Counsel for Complainers—W. Campbell—W. Thomson. Agent — Charles George, S.S.C.

Counsel for Respondents—Balfour, Q.C.—Clyde. Agents—Welsh & Forbes, S.S.C.

Thursday, July 9.

FIRST DIVISION.

[Lord Kincairney, Ordinary.

HIGHGATE & COMPANY *v.* BURGH OF PAISLEY.

Process—Preliminary Pleas—"All Parties not Called"—Superior and Vassal—Reservation of Minerals—Mineral Lease—Damages.

A proprietor granted a feu-contract containing a reservation of the minerals in the subjects feued, and of power to work them "but not to occupy the surface." The feuar was bound to erect and maintain buildings of a certain value. The superior having leased the minerals to tenants, subsidences took place in consequence of their operations.

In an action of damages raised by the feuar against the superior in respect of injury sustained through the subsidences, the defender averred that the damage was caused by the mineral tenants' disregard of the prohibitions contained in their lease, and pleaded, "all parties interested not called."

Held (*rev.* the judgment of Lord Stormonth Darling) that the pursuer was not bound to call the mineral tenants.

The Corporation of Paisley, as represented by the Provost, Magistrates, and Town Council, granted to Messrs Hugh Highgate & Company, oil refiners, Paisley, a feu of certain subjects in Murray Street, Paisley.

The feu-contract, which was dated 26th July 1872, contained the following reservation as to the minerals in the subjects:—"But reserving always to the said Parliamentary trustees and their successors and assignees the whole coal and other metals and minerals within the said steading of ground, and power to work, win, and carry away the same, but not to occupy the surface."

The contract also contained a building clause to the effect that the feuars were bound within two years of the date of entry to erect and to maintain on the subjects feued a building capable of yielding a yearly rental of at least triple the feu-duty paid.

Buildings were erected on the subjects, and were used by the feuars for the purposes of their business. By lease dated 22nd September 1885 the Corporation let to Alexander Speirs, fireclay goods manufacturer, and John Faill, as trustees for the firm of Speirs, Gibb & Company, the fireclay under the ground feued to Messrs Highgate. Under the lease the lessees were taken bound to relieve the Corporation of all damage caused by their operations in working the fireclay, and stringent regulations were laid down as to the method of working.

Subsidences having taken place on the lands occupied by Messrs Highgate in consequence of the working of the fireclay, they raised an action against the Corporation for declarator that the defenders were not entitled either by themselves or their lessees to work the minerals under their feu in such manner as to cause subsidence, for damages in respect of the injury caused thereby, and for interdict against future workings.

The defenders averred that the subsidences had been caused by the fault of their tenants, and pleaded—"(1) All parties interested not called."

The Lord Ordinary (STORMONTH DARLING) on 29th May 1896 sustained this plea, and continued the cause.

Opinion.—"The fuller discussion to which I listened in the cognate cases of *Magistrates of Paisley* v. *Spiers, Gibb & Company* has led me to reconsider the view which I was disposed to take (but to which I had not given effect by interlocutor) on the plea of 'All parties not called' in this case.

"The main defence of the corporation is that the letting down of the surface is due to the fault of the lessees, and that for such fault they are not responsible. This defence makes it proper, I think, that the lessees should be called. As a general rule, a landlord is not liable for the consequences of his tenant's act or default unless it be the necessary result of the lease having been granted (*Westorn* v. *Tailors of Potterrow*, I D. 1224; *Lyons* v. *Anderson*, 13 R. 1020). Nor is this rule affected by the circumstance that the pursuers here stand in the relation of vassals to the defenders. A superior who feus ground for building without special stipulation may not be entitled himself to do anything that will bring the buildings down, but he does not warrant support to his feuar against the illegal acts of all and sundry. Accordingly, in the case of *Tassie* v. *Magistrates of Glasgow*, in 1 S. (June 18, 1822), where the pursuers were the tenants of the Corporation, and complained of operations by other tenants, the Magistrates were assoilzied and the actual wrongdoers were held liable.

"It appears from the defences of the mineral tenants to the action of relief at the instance of the Magistrates against them, that they mean to maintain that the subsidence was caused not by their operations but by the operations of their predecessors. It is right, I think, that they should have the chance of substantiating this defence, if they can, in the present action; otherwise the question might have to be tried over again in the action of relief.

"I shall therefore sustain the first plea-in-law for the defenders and continue the cause, in order to give the pursuers an opportunity, if so advised, of bringing a supplementary summons against the mineral tenants."

Argued for reclaimers—The defenders

having feued the ground and reserved the minerals were liable for any injury caused by withdrawal of the support, and warranted the feu against damage caused by themselves or their lessees—*Buchanan, &c.* v. *Andrew*, March 6, 1873, 11 Macph. (H. of L.) 13. The pursuers had called the superiors, and averred that they had damaged the pursuers' property; they might be wrong in this, but that was not a reason for compelling them to call third parties, against whom they made no averments. The Court might in some cases order this to be done, *e.g.*, when the defenders or the third parties might be prejudiced by the failure to call the latter, but there was no question of that here, for the defenders here were raising an action of relief against their tenants, while the case would not constitute *res judicata* against the latter. The cases quoted by the Lord Ordinary did not conflict with this view—*Westorn* v. *Tailors of Potterrow, supra*, only showed that this action might be bad, and was clearly distinguishable, as was *Lyons* v. *Andersen, supra*, there being no obligation on the landlord making him primarily liable such as there was here.

Argued for respondents—The case might result in the tenants being found liable, and accordingly they should be called. If it could be shown that it was prudent to call the tenants to avoid the expense of another action, then it should be done—*Hamilton* v. *Hamilton*, March 20, 1877, 4 R. 668; *Neilson* v. *Wilson*, March 12, 1890, 17 R. 609. There was no case in which a landlord had been found liable to the surface owner for damage caused by his tenant having gone outside the obligations of his lease, unless the landlord had specially bound himself to indemnify against such damage. The defenders had undertaken no such specific obligation, but there was merely a reservation of a right by them as superiors. Accordingly, while they might be liable for damages done by themselves, they were not so for that done by their tenants. There were numerous cases similar to this where the tenant had been called. and rightly so—*Hamilton* v. *Turner and Others*, July 19, 1867, 5 Macph. 108; *White's Trustees* v. *Duke of Hamilton*, March 10, 1887, 14 R. 597.

LORD PRESIDENT—If this were a question of inconvenience or discretion, I should be at one with the Lord Ordinary. It, no doubt, would be very desirable that all the questions existing between the several parties concerned should be brought together and the ultimate liability ascertained in one trial.

The question before us, however, is whether the pursuers are to be denied the right to go on with their present action as it stands, for this is the necessary result of sustaining the plea that all parties are not called. Now, the pursuers, rightly or wrongly, sue the defenders on the footing that they, and they only, were answerable to the pursuers in the matters alleged. The action cannot at present be assumed to be irrelevant, and I think that the pursuers have a right if they so choose to go on with their action. The result may show that they are ill advised, but that is their concern.

I am for recalling the interlocutor, and remitting to the Lord Ordinary to proceed.

LORD KINNEAR—I agree. The pursuers bring this action against the proprietors of the minerals under their lands, and the main ground of their action rests upon the contractual relations between themselves and the defenders as granters of the right by which they hold the surface. There may or may not be a relevant case against these defenders on this or other grounds, and there may or may not be a relevant case against the defenders' lessees, but a case against the lessees must be based upon some other ground than that alleged against the lessors.

Now, I know of no rule of law by which the Court can compel the pursuer of an action which we must at present assume to be relevant to bring an action, to bring another action against persons against whom he at present alleges no ground of complaint. It is impossible to say that the pursuers ought to bring such an action without determining beforehand that if they have a relevant case against the defenders they have called, they must also have a relevant case against the persons they have declined to call. That cannot be decided until the case has been heard on the merits. I see no reason to suppose that the defenders will be prejudiced by the failure to call their lessees, because their right of relief, if they have such a right, the means for protecting it are in their own hands. On the other hand, the lessees whom it is said the pursuers ought to call cannot be prejudiced since whatever our decision may be, the question cannot so far as concerns them be *res judicata*.

I accordingly see no good ground for refusing the pursuers the right to proceed against those persons whom they aver to be liable.

LORD M'LAREN concurred.

LORD ADAM was absent.

The Court recalled the interlocutor of the Lord Ordinary and remitted to him to proceed.

Counsel for the Pursuers — Guthrie — C. Johnston. Agents — Thomson, Dickson & Shaw, W.S.

Counsel for the Defenders—H. Johnston—Clark. Agent—F. J. Martin, W.S.