waited till the expenses had been paid by the pursuer, or he had become bankrupt. But in these special circumstances the Court would take the lead out of the pursuer's hands, as by May one or other of these events would have occurred; and if the expenses were not paid it would be the defender's fault.

The expenses not having been paid or caution found, the Court, on the following day, discharged the notice of trial.

Agent for Pursuer—
Agents for Defender—Webster & Will, S.S.C.

Wednesday, March 20.

SIR GEORGE DOUGLAS CLERK, BART., *v.* GEORGE EDWARD CLERK & OTHERS.

Entail—Prohibition—Lease—Minerals.

Where the heir in possession of an entailed estate was prohibited from letting the coal under a certain portion of the entailed lands, and from communicating the level of the said coal to any neighbouring colliery, but the said restriction did not apply to the ironstone or other minerals under the said lands or their levels; and where, in virtue of the Act 6 and 7 Will. IV. c. 42, a lease of the whole minerals under the said lands had been let for the period of thirty-one years, and it was sought for the purpose of beneficially working the coal as well as other minerals under one part of the lands to communicate the said coal levels to a neighbouring colliery:—

Held that the heir of entail in possession was entitled to do so, notwithstanding the said restriction, provided the doing so was beneficial and not prejudicial to the enjoyment of the mineral estate, and that provision was made for restoring matters to their former condition whenever this should cease to be the case, it not being a prohibition which was necessary for the preservation of the entailed estate, or its transmission to the succeeding heirs of entail.

This action of declarator was raised by Sir George Douglas Clerk, Baronet, heir of entail in possession of the estate of Penicuick, and by John Clerk, Esq., Q.C., his curator, against George Edward Clerk and Others, the substitute heirs of entail to the said property.

The summons sought to have it declared that "the pursuers, Sir George Douglas Clerk and John Clerk, have full and undoubted right and power to communicate the level of the coal of Lasswade, belonging to the pursuer, Sir George Douglas Clerk, to the neighbouring colliery of Dryden, belonging to Colonel Robert Archibald Trotter of Castlelaw and Dryden, notwithstanding any prohibition contained in a deed of entail executed by the deceased Sir James Clerk of Penicuik, Bart., bearing date the 14th, and registered in the Register of Tailzies 12th June 1782, and in the books of Council and Session 26th April 1798; and in particular, it ought and should be found and declared, by decree foresaid, that the pursuers have full and undoubted power and authority to permit the Shotts Iron Company, tenants of the minerals under the pursuers at Loanhead, in the parish of Lasswade, to communicate the coal workings and coal levels within the said field to the neighbouring estate of Dryden, belonging to the said Colonel Robert Archibald Trotter, so as thereby to enable the said Shotts Iron Company to make use of the said coal workings and levels for carrying off the water from the mineral field, so as to facilitate and admit of raising minerals from the said estate of Dryden."

The deed of entail under which the estate of Penicuik was held by the pursuer contained the following prohibitory clause:—"And with this limitation and provision also, that it shall not be lawful to, nor in the power of my said heirs of taillie, or any of them, to sett tacks (for any periods whatever) of the whole or any part of the coal lying under and beneath the whole lands and barony of Lasswade, for any term whatever, nor to communicate the level of the said coal of Lasswade to any neighbouring colliery."

In virtue, however, of the Act 6 and 7 Will. IV. c. 42, a lease was entered into in 1866, whereby the late Sir George Clerk and his *curator bonis* let to the Shotts Iron Company, for thirty-one years as from 1865, the whole coal, cannal coal, bituminous shale, ironstone, limestone, and fire-clay, lying under certain parts of the lands of Lasswade in the neighbourhood of Loanhead. This lease contained a clause in the following terms:—"And it is hereby expressly provided and declared that the lessees and their assignees and sub-tenants shall on no account communicate any of the coal workings *or levels* within the foresaid lands to any adjoining proprietor; but this prohibition is not intended to apply to their works for raising and manufacturing *iron*, and that the said lessees may communicate their works for raising and manufacturing *iron, but not coal*, to neighbouring lands, the minerals of which may be let to them; and should the lessees also become lessees of the minerals in any of the adjoining properties, they shall have liberty to use the pits, hill-grounds, and railways, &c., on the foresaid lands, in so far as that can be done in conformity with the provision and declaration above written, for similar purposes, upon their satisfying the said Sir George Clerk or his foresaids that the minerals raised from the different properties will be properly distinguished, and upon paying to the said Sir George Clerk or his foresaids *one penny sterling* per ton of twenty-two and a-half hundred weight for all other minerals that shall be raised from the pits in lands belonging to other parties and carried over the lands belonging to the said Sir George Clerk."

The lands of Lasswade are bounded on the west by the estate of Dryden, belonging to Colonel Trotter of Castlelaw and Dryden. The Shotts Iron Company became in the year 1869 lessees of the minerals under the lands of Dryden in the neighbourhood of their Loanhead workings or the estate of Lasswade. In January 1870 the Shotts Iron Company applied to the late Sir James Clerk, then heir of entail in possession of the estate of Penicuik, for leave to communicate the level in the Loanhead estate to the workings in the Dryden field, so as to economise labour and expense by working the two fields with the same level and from the same pits. Their application was in the following terms:—

"*Shotts Iron Works, 21st January* 1870.

"Stuart Neilson, Esq., W.S., Edinburgh.

"Dear Sir,—The Shotts Iron Company's mineral workings in the lands of Loanhead, which have been carried on for some time from pits and mines on the east side of the village of Loanhead, are

approaching a 'slip' or 'dyke' near the western boundary of Loanhead estate, known in the district as the 'Burghlee Dyke.' The minerals to the west of this 'slip' or 'dyke,' although the same as on the east side, are not of sufficient extent in Loanhead lands alone to warrant the necessary expense for opening up and working the same; and it is a question with the mineral tenants whether they would not be better to restrict their workings entirely to the east side of Burghlee Dyke, and leave the western portion of the mineral field unworked. This however, they are very unwilling to do, as they consider it would be more advantageous to both landlord and tenants that the whole area of this mineral field should be worked simultaneously.

"In order to do this properly, the minerals in the adjoining lands of Dryden, belonging to Colonel Trotter of the Bush, would require to be worked along with and from the same pits and mines as the minerals in Loanhead to the west of the Burghlee Dyke before referred to; but although the Shotts Iron Company have the right under their lease of Loanhead minerals of working the *ironstone* in the manner described, they are prohibited from working the coal in the same way; and this prohibition will, if adhered to, operate very injuriously for the interests of both landlord and tenants, because the same expenditure in sinking and fitting pits and mines would, if that prohibition were removed, enable the tenants to work both coal and ironstone; but, on the other hand, with such a prohibition it is not worth while for the tenants to incur such an expenditure for the sake of working the ironstone alone. If the prohibition was removed the tenants would immediately conclude an arrangement with Colonel Trotter for working the whole of his Dryden minerals from pits and mines to be situated near the western boundary of Loanhead lands, so that the whole of the minerals in the lands of Loanhead, to the west of the Burghlee Dyke before referred to, would be worked from such pits and mines simultaneously with the minerals on the east side of said dyke from the pits and mines now at work near Loanhead village, and the gross output of minerals from Loanhead estate would, in this way, *be increased about* 50 *per cent.*, and that from a part of the mineral field which cannot be worked advantageously except in connection with Dryden minerals. Besides, the whole of the Dryden minerals raised from these pits and mines would be subject to a wayleave which might be expected to run *from* £100 *to* £300 *per annum.* Nor would any permanent injury whatever be done to Loanhead mineral field by such an arrangement, because it would be an easy matter to provide for the building up of any temporary connection that might be made between the workings on the east and west sides of Burghlee Dyke, which is undoubtedly the natural boundary of Loanhead mineral field to the west. What I would suggest then is, that this matter should be referred to the mining engineer for the landlord (Mr Geddes), for his consideration, and if he reports that what I have proposed is fair, reasonable, and practicable, and for the mutual advantage of both landlord and tenants, then that an application should be made to the Court to grant the necessary powers to Sir James Clerk's curator to modify the lease as desired. The Shotts Iron Company, of course, bearing all the expense of the remit to the engineer, and of the application to the Court.—I am, dear Sir, yours respectfully,

(Signed) J. W. ORMISTON."

Mr Geddes reported in favour of this proposal of the Shotts Iron Company, and an application was accordingly made to the Court by Sir George Clark's curator for special powers to modify the lease of the Shotts Iron Company. This application was reported to the Inner House by the Lord Ordinary, and it was in consequence of the views expressed by the Court, and with reference to that application, that this action of declarator was raised.

The pursuer pleaded—"(1) The prohibition to communicate the level of the coal of Lasswade is no longer binding upon the heirs of entail, the same being subsidiary to the prohibition against setting tacks of coal, which prohibition is now no longer operative. (2) The said prohibition against communicating the level of the coal is null and void, as imposing an undue restraint upon property, without any corresponding interest to protect. (3) The heirs of entail having no interest in enforcing the prohibition, they have no title to do so, and decree ought to be pronounced in terms of the conclusion of the summons."

On the other hand, the defender pleaded—"(1) The whole defenders should be assoilzied from the whole conclusions of the summons, in respect that the proposed communication of level of the coal of Loanhead to the colliery of Dryden is expressly and effectually prohibited by the entail libelled, and that said prohibition has not been relaxed by any subsequent legislation, or other competent authority. (2) The proposed operation being not only not advantageous, but, on the contrary, prejudicial to the interests of the whole heirs of entail other than the pursuer Sir George Douglas Clerk, the defenders should be assoilzied from the whole conclusions of the summons."

The Lord Ordinary (MACKENZIE) having heard counsel for the parties, reported the case "not only on account of the novelty and importance of the question, but because the action has been raised in consequence of the views expressed by the Court on the report of the Lord Ordinary (interlocutor, dated 25th May 1870) in an application presented, under the Pupils' Protection Act, by the *curator bonis* of the last proprietor, for authority to modify the lease of the Shotts Iron Company, by removing the prohibition therein contained against communicating the levels of the coal of Lasswade to the Dryden colliery."

He added the following statement in his Note:—"The first question is, What is the meaning and object of the limitation in the deed of entail? The Lord Ordinary considers that it was not inserted for the purpose of limiting the operations of the heir in possession in winning the coal of the Lasswade coalfield. It appears to him that, in order to prevent the communication of the level in the coal in Lasswade to any neighbouring colliery, a barrier of coal would require to be left at the march of the estate, and that the object of the limitation was to exclude the water of neighbouring collieries from the Lasswade coal-field, and to secure to the heirs of entail, in personally working the Lasswade coal, the sole benefit of day level drainage by means of the Mavisbank level, which has long existed in the Lasswade coal-field to a depth of forty fathoms, or thereby, from the surface at the Engine pit. But this limitation, which was, it is thought, intended for the benefit of the heirs of entail, is

now found to be injurious. If effectual, it will prevent the beneficial working of the coal and other minerals in the thirty acres of ground situated to the west of the Burghlee dyke, and it will also deprive the heir in possession of the benefit of a considerable amount of revenue, which he would derive from a way-leave on all the Dryden coal and other minerals carried through the intended workings in these thirty acres, and brought to the surface by means of a pit which would be sunk therein, if it is lawful to open a communication between the coal-workings in the two estates. The limitation, then, is truly an interference with the beneficial administration and management of the estate by the heir in possession. Further, it does not confer any corresponding advantage upon succeeding heirs. The only advantage from the limitation is that which arises from excluding by a barrier the water of the Dryden coal-field from the Lasswade coal-field, which, as the dip of the strata is to the south-east, would flow into the Lasswade workings when these happened to be deeper than the workings in Dryden. But this advantage would not be obtained, because, as there is no prohibition in the entail against communicating the levels of the ironstone, oil shales, limestone, and fire-clays, in the lands of Lasswade to neighbouring collieries, the limitation in the deed of entail is, according to Mr Mackenzie's report (on a remit made to him by the Lord Ordinary), 'quite useless, and of no benefit at all, as the workings in the two properties can be as effectually connected, so far as drainage is concerned, in the ironstone or other mineral seam, as in the coal.'

"The question then arises, whether the limitation is so fenced, by virtue of the provisions of the Act 1685, c. 22, as to prevent the heir in possession working out the coal to the march of the Lasswade estate, and for a valuable consideration communicating the levels of the Lasswade coal to the Dryden colliery. It is, no doubt, made lawful to proprietors by the Act 'to tailzie their lands and estates, and to substitute aires in their tailzies with such provisions and conditions as they shall think fit, and to affect the said tailzies' with prohibitory, irritant, and resolutive clauses against alienation, the contraction of debt, and the alteration of the order of succession. But does the Act make every condition and provision which may be invented by an entailer binding upon the heirs of entail, and, in particular, a provision like the present, which imposes an undue restraint upon the heir in possession, and is hurtful to his beneficial enjoyment of the estate, and which is not calculated to carry out the express prohibition mentioned in the Act, or to secure the succession of the substitute heirs in terms of the tailzie?

"Further, it is to be observed that the limitation is an integral part of the clause prohibiting tacks of the coal. But by the statute 6 and 7 Will. IV. c. 42, sec. 1, it is enacted that, 'notwithstanding any prohibitory, irritant, and resolutive clauses, contained in any entail' pursuant to the Act 1685, c. 22, it shall be lawful for the heir in possession 'to grant tacks of any mines and minerals contained in such lands and estates for any period not exceeding thirty-one years.' Is the pursuer, by virtue of this statute, entitled to grant a lease of the whole Lasswade coal to the Dryden march? because, if he is, the tenant may work it all out, and so defeat the limitation in regard to the communication of the coal levels.

"After anxious consideration, the Lord Ordinary has come to the conclusion that the limitation in question does not prevent the pursuer, Sir George Douglas Clerk, from communicating *for onerous causes*, the levels of the coal of Lasswade to the Dryden colliery, and from permitting *for onerous causes*, the Shotts Iron Company to make such a communication. It will be observed that the pursuer does not, in the conclusions of his summons, limit the right he seeks to have declared to the granting of onerous deeds.

"The benefit to the heir in possession by the coal-workings in Lasswade and Dryden being made to communicate, would be the increased income arising from the immediate working of the thirty acres of coal and ironstone to the west of the Burghlee Dyke, by means of a pit in these thirty acres, and from a considerable amount of way-leave on the Dryden coal and minerals brought to the surface by means of that pit. The defender avers that this would be prejudicial to the interests of succeeding heirs of entail by leading to the unduly rapid exhaustion of the minerals. That is the only prejudice averred in defence. Such an objection is not, it is thought, a sufficient answer to the pursuer's claim, in so far as regards onerous deeds, because the object of the limitation was not to prevent or retard the operations of the heirs of entail in winning the coal, but, on the contrary, to facilitate these operations, and, through the benefit arising from the day level drainage afforded by the Mavisbank level, to enable them, when selling their coal in the market, to compete on favourable terms with other proprietors."

FRASER and WATSON were heard for the pursuer.

Solicitor-General (CLARK) and MARSHALL for the defender, Colonel Henry Clerk, R.A.

Authorities referred to—Hunter on Landlord and Tenant, i. 113; *Gordon*, Jan. 24, 1811, F.C.; *Muirhead* v. *Young*, Feb. 13, 1858, 20 D. 592; *Wemyss*, Feb. 7, 1809, F.C.; *Crawfurd*, Feb. 3, 1824, 2 S. 667, and H. of L. 2 W. and S. 354; *Egerton*, 1853, 4 H. of L. Cases, 241; Kames' Elucidations.

At advising—

LORD PRESIDENT—The pursuer in this declarator, Sir George Douglas Clerk, concludes to have it found and declared—(*reads conclusions of summons*). There may be a question whether the pursuer is entitled to have decree in these terms, and, if not, whether he is entitled to decree under more restricted conclusions.

But the first question, of course, is whether he is entitled to have decree at all. The deed of entail under which he holds the estate contains this limitation—(*reads limitation, given above.*) As regards the first part of this prohibition, it is no longer binding by reason of the Act 6 and 7 Will. IV. c. 42, which permits heirs of entail to lease the lands and minerals of an entailed estate notwithstanding any prohibition. It is implied, of course, that these leases are to be granted on such terms as to make them beneficial. The Lord Ordinary thinks that, in consequence of the provisions of this statute, it follows that the heirs of entail in possession are also liberated from this restriction against communicating the coal levels on their estate of Lasswade to any neighbouring colliery. That against leasing being removed, he thinks the restriction against communicating the levels falls with it. I am not entirely inclined to concur in this, for even if there had been no restriction against leasing at all, there might have been this restriction against communicating the levels. The

wish to enforce it is quite conceivable, and the object quite intelligible. The case must therefore turn on some other consideration than this. But we are advanced thus far towards our decision by the consideration, that we are dealing with an heir of entail who is entitled to let leases for minerals on the entailed estate on the ordinary terms.

Whether, supposing the restriction on the heir of entail against communicating these levels did not exist in the entail, there still might have been anything to prevent his doing so, is a question which does not in any way arise here. But I rather apprehend there would not in the ordinary case—though no doubt it is always a matter of discretion whether the level of one colliery should be communicated to another. It might be extremely prejudicial. It might lead to the drowning of the minerals of the estate communicating the privilege, and either put an end to their working or enormously increase the expense, and so diminish the profit. Of course no man in his senses would agree to that, as a fee-simple proprietor, for it would amount to the destruction of his property. And there would be every reason for restraining an heir of entail from doing so also, for he would be deteriorating the entailed estate, without any benefit to himself or anybody else. But, on the contrary, if there were sufficient reason to induce a fee-simple proprietor, being a prudent man, to permit the communication to be made, then, if there be no special valid restriction, I can see no reason for prohibiting the heir of entail from authorising the same.

So far as we can see from the testimony of the men of skill who have reported, the making of this communication would not be at all an inexpedient or detrimental proceeding, and I hold myself entitled to consider that this is the case. If, therefore, we were dealing with an entail in ordinary terms, I do not think that, in these circumstances, there would be any restriction.

There remains, however, the question what is to be the effect of the express restriction? Here, we must take into account that if, as I have already said, the heir of entail cannot be restrained from communicating these levels independently of this clause, he must be entitled to communicate the levels of all minerals other than coal. Because the prohibition in the entail only affects the coal levels, and, as it must be strictly interpreted, coal cannot be read as including ironstone, or any other minerals. This suggests that the enforcement of the prohibition would be practically ineffectual. Assuming, and as I think rightly assuming, that it was intended to prevent the use of this level as a drain for the water of neighbouring workings, this object cannot be attained if the level of other minerals can be communicated. This, though not entirely conclusive on the subject, still certainly reconciles me very much to disregarding the prohibition in the entail. I have, however, on other grounds, come to the conclusion that it is not binding on the present heir. It appears to me that it is not a restriction properly auxiliary to the recognised prohibition of the entail, nor necessary for the preservation of the estate. Had it been of that nature, I should have said that, according to the principles of the Act 1685, as interpreted by a long train of decisions, it ought to be enforced. But I think that that statute, as so interpreted, places the heir of entail in possession in the position of a proprietor in fee of the estate, except in so far as it is necessary to restrain him, in order to secure that his proceedings do not interfere with the transmission of it to the heirs called after him under the tailzie. I do not think that this prohibition is necessary for that end, and therefore, on the whole matter, I am for giving judgment for the pursuer, but not entirely in the terms of his conclusions. I think all we should do is to give him decree as concluded for, in so far as it is necessary to the beneficial enjoyment and working of the mineral estate.

Lord Deas—I agree with your Lordship that the communication of levels, if it entailed any consequences seriously detrimental to the true interests of the estate, ought not to be allowed. I have, however, no difficulty about the prohibition against working coal. That prohibition was entirely removed by statute. Still, this does not settle the question as to the communication of the levels, and though that restriction be removed, had I been of opinion that such communication would be a detrimental thing for the estate, I would not have been for allowing it.

There can be no doubt, in the first place, that this proposed communication of levels is attended with risk, for the result will be that the whole water from the workings in the upper property will come down on the Loanhead field, and might drown the whole mineral field on the estate, unless some safeguard be provided against such contingency. However, all the men of skill consulted agree that, though the communication be made, the necessary excavation can be securely built up at any time. I should not have been quite satisfied of this myself, but their opinion on the point is unanimous. If that were not the case, and the only possible means of getting rid of the water, should it flood the Loanhead workings, were artificial pumping, then I should say that the restriction was binding on the heir of entail in possession of the estate, and that they were not entitled to contravene it. Though I am relieved from much of the difficulty by the consideration that the same prohibition does not extend to the communication of the levels of ironstone and other minerals, still, had it not been for this unanimous opinion of the men of skill consulted, I would not have been prepared to say that the present heir of entail could have communicated these coal-workings and levels.

But, assuming it to be correct that the access can be built up, and, moreover, that the tenants, the Shotts Iron Company, are willing to undertake that they will build it up, my difficulty very much gives way. I see that Mr Geddes says—"And it is practicable, at the termination of the lease, if then desired, to build off the communicating mines through Burghlee Dyke, which I have no doubt the tenants would undertake to do from time to time." I am humbly of opinion that that should be made a condition, and that decree should not go out in terms of the first conclusion of the summons, but only in those of the second, and under the restriction I have mentioned. The object of the pursuer will be sufficiently gained by this course. He need not have this declared for all time coming, but merely with reference to the present transaction, and to enable him to get authority to modify the presently existing lease, and I would not have the Court go farther than necessary for that purpose.

Lord Ardmillan concurred.

Lord Kinloch—By the entail under which the

pursuer, Sir George Clerk, holds the lands of Lasswade, it is declared "that it shall not be lawful to, nor in the power of my said heirs of tailzie, or any of them, to set tacks, for any period whatever, of the whole or any part of the coal lying under and beneath the whole lands and barony of Lasswade, for any term whatever, nor to communicate the level of the said coal of Lasswade to any neighbouring colliery." The prohibition to let leases of coal is removed by the Statute 6 and 7 William IV. c. 42; which gives power to let leases of minerals for thirty-one years, notwithstanding the prohibitions of any entail. The question now raised is, How the remaining prohibition "to communicate the level of the said coal of Lasswade to any neighbouring colliery," is to be dealt with?

I am of opinion that this prohibition is ineffectual, in respect that it is not a prohibition which can competently be fenced by irritant and resolutive clauses. It is not every clause which may be put into an entail which can be so fenced. Some are sanctioned by long usage, and their close connection with the object of perpetuating families, such as the obligation to bear a particular name and arms. But, generally speaking, it may be said that it is not within the competency of an entailer to dictate the whole future administration of his estate, and enforce his dictates by irritant and resolutive clauses. Entails are not intended to regulate administration, but to prevent alienation; and it is well known that it is mainly as forming acts of alienation that extraordinary acts of administration, such as granting long leases, have been disallowed. This clause about the non-communication of levels I consider simply as a direction in regard to administration. I do not see that it can be considered, in any rational view, a matter touching on alienation. There is no alienation implied in communicating a level. It may be a good thing or a bad thing in itself, in regard to the wellbeing of the entailed estate. Properly speaking, it is good or bad according to circumstances. In the present case there is the strongest evidence from men of skill that the communication of the level will be to the great benefit of the entailed estate. But however this may be, it is simply a matter of administration, and not capable of being enforced by irritant and resolutive clauses. If the entailer had declared that his entailed estate should never (any part of it) be put under crop, or that some particular kind of crop should never be grown on it, I suppose no one would contend that the prohibition could be enforced by irritant and resolutive clauses. If he had declared that there should never be any communication on the surface between the entailed property and the next adjoining estate,—that there should never be a road from the one into the other, but always a wall of 20 feet high kept up between the properties,—I think he would have engrossed an ineffectual prohibition. But so equally in the present case.

It was suggested that, even without any express prohibition, an heir of entail was bound to avoid communicating a level, as an act equivalent to throwing away the protection of the property against over-drainage; like knocking down an embankment on the bank of a turbulent stream. To test this argument, all reference to the subject must be supposed left out of the entail; and how, then, would matters stand? I cannot for a moment suppose it competent to a succeeding heir of entail, on mere general grounds, and without any express prohibition, to have the heir in possession interdicted in all circumstances (for such is the demand) from communicating a level. The reason is that there is nothing in the nature of the case making the act always one of injury to the entailed estate. It does not necessarily follow that the lower workings will be drowned. The reports of the scientific men prove that arrangements may be made so as not merely to avoid all injury, but to produce large benefit to the entailed estate. Two adjoining heirs of entail may so contrive as to benefit both estates equally. It is, no doubt, conceivable that the act may be threatened to be performed in such a way as to create injury; so may every possibly beneficial act. In such a case there may be special means of prevention applicable to the special circumstances. But what the defender here asks us to do is to pronounce that, in no circumstances whatever, can there be a communication of level. I cannot so find. With regard to the special circumstances, the reports are all in favour of the measure. I am of opinion that, both on the general point, and with reference to the special circumstances, the pursuer is entitled to decree of declarator.

I would only add that I do not proceed on the terms of the Statute 6 and 7 William IV. c. 42. That statute permits leases of minerals. But the communication of levels is not a necessary incident of a lease. There may be a lease, and a beneficial lease, without such communications. I cannot infer from a permission to lease a permission to communicate levels. To do so is to beg the question. But the more general ground on which I have proceeded is sufficient for the determination of the present case.

The Court accordingly pronounced judgment to the following effect:—Find and declare that the pursuer has right, notwithstanding the clause of restriction in the deed of entail of 1782, to communicate the level of the coal workings at Loanhead to the neighbouring colliery of Dryden, in so far as such communication may be necessary and beneficial to the working out of the minerals at Loanhead, and not prejudicial to the mines of Lasswade, but under the condition that, so soon as the purpose for which this communication is made is fulfilled, the pursuer and his lessees shall be bound and obliged to build up the communication made between the two fields.

Agent for Pursuer—Stuart Neilson, W.S.
Agent for Colonel Henry Clerk, R.A.—John W. Tawse, W.S.

Wednesday, March 20.

CALEDONIAN RAILWAY COMPANY *v.* GLASGOW AND SOUTH-WESTERN RAILWAY COMPANY.

Railway—Obligation—Clause—Construction.

The Caledonian Railway Company had in 1849 leased the Barrhead Railway for 999 years at a rent of £16,500. In 1851, under the Caledonian Railway Arrangements Act, it was agreed that this rent should be reduced to £11,250 per annum, and that the Caledonian Company should issue to the shareholders of the Barrhead Company £82,500 of the ordinary stock of their Company, which was then selling in the market at from 27 to 30 per cent,