originally a mensal church of the Bishop of Brechin, and was given over to the magistrates at the Reformation. The stipend of the clergyman is paid partly from the teinds of the parish, and partly from an annuity-tax levied on the whole inhabitants.

In 1791 the church was rebuilt, and the expense was defrayed, one-fourth by the landward heritors, and three-fourths by the owners of sittings in the old church. The area of the church was apportioned in the same manner, and the seats in dispute are in that portion of the church not belonging to the landward heritors.

The seats have been for a long time treated as moveable, being included in the personal inventories of deceased owners, and transmitted frequently by simple receipts for the price.

BIRNIE, for the heir, referred to the cases of *Watson* v. *Watson* (M. 5431) and *Telfer* v. *Fulton* (Hume's Dec., 192).

MAIR for the judicial factor.

The Court held the seats to be heritable.

Agents for Heir—Henry & Shiress, S.S.C.

Agent for Factor—W. Officer, S.S.C.

OUTER HOUSE.

(Before Lord Kinloch.)

JAMIESON (DUNDAS' TRUSTEE) *v.* NORTH BRITISH RAILWAY COMPANY.

Railway—Edinburgh and Glasgow (Queensferry) Act 1863—*Railway Clauses Consolidation (Scotland) Act* 1845—*Disposition—Minerals—Interdict. Held* (by Lord Kinloch, and acquiesced in) that a Railway Company, having a right to a certain piece of ground for the purposes of their Act, but having no conveyance of the minerals, and therefore, under section 70 of the Railway Clauses Consolidation (Scotland) Act 1845, not being entitled "to any mines of coal, ironstone, slate, or other minerals" under their land, "except only such parts thereof as shall be necessary to be dug or carried away, or used in the construction of the works" authorised by the Act, were not entitled to work a bed of freestone under the land by means of an open quarry, and use the same in constructing works authorised by the