circumstance that David Reid himself predeceased the truster's widow would not have in the least affected the children's right to the ultimate fee. In short, the moment it happens that David Reid marries, and if it is fixed in any way whatever that David Reid himself is not to get the residue as his own absolute property, then the will absolutely provides that David Reid and his wife shall get the residue in conjunct liferent, and that the children of their marriage shall get it in fee. Now, the failure of any of these parties will not destroy the gift so far as the others are concerned. If there were no issue of the marriage that would not prevent the spouses from enjoying the conjunct liferent. If David Reid's wife had predeceased him, that would not prevent David Reid himself from enjoying the liferent during his own life, and in like manner I think it is impossible to maintain that the mere circumstance that David Reid predeceased the truster's widow deprived either his own wife or his children, if there had been any, of the independent rights provided to them. David Reid's survivance of Mrs Reid senior is nowhere made a condition of his taking under the provision; much less is his survivance made a condition on which alone should depend the right of his wife or of his issue to take under the deed. It would be monstrous to hold that David's own children, assuming him to have had children, would have been deprived of all interest whatever under their grandfather's deed from the mere circumstance that David Reid himself predeceased the liferentrix. But if David Reid's children could not be so excluded, neither can his widow, for the rights of the widow and of the children stand on precisely the same footing. The true view is that David Reid himself, his wife the present defender, and the issue of the marriage, are three separate and independent objects of the testator's bounty, and the failure of one or more of them will not in any way affect the rights of the others.

This being so, it follows that the present defender as the widow of David Reid is entitled to a conjunct liferent of the whole residue, just as if it had been taken to herself and her deceased spouse—that is, she is entitled to the full liferent of the residue—for a conjunct liferent given to spouses means that the surviving spouse takes the liferent of the whole, and not merely one half-of it. This point was not ultimately disputed.

I am also of opinion that the trustees of the testator have no right under the trust-deed to restrict or terminate the defender's liferent in the event of her marrying again. That would not be to give the liferent under conditions, but to deprive her of the liferent altogether. I agree with the Lord Ordinary that the power to impose conditions was intended to secure the benefit to the beneficiaries, and not to destroy their right. Possibly, or probably, they might declare the liferent alimentary, but there is no power to forfeit it in the event of a second marriage. It follows that the trustees have entirely failed in the present action, from which the defender must be assoilzied with expenses.

Lord Ormidale—I have, although not without some difficulty, come to be of opinion, with the Lord Ordinary, that the defender is entitled to prevail in this case. In any other result the defender, who is the widow of the truster's only son and child, would be deprived of all interest in the trust-estate, although manifestly the truster intended to favour her to a large extent. If the defender's husband had survived his mother, the truster's widow, for however short a time, he and his wife would, beyond all doubt, have had a right of conjunct liferent in the residue in question, and the fee would have belonged to their issue if they had any. And although it is true that the defender only, and not her husband, has survived the truster's widow, I see nothing sufficiently clear in the trust-settlement to the effect that she was in such an event to have no interest at all in the residue. On the contrary, it rather appears to me, as it seems to have done to the Lord Ordinary, that her interest notwithstanding the death of her husband continued the same—that is to say, that the bequest in her favour remained as it was, although, in consequence of the death of her husband before the truster's widow, she on the death of the latter came into the sole enjoyment of the liferent of the residue in place of its enjoyment conjunctly with her husband so long as he lived. This view, I think, receives support from the terms in which the truster provides for the disposal of the fee of the residue in favour of certain young men, apparently entire strangers to him, for it is only failing his trustees "paying or otherwise making over" the free residue, not to his son only, but also to his spouse and their children, that the young men referred to are to succeed.

With these observations, and for the reasons assigned by the Lord Ordinary, I am of opinion that his judgment is right.

The Lord Justice-Clerk concurred.

The Court adhered.

Counsel for Pursuers (Reclaimers)—Dean of Faculty (Fraser)—Robertson. Agents—Duncan & Black, W.S.

Counsel for Defender (Respondent)—Pearson. Agents—C. & S. Douglas, W.S.

Tuesday, May 20.

FIRST DIVISION.

[Lord Craighill, Ordinary.

LIVINGSTONE *v.* THE RAWYARDS COAL COMPANY.

Mines and Minerals—Encroachment—Amount of Compensation where Defender in bona fide, *and Property invaded of Small Extent.*

The lessees of a coal mine wrought out certain coal belonging to a coterminous proprietor in the *bona fide* belief that the coal was included within their lease—a belief shared in by the true owner himself. The mine possessed by the lessees entirely surrounded the property encroached upon, which in extent amounted only to 1 acre 30 falls 21 ells. *Held*, in an action for damages, at the instance of the coterminous proprietor, that the compensation was to be at the rate of the lordship of the surrounding mine, together with a sum for the surface damage, on the ground that there was perfect *bona*

fides on the part of the trespassers, and that in the circumstances of the case the only possible way in which the owner could have made a profit out of his coal would have been by leasing it on these terms to the lessees of the adjoining mine.

The pursuer of this action was the proprietor of a piece of ground forming part of the lands of Rawyards in the parish of New Monkland, Lanarkshire, and of certain miners' houses erected thereon. The extent of the ground was only 1 acre 30 falls 21 ells, and the pursuer when he made the purchase in 1869, did so mainly on account of the houses. The greater part of the coal in the district had been wrought out, including that under the ground purchased. The defenders were the lessees of the entire coal which immediately surrounded the pursuer's piece of ground. When they entered upon their lease in 1872 both they and the pursuer were under the *bona fide* belief that when the feu of the pursuer's property was given out to his predecessor in 1837 the superior had reserved the coal, and that the defenders' lease included this coal. It turned out that their belief was erroneous, the superior having reserved the ironstone but not the coal. This error, however, was not discovered until 1877, when the pursuer came to consult his titles in prosecution of a claim for surface damage against the defenders, who had by this time wrought out the entire coal underneath the land in question. The pursuer, according to his own account, first observed damage to his houses in the middle of 1875.

The present action concluded for payment of £2000 in name of damages, and the averments upon which that claim was based were as follows:—"(Cond. 5) The defenders having then (*i.e.*, in 1877) admitted the encroachment, the pursuer desired access to their books for the purpose of ascertaining the quantities of coal and other produce which had been gotten and removed by the defenders or by their order from the pursuer's feu, and the market price or value thereof at the pit's mouth. The defenders, however, refused any such access, and the pursuer claims that this account should be now taken, and, under deduction of such pit allowances for raising said coal as may be proper, the pursuer should be found entitled to said value. (Cond. 6) The defenders in the course of their said operations drove roads, levels, and passages in said area, and they carried large quantities of coal and others wrought from the coalfield tenanted by them through the pursuer's said area, without any leave being asked or obtained. The pursuer claims that an account shall be taken of the quantities of coal and other produce so conveyed through his said lands, and of the value or benefit to the defenders of said roads, levels, and passages, and a sum in name of way-leave and royalty in respect thereof shall be paid to the pursuer. (Cond. 7) The houses in said Buttery Square, the property of the pursuer, are entered in the valuation-roll at £141, 5s., and over £150 would have been collected this year but for the damaged state of the property. The pursuer has also spent considerable sums in repairing the damage done by the defenders. (Cond. 8) Said encroachments and operations by the defenders were wrongful, illegal, and most unwarrantable. They have largely benefitted therefrom, not only by the appropriation and consumption of said coal, and the using of said area as a means of transit for the material worked in their coalfield, but they have been saved large costs which they would have been compelled to incur had they abstained or been prevented from carrying on said operations in the pursuer's said property. On the other hand, the pursuer has sustained loss and damage, as before condescended on, to an extent not less than £2000 sterling; but as the defenders have refused, or at least delayed, to make any settlement thereof, the present action has become necessary."

The defenders pleaded, *inter alia*—"The encroachment on the pursuer's minerals having been made in the belief that these minerals had been let to the defenders, which belief was induced by an error entertained by the pursuer as well as by the defenders, and having been made in the pursuer's knowledge and without objection by him, the defenders are not bound to pay him a larger sum than the profit which they have themselves made by working said minerals."

The Lord Ordinary (Craighill) after a proof pronounced the following interlocutor:—" . . . Finds as matters of fact—(1) that the coal in the pursuer's feu, described in art. 1 of the condescendence, at the time when the operations referred to on the record were commenced, was the property of the pursuer, though he was ignorant that it belonged to him, he having purchased the subjects in 1869 under the impression that all minerals had been reserved to the superior, and having continued in that persuasion till his coal had, as after mentioned, been wrought out by the defenders; (2) that the defenders are tenants of the coal-field adjoining and surrounding the coal in the pursuer's feu, and the coal in that feu was believed by them, when they became tenants, and when that coal was removed as after mentioned, to be part of the minerals carried by their lease; (3) that in the course of the years 1875 and 1876 the defenders, while acting as they believed by virtue of the powers conferred by their lease, removed the coal in the pursuer's feu, and disposed thereof along with coal raised during the same period from their own field; (4) that the coal so removed from the pursuer's feu by the defenders consisted of 4300 tons or thereby of free coal, 1275 or thereby of dross, and 320 tons or thereby of gas coal, in all 5895 tons or thereby, and the value of these at the pit-head, according to a reasonable calculation of the market value, was as follows:—common coal, at 6s. per ton—£1290; dross, at 1s. 6d. per ton—£95, 12s. 6d.; and gas coal, at 23s. 11d. per ton—£382, 13s. 4d.; thus amounting in all to £1768 5 10

(5) that a fair price for working the said coal may reasonably be fixed at 4s. 3d. per ton overhead, this sum including everything except lordship and capital charges, the amount at this rate being in the aggregate 1252 13 9

And leaving as free profit or value in the hands of the defenders, derived from coal belonging to the pursuer, the sum of £515 12 1

In the second place, Finds, as matter of law, the

facts being as above set forth, that the pursuer is entitled to recover the said sum of £515, 12s. 1d., and no larger sum, from the defenders; therefore ordains the defenders to make payment to the pursuer of the sum of £515, 12s. 1d. with interest at the rate of 5 per cent. per annum from 9th July 1877, the date of the institution of this action, till payment, in terms of the conclusions of the summons, and decerns, &c. . . .

"*Note.*—The feu referred to in the foregoing interlocutor was purchased by the pursuer from the former vassal in 1869 for £80. His chief inducement to make the purchase was the colliers' houses which had been built on the ground. The mineral workings in the neighbourhood had to a considerable extent became exhausted; and the demand for such houses having in consequence been reduced, the subjects were procured for a price which, even at the time, must have been considered to be exceptionally small. The investment, as might be expected, has proved unusually lucrative. In every year since 1869 the rental has been greater, and in recent years has been very much greater, than the purchase-money. This, however, is a consideration which is not of much importance on the present occasion. What is more material is the fact that the pursuer in buying the property did not take minerals into account. These to a considerable extent, as was known to the pursuer and to all in the neighbourhood, had been already wrought, and what remained did not become the subject either of enquiry or speculation. The pursuer's belief and understanding was that all the minerals had been reserved by and to the superior in the original charter; and it was only after the coal in question had been so far wrought out by the defenders as to be a cause of injury to the houses on the surface that the pursuer became aware, from an examination of his titles, conducted by a professional man on his behalf, that the minerals in his feu were not reserved to the superior as had been supposed. This circumstance, of course, does not disentitle the pursuer to recover the value of the coal which has been removed by the defenders; but it renders his case one in which hardship or disappointment cannot reasonably be urged as a ground upon which more than the mere market value of the coal ought to be awarded. The truth of the matter is, that the removal of the pursuer's coal by the defenders, in place of being a misfortune, has been to the pursuer a singular stroke of luck. The size of his feu is less than an acre and a-half, and the coal which it contained could not have been wrought to profit by itself. The expense of sinking a pit and providing machinery would many times over have exceeded the value of the minerals. Possibly, no doubt, the pursuer might have endeavoured to make with the defenders terms upon which his coal might have been raised along with the coal of which they were the tenants. But the return which would have been rendered to him under such an arrangement must have fallen far short of what has been awarded by the Lord Ordinary. The lordship in the circumstances could not be expected to be higher than that paid by the defenders for the adjoining portions of the seam; and this upon the quantity taken out, even if increased by reasonable damages for injury through subsidence to the houses on the surface, would certainly have fallen considerably short of £500. As things are, the issue to be tried is this—Coal belonging to the pursuer having been removed by the defenders, what is the sum at which the pecuniary surrogatum ought to be fixed? In coming to a conclusion upon this point it is necessary to bear in mind that the defenders were not conscious or intentional trespassers upon the property of the pursuer. They believed that the coal in this feu, as was the case in almost all of the other feus, had been reserved to the superior, and had been carried by the lease which had been granted by the superior, otherwise it would have been left untouched. The defenders, therefore, are not to be dealt with upon the principle that something has been done for which a penalty may be enforced, and that something more than the fair or reasonable value of the coal which was removed must be rendered as satisfaction to the pursuer. The latter, as the Lord Ordinary thinks, will get all to which he is in the circumstances entitled if he receives simply the value of his coal, as that according to the light afforded by the proof shall be determined.

"Parties are agreed as to the quantity of coal which was removed. The amount was 5895 tons, which consisted of free coal, dross, and gas coal in the proportions specified in the foregoing interlocutor. Upon consideration of the proof as a whole, the Lord Ordinary is of opinion that the values of these several qualities with which the pursuer ought to be credited are 6s., 1s. 6d., and 23s. 11d. per ton respectively. In this matter the evidence of the pursuer's witness Alexander Moore, and the returns rendered by the directors of the defenders' company to the defenders, are the things by which the Lord Ordinary has been principally influenced. The aggregate value at these rates is £1768, 5s. 10d.; from which, however, there has to be deducted what shall be considered a fair allowance for severing, lifting, and realising the coal. Upon this latter topic the conlusion at which the Lord Ordinary has arrived is, that 4s. 3d. per ton—the sum suggested by the pursuer's witness David Rankin—may fairly and reasonably be adopted. That allowance, as Mr Rankin explains, includes—and the Lord Ordinary thinks it ought to include—'all charges except lordship and capital charges.' The defenders, it may be anticipated, will not be satisfied with this result. Their counsel at the debate upon the proof insisted that all charges appertaining to capital ought to be taken into account along with other charges in estimating the value of the coal at the pithead. But the Lord Ordinary has overruled this contention, for the following reasons. In the first place, its effect practically would be to make the pursuer a joint adventurer in working the minerals of which the defenders are tenants. And in the second place, it would enable the defenders to make a profit out of the working of the pursuer's coal, by charging against the pursuer a part of the outlay connected with their pits which had been incurred solely for their own purposes, and was not to any extent affceted by the working of the coal which in the end has been found to belong to the pursuer.

"In the account in which there are set forth the particulars of the pursuer's claim there are specified other items than the value of the coal which was removed. One of these is a consideration for what is called 'wayleave,' and this the Lord Ordinary thinks cannot be allowed. At the time

when the defenders are assumed to have used for the purposes of passage the space left vacant by the removal of the pursuer's coal, they understood that the minerals which had been taken away and the place which it had occupied were parts of the subjects to which they had right; and therefore, even if it could be held upon the proof that the use of the vacant space was, by the facilities it afforded for passage, an advantage to the defenders, he thinks that, inasmuch as nothing was taken from the pursuer by what they did, they ought not to be subjected in liability for this item of the pursuer's claim.

"Another item also claimed by the pursuer is a sum of £110, 9s. 8d., which is said to have been saved to the defenders 'by working direct through instead of round the pursuer's feu.' How this can be distinguished from the 'wayleave' already alluded to can hardly be imagined. If there is a distinction between the two items, the second is seemingly that for which least can be said.

"The last of the items specified in the account referred to is for damage done to the surface, and the sum claimed under this head amounts in all to £480. Such a sum, as the Lord Ordinary reads the proof, is perfectly extravagant. Less than a half would in his opinion afford ample reparation, supposing anything were to be allowed but as he views the matter, this is an item which ought to be altogether disallowed, because the pursuer has asked and is to receive the full value of the coal by the removal of which the subsidence of the surface and the consequent injury to the houses was produced. Had the pursuer been paid for his coal by lordship, he would have been entitled to the benefit of the ordinary condition that damage to the surface must be repaired. But as he is taking the coal itself, he must be content to take with it the burden which under this head of his claim he endeavours to throw upon the defenders.

"Several English decisions were cited by the pursuer in support of his claim. To these, though they are not binding as authorities, the Lord Ordinary has given effect so far as they were considered applicable to the circumstances. But it is plain that cases analagous to the present cannot be absolutely ruled by any prior decisions. This, moreover, must be observed,—though one point was decided as the pursuer thinks favourably to his argument in one case, and another was also so decided in another case, there is no instance except the present in which all the items now claimed by the pursuer were presented for decision; and the impression in the mind of the Lord Ordinary is, that were all which is now asked by the pursuer to be granted, the judgment would be one, if not against, at least without authority.

"As the pursuer has asked and has led proof upon so much which has not been allowed, the expenses awarded to him would have been given subject to modification, had it not been for the consideration that the defenders have been equally extreme in the contentions which they have maintained and endeavoured to establish. As things are, the Lord Ordinary has thought it right to allow the costs to follow the result of the action."

The defenders reclaimed, and argued—The English authorities were not altogether consistent. At common law it was laid down that the proper estimate of damages was the value of the coal when it first became a "chattel"—that is to say, as it first became a chattel when it was severed from the ground—under deduction of the cost of bringing it to the surface, but not under deduction of the cost of hewing—*Martin* v. *Porter;* but in the following year Baron Parke, one of the Judges who decided *Martin* v. *Porter*, charged the jury in another case that unless they found that the defendant had been guilty of fraud or of negligence, the damage was the value of the coal at the pit-mouth under deduction not only of the cost of haulage but also of hewing—*Wood* v. *Morewood.* And that rule had since been followed in equity—*Hilton* v. *Woods; Jegon* v. *Vivian; United Merthyr Collieries Company; Ashton* v. *Stock.* But it was doubtful whether this Court would ever apply the severe principle of *Martin* v. *Porter*, which was based on the technicalities of English law. At any rate, there was here the most perfect *bona fides*, and that brought the defender within the milder alternative; and so the Lord Ordinary had held. He had, however, as the evidence showed, under estimated the cost of hewing the coal and bringing it to the surface; and he had also declined to deduct anything for depreciation of capital, which was inequitable to the defenders who had thus virtually lost so much capital. A greater deduction ought therefore to be made even on the Lord Ordinary's principle; but the case was so peculiar in its circumstances as to bring it within another rule. For the coal which the pursuer had owned was of very small amount and was entirely surrounded by the defenders' pits. He never could have worked it to profit himself, and no one else could have done so except the defenders. He was therefore not entitled to the profits, but only to the lordships which he would have got under a lease of this coal to the defenders. And of course he was, on this view, entitled to something for surface damage. [LORD PRESIDENT—But was he bound to use the coal at all? He might have wished to put up some heavy building on the surface.] That was not alleged on record, and in a district like the present was out of the question. Besides the coal underneath was already partly worked out before the defenders interfered. It was a jury question—What was the value to the pursuer of the coal he had lost?

Authorities—*Martin* v. *Porter* (1839), 5 Meeson and Welsby, 351; *Wood* v. *Morewood* (1840), 3 Adolphus and Ellis, 440; *Hilton* v. *Woods* (1867) Law Rep., 4 Equity 433; *Jegon* v. *Vivian* (1871), Law Rep., 6 Chanc. 742; *The United Merthyr Collieries Company* (1872), Law Rep., 15 Equity 46; *Ashton* v. *Stock* (1877) Law Rep., 6 Chanc. Div. 719; *Houldsworth* v. *Brand*, May 18, 1875, 2 R. 683; Jan. 8, 1876 3 R. 304; Jan. 27, 1877, 4 R. 369; *Buchanan* v. *Duke of Hamilton*, Jan. 25, 1878, 5 R. 588.

Argued for the respondent—The law in England was by no means so settled in favour of deducting the cost of severing the coal from the amount of the damages. *Wood* v. *Morewood* was merely a *nisi prius* decision, and was disregarded by the Court of Queen's Bench in *Morgan* v. *Powell.* In the Equity Courts too the cost of severing had recently been deducted—*Ecclesiastical Commissioners* v. *North-Eastern Railway.* But here there was undoubtedly the most complete *bona fides;* it might therefore be granted that all necessary expenditure ought to be deducted. Now, the deduction allowed by the

Lord Ordinary was on the evidence more than enough. It was said that account should be taken of depreciation of capital. That was untenable. All the capital which the defenders had expended would have been expended in any case on their own pits; or rather, both the capital expenditure and the annual outlay would have been much greater had the defenders been obliged to go round instead of being allowed to go through the pursuer's property. The pursuer had thus the advantage of position, and would make his own terms; a mere lordship therefore on the scale of the surrounding coal-fields was quite inadequate. The Lord Ordinary's interlocutor was the equitable one in the circumstances, and ought to stand.

Authorities—*Morgan* v. *Powell* (1842), 3 Adolphus and Ellis 279; *Hunt* v. *Peake*, Johnson's Reps. 705; *Ecclesiastical Commissioners* v. *North-Eastern Railway* (1877), Law Rep., 4 Chanc. Div. 845; Bainbridge on Mines and Minerals, 4th ed. 310.

At advising—

Lord President—This is certainly a very peculiar case. The feu which belongs to the pursuer was given out by the proprietor of the ground in 1873, the proprietor being a Mr Gavin Black, and the original feuars the Monkland Iron & Steel Company. The pursuer acquired right to the feu at a subsequent time, but the defenders' right did not come into existence till 1872. The feu-disposition contained a reservation of the whole ironstone in the ground feued, but it contained no reservation of the coal, and of course when the defenders obtained their lease in 1872 they were not entitled to work the coal. But the lease contained no exception of the coal, and the defenders knew nothing about the feu-right obtained by the pursuer, and singularly enough the pursuer himself was equally ignorant of his rights, and that ignorance continued down to a very recent date. Therefore both parties proceeded on the assumption that the coal was reserved by the proprietor and was conveyed by lease to the defenders.

There was thus, as regards both, not only perfect *bona fides*, but also the most thorough conviction that in working this coal the defenders were within their right as lessees, and not the slightest blame can attach to the defenders for what has taken place. But it is not exactly the same with the pursuer. His title plainly showed that he had right to the coal, and had he consulted his title, or if his agent had been as vigilant as agents often are, he would have known that the title contained no reservation of the coal. Now, the pursuer, according to his own account, noticed in 1875 that the defenders were working underneath his ground, and he was made aware of what was going on at a very convenient season, for he would then have been able to stop operations if only he had consulted his titles. I do not say that it contributes very much to the decision of this case, but still it is not unimportant, to observe that one party had no means of discovering the error under which both lay, while the other had, although he remained in *bona fide* ignorance.

Well, the coal has now been wrought. With regard to the demand for compensation for injury to the houses, I will speak bye-and-bye. But, in the first place, it is not disputed that the pursuer is entitled to what was the value to him of this coal. It has, however, been maintained that he is also entitled to all the profits made by the defender in selling the coal. Now, in the circumstances of this case I am not prepared to sustain this contention. In addition to the perfect *bona fides* of the defenders, the coal here was in a very peculiar situation. It was surrounded on all sides by coal belonging to the defenders. As it only amounted to an acre and a-half in extent it is scarcely necessary to say that the pursuer could not himself have worked it to any profit. Again it is perfectly clear that no one else except the defenders could have worked that coal unless the pursuer could have done it himself. If it was to be worked at all, it must be either by the pursuer or by the defenders. The relation between the parties was simply this—the pursuer was possessed of a small piece of coal within this mine. His object was to dispose of it to the best advantage. For it is not suggested that he contemplated keeping it. It was in a country where all coal is worked whenever it is possible to do so. Now, if the parties had come together before this coal had been disposed of, and knew exactly how their respective titles stood, what would have happened? The coal must have been sold to the defenders. The pursuer says he would have been able to make very good terms, as it was the defenders' great object to get a passage through the coal. That is true. But I think that Mr Smith when he spoke of the "defenders' necessity being the pursuer's opportunity," somewhat overstated his case. It was not a matter of necessity to the defenders, only of convenience; but it was not so to the pursuer; it was a matter of necessity with him. He must have taken what the defenders could give him, or let the coals lie unused. Therefore the parties were just in a position to make a fair bargain.

Now, does not that ascertain what is the value of that of which the pursuer was deprived by the innocent act of the defender? It is just its value—not as wrought and brought to the surface —but its value *in situ*. And I do not think that there can be much difficulty in settling what that value is. Mr Rankine, the pursuer's principal witness, says—"The only way in which the pursuer could have made anything of those minerals would have been by letting them to the defenders or by the defenders taking possession of them as they did. Supposing the pursuer had let them to the defenders, a fair lordship would have been the same as the lordship in the general field, and it would have amounted to £171, 7s. 6d., over and above which the pursuer would have been entitled to compensation for all the damage done to his property." And on the next page, in answer to the question "Suppose you had been asked by pursuer whether it would be advisable for him to sell the whole of these minerals to defenders for £100, the defenders paying compensation for the damage to the houses, would you have advised him to take it?" he replies—"The advice I have invariably given—I have done it in two instances within the last two years—is, 'Do not let your coal for a less lordship than that obtained by the adjoining proprietor;' and in that case I would have said to the pursuer, 'Do not take less than

£171, 7s. 6d. for the coal *plus* the damage to the houses.'" Now, I think that is the fair value of the subjects. I think it is worth all the evidence put together as to the price of the coal when wrought and the cost of working it. These may come to be of great importance where it is the case of two mines worked by large mine-owners, and one of the owners encroaches upon the mine of the other. That is quite a different question. If a man takes away from me what I want to sell, we may be obliged to take into consideration all the elements of which we have heard so much. But the thing which the pursuer here has lost is not the right and power of taking this coal to market. The thing he has lost is that coal *in situ* which he could not work, and never could hope to work to profit. That is the value. He is thus entitled to this £171, 7s. 6d., and of course he is also entitled to interest.

Now, that being so, I think that he is entitled to something in name of damages to his houses, and for this reason—That if such a bargain as I have supposed had been entered into, there would have been a reservation of damages, or security against damage, or something of that kind. It is needless to say that in claims of this kind the evidence is always conflicting. Perhaps here it is even more so than usual. I think the view of the Lord Ordinary is very near the truth. He says the sum claimed under this head amounts in all to £480. "Such a sum, as the Lord Ordinary reads the proof, is perfectly extravagant. Less than a-half would in his opinion afford ample reparation supposing anything were to be allowed." I should propose to your Lordships a sum of £200, and thus these two sums—£176, 7s. 6d., and £200—together would be what I should propose to award to the pursuer.

Lord Deas—In all the cases (chiefly English) which have been quoted to us there has either been a degree of bad faith or some degree of negligence. That is not so here. It is quite true, as I myself observed, that what may be called the active error here is on the part of the defenders, who took away the coal. That, however, is a very slight approximation to negligence —if approximation it be at all. On the other hand, as your Lordship has pointed out, the other party might have discovered this error, whereas the defenders could not have done so. The result then comes to this, that fault cannot be attributed to either party. The result is *bona fides* in both parties. That being so, the peculiarity of the case is that the mine belonging to this pursuer is under only an acre and a-half of ground, and that this is in the centre of a large mineral field. That peculiarity is not likely to occur again. Therefore, the way in which I am disposed to view this case is, that both parties seeing it to be for their mutual advantage, the one to sell and the other to purchase these coals, they appoint an arbiter to determine what the one is to pay to the other. That is the position in which to regard the matter. Now, in the first place, there is the lordship of coal, and then there is a sum on account of damage to houses. The amount is got by adding the £176, 7s. 6d. to the £200 which your Lordship proposes to give, and which I think is a very fair sum. The aggregate may quite reasonably be supposed to be the value which an arbiter would have put on the subject.

Lord Mure—I have come to the same conclusion. The rule seems pretty well fixed in England that the fair value of the coal to the pursuer is its value in market. But that is laid down in cases in which the pursuer is able to work the coal himself. That is not the case here. He could not work it. Now with this addition what is the value here? I think the pursuer would have been very glad to get the ordinary lordship, with something added by way of surface damage. I therefore agree with your Lordships.

Lord Shand—I am of the same opinion. This is not a case of either wilful damage or negligence on the part of the defenders; and the decision will not affect cases of that class. There are two specialties. The first is that the defenders were in perfect *bona fides* in what they did, and indeed the pursuer was also under the belief that they had right to work the coal. They were justified in being under that impression by their titles, confirmed by the conduct of the pursuer. The second specialty is that the subject was one of no value if the owner was to work it himself. It could only be worked by a coterminous proprietor, and the working could thus only take place by arrangement, or in the manner in which it has actually happened.

The case would have been essentially different if either of these peculiarities had been absent, If the defenders had not been in *bona fide*, a different rule would have applied in estimating the damages; and again, if the proprietor had been able to work the coal at his own hands, and it could be shown that he would have made a certain amount of profit by himself working the coal, it might not be reasonable to deprive him of that profit. A good deal has been said of the advantage to the defenders of possessing this coal from its advantageous position with reference to the rest of the coal field. I cannot say that this is an element altogether to be left out of view. But I think there is here a mutual advantage; and as regards the value of the coal, I am disposed to agree with your Lordship that it would have been the sum which Mr Rankine has named in the part of his evidence to which you have referred.

The Court recalled the Lord Ordinary's interlocutor, and decerned (1) for £171, 7s. 6d., the value of the coal belonging to the pursuer wrought out by the defenders; and (2) for £200 as reparation for the damage done to the houses on the feu, &c.

Counsel for Pursuer (Respondent)—Guthrie-Smith—M'Kechnie. Agent—W. B. Glen, S.S.C.

Counsel for Defenders (Reclaimers)—Gloag—Rutherfurd. Agents—Wilson & Dunlop, W.S.

Wednesday, May 21.

SECOND DIVISION.

[Lord Rutherfurd Clark, Ordinary.

MOORE *v.* DEMPSTER AND OTHERS.

Lease—Joint Adventure—Rights of Parties inter se *—Mode of Proof.*

An agreement was entered into between certain parties to a joint lease of a quarry,