Wednesday, July 15.

FIRST DIVISION.

[Lord Kyllachy, Ordinary.

CARRON COMPANY *v.* MERCER HENDERSON AND OTHERS (MERCER HENDERSON'S TRUSTEES).

Mines and Minerals—Mineral Lease—Construction—Prohibition against Simultaneous Working Above and Below Day Level.

A landlord let to a tenant "all and whole the coal" under certain lands, "with the sole exclusive power of winning . . . the whole or any part of said coal," with power to the tenant to renounce the lease "so soon as that part of the coal is worked out which lies above" a certain "day-level." "As long as the workings are confined to that part of the coal which is above" the said day-level, the tenant was to pay either a fixed rent, or a royalty of one-seventh on the gross produce, in the option of the landlord. The tenant farther bound himself "to proportion the working of the splint seam as nearly as possible to the other seams." Lastly, it was agreed that if, when that part of the coal is worked out which lies above" the said day-level, the tenant, not availing himself of the break in the lease, "shall declare his intention of proceeding to work out the remaining coal by means of a deeper cut level," then, "so soon as the coal lying above the said level shall be completely worked out and disposed of," the tenant shall pay "in lieu of the rent and proportion hereinbefore specified," either a smaller specified fixed rent or a royalty of one-tenth on the gross produce, at the option of the landlord.

Held (*aff.* judgment of Lord Kyllachy) that upon a sound construction of the lease the tenant was not entitled without the consent of the landlord to work the minerals below the day-level until the minerals above the day-level had been exhausted.

Mines and Minerals—Mineral Lease—Infringement of Condition of Lease by Tenant—Knowledge and Acquiescence of Landlord.

The proprietor of two adjoining pieces of land, the minerals of which were let to the same tenant, sought to interdict his tenant from bringing coal wrought in the one leasehold to a pit situated in the other.

The landlord founded on certain clauses in the leases which he maintained prohibited the tenant from so doing, and which stipulated for the existence of a barrier between the two leaseholds.

It was proved that for many years, to the knowledge and with the tacit consent of the landlord, the tenant had regularly pursued the course of working complained of, and that the barrier had been sufficiently removed to allow of free communication between the leaseholds.

Held (*aff.* judgment of Lord Kyllachy, and following *Wark* v. *Bargaddie Coal Company*, March 15, 1859, 3 Macq. 467) that the tenant must be assoilzied.

Lease—Proof—Mines and Minerals—Alteration of Lease—Writ—Effect of Actings in Contravention of Lease.

The terms of a mineral lease prohibited the tenant from working coal below a certain level until the coal above that level was exhausted.

In an action to enforce this prohibition in the future, brought by the lessor's successor in the lands, the tenant relied (1) upon a subsequent lease to him by the same landlord of the minerals of an adjoining piece of ground, by which he was permitted to work simultaneously above and below level in a specified portion of the prior leasehold; (2) upon certain actings by him, as for example—from a very early period of the lease there had now and again been simultaneous working to substantial amounts, conducted not only with the knowledge and acquiescence but at the invitation of the pursuer's predecessors, and the same system of working was continued after the pursuer became proprietor; (3) upon the view that to revert to the scheme of the lease had, by the acquiescence of the landlord, been rendered impossible without subjecting the tenant to unreasonable loss in respect of workings, &c., undertaken by him, and expenditure incurred.

Held (*aff.* judgment of Lord Kyllachy) (1) that an agreement to alter the terms of a written lease could only be proved by writing, and that the terms of the subsequent lease did not prove any abrogation of the prior lease; (2) that waiving the question of the competent mode of proof, the tenant had failed to prove any such agreement, inasmuch as the actings and acquiescence relied upon, though sufficient to exclude an action for breach of contract, showed that the alteration of the terms of the lease with reference to the prohibition had never even been considered; and (3) that the tenant had failed in fact to prove that he would suffer unreasonable loss from a reversion to the prescribed mode of working—*Wark* v. *Bargaddie Coal Company*, March 15, 1859, 3 Macq. 467, *distinguished*.

By lease dated 4th October 1798 William Wemyss of Cuttlehill let to Sir John Henderson of Fordel, with full power to him to subsett the same in whole or in part, "All and whole the coal, coal-seams, and ironstone in, within, or under" certain lands in Fife specifically described, "together with the sole exclusive right and privilege of winning, working, selling, disposing of,

away carrying, and leading off the whole or any part of said coal or ironstone lying and situated within or under the bounds before ascertained and described."

The term of the lease was 171 years, and power was given to the tenant to renounce the lease in certain events, and in particular "so soon as that part of the coal is worked out which lies above the said Sir John Henderson's present level as it now stands in stone in or under Hopewell pit workings in Fordel ground."

The tenant on his part bound himself and his successors to pay to the landlord and his successors, "and that as long as the workings are confined to that part of the coal which is above the said Sir John Henderson's present level as it now stands in or under Hopewell Pit working in Fordel grounds as aforesaid, the sum of £200 annually, or, in the option of the said William Wemyss or his foresaids, one-seventh part of the gross produce of the coal and ironstone worked out of and sold from the subjects hereby sett."

The tenant further undertook to work the coal in a regular and workmanlike manner, and "more particularly the said Sir John Henderson binds and obliges himself and his foresaids to proportion the working of the splint seam as nearly as possible to the other seams in the same manner as is observed in Fordel or other well-regulated collieries, and to regulate the prices of the different coals agreeable to the practice of the adjoining collieries as nearly as circumstances will admit of."

It was provided that the landlord might inspect the works and the tenant's books, and, the better to ascertain the gross produce, the following claim was inserted, "it is declared that no coal or ironstone worked and win in the premises hereby sett shall be drawn out or brought to bank through or by means of any pitts or other apertures made or sunk on any other grounds save those belonging to the said William Wemyss and his foresaids, or to Sir James Malcolm, or to Miss Wardlaw and their foresaids, unless the said Sir John Henderson and his foresaids shall, by a writing under his or their hands, previously declare and consent that all the produce of such pitts shall be held and accounted to proceed from the premisses contained in this lease."

It was likewise "expressly provided and declared that Fordell level is to remain the sole property of the said Sir John Henderson and his foresaids, and as he possesses, on the one hand, the full and exclusive power and right to extend, produce, and communicate the said level in any direction through the subject hereby lett, so on the other hand it shall be lawfull and competent to him and his foresaids to withdraw all benefit thereof, and shut up the same entirely at any time either during the currency or at the termination of this lease as he or they shall incline."

Then followed this provision — "And moreover, it is hereby covenanted and agreed upon betwixt the parties that in case the said Sir John Henderson and his foresaids shall not avail themselves of the breach stipulated for in this lease when that part of the coal is worked out which lies above the said Sir John Henderson's present level as it now stands in stone in or under Hopewell Pitt Workings in Fordel ground, but shall declare their intention of proceeding to work out and exhaust the remainder of the coal and ironstone in the premisses hereby lett by means of a deeper cut level, or of a steam-engine or other machinery to be anywhere erected, whether on the ground herein described belonging to the said William Wemyss or upon the ground belonging to the said Sir John Henderson, or wheresoever else the lessee shall consider most advantageous for prosecuting the work, then, and in that event, and so soon as the said coal lying above the said level shall be completely worked out and disposed of, the rent and proportion herein before specified and fixed shall from thencefurth cease and determine, and the said Sir John Henderson and his foresaids shall in lieu thereof be bound and obliged, as he hereby binds and obliges himself and them to pay to the said William Wemyss and his foresaids £150 sterling of certain or fixed rent only, or in the said William Wemyss and his foresaids' option, one-tenth part of the gross produce of the coal and ironstone, and that as the yearly rent and tack-duty of the subjects hereby sett, the said restricted rent to commence either upon the day in which the sale of the coal and ironstone under the foresaid level commences, or at the expiry of two years from the day upon which the former rent ceases, whichever of these events shall first happen."

By lease dated 14th June 1832 Robert Wemyss, successor of the said William Wemyss in the lands of Cuttlehill, let to Sir Philip Charles Henderson Durham and his wife, assignees of Sir John Henderson of Fordel in the lease of 1798, with power to them to sub-let, "All and whole the coal and seams of coal" under certain lands in Fife adjoining the lands of which the minerals were let by the lease of 1798.

The term of the lease was 132 years, and the tenants undertook to pay to the said Robert Wemyss, in name of rent or tack-duty, "the sum of £150 sterling annually of fixed rent, or in the option of the said Robert Wemyss and his foresaids, one free and clear eighth part of the gross produce or annual value of all coal raised and sold under this lease that shall be wrought level free, or of one free and clear tenth part of the gross produce or annual value of all coals raised and sold from the coalfield hereby let, which shall be drained by machinery."

It was provided that the tenants should keep regular books, which were to be kept distinct and separate from the books showing the output of sales from the leasehold of 1798.

The tenants further bound themselves "within two years from the 24th day of November 1831, to complete a proper and substantial winning to the splint coal at or near the south-west corner of the field marked No. 3 on the said plans, which win-

ning shall be made to the north of No. 6 dyke, and the engine-pit of the said winning shall be situated so near to the Dirthill Dyke as to work out the whole splint and other coals between these dykes to the depth of the said winning—that is to say, not only the whole coal hereby let, but also the whole coal possessed by the said parties in right of the said Sir John Henderson as aforesaid."

It was also provided and declared that the tenants "shall have power to extend and communicate the Fordel day-level through the portion of the Cuttlehill coalfield which they at present possess as in right of Sir John Henderson as aforesaid to the coalfield hereby let."

It was furthermore provided and declared "that it shall not be lawful to nor in the power of the said Anne Isabella Henderson Durham or her foresaids, or Sir Philip Charles Henderson Durham to communicate to any neighbouring heritor the foresaid Fordel day-level or any level or mine or working that may be formed and extended within the coalfield hereby let without the consent in writing under the hands of the said Robert Wemyss or his foresaids being first had and obtained for that purpose: Declaring that this restriction shall in no respect be held to interfere with their exclusive right to said level in Fordel lands. . . . And further, that they shall not approach with any of their levels or workings within the coalfield hereby let nearer to any of the surrounding coal properties than 10 fathoms without the consent of the said Robert Wemyss and his foresaids, had and obtained in writing as aforesaid, excepting in the case where a privilege is given of communicating the Fordel day-level to the coalfield hereby let as before written."

On 17th April 1895 the Carron Company, incorporated by royal charter, singular successors of the said William and Robert Wemyss in the lands and minerals of Cuttlehill, conform to disposition in their favour dated 1854, raised an action against the Hon. Hew Hamilton Duncan Mercer Henderson and others, Mercer Henderson's trustees, and, as successors of the said Sir John Henderson and Sir Philip Henderson Durham and his wife, lessees under the said leases, to have it declared—(1) that the defenders as lessees under the lease of 1798 "are not entitled until that part of the coal which lies above the day-level, called in the said lease 'Sir John Henderson's level,' and generally known in the district as the 'Fordel day-level,' is completely worked out and disposed of in terms of said lease, to work and win any part of the remainder of the said coal . . . which lies under the said day-level, except only in so far as it lies within the area between the dykes known as the No. 6 Dyke and the Dirthill Dyke respectively, . . . or otherwise, and in any event, are not entitled, until that part of the said coal which lies above the said day-level is completely worked out and disposed of as aforesaid, to open up or commence any new winnings and thereby prosecute their workings" within any part of the remainder of said coal; and to have defenders interdicted accordingly. (2) To have it declared that the defenders are not entitled to draw or bring to bank the coal won by them in the 1798 leasehold (except as regards the aforesaid "between dykes" area) by means of any pit in the 1832 leasehold; and to have the defenders interdicted accordingly. (3) In the event of its being found that the pursuers are not entitled to decree of declarator and interdict under one or other of the alternatives of the first conclusion of the summons, to have it declared that the 1798 lease "does not contain any provision for determining the rent or lordship payable by the defenders as lessees in the circumstances which have arisen of their working coal below said day-level while the coal above the same has not been completely wrought out, and that the said lease is null and void and not binding on the pursuers, and to have the defenders ordained to flit and remove from the 1798 leasehold.

The pursuers averred, *inter alia*—"(Cond. 5) There is still a large quantity of the coal let by said lease of 1798 lying above the said day-level unwrought, and it is the duty of the defenders to confine their workings within said leasehold thereto until it is completely exhausted. They have, however, discovered that the coal below said day-level is greatly superior in quality to the bulk of the coal above it, and that it is more to their profit to work said below-level coal, and they have in consequence practically abandoned their working of the coal situated above said day-level, and have proceeded to work the coal situated below said day-level, in violation of the provisions of the lease as above condescended on. The pursuers have called on the defenders to desist from working the coal below said day-level until the coal lying above the same is completely worked out. The defenders, however, refuse to desist from working the coal below said day-level, and maintain that they are entitled to continue working it. The present action has thus become necessary. The pursuers reserve all claims of damages competent to them in respect of the defenders' said illegal working. (Cond. 6) . . . In virtue of provisions in the two leases the defenders are bound to maintain a barrier of at least ten fathoms between their workings in the two leaseholds, save only in so far as they require to penetrate said barrier for the purpose of communicating said day-level to the second leasehold. They are further not entitled to raise coal worked on the first leasehold by means of pits sunk in the second leasehold unless they shall have first declared in writing that the whole coal raised by said pits is to be held and accounted as the produce of the first leasehold. They have, however, pierced the barrier between the two leaseholds in many places where that is not necessary for the purpose of communicating the said day-level, and where in point of fact it is not and cannot be communicated. They have also, although they have granted no such

writing as aforesaid, raised large quantities of the coal worked from the first leasehold by means of pits sunk in the other, and at present there is no going pit situated on the first leasehold. The course of working thus carried on at present by the defenders is in direct violation of the provisions of said leases, and is greatly to the prejudice of the pursuers."

The defenders averred in their statement of facts—"(Stat. 1) The splint is the lowest and most valuable seam, and only a small part of it is above the day-level. It was accordingly impossible properly to proportion the quantities of splint and other coals worked without going below said day-level before the coal above the level was exhausted. Accordingly workings below the day-level were first opened by the lessees under the 1798 lease in or prior to 1829. Since said date workings have been continued, sometimes above and sometimes below said level, and sometimes both above and below said level. The lessors were all along well aware that the splint coal was being worked below the day-level, and that outwith the area between the Dirthill Dyke and Dyke No. 6 as well as within it. Reference is made to the provisions of the lease of 1832, which proceeded on the footing of the defenders' right so to work. In particular, the pursuers since their acquisition of said minerals have all along been kept informed by their engineers and managers, who inspected the workings and made surveys and reports thereon, and by the defenders, as to the state and extent of said workings. They were accordingly all along well aware that coal was being worked both above and below said level, and took no exceptien thereto till the present action was raised. They were also all along well aware of the fact that without such working the obligation to proportion the quantities of splint and other coals worked could not be implemented, and they acquiesced in and agreed with the lessees that said workings should be continued accordingly both above and below the level throughout the currency of the lease. On the faith of said agreement the defenders' pits, machinery, and workings were made and adapted for the winning of the coal simultaneously both from below and from above said level. The expense thereby incurred was very largely in excess of what would have been incurred at the time if no coal was to be worked at the lower level until the higher coal was exhausted. The abandonment of the workings and pits thus made and opened below said level, and for the purpose of working the coal below said level until the higher coal should be exhausted, could not now be carried out except at heavy loss to the defenders, and without rendering useless a large part of the said expenditure. On all these matters the pursuers have been throughout well aware." "(Stat. 3.) The pursuers have throughout been, also since 1854, informed through their engineers and managers, and by the defenders themselves, that at certain points no barrier was left between the coal in the first leasehold and that in the second. The pursuers have also been aware all along that coal worked in the first leasehold has been raised by pits sunk in the second." . . . "(Stat. 5) The quantity of coal remaining in the 1798 leasehold north of the Dirthill Dyke is 175,385 tons. If the pursuers were to be successful in obtaining decree in terms of the second conclusion of the summons, new shafts would require to be sunk in the 1798 leasehold for this coal, in order to avoid raising it through the pits on the 1832 leasehold as at present. The expense of sinking such pits would, however, now be out of all proportion to the profit attainable for working the said remaining coal, which would accordingly be rendered entirely useless. The loss to the defenders would be about £9000, and the loss to the pursuers would be about half that sum."

The pursuers pleaded—"(1) The defenders, on a sound construction of their lease, not being entitled to work the coal below the day-level until the coal above it is exhausted, the pursuers are entitled to decree of declarator and interdict as concluded for. (2) In the event of its being held that there is no prohibition against the defenders working the coal below the day-level before the coal above it is exhausted, the lease is null and void in respect that it contains no provision for ascertaining the rent or lordship, and the pursuers are entitled to decree of declarator to that effect, and to decree of removing as concluded for. (3) The defenders, on a sound construction of the leases founded on, are not entitled to raise coal worked on the first leasehold by means of pits sunk in the second, and the pursuers are entitled to decree of declarator and interdict against their doing so in terms of the conclusions to that effect. (4) The alterations alleged by the defenders to have been made on the terms of the lease can only be constituted by probative writ; otherwise and in any event they can only be proved by writ or oath.

The defenders pleaded—"(4) The pursuers are excluded by *mora*, taciturnity, and acquiescence from insisting in the present action. (5) In respect of the actings of parties as condescended on, the defenders should be assoilzied. (6) The conclusions of the summons not being warranted by the leases founded on, or either of them, the defenders should be assoilzied. (7) In respect the said lease provides for simultaneous workings above and below the level, and in respect that the royalty stipulated for in said lease is, on a sound construction thereof, one-seventh on coal wrought above the level, and one-tenth on coal wrought below, the said lease is valid, and the defenders are entitled to be assoilzied from the conclusions of the summons."

The Lord Ordinary allowed parties a proof of their averments, and appointed the defenders to lead.

The import of the defenders' proof was as follows:—The coal that it was of most importance to secure was the splint, without a mixture of which in the proportion of from one-half to two-thirds the inferior kinds would be unsaleable. There was

very little level free splint in the 1798 leasehold. Consequently to enable that leasehold to be worked at all it was necessary to go below the day-level.—David Rankine, mining engineer, deponed—"If the simultaneous working above and below the level were prohibited in the 1798 leasehold outwith the dykes, it would practically mean that that leasehold could not be worked, because you must have coal to meet the requirements of the market, and without splint coal you could not, even at the present day, meet the requirements of the market."

As a matter of fact, from 1798–1828 simultaneous working did go on. In 1828 John Geddes, mining engineer, presented a report on the colliery operations at Cuttlehill which tacitly assumed the permissibility of simultaneous working, and by an agreement in the same year between the landlord and tenant, the latter, who stipulated for power to open a pit outwith his boundary, undertook "to work on the Cuttlehill coal as formerly." In 1830 Robert Bald, mining engineer, in reporting to the landlord's trustees, urged that the output and sales-books in connection with Cuttlehill Colliery should be regularly audited. "This is done half-yearly at every extensive colliery with which I am acquainted, and at Fordel I consider it to be particularly requisite, because part of the coal is wrought level-free, and part is drained by machinery, so that there being two rates of royalty payable according as the coal is wrought by one or other of these means, Mr Wemyss should be satisfied every half-year when the royalty is paid that the sales of level-free coal and coal drained by machinery are properly accounted for."

From 1832 to 1854 there was regular simultaneous working, and royalties were paid at the rate of one-seventh for level-free coal, and one-tenth for below-level coal. During the same period there was a series of reports by Mr Geddes to Wemyss' trustees urging that a larger proportion of splint coal should be worked by the tenants. These were all communicated to the tenants, and the desirability was also impressed upon them in conformity with Mr Geddes' reports of securing a larger output of splint which was then below level. In 1860 Wemyss' trustees entered into an agreement with the tenant, then Mr George Mercer Henderson, by which the latter bound himself to re-commence working the splint coal and to pay a higher fixed rent. It was also agreed that any dispute which might arise regarding the working of the coal was to be determined according to the conditions of the original leases "in the same manner as if this agreement had not been entered into." In 1850 the tenant sublet a portion of the 1798 leasehold for a term of seven years to a firm of coalmasters, who bound themselves to pay "the whole royalty rents, being one-tenth or one-seventh, as the case may be, to the proprietors."

In 1854 the Carron Company became proprietors of Cuttlehill and in 1855 and 1860 reports were presented to them by Mr Geddes, which called their attention in such terms as the following to the proportioning clause in the lease of 1798 and the desirability of enforcing it. "It seems fair to infer that under the conditions of the clause the splint coal is not to be worked in any view exclusively to the neglect of the other seams, but that as nearly as possible the seams of coal are to be worked to an equal extent, if not yearly, at all events that when the splint coal output is large, the output of each of the other seams of coal must be likewise considerable; and that over a period of five years there shall be an equal output of each of the seams so far as this can be obtained at any one pit or pits that may have been opened and worked in the parts of Cuttlehill coalfield embraced under this lease of 1798 during said period of five years if that can be done with profit."—(1855). "It is not clear with what object the clause for a proportion of splint coal to the other seams was inserted in the lease. Apparently it was to guard against this better seam being worked to the neglect of the coals less valuable, but in another view it may imply an obligation on the lessee not to allow the splint coal to fall below the proportion of the same seam at other well regulated collieries. In other words, it seemed like an obligation on the tenant to lay out money for sinking pits from time to time as becomes necessary to maintain a supply or given proportion of splint coal, and so carry on the sales of the other seams by aid thereof to the greatest practicable extent yearly."—1860.

From 1854 to the present time simultaneous working has gone on. The only working pits at present are the William and the George, both sunk in the 1832 leasehold at a date prior to 1854. Coal from the 1798 leasehold has constantly been and is now brought up by these pits. The cost of these pits with the mines communicating them must have been about £25,000.

R. Muir Morton, mining engineer, cross-examined by pursuers—"The George Pit is not quite in the centre of the 1832 field, but it is well into it. If that pit had been intended to be confined to the 1832 field alone, I consider it would not have been sunk in the position where it is. I do not consider it a proper site for the working of the 1832 field; it is too far to the west. I think the proper situation for it, if it had been intended to work the 1832 field alone, would have been to the north and west of the William Pit. . . . If it had been confined to the 1832 leasehold alone, it would have been placed so as to command that leasehold, and the William Pit would not have been sunk at all." David Rankine—(Q) In your judgment would it have been a prudent thing to put down the William Pit where it is if the workings in it were to be confined to the 1832 lease?—(A) You must take that in conjunction with the rest of the field, and I would say that the pits there in the 1798 leasehold would not have been sunk in their present position if the workings had been confined to that leasehold alone, or even if they had been entitled to extend the workings from

the 1832 leasehold into the bit of the 1798 leasehold lying between the dykes; the pits have been naturally planted where they are with the view of extending the levels westward and eastward to the march in each case, across the boundary between the two leaseholds, and cutting into the 1798 leasehold outwith the two dykes." Cross-examined—"With regard to the working of the leaseholds, what I said was that the George Pit and the William Pit were in a suitable place for working the 1798 leasehold combined with the 1832 leasehold. The George Pit is in a fair position for working part of the 1832 leasehold coal. If the tenant had had nothing else to work except the 1832 leasehold, I question if he would have put the George Pit where it is; I think he would have put it further to the dip. (Q) But it is at least a question that? (A) I think a very reasonable question."

If the pursuers' contention were sound a large quantity of coal would be lost, because it would not pay to sink new pits for it.

The pursuers led evidence to contradict defenders' witnesses as to the situation of the William and George Pits, and to prove that the defenders must have recouped themselves in forty years' time for what had been spent in sinking them. They further proved that a stone mine from the George Pit was begun in 1888 and finished in 1890 by the defenders, though the pursuers' agents had in the former year intimated to them their objections to simultaneous working.

In 1886 the pursuers raised an action against the defenders to have it declared that until the coal above day-level in the 1798 leasehold should be exhausted the defenders were bound to pay a royalty of one-seventh on the gross produce of the coal in said leasehold, and concluding for payment of £11,000.

The Lord Ordinary (KINNEAR) pronounced an interlocutor in which he found that the royalty payable by the defenders was one-seventh on coal above the day level, and one-tenth on coal below the day level, and therefore assoilzied the defenders.

On 17th June 1887 the First Division adhered to the Lord Ordinary's interlocutor in so far as it assoilzied the defenders; *quoad ultra*, recalled it, and remitted to the Lord Ordinary to proceed.

On 28th June 1888 the House of Lords affirmed this judgment.

The following are excerpts from two of their Lordships' opinions:—LORD CHANCELLOR—"Speaking for myself, I desire to say that I cannot assent at present to the view that the tenant would have been, in defiance of his landlord, entitled to work the lower seam before the upper. I do not say which way that question ought to have been decided. All I say at present is that I do not assent to that view of it, looking at the language of the instrument alone." LORD WATSON—"The claim made in the summons, and the only claim which has been urged at your Lordships' bar, is a claim for a lordship of one-seventh of the gross output taken from both seams. Now, to that I agree with the learned Judges in the Court below, that the defender has a conclusive answer. There is no stipulation whatever in this lease with regard to the lordship which is to be paid for the produce of both seams together. There is a stipulation to the effect that a lordship of one-seventh shall be paid, but it is clearly limited by the terms of the contract to that period during which only one, and that the upper seam, is worked."

The case having gone back to the Outer House, and proof having been led, Lord Stormonth Darling, on 22nd June 1894, pronounced an interlocutor finding the pursuers entitled to payment of £1113 in terms of their first petitory conclusion. His Lordship explained in his opinion that he had come to the conclusion that a royalty of one-seventh was due on coal wrought above level, and one-tenth on coal wrought below level, between 1854 and 1886.

To this interlocutor the First Division, on 11th December 1894, adhered.

With reference to the clause in the 1832 lease, binding the tenants to make a proper and substantial winning to the splint coal, etc., the LORD PRESIDENT said.—"It is admitted that the splint coal here referred to is all below the day level. The tenants were therefore taken bound to work out by this new pit a particular part of the splint coal below the level, which is said to be possessed by them under the lease now in question. Now, it is true that this particular obligation applies only to what is between the dykes. But the importance of the clause to the present question lies in the fact that it does not purport to confer a new right or licence to work this lower splint coal within the old lease, but on the contrary treats the tenants as already possessed of that right, and binds them to exercise it in a particular way. When this lease is read in the light of the fact incidentally disclosed in the report of Mr Geddes, viz., that in 1829 this splint coal below the level was, in the knowledge of the landlord's representatives, being worked, it seems to me to be manifest that the working of the coal below the level, whether it might have been questioned or not, was in fact recognised and sanctioned by the landlord. Whether, by what was done in 1832, the landlord tied his hands from ever at any future time challenging future workings below the level, I have no occasion to determine." His Lordship added—"The defenders have maintained that on the lease of 1798 itself they were legally entitled to work the lower coal simultaneously with the upper. I do not find it necessary to decide that question." LORD M'LAREN said, with reference to the same clause in the 1832 lease—"It is not that the tenants are empowered to work this coal; it is assumed that they have the power, and they are put under obligation to work it, in order, I presume, that the strata may be wrought out continuously,—not leaving detached unwrought portions; and the royalties as to the section of the level lying between the two dykes are left

unaltered. This clause appears to me to prove one of two things, either that in the understanding of the parties simultaneous working was not prohibited by the old lease, or that the prohibition was withdrawn as being contrary to the interests of landlord and tenant. The former I consider to be the preferable view, because, as I have indicated, the words in the first lease referring to the exhaustion of the upper section of the coal, and the consequent sinking of shafts to the lower section, only refer to what was contemplated as a suitable mode of working, and do not amount to a prohibition to work in a different way, should the nature of the strata render such variation necessary."

On 21st February 1896 the Lord Ordinary (KYLLACHY) pronounced the following interlocutor—"Having considered the cause, decerns in terms of the first alternative of the first declaratory conclusion of the summons; decerns also in terms of the first alternative of the corresponding conclusion for interdict; assoilzies the defenders from the second declaratory conclusion and conclusion for interdict following thereon; *quoad ultra* finds it unnecessary to deal with the remaining conclusion, therefore dismisses the same; finds no expenses due to or by either party."

Opinion.—. . . "The present action has been brought not to raise any further question with respect to the *past*, but to determine and regulate the order and mode of working for the future. And with respect to that matter, what I have first to consider is, what is the just construction of the lease of 1798—confining attention to its terms, and construing it as if the question had arisen say in the year 1798 when it was made?

"Now, I must observe in the outset that this question has not hitherto been decided. There have been opinions expressed, or rather indicated, both in this Court and in the House of Lords, which are of course entitled to great weight; but there has been no decision. Moreover the opinions indicated have been, as I read them, conflicting. I must therefore endeavour to construe the lease according to the best judgment I can myself form.

"I do not recite the clauses of the lease on which the question turns. They are by this time familiar to us all, and up to a certain point all parties are, I think, at one as to their effect. It is conceded on all hands that the lease does not contemplate simultaneous working, but, on the contrary, contemplates that the upper—the 'level-free' seams—should be worked out first. That seems to be common ground. But as to the inference to be drawn, there are two views.

"The pursuers say that the just inference is that both parties were agreed that simultaneous working should not occur—in other words, that while the whole coal was let, it was an *implied condition of the lease* that it should be worked in two stages, the coal above the level on certain terms, and the coal below the level on certain other terms. The defenders on the other hand say that the just inference is only this: that the parties assumed—erroneously as the event proved—that simultaneous working was impossible; that is to say, practically impossible, because inconsistent with any interest on the part of the tenants; and they argue that right being given to work out the whole coal without restriction expressed, no restriction can be implied from the omission to fix the rent or lordship payable in an event which was overlooked. That omission they admit creates a difficulty as to the rent or lordship which they have now to pay, but it cannot, they say, affect their right to work out the coal in such manner as is most for their interest.

"Now, I do not say that the question thus raised is free from difficulty, but I have come to be of opinion that so far the pursuers are right. Whatever the motive was (objection by the landlord to simultaneous working, or assumed absence of any interest in the tenant so to work), the fact is, I think, manifest that the parties transacted and adjusted the clauses of the lease on the footing that the upper seams should be worked before the lower seams were touched. That such was the intention of both parties is, I think, as plain as if it had been expressed; and if the judicial mind is satisfied on the just reading of the instrument that such was their intention, it does not seem to me to be a different proposition to say that such was their agreement.

"If I am right in this, it is not necessary to inquire to what results in law the acceptance of the defenders' view would lead. But I must say that these results would appear to me to be dangerous for the defenders. If they are right, that the lease proceeded on an erroneous assumption as to the modes of working possible, then it becomes at least a question whether the lease is not void, or voidable, as having been made under mutual error. Similarly, or rather alternatively, if they are right in holding that for modes of working possible under the lease, and which have been in fact followed, neither rent nor lordship is stipulated, I do not, as at present advised, see how the lease in question can be a good lease, or at least a lease binding under the Act 1449 on singular successors. The suggestion no doubt is that the contract of lease having been partly executed, the absence of a stipulated rent involves merely a reference to the *quantum meruit*. But I know of no such doctrine as applicable to a claim for future possession, or at all events a claim by a tenant to continue in possession as against the lessor's singular successors,

"I have not overlooked the defenders' argument that simultaneous working must be held as impliedly permitted because the lease contains a clause obliging the tenants as far as possible so to work as to put out a proportional quantity of splint coal. It may be, as the defenders allege, that as matters now stand that obligation cannot now be performed without simultaneous working both above and below the level. But if so, it is enough to say that at the time the lease was made the assump-

tion of parties was plainly different. That, as we have seen, is common ground. And accordingly, if the fact be as the defenders say, the only result is that the obligation in question is now imprestable. In point of fact there was no difficulty in procuring sufficient splint above the level down at all events to 1828; and it is a circumstance not without significance that as soon as a deficiency appeared, the new lease of 1832 was negotiated—one of the objects of that lease being to provide splint coal to be wrought with the other seams.

"On the whole, therefore, I conclude that the pursuers are right in their construction of the lease of 1798, and that if the conditions of that lease are still in force, the pursuers are entitled to prevail in this part of their action. The defenders however allege that, with respect to the particular matter in controversy, the conditions of the lease have been abrogated by agreement express or tacit, or by acquiescence by the landlords in the mode of working which is now challenged.

"Now, the law on this subject is so far fairly well settled, and I think, speaking generally, it may be stated as follows—(1) A lease may have its provisions varied by a subsequent agreement expressed in a probative writing. That is of course clear. (2) The same result may follow from an improbative written agreement followed by *rei interventus;* or from a verbal agreement proved by writ or oath and followed by *rei interventus.* The rule so far is the same as in the constitution of contracts relating to heritage—*Gowans* v. *Carstairs,* 24 D. 382; *Walker* v. *Flint,* 1 Macph. 417; *Gibson* v. *Adams,* 3 R. 144. (3) A lease may also be altered by a verbal agreement proved by parole if followed by actings contrary to the lease and in pursuance of the agreement. At least it may be so to the effect of justifying, or barring challenge of the particular acts done—*Bargaddie Coal Company* v. *Wark,* 3 Macq. 467; *Kirkpatrick* v. *Allanshaw Coal Company,* 8 R. 327. (4) Apart from express agreement, written or verbal, consent to a particular contravention may be implied from knowledge and non-objection—that is to say, from acquiescence on the part of the landlord; and such acquiescence may be proved by parole—*Bargaddie Coal Company* v. *Wark, supra.* (5) Apart also from express agreement, a lease may be altered *rebus ipsis et factis*—that is to say, it may be altered, both for the past and for the future, by acts of the parties necessarily and unequivocally importing an agreement to alter; and such acts of the parties may be proved by parole—*Bargaddie Coal Company* v. *Wark, supra.*

"In the present case the first suggestion is that the lease of 1832, which is of course a probative writing, abrogated by implication the restriction in the lease of 1798. It certainly did so as regards a particular area, viz., that between No. 6 Dyke and Dirthill Dyke. For it required that within that area the splint coal (which was there under the day level) should be at once worked in both leaseholds. But I am quite unable to hold that as regards the rest of the 1798 leasehold any change was made or sanctioned by the lease of 1832. The utmost that can be said is that it was not thought necessary to express in that lease that the provisions which it centained as to working between the Dykes were in derogation of the provisions of the prior lease.

"There being thus no written agreement, it has next to be noted that there is no evidence—and, indeed, no proper averment—of any verbal agreement. There is thus no need to inquire what would be the result as to future workings of such verbal agreement proved by parole and followed by acts done in pursuance of such agreement.

"Accordingly the defenders' case must depend upon simple acquiescence, or upon acquiescence coupled with facts and circumstances importing necessarily and unequivocally an alteration of the lease *rebus ipsis et factis.*

"Now, I think it is quite clear that, except as regards the past, mere acquiescence will not do. Acquiescence in—that is to say, tacit consent to—acts done in contravention of a lease may justify those acts, or bar complaint with respect to them, but it can have no effect as to the future. This, I think, was not ultimately disputed.

"The ultimate question therefore comes to be whether both parties to the lease have so transacted and acted as to imply, and necessarily to imply, a final agreement between them that for the whole period still to run of the 1798 lease the coal above and the coal below the day level may, notwithstanding the terms of the lease, be worked simultaneously.

"Now, there is no doubt upon the proof of two things—(1) that the landlord (including the pursuers since their purchase in 1854) knew, or through their engineers had the means of knowing, that coal was being worked in the 1798 leasehold both above and below the day level. (2) That in that knowledge they accepted (without objection on that score) lordships calculated at one-seventh of the produce for the coal above and one-tenth of the produce for the coal below. On the other hand, it is not, in my opinion, proved that any pits were sunk or mines driven specially in connection with the lower level—that is to say, pits or mines which would not have been sunk or driven if the conditions of the lease had been adhered to. I speak with diffidence as to the results of a proof which was so much overloaded, and in which the different issues were so much mixed up. But I do not remember, and cannot find, that proof of that kind was even attempted. Certainly if it was so my attention was not drawn to it. Of course the simultaneous workings (admittedly lawful in the 1832 field) were extended into the lower seams in the older field, and the necessary roads and communications were of course made as those workings progressed. But there is no evidence that these workings thus permitted did not fully recoup the necessary outlay, or that anything was done which would not have been done supposing it had been quite in

view that the right to work simultaneously was precarious, and that in course of time it might be the landlord's interest to interfere. Further, I do not find that, except by inaction, the landlords, particularly the present pursuers, made themselves in any way parties to the workings in question, or any of them. The tenants did what they did, whatever it was, at their own instance and on their own responsibility. I am not, of course, speaking of the arrangements of which the 1832 lease was the upshot. These were made matter of express agreement under that lease.

"These being the facts, can I affirm that they necessarily imply an agreement to abrogate or alter the conditions of the 1798 lease? I am of opinion that I cannot. I think all that the facts necessarily imply is a licence by the landlord to the tenants to do the things which the tenants did do. They do not, I think, necessarily imply an agreement fettering or affecting the landlord's action during the whole period of the lease. In other words, I do not think it necessary, in order to explain what occurred, to postulate any such agreement as the defenders infer. Especially do I hesitate to do so when there is no averment and no suggestion that the subject was ever brought up between the parties, or that any definite terms were ever discussed between them. It would, I think, be highly dangerous if the provisions of a formal lease should be liable to be abrogated by proof of facts and circumstances so plainly equivocal; and in that connection it is not, I think, without importance that the alteration which the defenders suggest is not said to have included any provision for a new fixed rent. Assume that simultaneous working is to be held as sanctioned not for the past only but permanently, what is to happen if the defenders after a time cease to find the working sufficiently profitable? what fixed rent are they to pay? There is none fixed in the lease. The alternative fixed rents in the lease are both inapplicable. That is admitted. And how, that being so, the rent is to be fixed, I have I confess been unable to gather. I think that is a difficulty which in itself militates seriously against the defenders' hypothesis of a permanent alteration of the prescribed mode and order of working.

"I am therefore of opinion that the pursuers are entitled to declarator and interdict in terms of the first alternative of the first conclusion of their summons.

"The second question in the case relates to a different matter and may be more shortly considered. The pursuers contend that the defenders are prohibited both by the 1798 and by the 1832 leases from raising coal worked in the first leasehold by means of pits sunk in the second. The defenders deny that such is the construction of either lease, but they further contend that the two fields have, with the landlord's consent, been hitherto worked as one—that they (the defenders) have incurred large expenditure upon that footing, and that here at least there are sufficient elements for concluding that *rebus ipsis et factis* the suggested restriction if it existed was permanently relaxed.

"The greater part of the proof has been directed to this last point. And I confess that the defenders seem to me to have here a stronger case than that which they make in connection with the lease of 1798. But I do not require, in the view I take of the case, to decide anything on that head. In my view the pursuers here fail upon the construction of the two leases. I do not see how, together or separately, the two leases, or either of them, can be held to prohibit the raising of coal from the old leasehold by means of pits sunk in the new.

"The first lease certainly contains nothing which can help the pursuers. The clause which they quote on record is (I think they had in the end to acknowledge) really against them. The lessees are prohibited, unless with the consent of the lessor, from drawing out or bringing to the surface the coal in the first leasehold except by means of pits sunk in ground belonging to the lessor or to certain of his neighbours. But the No. 2 leasehold was, and is, in the ground of the lessor, and when the clause is examined it is quite obvious that that circumstance entirely satisfies not only the words but also the purpose of the provision.

"With respect again to the 1832 lease the position is this. The lease certainly contains no direct prohibition of the thing complained of. It contains in fact no provision on the subject. It does, however, contain a clause by which the lessees are taken bound not to approach (without the lessors' consent) nearer than 10 fathoms to any of the surrounding 'coal properties.' And an exception which follows with respect to the Fordel day level is said to show that among the neighbouring coal properties' the leasehold of 1798 (although belonging to the same proprietor) was meant to be included. On the other hand, that construction is rendered somewhat difficult by another clause in the lease which clearly excludes the existence of any barrier between the 1832 leasehold and at least a large area of the 1798 leasehold. I mean the area between the two dykes.

"If therefore the matter had rested there I think there might have been some difficulty. The 10-fathom barrier, if required to be left between the two leaseholds, would, whether intended or not, have in fact prevented the passage of coal from the one leasehold to the other. And if the barrier had been left, and still stood, it would have been at least open to argue that the defenders must be prohibited from doing what involved its total or partial removal. But the fact is, as clearly appears from the proof, that the barrier is already removed over a great part of the boundary between the two leaseholds, quite sufficiently removed to allow free communication between the 1798 workings and the 1832 pits. Therefore, as matters stand, there is no physical obstacle to be considered. And that being so, and there being no prohibition in the lease, I am not,

I confess, able to see how, upon the construction of the lease, the defenders can be prevented from working both leaseholds if they so please by means of pits sunk in the second. No doubt if the pursuers are right in their construction of the 1832 lease (as to which, however, I am far from clear), it may be open to them to contend that the removal of the barrier was illegal. But supposing that question to be within this action, the defenders' point is, I think, conclusive, viz., that whatever else is proved, it is clearly proved that, so far as the barrier has been removed, it has been so with the landlord's knowledge and with his tacit consent. That is provable by parole upon the lowest view of the doctrine of the *Bargaddie* case, and being so, the result is, I think, that both *de facto* and *de jure* the barrier is to be held as now away.

"On the second question, therefore, I am against the pursuers, and propose to assoilzie the defenders from the conclusion of the action.

"With regard to expenses, I wish very much if it were possible to hold both parties liable in the expenses of the proof. It extended to quite immoderate length, and was in my judgment quite unnecessary had the parties been willing to take a little trouble in laying before the Court the undisputed facts. A plan or a couple of plans and a few tables, which could have been easily prepared from the colliery plans, would have quite sufficed for the decision of the case. As it is, however, all I can do is to find no expenses due to or by either party."

The defenders reclaimed, and argued—(1) The lease of 1798 contained no express prohibition of simultaneous working. It let "the whole coal," and empowered the tenant to sublet any part of it. The proportioning clause necessarily implied simultaneous working, for almost all the splint was below level. (2) But even assuming that the 1798 lease did prohibit simultaneous working, it had been altered by the 1832 lease, and the Court expressed the opinion in 1894 that reading the leases together there was no such prohibition. Then there were the agreements of 1828 and 1849, which showed the interpretation then put by parties on the 1798 lease, so that when Carron Company bought Cuttlehill in 1854, the tack on which the minerals were possessed was the 1798 lease as modified by these subsequent writings. The existing lease at the time of the sale was always what must be looked at in a question with singular successors. (3) But if these writings were not enough, there were actings of parties which were quite sufficient to alter a lease and make the alteration binding on singular successors. The regular simultaneous working was clearly proved to have been within the landlord's knowledge; and simultaneous working since 1854 had been equally well-known to, and had never been challenged by, Carron Company. The test was this—had the landlord by acquiescing in actings inconsistent with the lease, permitted the tenant to put himself in a position from which he could not withdraw without serious loss? Here the George and William pits would never have been placed in their actual situations but for the tenant's belief that simultaneous working was allowed. Authorities cited—*M'Tavish* v. *Fraser's Trustees*, May 13, 1790, Hume, p. 546; *Bell* v. *Lamont*, June 14, 1814, F.C.; *Lindsay* v. *Webster*, December 9, 1841, 4 D. 231; *Baillie* v. *Fraser*, June 15, 1853, 15 D. 747; *Wark* v. *Bargaddie Coal Company*, March 15, 1859, 3 Macq. 467; *Carnegie* v. *Guthrie*, December 22, 1866, 5 Macph. 253.

Argued for the pursuers—(1) The 1798 lease prohibited simultaneous working by implication. The defenders were permitted by it to take away coal, but only in a specified manner, and no provision was made for the possibility of simultaneous working. The question of the interpretation of the lease had been expressly left open, in the House of Lords at all events. If, however, the lease must be taken to allow simultaneous working, no rent was fixed by it for the coal so won. In the absence of that essential stipulation, therefore, the lease was void. (2) The 1832 lease made no alteration on the conditions of working imposed by the 1798 lease. It did, indeed, permit simultaneous working in the "between dykes" area. But by so doing it implied that all the rest of the 1798 leasehold was excluded from that privilege. As for the other writings, the stipulation as to the settlement of disputes in the agreement of 1849 obliterated them in so far as they could be supposed to alter the lease of 1798. (3) A singular successor was bound by the lease and nothing but the lease—Act 1449 cap. 17, and that lease must be in writing—Ersk. Inst. ii. 6, 24. If it was contended that a lease had been altered, there must be an averment that there was an agreement to that effect; the agreement must be proved by writing; and if the writing was improbative, there must be such subsequent actings as could only be referable to that agreement—*Hall* v. *M'Gill*, July 14, 1847, 9 D. 1557; *Sutherland* v. *Montrose Shipbuilding Company*, February 3, 1860, 22 D. 665; *Bank of Scotland* v. *Stewart*, June 19, 1891, 18 R. 957. The actings here, though they might be such as to exclude a claim of damages, were not binding on Carron Company as to the interpretation of the lease and as to the future. The defenders, moreover, had long since been recouped for their outlay on the William and George pits. Further authorities cited—*Bruce* v. *M'Leod*, July 8, 1822, 1 Shaw App. 213; *Turner* v. *Nicolson*, March 6, 1835, 13 S. 633; *Kirkpatrick* v. *Allanshaw Coal Company*, December 17, 1880, 8 R. 327.

At advising—

LORD PRESIDENT—The first question is whether, on a sound construction of the lease of 1798, the tenant is entitled without the consent of the landlord to work the minerals below the day level before the upper minerals have been exhausted, and I am of opinion that he is not.

If the lease be examined as a whole, and

the several passages be compared which directly relate to working and to royalties, it is plain that the lease contemplates and provides for the tenant working and paying for, first, the minerals above, and then, when they are worked out, the minerals below the day level. It does not contemplate or provide for the simultaneous working or payment of both. The smaller royalty to be payable on the more costly working of the lower minerals is expressed as "in lieu of" the higher royalty which, it is assumed, has ceased to be paid. The absence of any provision for payment of any return for any of the lower minerals, worked simultaneously with the other, presents the strongest possible reason for holding that the contract treats such working as outside its scope.

It is true that the whole coals are let, and that this includes the lower strata. But nothing is more common than to let the whole coal of a field, and then to define the system or order of working. The two provisions are quite consistent, and in my opinion we have here a prescribed order of working.

The defenders also founded upon the clause in the lease requiring the tenant to proportion the working of the splint seam as nearly as possible to the other seams, and they say that it is impossible to give effect to this clause on the pursuers' theory, inasmuch as all the splint coal is below the day-level. It is to be observed, however, that while it is true of the splint coal now and for a long time that it is below the day-level, this was not so at the date of the lease, or for some years after its date, and the words "as nearly as possible" point to this being a condition which might not in all circumstances be effective.

Assuming now that under the terms of the lease of 1798 the tenant was not entitled without the consent of the landlord to work the lower minerals until the upper minerals were exhausted, the next question is, have the pursuers been debarred by anything done by themselves or their predecessors in title from compelling adherence to the lease in the future workings.

I do not consider the lease of 1832 to have had any such effect. I think that its provisions about what has been called the "tween dykes area" show that the parties assumed that the tenant was entitled to work both levels simultaneously, and I gave my reasons for so thinking in my former opinion. But, be those reasons as sound as I deem them, they furnish no warrant for holding that this error bound the parties to prosecute the same system of working on a part of the field to which the contract of 1832 itself had no application. Among the acts and deeds on which the defenders rely the lease of 1832 stands out, not on account of its argumentative avail, which I think small, but because it is a written deed. It has its place, however, also in the train of conduct on which the defenders found.

I have become very familiar with the various incidents from 1798 downwards to which our attention has been called. It may be conceded to the defenders that it is clearly proved that from a very early period of the lease coal was wrought in the lower seams now and again and to substantial amounts, that not only was this done with the knowledge and consent of the pursuers' predecessors, but that the working of the lower minerals was encouraged by them, and that the same system of working was continued after the pursuers became proprietors and down to the present time. Further, I think it clear in fact that, until the former action was in the House of Lords, neither party had at all considered whether the lease allowed or did not allow the working of the lower minerals. Both parties found it convenient that they should be so worked.

I think that I have put the case of the defenders on this matter fairly, and the question is, what does it avail them in the present action?

The pursuers are not seeking to question or to make the defenders liable for anything done in the past as having been done in breach of the contract. Their own knowledge and consent would be conclusive against any such claim. But the present question is of the future. Have the pursuers barred themselves from now insisting that the lease shall in future be complied with?

Now, it can hardly be maintained that a permitted deviation from a clause of a lease of itself commits the landlord to continue the like permission all through what may be, as in the present lease, a very long term. The case must be carried beyond the mere fact of the prohibited act having been allowed to be done with more or less frequency. Whatever be the mode of proof competent, the thing to be proved is an agreement to abrogate for the future one of the terms of the lease.

The primary answer, however, to the defenders' case is that such an agreement can only be proved by writing. None of the cases cited support the defenders. In particular, the difference between the *Bargaddie* case and the present is too obvious to require further development, except in one aspect to which I shall presently refer.

I have said that whatever be the competent mode of proof, the thing to be proved is an agreement to abrogate one of the leading conditions of the lease. Now, it may be well to say that, even were the question of competency waived, the history of the coalfield shows that this question was never so much as considered. As I have already said, the parties never adverted to the terms of the lease, and assumed that simultaneous working was within the lease. Further, very much shorter views were taken than applied to the whole remaining term of the lease.

It was argued, however, for the defenders that what had been already done in the way of working, and done with the consent and approval of the landlord, rendered it impossible, without altogether unreasonable loss, now to revert to the scheme of the lease, and that the past permission or tolerance must be held to have implied a con-

sent for the future. The defenders' case under this head (even assuming it to be a legitimate development of the *Bargaddie* case) fails in fact. All that can be said is that certain mines have been constructed for the lower minerals, which, if those workings must in the meantime be given up, will cease to be remunerative. Even if this general statement were not subject to some criticisms, I should say that the mere fact that some of the defenders' outlay would be made unremunerative by the pursuers reverting to their rights under the lease, could hardly be held to debar them from those rights. The defenders cannot say, to put it at the highest, that the pursuers are more responsible than they are themselves for the departure from the lease, and they must be held to have executed those works at their own risk. But further, the defenders could only found on the execution of those works by pleading that it would be inequitable to throw on them substantial loss induced by the pursuers' conduct. Now, I do not think that it is proved that the works in question have been unremunerative, even if their working be stopped now. Yet again, one of the stone mines from the George Pit, upon which this argument arises, was constructed after intimation by the pursuers that they held the under workings to be illegal.

On these grounds, which I have stated in condensed form, I am of opinion that the pursuers are entitled to prevail in their leading conclusions.

For the reasons stated by the Lord Ordinary I consider their case on the second set of conclusions to have failed, and I have nothing to add to what his Lordship has said.

LORD ADAM concurred.

LORD M'LAREN — Twice the case was argued before us. I have carefully considered the documentary evidence and proof in order to ascertain whether there is legal evidence of a variation of the conditions of the holding of the tenants of the minerals as expressed in the lease of 1798. As we are agreed in opinion, I do not think it necessary that I should re-state the grounds of our decision which are expressed in your Lordship's opinion. I shall confine myself to the briefest possible statement of my view of the law applicable to such questions. As it is a fundamental principle of our law that rights to land can only be constituted by writing, it follows in my view that where a subaltern right is constituted by an owner of land, whether this be a right in perpetuity, or a right of tenancy for a term of years, the interests of the superior or owner on the one part, and of the feuar or tenant on the other, will be regulated by the original grant until these rights are altered by an agreement in writing between the parties or their successors in title. I think there is neither principle nor authority to support the proposition that the right of the tenant may be enlarged or restricted otherwise than by an agreement in writing, but of course if there be such an agreement in an informal writing, evidence of possession, or performance distinctly referable to the new agreement, may be used to supply the want of the formalities which are essential when the written title only is relied on.

I think that the generality of the rule, that writing is necessary to the constitution of a right in relation to land, is in no way affected by the principle recognised in such cases as *Wark* v. *Bargaddie Coal Company*, which, as expressed by Lord Cranworth, amounts to no more than this—that if a landlord authorises something to be done in contravention of a lease, the tenant is not liable as for a breach of contract. If, for example, a tenant or feuar is put under obligation not to build on a certain part of his holding, or is to leave intact a barrier between his mine and that of an adjacent tenant or proprietor, or is only to cultivate his field in a particular way, then, if he is charged with a breach of his agreement, he may prove *prout de jure* the consent of the landlord to the particular building, or mine, or deviation from the prescribed rotation, as a bar or justification of the alleged breach. But I am unable to admit that this equitable plea should be extended so as to justify acts of the tenant to which the landlord has not given his consent, or so as to warrant the inference that the consent to particular acts amounts to a discharge of the condition for the remaining years of the lease.

The landlord could not in my judgment be entitled to deprive the tenant of the benefit of capital laid out with his consent in developing the estate; and if it could be shown in the present case that pits had been sunk with the landlord's permission or acquiescence for the working of an area which had not been fully wrought out, I should have thought that the defenders were entitled to follow their workings to the extent to which the original permission might reasonably be taken to apply. But the existing pits have already been wrought for a period exceeding the usual duration of a mineral lease. Such expenditure in underground mining as has since taken place is in my view nothing more than ordinary mining, and I cannot regard it in the light of capital expended in reliance on a right or permission given to vary the mode of working prescribed by the lease.

With regard to the question, how far the consents of the heirs of Mr Wemyss, the contracting party, would be binding on the Carron Company, I should imagine that an alteration of the terms of a lease, if made in writing and acted upon, would be binding on a singular successor for the same reason as the lease itself is binding, I mean by the effect of the statute. But I do not think that the accounts of royalties which were rendered from time to time by the tenants and accepted as the bases of settlement, nor the letters which were written on behalf of the proprietors inviting the tenants to work the splint coal below the day level, amount to an agreement or consent to discharge the condition which I take to be implied in the lease of 1798, that the

working of coal below the level is only to begin after the upper coal is exhausted. I think these writings amount at most to a toleration of simultaneous working above and below the level so long as such working suited the views and wishes of both parties; and such consent to the existing mode of working as the Carron Company may be held to have given is of the same character. In our judgment in the previous case, in which we applied the successive rates of royalty specified in the lease to the altered state of circumstances, we gave full effect to the principle that the landlord is not entitled to be indemnified against acts which he has authorised. But I find nothing in what has been done which amounts to the introduction of a new term into the contract of location, or which bars the Carron Company from reverting to the mode of working prescribed by the lease.

LORD KINNEAR—I agree with your Lordships and the Lord Ordinary on all the points.

The Court adhered and found the respondents entitled to two-thirds of their expenses in the Inner House.

Counsel for the Pursuers—D.-F. Asher, Q.C.—Guthrie—Chree. Agents—John C. Brodie & Sons, W.S.

Counsel for the Defenders — Sol.-Gen. Dickson — Clyde. Agents — Davidson & Syme, W.S.

Thursday, July 9.

SECOND DIVISION.

[Lord Low, Ordinary.

DAVIDSON'S TRUSTEE *v.* SIMMONS.

Expenses—Finding of Expenses to Trustee — Taxation — Whether to be Taxed as between Party and Party or Agent and Client.

In an action by a trustee for discharge the Court held him "entitled to expenses in the Outer House subject to modification to the extent of one-half of the taxed amount thereof, as also to the whole expenses of his reclaiming-note, and on . . . said expenses being paid," appointed a disposition to be delivered to a beneficiary, which would have had the effect of denuding the trustee of the whole trust-estate. The Auditor taxed the account as between party and party. The trustee objected to the Auditor's report, and claimed expenses as between agent and client. In support of the Auditor's taxation it was maintained that the claim ought to have been made when the interlocutor was pronounced, and that there was nothing in the interlocutor to indicate any departure from the ordinary rule. The Court *sustained* the objection, and allowed the trustee expenses as between agent and client on the ground that he was entitled to be kept *indemnis*.

David Stewart, solicitor, Dundee, sole surviving trustee acting under a mutual trust-disposition and settlement granted by John Davidson, formerly mason in Lochee, and Janet Peat or Davidson, formerly his wife, dated 23rd October 1871, brought an action against John Davidson Cooper, Otago, New Zealand, and Isabella Stewart or Simmons, Lochee, and her husband as her administrator-in-law and as guardian of his pupil children, concluding for declarator that the pursuer and his co-trustees, now deceased, had fully accounted for his whole intromissions, and for a discharge for himself and his co-trustees upon his granting a valid and sufficient conveyance of certain heritable property in favour of the defenders for their respective rights of fee and liferent.

The defender Cooper did not enter appearance, and decree in absence was pronounced against him.

On 19th March 1896 the Lord Ordinary (LOW) pronounced the following interlocutor—"The Lord Ordinary having considered the cause decerns against the defender Mrs Simmons for payment to the pursuer of the sum of £6, 4s., being the balance brought out as due by her in the note annexed to the accountant's report No. 88 of process, and on said sum being paid appoints the clerk of the process to deliver up to Mrs Simmons the disposition No. of process, executed by the pursuer in conformity with the interlocutor of 4th February last, and on said delivery being made, discharges the pursuer of the office of trustee referred to on record, and also exoners and discharges the pursuer and his co-trustees conform to the conclusions of the summons thereanent: And after hearing counsel on the question of expenses, finds the pursuer entitled to expenses subject to modification to the extent of one-half of the taxed amount thereof: Allows an account," &c.

Against this interlocutor the pursuer reclaimed.

On 5th June the Court pronounced the following interlocutor—"Recal the interlocutor reclaimed against, and decern against the defender Mrs Simmons for payment to the pursuer of the sum of £6, 14s. sterling, being the balance due as per note to the Accountant's report No. 88 of process: Further, find the pursuer entitled to expenses in the Outer House, subject to modification to the extent of one-half of the taxed amount thereof, as also to the whole expenses of his reclaiming-note, and on said sum of £6, 4s. sterling and the said expenses being paid to the pursuer, appoint the clerk of the process to deliver to Mrs Simmons the disposition No. of process, duly executed, and thereafter discharge the pursuer and his co-trustees in terms of the conclusions of the action, and decern: Remit the said accounts of expenses to the Auditor to tax and to report."

The Auditor taxed the expenses as between party and party, but also stated what in his opinion would be the proper