Friday, March 19.

SECOND DIVISION.

[Lord Adam, Ordinary.

NEILL AND WALKER (NEILL'S TRUSTEES) *v.* WILLIAM DIXON (LIMITED).

Mines and Minerals—Support—Interpretation of term "Surface Damage."

In 1802 a proprietor sold certain lands to one purchaser, and the minerals beneath them to another. In the disposition of the former subject power was reserved to the purchaser of the minerals to win and work them on paying "all surface damage, if any shall be thereby occasioned to the ground of the lands," and a power conceived in the same terms was given to the purchaser of the minerals in his disposition. At that time the lands were entirely an agricultural subject, except for a few small cottages scattered over them. Subsequent to 1802, and about 60 years before 1878, a house and offices were built upon part of the lands in question. In 1878 the workings of the lessees of the proprietor of the minerals caused a subsidence which injured the house and offices. *Held* that such damage was "surface damage" in the sense of the disposition of 1802, and that the obligation was not to be restricted so as to be applicable only to the ground as it existed at that date,—when the landed and mineral estates were divided.

Opinions reserved on the question whether in the event of the proprietors of the surface unduly increasing the burden of support laid upon the proprietor of the minerals, by feuing the ground out for streets, a claim of damages would be sustained by the Court?

This was an action by Mrs Janet Walker or Neill and Archibald Walker, the trustees of Thomas Neill, Glasgow, against William Dixon (Limited), coalmasters in Glasgow, claiming £1000 in name of damages for injury sustained to a house and offices named Bellevue, belonging to the pursuers, through the mineral workings of the defenders.

Prior to 21st May 1802 Mr Robert Houston Rae had purchased for behoof of the Govan Coalwork Company the lands of Hangingshaw, situated at Langside, near Glasgow. They were at that time vested in the person of Mr Allan Scott, and Mr Rae, though he paid the price sometime previously, did not until 1802 obtain a disposition to them. By disposition dated 21st May 1802 Mr Scott, on the narrative of the acquisition of the whole subjects, surface and minerals, by Mr Houston Rae, and the sale by the latter to Mr Thomson of the surface (as after narrated), and conveyance thereof to him, sold, disponed, alienated, and conveyed "All and whole the coal and ironstone, and metals and minerals in the lands after described, and conveyed by me to the said Robert Thomson, his heirs and assigns, by the disposition above mentioned, ... with liberty to my said disponees to work and take away the said coal, ironstone, metals, and minerals in the said lands, and to make and erect all the pits, hills, roads, machinery, and others they shall judge necessary for working and taking away the same from the said lands and the other contiguous lands belonging to them, and providing that the persons working the same shall be obliged to satisfy and pay the said Robert Thomson and his foresaids for all surface damages, if any shall be thereby done to the ground of the said lands, as the said damages shall be ascertained by two neutral men mutually chosen, but upon condition always that no coal-pits shall be put down in said lands on the southside of the road leading from Rutherglen to Langside, except that when the proprietor of the said coal shall have carried the working of the same forward to a dyke in the coal called the Crosshill dyke, he shall have power and liberty as aforesaid to put down one or two trial pits anywhere upon the south-side of the said road, in order to ascertain the coal upon the south-west side of the said dyke, and to enable him with more certainty to carry forward his operations underground for taking out that coal, and which trial pits if made shall be carried on with reasonable despatch from the time the same are begun until finished, and shall, within six months thereafter, be filled up and levelled with the surface of the ground, and so remain in all time coming." On that disposition Mr Rae was infeft, and Mr William Smith Dixon, whose tenants the defenders were, was at the date of this action in right of the minerals and whole rights conferred by that disposition.

By a second disposition of similar date Mr Scott, on the narrative of the acquisition of the whole subjects by Mr Rae for behoof of the Govan Coalwork Company, and "that the said Robert Houston Rae has lately sold the part of said subjects hereinafter disponed to Robert Thomson junior, manufacturer in Glasgow," sold, disponed, alienated, and conveyed the same lands to Mr Thomson, "but excepting and specially reserving to the said Robert Houston Rae, for behoof of the said Govan Coalwork Company, and his heirs and successors, the whole coal and ironstone and metals and minerals in the said lands, with liberty to work and take away the same." The disposition then proceeded in the same terms as provided in the conveyance of the minerals to Mr Rae quoted above. Under that disposition Robert Thomson was infeft. The whole extent of the lands disponed to him was 58½ acres, of which the pursuers were now proprietors of about 4½ acres. Subsequent to the date of the disposition of 1802, but at what particular time was uncertain, the pursuers' predecessors built a house and offices on their property. It was an alleged injury to these buildings which led to the present action. The following were the pursuers' averments — "(Cond. 5) The said workings have recently approached very near, if they have not actually come under, the pursuers' said lands, and have caused there a serious subsidence of the ground, and consequent damage to the pursuers' property. A great portion of the boundary and garden walls has fallen, and the rest is in a dangerous state, and will require to be taken down to the foundation and entirely rebuilt and coped. The exterior walls of the mansion-house, from the foundation to the top, in several places are rent and off the plumb, and the partition walls inside are all cracked. The offices and outhouses are in a somewhat similar condition, and the whole of said buildings are at present in a dangerous and almost untenantable

state. (Cond. 6) . . . . The pursuers believe and aver that the said workings have been conducted in an irregular and unskilful manner, and that such irregular and unskilful workings have occasioned, or partly occasioned, the said damage."

The defenders averred in answer—"(Stat. 7) In 1802, when the above-mentioned dispositions of the surface and minerals respectively were granted, the lands of Hangingshaw were distant about two miles from the city of Glasgow as it then existed. The estate was purely an agricultural one, with no buildings on the surface except perhaps some small cottages of not more than one storey in height. At the said time the working of minerals in the district about Hangingshaw was common. The Govan Coal-work Company were well known and extensive coalmasters in the district, and it was in the contemplation of all the parties to the said disposition that the coal should be worked out under the said land, and that the only damage for which the said Robert Houston Rae or his successors should be liable was ordinary surface damage to the ground of the lands of Hangingshaw. (Stat. 8) The pursuers' property (the houses on which were erected not more than thirty years ago, and, at all events, subsequently to the disposition of 1802 already referred to) is wholly situated to the north of the road leading from Rutherglen to Langside, where, under the titles already referred to, the mineral proprietor is entitled to put down pits or make hills, roads, erect machinery and others on the surface of the ground; and the defenders have repeatedly intimated to the pursuers and their predecessors that they would not hold themselves liable for any damage to the pursuers' said property other than of a surface or agricultural nature, and, in particular, the defenders gave intimation to the late Mr Neill that they would not hold themselves liable for injury to buildings upon its coming to their knowledge that he had advertised his property to be sold or feued for building."

The pursuers pleaded—"(1) The defenders having, by their mineral workings foresaid, injured and damaged the pursuers' property to the extent sued for, are liable in payment of the same, and the pursuers are entitled to decree as concluded for. (2) The said workings having been irregular and unskilful, the defenders are liable for the damage thereby occasioned."

The defenders pleaded—"(1) The defenders' mineral workings not having been improperly or unskilfully conducted, they are not liable for any damage thereby occasioned. (2) On a sound construction of the titles of the pursuers and W. S. Dixon, neither W. S. Dixon nor the defenders are liable to the pursuers for damage done to the houses and other erections on the pursuers' ground."

The Lord Ordinary (ADAM) heard argument in the Procedure Roll on the defenders' second plea, but in the result allowed parties a proof of their respective averments. After proof the Lord Ordinary on 7th January 1880 decerned in favour of the pursuers for the £350, adding this note:—

"*Note.*—[*After stating the facts ut supra*]—It appears to the Lord Ordinary that this question depends upon the construction of the disposition of 1802. This disposition contains a clause which, in the Lord Ordinary's opinion, was intended to fix and determine the extent of the liability of the owners of the minerals for damage done by the removal of the minerals, and which, therefore, he thinks, excludes any claim at common law.

"By this disposition liberty is reserved to the owners of the minerals—[*quotes reservation ut supra*].

"It was maintained by the defenders that the damages complained of, being damages to the house and other buildings erected on the ground, were not surface damages to the ground for which it was declared that they should be liable. It appears to the Lord Ordinary that the case of *Oswald* v. *Gordon*, Nov. 22, 1853, 16 D. 70, is conclusive against the defenders on that point.

"It was further maintained by the defenders that they were not liable in damages for injury to the buildings, because these were erected subsequent to the date of the disposition in 1802. No doubt if a grant of land is made, or land is disponed, for a particular purpose under reservation of the minerals, the owners of the minerals will be bound to afford support to the surface in so far only as may be necessary for that particular purpose, and will not be liable in damages resulting from the lands being put to other purposes not within the contemplation of the parties. But where, as in this case, lands are disponed for no specified purpose, and without limitation as to the uses to which they may be applied, it appears to the Lord Ordinary that it must be held to have been in the contemplation of the parties that the land might be put to the uses and purposes to which land is usually and admittedly put. The erection of houses upon land is certainly one of the usual and ordinary purposes to which land is put. In this particular case, the land included in the disposition of 1802 was 58½ acres in extent, and it cannot be supposed that it was in the contemplation of the parties that no buildings should thereafter be erected on the ground. The Lord Ordinary accordingly thinks that when the owners of the minerals bound themselves to pay for all surface damages done to the ground by the removal of the mineral, it was within the contemplation of the parties that buildings might be erected upon the ground when the minerals came to be removed, and that the defenders took the risk of whatever damage might be occasioned to these buildings.

"The buildings in this case are just such buildings as might naturally and reasonably be expected to be erected on the ground.

"If there was anything of an extraordinary or unusual nature about the buildings, the result might be different—*Dunlop* v. *Corbet*, June 20, 1809, F.C.

"The Lord Ordinary thinks that the point of time to which the defenders' obligation has reference is the date at which the damage is done.

"The obligation is to pay for the damage done to the surface at that date, and not for the damage which would have been done to the surface by the removal of mineral at the date of the disposition.

"The Lord Ordinary was referred to the cases of the *Caledonian Railway Company* v. *Sprot*, 2 Macq. 449; *Buchanan* v. *Andrew*, Mar. 10, 1873, 11 Macph. (H. of L.) 13; *Hamilton* v. *Turner*, July 19, 1867, 5 Macph. 1086; and also to the

following English cases—*Rowbotham, &c.* v. *Wilson*, June 8, 1860, 8 H. of L. Cases, 348; *Aspden* v. *Seddon*, Mar. 24, 1875, 10 L.R., Ch. Apps. 394; *Smith* v. *Thacherah, &c.*, May 25, 1866, 1 Com. Pleas 564.

"The Lord Ordinary thinks that a sum of £350 will fairly remunerate the pursuers for the damages they have sustained."

The defenders reclaimed, and argued—They did not dispute that damage to the extent estimated by the Lord Ordinary had been caused, but denied liability for any damage to the subjects belonging to the pursuers other than surface damage to the lands of the pursuers as agricultural subjects, under reference to the clause in the disposition of 1802

Authorities—Bainbridge on Mines, 269; *Bain* v. *Duke of Hamilton*, Nov. 4, 1867, 6 Macph. 1; *Bald* v. *Alloa Coal Co.*, May 30, 1854, 16 D. 871; *Hutton* v. *Macfarlane*, Nov. 11, 1863, 2 Macph. 79; *Benfieldside Local Board* v. *Consett Iron Co.*, Nov. 28, 1877, 3 L.R., Ex. Div. 54; *Humphries* v. *Brogden*, Nov 21, 1850, 12 A. & E., Q. B. 739; *Harris* v. *Ryding*, 1839, 5 M. & W. 60; *Smart* v. *Morton*, May 5, 1855, 5 E. & B. 30; *Hext* v. *Gill*, July 22, 1872, 7 L.R., Ch. Ap. 699; *Duke of Buccleuch* v. *Wakefield*, March 25, 1870, 4 L. R., E. & I. Ap. 377; and cases in Lord Ordinary's note.

At advising—

Lord Ormidale—Although the defenders are in the position of lessees of Mr Dixon of the mineral estate in question, they are, by the express terms of their lease, responsible to the pursuers for all injury or damage done by their working, in the same way as Mr Dixon himself would under his title-deeds or otherwise be so liable or responsible. It is necessary, therefore, to inquire what was the nature and extent of the liability attachable to Mr Dixon.

[*After stating the facts of the case*]—The pleas in defence are stated in such general if not vague terms as to make it difficult to apprehend precisely their bearing and effect, looking at them by themselves; but this was made clear and intelligible at the debate, the salient points of which will be presently adverted to.

Before disposing to any extent of the merits of the case, the Lord Ordinary thought it right to allow the parties a proof of their respective averments, and a proof was indispensable if for no other reason than to ascertain what amount of damage had been done.

In regard to the amount of damages, the defenders did not at the debate raise any dispute. They conceded—and I think that upon the proof they could not have avoided doing so—that supposing they were liable in damages at all, the amount so fixed by the Lord Ordinary could not be challenged. But the defenders did maintain, in a very able argument fairly covered by their pleas, that they were not in law liable to the pursuers in any damages at all. They maintained this as well on what they represented to be the true construction and effect of the titles under which they and the pursuers held their respective estates of minerals and lands, as on the general principles which have been settled as applicable to cases where the land or surface and mineral estates are divided.

In regard to the plea that the defenders are not liable—having regard to the true construction and effect of their and the pursuers' titles, I am unable to entertain it. It cannot, I think, be reasonably disputed that *prima facie* the defenders are liable, for although by their titles they are at liberty to work and take away the minerals, it is at the same time expressly provided that they shall be obliged "to satisfy and pay" the owners of the superincumbent estate "for all surface damages, if any shall be done to the ground of the said lands." But the defenders contended, as I understood their argument, that according to the language thus used, it was only for damage to the mere surface of the ground as it existed at the time the landed and mineral estates were divided that they are liable. It appears to me that this is by far too critical and narrow an interpretation of the words of the obligation to be sustained. It would be unreasonable and unnatural, I think, to suppose that the parties so contracted, or that they meant or contemplated to exclude from the obligation damages done to the land as the support of buildings or erections suitable and necessary for the owners or occupiers of the landed or surface estate. There is nothing in the titles as I read them to indicate that such was the intention of the parties. There is no description in the titles to show with certainty the nature or character of the surface, or for what purposes it was used at the time the estates were divided, and that cannot now be ascertained from the proof. It cannot, indeed, be ascertained with certainty when the building called "the mansion-house" at present on the pursuers' ground was erected, although it is not disputed that it was subsequent to 1802. I find, however, that, according to the defenders' own statement in the record, in 1802 the lands were distant about two miles from Glasgow, and purely agricultural, "with no buildings upon the surface except some small cottages of not more than one storey in height." That there were some buildings upon the lands when they came to be separated from the minerals is thus admitted. Nor can I find from the proof any evidence to the effect that the building now on the lands called "the mansion-house" is of a description unusual or unfitted for the occupier of the lands themselves.

It is not doubtful, therefore, that, according to the fair and legitimate meaning and intendment of the parties, the obligation of the defenders cannot be limited to the mere surface for grazing or agricultural purposes, but must be held to comprehend injury or damage to ordinary and legitimate buildings or erections upon the lands, and beyond this the Lord Ordinary's judgment does not extend; and I agree with his Lordship in thinking that the case of *Oswald* v. *Gordon* decided the point. I can very well understand that this matter might have assumed a different aspect if there had been erected upon the lands buildings of an extraordinary description. I mean extraordinary in relation to the state or condition of the ground as it may be supposed to have existed in 1802; as, for example, if the whole ground had been covered by streets or villas of an expensive description, the risk of injuring such buildings, and damage arising from such injury, might have been so great as to operate as a prohibition upon the working of the minerals at all, and a different judgment might be called for. In the present, as in every case of the kind—I mean in every case

where the landed or surface estate is separated from the underground or mineral estate—the parties must always be, unless otherwise provided for by express stipulation, subject to mutual forbearance. The owner of the upper or landed estate must not so use it as entirely to prohibit or destroy the use of the underground or mineral estate to the owner thereof. And neither ought the latter to carry on his workings so as to render useless the right of the owner of the surface. This is a mutual obligation necessarily resulting from the division of the two estates, and must be governed very much by the principles which are applicable to the enjoyment of common property.

It may, no doubt, be often very difficult—and the cases cited by the Lord Ordinary (and there are more in the books) show that it is difficult—to define when the rule of forbearance has been infringed or encroached upon by the one party or the other. All that it is necessary for me to say in the present case is that the rule does not appear to me to have been infringed upon. On the contrary, I am disposed to think that nothing has been done by either party different or beyond what may fairly be held to have been contemplated by the parties when the two estates were divided; or, in other words, that it was just to provide for what has occurred that the obligation on the owner of the mineral estate to indemnify the owner of the upper or landed estate was inserted in the titles.

But although I have made these remarks, I desire to add that I deem it unnecessary to deal with the question whether the defenders as owners of the mineral estate would in the present case be entitled to work and take away the whole minerals under the piece of land in question, though the buildings thereon might be thereby necessarily injured or destroyed, as was held in the case of *Aspden* v. *Seddon* referred to by the Lord Ordinary, and pressed on the consideration of the Court in the argument for the defenders? The present is neither an action of declarator nor an application for interdict raising any such question. The summons here concludes for damages only, caused by the defenders' past workings, and for such damages the defenders are, for the reasons I have stated, liable, irrespective altogether of the question determined in *Aspden* v. *Seddon*—a question in regard to which I desire it to be understood that I entirely reserve my opinion.

In these circumstances, and for the reasons stated, I am of opinion that the Lord Ordinary's interlocutor reclaimed against is well founded, and ought to be adhered to.

Lord Gifford—It was stated from the bar that the question involved in this action would or might have an important bearing upon certain other questions which are not unlikely to arise in connection with the same mineral field—that is, with the mineral field belonging to the defenders the company of William Dixon (Limited). It was stated that the proprietors of the surface, or of some portion of it, had lately advertised the lands, and offered them for sale as feuing ground for the erection of streets, of villas, or houses, and that if the ground came to be covered with streets and buildings, and if the defenders were to be held liable for all injury which their mining operations might occasion to all the buildings which might be erected upon the surface, this would probably have the effect of preventing the working of the minerals altogether.

It was quite right for the counsel for the defenders to state that such questions might probably or possibly arise, and that the present action might possibly have a greater importance than the mere sum at stake therein, which is only £350, being the sum decerned for by the Lord Ordinary, and in considering the case I have kept in view the possibility that new and other buildings may perhaps be erected on the ground besides the dwelling-house and offices now belonging to the pursuers. At the same time, I am of opinion that there are materials for deciding the present action without trenching upon or without determining either way those larger questions to which the defenders' counsel referred. What the rights of parties may be if the ground comes to be fully feued out and completely covered with streets or houses I do not think it necessary to determine, and I reserve all such questions until they arise. Their decision is not, in my opinion, necessary for the disposal of the present case.

The pursuers of the present action are the trustees of the late Thomas Neill, and as such they are proprietors of a piece of ground consisting of about 4½ acres. The exact measurement is 4·3558 acres, situated at Langside, near Glasgow, with a dwelling-house and offices erected thereon. The dwelling-house and offices belonging to the pursuers were erected long ago, but it does not exactly appear at what precise date they were built. They have, however, existed beyond the memory of any of the witnesses examined. I think they may be taken to have been built about sixty years ago, and they are at all events more than forty years old. It is enough for the purposes of this action that the house in question is not a recent erection, but that it has been possessed and enjoyed by the pursuers and their predecessors far beyond the prescriptive period. It further appears that the house and offices in question are the only buildings upon the 4½ acres belonging to the pursuers, and it is not said that they are otherwise than quite appropriate for the natural use and enjoyment of the ground. They are of very moderate size, and there is nothing unusual in their nature or construction. Although called a "mansion-house," the dwelling is of inconsiderable size, and with its whole offices is valued at less than £1000. Indeed it is said that in 1862 the house, with the whole 4½ acres of ground, were sold for £1000.

The ground upon which this house is built is part of a larger piece of ground extending to about 58 acres, and the minerals under these 58 acres were separated from the right to the surface and the other right of property in the lands in 1802. [*Examines the titles, and reads the reservation clauses.*] These two deeds first separated the minerals from the lands and created two estates out of what had been originally one, and the whole question before us appears to me to depend upon what is the sound construction of the deeds. The mineral estate has remained separate from the land estate ever since 1802. The pursuers, as successors of Robert Thomson, are proprietors of 4½ acres of the land estate; the defenders, as successors of Robert Houston Rae, are proprietors of the mineral estate.

Now, it is admitted and proved that the de-

fenders' mineral workings of one of their seams of coal have extended to some extent under the pursuers' lands, and have to some extent caused injury and dislocation to the pursuers' house, buildings, and walls. The Lord Ordinary after a long proof has found that the damage so caused by the defenders' workings amounts to the sum of £350. No objection was stated to the mere assessment of this sum by the Lord Ordinary. It was not maintained by the defenders that it was excessive, or that it was not fairly warranted by the evidence adduced, and on looking to that evidence I agree with the Lord Ordinary that the sum is a fair and reasonable deduction from the evidence so far as regards the mere assessment of the amount of damages.

The only question left, and the only question really disputed between the parties, is, whether under the respective titles founded on, and in point of law, the defenders are liable to the pursuers in the damages so assessed, or whether the defenders are not liable in any damages at all, and entitled to absolvitor?

Now, I agree with your Lordship that both under the titles and at common law the defenders are liable to make good to the pursuers the damages claimed. I think the defenders are not entitled either under the special clauses of their disposition or at common law so to work their minerals as to destroy the pursuers' house and offices without making compensation therefor. The case was pleaded as high as if the pursuers' house and offices had been entirely destroyed instead of injured, and it was broadly maintained for the defenders that they were entitled so to work their minerals as utterly to destroy any or every house which might be built on the pursuers' land, and that without payment of any damages or compensation whatever.

I cannot assent to the defenders' contention, but I confine myself exclusively to the case before us, which is the case of a single dwelling-house which has stood upon the pursuers' 4½ acres for upwards of sixty years. I think that if the defenders so excavate their coal as to destroy or injure this house of the pursuers, in the circumstances before us they are liable in damages or compensation. It appears to me that this follows from the terms of the titles of both parties. No doubt the defenders are proprietors of the minerals, and they are entitled to win and to work them; but then there is the express provision that "the persons working the same shall be obliged to satisfy and pay the said Robert Thomson and his foresaids for all surface damages, if any shall be thereby done, to the ground of the said lands." I think the expression "surface damages" in the connection here used is sufficient to cover injury done to the pursuers' dwelling-house and offices, which stand upon the surface, and the erection of which was quite a proper and natural use to which to put the surface. It cannot have been contemplated that there should be no buildings at all on these 58 acres, and so long as the buildings were only such as might be fairly in view of the parties I think they are entitled to protection. In the present case the reasonableness of the building in question is proved by the fact that it has stood unchallenged and undisturbed for upwards of sixty years. I cannot listen to the plea of the defenders that a building which has stood so long unchallenged and uninterfered with was erected contrary to the contemplation of the contracting parties in 1802, and I reserve all question as to the rights of parties if the ground shall now happen to become a part of a town and to be covered with streets and buildings. No such case, I think, is raised in the present action.

The defenders contended that "surface damage" only extended to damage caused by sinking pits or making roads or rubbish heaps upon the surface, and did not extend to subsidence of the surface caused by underground workings. I do not think the provision can be so limited. All surface damage occasioned by the working is to be paid, and the expression "if any" seems to point to underground workings, for if the only damages contemplated were those caused by pits and roads the words "if any" would probably not have been inserted. Pits and roads always affect the surface. Underground workings may often be conducted so as to leave the surface uninjured. Hence the expression "surface damages if any" occasioned by the working. This view is in conformity with *Oswald* v. *Gordon*, 16 D. 70, and I think with common practice.

But apart altogether from the special terms of the conveyance, I think, at common law, where the minerals are conveyed separately from the general estate in the lands, the owner of the minerals must so work them as to leave sufficient support for the surface. Now I think it proved in the present case that this has not been done. The subsidence of the surface was not occasioned by the weight of the buildings. It would have subsided, and to the same extent, though there had been no buildings on it at all, and the only materiality of the buildings is that they increase the damages which the subsidence has occasioned. But even although the weight of the buildings had been a material element, I think all plea on this head is barred by the fact that they are ancient buildings which have stood there for sixty years. I think, therefore, the Lord Ordinary's interlocutor should be affirmed.

Lord Justice-Clerk—I concur in the interlocutor of the Lord Ordinary, and on the grounds stated by Lord Ormidale. I am very far from implying any opinion as to what the respective rights of the landowner and mineral owner might be in the event of the landowner altering substantially the use to which the surface was put at the date of the contract. I think that state of facts would raise a very large and important question, which perhaps has not as yet received any very definite solution; but the present controversy really does not involve any general question of this kind. The existing buildings at present on the surface are not of greater extent nor of a more valuable character than are fairly suitable for the use of the ground at the date of the original separation of the surface and mineral rights. It is the same as if they had been on the ground at that date, and indeed it would rather appear that there were at that time other buildings nearly in the same position. Whether the owner of the surface under such a conveyance as this can so increase the burden of support on the mineral owner, or his liability for damage done, as entirely to alter the relative position and obligation of the parties, is a very different question, and one certainly depending on principles

entirely different from those on which we decide this case.

The Court adhered.

Counsel for the Pursuers (Respondents)—Kinnear—Mackintosh. Agents—Messrs Frasers, Stoddart, & Mackenzie, W.S.

Counsel for the Defenders (Reclaimers)—Asher—Jameson. Agents—Messrs Melville & Lindesay, W.S.

COURT OF TEINDS.

Monday, March 15.

(Before the Lord President (Inglis), Lord Deas, Lord Mure, Lord Shand, and Lord Rutherfurd Clark).

MACDOUGALL AND OTHERS (TRUSTEES OF ST COLUMBA CHURCH, OBAN) *v.* THE MINISTER AND KIRK-SESSION OF OBAN.

Church—Parish quoad sacra—*Erection where New Church is for English Speaking Inhabitants of a Highland Town.*

It is not incompetent to erect a new church and parish *quoad sacra* for the purpose of providing full English services for the English speaking inhabitants of a Highland town, although some of the inhabitants of the new parish may be unable to speak English.

Case where in such circumstances a decree of disjunction and erection was *pronounced*, erecting a new church and parish *quoad sacra*, and where the boundaries of the new parish had been amended subsequently to the presentation of the petition.

This was a petition by Charles Allan M'Dougall and others, trustees under the deed of constitution for a proposed new church and parish in Oban, to be called St Columba Church and Parish. The petition set forth, *inter alia*:—"That St Columba Church, now sought to be erected into a parish church, with a district attached to it *quoad sacra*, is situated in the united parish of Kilmore and Kilbride *quoad civilia*, and in the district thereof which was in 1867 erected into the parish of Oban *quoad sacra*. It was built upwards of four years ago, partly to suit the convenience of those residing in the western district farthest from the parish church, and partly for the purpose of providing the regular as well as the occasional inhabitants of Oban with services exclusively in English. The church has been found to be of much advantage to the inhabitants of the district proposed to be attached to it—which district is situated partly in the said united parish, and partly in the said parish of Oban *quoad sacra*—as well as to the numerous visitors who frequent the neighbourhood during the months of June, July, August, and September. That with reference to the population of the parish of Oban, which numbers, according to last census, 2576 souls, and is now believed to have increased to 3000, and to the fact that the permanent population is largely augmented during summer and autumn by visitors and tourists; and with reference also to the extent and population of the united parish of Kilmore and Kilbride—which contains upwards of 800 inhabitants,—it is highly desirable that additional spiritual superintendence should be provided and permanently secured in connection with the Church of Scotland, and that for this purpose a certain portion of the said parishes should be disjoined therefrom, and erected into a new parish *quoad sacra*. . . . . That with a view to the present application, the proposal for disjunction and erection of the church and parish of St Columba was, on 6th May 1879, considered by the Presbytery of Lorn, which Reverend Court resolved to approve of the proposed disjunction and erection; to find the same to be expedient and proper; to consent to the application to be made to the Court of Teinds therefor; and to authorise and recommend to the parties interested to take the necessary steps for having the same carried through with as little delay as possible. The said presbytery further marked off and designated the district which appeared to them to be suitable, and which they accordingly recommended should be attached *quoad sacra* to St Columba Church proposed to be erected . . . [The proposed new district was then described, part of it being in the town of Oban, and part in the landward parish of Kilmore and Kilbride.] That this district is about two miles and one-half in length by about one mile in breadth, and contains a resident population of 1500 or thereby, which is augmented by visitors and tourists in summer and autumn to nearly 2000. St Columba Church contains 526 sittings, and of these 313 are let; and the building has been so constructed that a gallery, to contain 274 sittings, can be erected when required. There is a congregation of above 350 persons, of whom 175 are on the roll of communicants."

Answers to the petition were lodged by the Rev. John Smith and others, the minister and kirk-session of Oban. They averred, *inter alia*:—"In the year 1872 a movement was originated in the parish for the erection of a new church for the parish, mainly with a view of providing for the increased accommodation required for the summer visitors to Oban. The kirk-session also considered that the possession of two buildings would afford greater facilities for the conducting of services in both English and Gaelic during the summer months. They therefore entered cordially into the movement, subscribed themselves to the erection of the new church, and encouraged the members and adherents of the congregation to subscribe also. The kirk-session contemplated the transference of the endowment from the old church to the new, but they were not in a position to take any steps in this direction on the completion of the building of the church, as they were unable at that time to clear the new building from debt. . . . St Columba Church is scarcely half-a-mile distant from the parish church of Oban. The attendance in St Columba Church, except during the summer months, never exceeds 150, and the majority of those attending have seats in the parish church. The greater part of those stated in the petition to be communicants are summer visitors who have communicated in the church, and the number of seats let includes seats