balance of the £2900 mentioned in the account, after deducting the £1000 bequeathed to her by the will. On this footing, accordingly, matters remained without objection during the life of Mr and Mrs Fleming, the former of whom appears, on enquiry, to have been made fully aware by Mrs Campbell of what she considered her obligation in the above respects."

The pursuers reclaimed.

MACKENZIE and SHAND for them.

SOLICITOR-GENERAL and ADAM in answer.

The Court adhered.

Agents for Pursuers—J. W. & J. Mackenzie, W.S.

Agents for Defenders—Adam, Kirk & Robertson, W.S.

Friday, January 7.

SECOND DIVISION.

WAUGH AND OTHERS (SHAW'S TRUSTEES) *v.* JAMES RUSSEL & SON.

Mineral Lease—Fixed Rent—Lordship—Deficiency. A mineral lease provided that the tenant, in the option of the landlord, should either pay a certain fixed rent or a lordship on the minerals "raised and carried off." The lease further provided that, in the event of strikes of the workmen or "other unforeseen occurrences" preventing the tenants from raising minerals under the lease to the extent of the fixed rent, they should notwithstanding be bound to pay the rent; but should be entitled during the succeeding years of the lease to work minerals free from lordship to the extent of the deficiency. *Held*, in an action for payment of lordships at the instance of the landlord, that the tenants were not entitled to the benefit of the clause providing for a deficiency in respect of minerals raised but alleged not to be "carried off" in consequence of the failure of a railway company to provide the waggons necessary for that purpose.

This was an action at the instance of the pursuers, as proprietors of the lands of Trees, against the defenders, for payment of certain lordships said to be due by them as tenants of the minerals in the said lands. Under the lease between the parties, the landlord had the option of a fixed rent of £200 per annum, payable half yearly, or of certain lordships on the minerals which should be raised and carried off by the tenants. It was further provided by the lease that, in the event of strikes of the workmen, or other unforeseen occurrences, preventing the tenants from raising minerals under the lease to the extent of the fixed rent, they should notwithstanding thereof be bound to pay the fixed rent, but should be entitled, during the succeeding years of the lease, to work minerals from said property to the extent of such deficiency free of lordship. It was not disputed that the lordships claimed by the pursuers were the lordships arising on the disposals during the periods to which these referred, but the defenders maintained that they were entitled to apply these lordships, in so far as they exceeded the fixed rent, in making up a deficiency in certain previous half-years, when they were obliged to pay the fixed rent although the lordships were considerably less. These deficiencies, they averred, arose chiefly through the railway company unexpectedly failing to send the necessary waggons for conveyance of the minerals. The pursuers, on the other hand, contended that the defenders were only entitled to the drawback in the single case where the deficiency in the disposal arose from inability on their part to work the minerals and as that was not the cause of deficiency averred by the defenders they were not entitled to the drawback claimed by them.

The heads of the agreement on which the discussion mainly turned were as follows:—"The tenants hereby agree to pay the sum of two hundred pounds sterling annually of fixed rent for the minerals in the said lands, or, in the option of the proprietor, to pay the following lordships for the ironstone, coal, and other minerals, which shall be raised and carried off by them from said lands during the foresaid space of twelve years, viz., on blackband ironstone, after being calcined and cleaned of dross, three shillings sterling for every quantity of twenty two and one-half hundredweight, imperial weight, so raised and carried off; on clay ironstone and iron ore, calcined and cleaned as aforesaid, one shilling and sixpence sterling for every quantity of the same weight, or, in the tenant's option, ninepence on the raw state; on all gas or parrot coal, three shillings sterling for every twenty-two and one-half hundred-weight as aforesaid; on all other coal separated from dross by a screen or riddle, one and one-half inch in the meshes, sixpence for every twenty-two and one-half hundredweight; on coal dross, passing through said riddle or screen, one penny for ever twenty-two and one-half hundredweight; but no lordship shall be chargeable on such dross as may be necessarily used by the tenants in working the minerals, or in calcining the limestone or ironstone, nor for such coals as may be used for the engines, pithead fires, or in ventilating the mines; on each quantity of twenty-two and one-half hundredweight of limestone in the raw state, fourpence; and on the same weight of fireclay in the like state, threepence sterling." "In the event of strikes of the workmen or other unforeseen occurrence, preventing the tenants from raising minerals under the lease to the extent of the fixed rent aforesaid, they shall, notwithstanding thereof, be bound to pay said fixed rent; but shall be entitled, during the succeeding years of the lease, to work minerals from said property to the extent of such deficiency free of lordship."

The Lord Ordinary (JERVISWOODE) allowed a proof before answer, and thereafter pronounced the following interlocutor:—

"*Edinburgh, 24th November* 1869.—The Lord Ordinary having heard counsel on the proof led, made avizandum with the debate and whole process, and considered the same,—Finds as matter of fact that the balance of the amount of the lordship on the minerals which was, in the option of the proprietor, stipulated for under the minute of agreement of lease between the deceased William Shaw of Trees, under whose deed of settlement the pursuers are trustees, and the company or firm of James Russel & Son, so far as respects the sums calculated on the quantities of the said minerals which were raised and also carried off by the defenders from the lands of Trees before the expiry of the said lease at Candlemas 1869, is correctly stated in the note No. 17 of process; but finds that a considerable quantity of the minerals which were raised from the said lands remained on or near the same, in the possession of the defenders, but not carried off therefrom, at the said date of expiry of the lease: And, further, finds as matter of law that

the pursuers have failed to establish grounds sufficient to warrant them in insisting in the conclusions of the action for payment of the whole sums of lordship arising from the minerals raised and carried off by the defenders in excess of the fixed rent paid by them for the several half years from Lammas 1867 to Candlemas 1869 inclusive, and that the pursuers are only entitled to the admitted balance of lordship for the period from Candlemas 1866 to Candlemas 1869 inclusive, as set forth in No. 11 of the statement of facts for the defenders, and amounting, said balance, to the sum of £141, 0s. 2d., with interest thereon at five per cent. from said term of Candlemas 1869 to 5th May 1869, when the defenders offered payment thereof, and with bank interest thereon since the last-mentioned date; and decerns for the said principal sum of £141, 0s. 2d., and interest thereon accordingly: *Quoad ultra*, and with reference to the preceding findings, dismisses the action, and decerns: Finds the defenders entitled to their expenses, of which allows an account to be lodged, and remits the same to the auditor to tax and to report.

"*Note.*—The Lord Ordinary thought it right to allow proof here; and although it is to be regretted that considerable expense must in consequence have been incurred by the parties, he cannot say that he regrets the step taken, so far as regards his own apprehension of the facts of the case, on which, as he thinks, the proof adduced has thrown light.

"Referring to the 19th head of the minute of agreement of lease, being the clause founded on by the defenders as entitling them to set off against the excess of lordship for the four half-years from Lammas 1867 to Candlemas 1869 inclusive, the deficiency of lordship below the fixed rent paid in the previous half-years from Candlemas 1866 inclusive, there is no doubt that the clause in express words provides only for the protection of the tenants in case of their being, from certain 'unforeseen occurrences,' prevented from '*raising*' minerals to the extent of the fixed rent; but as the lordships were by the agreement (head 8th) to be payable, not on the minerals *raised*, but on those which should be '*raised and carried off*' by the tenants, and as they appear to have settled with Mr Shaw, the proprietor, upon that footing previous to his death, the Lord Ordinary thinks that a fair interpretation of the 19th clause must include the *carrying off* as well as the *raising* of the minerals."

The pursuers reclaimed.

LORD ADVOCATE, PATTISON, and STRACHAN for them.

SOLICITOR-GENERAL and GLOAG in answer.

At advising—

LORD JUSTICE-CLERK—We have had a very ingenious argument on the part of the defenders, but I think the case is not one of much difficulty. The question turns on the construction of the 19th clause of a lease granted by the pursuers to the defenders. It is a mineral lease, which gives the lessor an option to receive payment either by a fixed rent or by a lordship on the minerals disposed of year by year. At the close of the lease there is a provision that "in the event of strikes of the workmen or other unforeseen occurrences preventing the tenants from raising minerals under the lease to the extent of the fixed rent aforesaid, they shall, notwithstanding thereof, be bound to pay said fixed rent; but shall be entitled, during the succeeding years of the lease, to work minerals from said property to the extent of such deficiency free of lordship."

Now, in the facts stated on record it seems to me that it is admitted by the defenders that, if this clause does not apply to the circumstances of this case, the deductions claimed from the amount sued for cannot be insisted in. And the question therefore is, whether the clause does or does not apply? In the record the defenders rest their defence upon the construction put by them upon the 19th clause. They say, "The lordship on the disposals for that half year," (the half year ending Lammas 1858) "amounted only to £3, 3s. 2d., thus falling short of the said fixed rent by the sum of £96, 16s. 10d. During the following years, however, the lordships exceeded the said fixed rent, and the settlements between the said James Russel & Son and the said William Shaw were made on the footing of payment by the tenants of the full fixed rent at Lammas 1858, and of a deduction being made, with the full knowledge and sanction of the landlord, from the lordships at subsequent terms, to the extent of the excess thereof over the fixed rent, so as to reduce the total payments by the tenants to the lordships on the whole disposals, all in terms of the 19th head of the said agreement." That is the only case presented on record.

The question then is, whether (in terms of the 19th clause) the defenders have proved that they were prevented from raising the minerals by unforeseen occurrences? Now, an ingenious view was suggested yesterday by the defenders, that the pursuers, in order to succeed in their claim, must maintain that the term "output," as used in the 19th clause, must mean output disposed of. Doubtless that is so; but the sufficient answer to that is, that the defenders themselves proved to-day that that was the meaning of the term as used in that clause. The 10th clause of the lease clearly prescribes that the lordship is due only on minerals disposed of. That clause provides that the daily sales shall be entered in a book, which book "shall furnish the quantities of the respective minerals on which the lordship shall be reckoned." That is also clearly the understanding of parties in their statements on record. This is evident, further, from the fact that the lease allows the landlord an option between a fixed rent and a lordship on the output on the minerals. Now, if the rent was a counterpart for a lordship on the output for the year, "output" must mean minerals raised and disposed of; otherwise the two things, between which lay the choice of the landlord, were not co-relatives. The books to be kept in terms of the 10th article, and on which lordship was calculated, showed only the quantity of minerals disposed of, and not what minerals were raised, and the presumption is that when the landlord came to choose the alternatives were both liquid, as on any other assumption he could not know what to choose between. If "output" mean anything else than minerals disposed of, there would be no co-relatives between the alternatives.

The result of the defenders' construction would be, that if the landlord chose to demand the lordship for one year he was entitled to a royalty on all minerals on the ground undisposed of; whereas if he preferred the fixed rent he thereby gave up all claim to lordship for the minerals raised during that year.

The real question therefore comes to be, are the facts relied on by the defenders, "unforeseen occurrences," preventing them from raising the minerals? I read the clause as it stands, and the facts proved do not, in my opinion, fall under the

unforeseen occurrences mentioned in it. The minerals were raised and the occurrences relied on prevented their *disposal* only. I take it the tenants took the risk of paying the fixed rent, although after raising the minerals unforeseen occurrences prevented these from being disposed of. But that was what occurred here, and I think it is impossible to say that the defenders have suffered from any occurrence falling within the meaning of the 19th clause.

I am therefore for recalling the interlocutor of the Lord Ordinary, and decerning against the defenders in terms of the conclusions of the summons.

LORD COWAN—I cannot doubt that we must confine ourselves to the disposal of this case as presented on record. Whatever questions might have arisen out of different facts or on different pleas, we cannot shut our eyes to the fact that no such question is before us. The defender has not averred that these minerals were minerals actually raised during years in which a fixed rent had been paid. I should have difficulty in holding that a lordship could be claimed on minerals raised but not disposed of in the year for which the rent was paid. But the only defence made to this action is, that under the 19th clause the defenders are entitled to a certain deduction in respect of fixed rents paid for previous years. That is, that in paying lordships the fixed rent of former years is to be taken into account. I am clearly of opinion that the clause has been misunderstood by the Lord Ordinary. I cannot read it as if it dealt with "unforeseen occurrences preventing the tenants from raising *and from disposing of* minerals under the lease," and as if the words "other unforeseen occurrences" were to be construed as including circumstances embarrassing the tenants in the *disposal* of the minerals. These general words must be construed as including only occurrences similar to those previously specially referred to, namely, "strikes of workmen." That is an invariable rule in construing general words appended to special. I know of no case in which general words can be construed as including circumstances different in character from those specially mentioned immediately before, and I read those general words as embracing only occurrences similar to those referred to in the special words. The clause provides for the case of the tenants being prevented from raising the minerals, and the "other unforeseen occurrences" are occurrences having the same effect. Nothing can be clearer than that they only refer to the case of the tenants being prevented from taking out—raising—the minerals. Taking this view of the clause, I must concur with your Lordship in thinking that the interlocutor of the Lord Ordinary should be recalled, and effect given to the claim of the pursuers.

LORD BENHOLME—The only difficulty I have felt in this case arises from the pleadings of the pursuers. I think they have maintained more than was necessary for the success of their case. The question, I take it, entirely depends on the 19th clause of the lease. Now, what are the circumstances contemplated by the clause? It is introduced to provide for the event of the tenants being prevented from raising minerals. The occurrences which may fall under this clause are indefinite in number, but they are clearly defined and restricted by the effect to which they tend. In order to be "unforeseen occurrences" in the sense of this clause they must tend to prevent the minerals being raised. To read the clause as including any other occurrences, such as those relied on by the defenders, would be to put a forced construction on the clause.

LORD NEAVES—I am of the same opinion. A question might arise under this lease as to whether, when a landlord elects to take the fixed rent for a certain period, he is entitled thereafter in subsequent years to exact the lordship of minerals raised in the period for which a fixed rent was paid, but which afterwards became due by their disposal; or whether the payment of fixed rent does not liberate the tenant from all claim for minerals raised during the period for which the rent was paid. But in order to raise such a point the record must set forth such facts as are suited to raise it. That has not been done here. The only case made is a claim for deductions from the sum sued for, in respect of the provisions of the 19th clause of the lease.

That clause appears to me to be quite unambiguous. Its object is very evidently to relieve the tenant of a particular risk in connection with the lease. It provides that, if the tenant be prevented from raising minerals from any unforeseen cause, he shall, in that event, and in that only, be entitled to relief. The occurrences specified are "strikes of workmen;" and these words must be held to limit the general expressions following, because they show that the risks contemplated in the clause are occurrences which shall prevent the raising of the minerals.

I think it is impossible, without doing violence to the clause, to extend it to occurrences such as those averred and proved here,—occurrences which do not affect the raising of the minerals. The exemption from risk therefore does not come into operation. The obstacle was to the disposal, but parties do not make such difficulties the subject of stipulation; and we must accordingly repel the defenders' pleas to that effect.

Agents for Pursuers—Scott, Moncreiff, & Dalgety. W.S.

Agents for Defenders—Wilson, Burn, & Gloag, W.S.

Saturday, January 8.

DOUGLAS *v.* THOMSON.

Succession—Heritage—Liferent—Fiduciary Fee—Service. Held that under a destination to a parent in liferent allenarly and to children *nascituri* in fee, the mother is fiduciary fiar for the children till they come into existence, and there is a vested right in them as disponees, transmissible without service to their representatives.

This was an action of reduction and declarator brought by James Archibald Douglas, residing in Edinburgh, for the purpose of setting aside the titles made up by the defender to certain heritable subjects in Glasgow, and to have it found that said subjects truly belonged to the pursuer. The circumstances were these:—

The late John Douglas, manufacturer in Glasgow, by his trust-settlement executed in 1832 directed his trustees to invest half the residue of his estate in heritable property, and convey the same to his sister Janet Douglas in liferent for