pursuer's case to prove malice, I cannot accept the doctrine of the Sheriff-Substitute, that the malice of the elder Mackie applies to the younger. Malice is purely personal and must be within one's own heart. But is malice necessary and must it be proved? I think it right to say that I hold there is a distinction between the use of diligence wrongfully and nimiously, where there is no debt due, but upon legal warrant, and the use of diligence upon no warrant at all. In the former there is good ground of action, but malice must be proved. Where arrestment is used without legal warrant, the effect is different. Here the warrant gives power to arrest the goods of one party, and it is used to arrest those of another *persona*. The arrester proceeded *ultra fines decreti*, and used it illegally. Therefore I am of opinion that malice and want of probable cause need not be proved here.

Lord Mure—The question whether it is necessary to libel malice and want of probable cause in this action is one attended with delicacy and difficulty. I am of opinion that the circumstances of this case fall under the rule of law as laid down by the Court in the case of *Meikle* v. *Sneddon*, 24 D. 720, and that proof of malice and want of probable cause is therefore not necessary.

The Court pronounced the following interlocutor:—

"Recall the interlocutors of the Sheriff-Substitute and the Sheriff, dated respectively 10th December 1874 and 11th March 1875; find that the firm of Archibald Mackie, provision merchants, 82 Main Street, Anderston, Glasgow, and the individual defender (appellant) Archibald Mackie junior, one of the partners thereof, caused the arrestments libelled to be used against the personal funds of the pursuer (respondent) William Wilson, executor of the deceased John Wilson; find that the said arrestments were so used wrongously and without legal warrant; find the said firm of Archibald Mackie and Archibald Mackie junior, one of the partners thereof, liable in damages therefor jointly and severally with the other individual defender Archibald Mackie, the other partner of said firm, against whom decree by default has already been pronounced in the Inferior Court for the whole sum sued for; assess the said damages at the sum of ten pounds sterling, and decern therefor with interest as libelled against the said firm of Archibald Mackie and the said Archibald Mackie jun., one of the partners thereof; find the said firm of Archibald Mackie and the said Archibald Mackie junior liable in expenses, both in the Inferior Court and this Court; allow accounts thereof to be given in, and remit the same when lodged to the Auditor to tax and report."

Counsel for Pursuer—Scott. Agent—George Begg, S.S.C.

Counsel for Defender — Thoms—Trayner. Agent—Lindsay Mackersy, W.S.

Friday, 22d October.

SECOND DIVISION.

[Lord Mackenzie.

BLAIR *v.* RAMSAY.

Property—Servitude—Superior and Vassal—Minerals—Reserved Right.

A acquired three parcels of land from B by three separate titles. In the first of these titles B reserved "the coals and coal-heughs to be won and disposed upon at our pleasure;" in the second, he reserved "the whole coal, stone quarries, and all other metals and minerals, with power to search for, work, and carry away the same;" and in the third he reserved "the coal, with full power to dig for, work, win, and carry away the same." B was proprietor of land on either side of A's property, and let the whole coal-field on lease to C, who made a mine under and through A's land, whereby he conveyed coal and minerals worked there, and on B's property beyond, to the surface. *Held* (1) that the rights to coal and other minerals reserved were rights of property belonging to B; (2) that the wastes caused by the minerals being exhausted also belonged in *plenum dominium* to B; and (3) that B's right of carriage was one of servitude, and did not extend beyond the limits of the lands conveyed to A.

This was an action at the instance of James Blair of Glenfoot, Clackmannanshire, against Robert Balfour Wardlaw Ramsay of Whitehill and Tillicoultry, and the Alloa Coal Company in the following circumstances:—

The pursuer was proprietor of certain lands of which the defender, Mr Wardlaw Ramsay, was superior. In the first place, the pursuer acquired from a predecessor of the defender the lands of Langour, and in the titles of that property, dated in 1825, there were reserved to the superior his heirs and successors "the coals and coal-heughs of the said haill lands to be won and disposed upon by me and my foresaids at our pleasure and the right of all others."

In the second place by contract of excambion, dated 25th August 1857, the pursuer acquired from Mr Ramsay's predecessor three acres of the lands of Westqarter of Coalsnaughton, "reserving always to the said Robert Wardlaw Ramsay, and his heirs and successors, the whole coal, stone-quarries, and all other metals and minerals within the said three acres of the lands of Westquarter hereby disponed, with power to search for, work, and carry away the same."

In the third place, the pursuer further, under contract of excambion with Mr Wardlaw Ramsay, dated 21st and 24th September 1857, acquired certain other lands, the coal in which was specially reserved to Mr Ramsay in the following clause of the deed:—"But excepting always the coal within the said several subjects above disponed to the said James Blair, which coal is hereby expressly reserved to the said Robert Balfour Wardlaw Ramsay, with full power to him to dig for, work, win, and carry away the same, on paying surface damages which the ground may thereby sustain, as the same shall be ascertained by two persons to be mutually chosen by the said parties,

with power to name an oversman in case of difference."

The defender Mr Wardlaw Ramsay was proprietor of the lands on either side of those acquired by the pursuer as above narrated, and of the minerals therein, and the defenders the Alloa Coal Company were lessees from him of the coal-field which extended under his lands and the said lands belonging to the pursuer. In reference to the working of the coal under this lease, the pursuer averred—(Condescendence. 7) "The defenders, the Alloa Coal Company, have recently, as the pursuer believes and avers with the consent and approbation of the defender Mr Wardlaw Ramsay, driven a mine under and through the pursuer's foresaid lands to the minerals under the defender Mr Wardlaw Ramsay's lands, which lie on a higher level to the south-east and south-west, and the said defenders have for some time been and still are conveying along the said mine large quantities of coal and other minerals, in hutches or waggons, from the defender Mr Wardlaw Ramsay's said lands, under and through the pursuer's said lands to a siding by which communication is obtained with the Stirling and Dunfermline Railway, and also with the Devon Valley Railway, at Tillicoultry station. The said mine has been driven not only through the coal seams claimed by Mr Ramsay as reserved to him, but also through the whole other strata to the surface of the ground, the last-mentioned strata being the exclusive property of the pursuer." (Cond. 8.) "The said mine was driven under and through the pursuer's said lands without his sanction or assent, and the said mine was not required for the purpose of working, winning, or carrying away any coal or other minerals claimed by the defender, Mr Wardlaw Ramsay, as belonging to him in or under the pursuer's said lands, but was driven and is used for the purpose of removing minerals from the defender Mr Wardlaw Ramsay's lands to the south-east and south."

The pursuer further averred that he had suffered great loss from the subsidence of the surface under which the passage was made, owing to the want of proper support, and the removal of soil from below.

The Coal Company averred that they had right to make and use the said mine, not only for the purpose of working coals under the pursuer's lands, but also for bringing to the surface coals worked under adjacent lands. They further pleaded that the pursuer was barred from objecting by *mora* and acquiescence.

These being the material facts of the case, the summons *inter alia* sought for a declarator that the defenders had no right or title "to make or drive any mines, or other roads or passages, whether above or below ground, in, through, or over any part of the lands" belonging to the pursuer, "for the purpose of obtaining access to coal or other minerals in any lands outside the bounds of the pursuer's said lands belonging, or the coal and other minerals in which belong to the defender Robert Balfour Wardlaw Ramsay, or for carrying along, through, or over such mines, roads, or passages any coal or other minerals from such lands, and in particular that none of the defenders were entitled or had or have right to make or drive a mine now existing in the pursuer's said lands, and having its daylight entrance at or near to the south side of the turnpike road between Alloa and Tillicoultry, near to the village of Devonside for any of the purposes foresaid: And further, that the defenders had not, and that none of them have or has, any right or title to carry or convey coal or other minerals wrought or won in lands belonging, or the minerals in which belong to, the defender, Robert Balfour Wardlaw Ramsay, outside the bounds of the pursuer's foresaid lands, either along the said mine, or along any other mine, road, or passage, either now existing, or which may be hereafter made, in, through, or over any part of the pursuer's said lands, whether below or above ground: And the whole defenders ought and should be interdicted, prohibited, and discharged, by decree of our said Lords, from making or using any mines, roads, or passages, whether below or above ground, in or through the pursuer's foresaid lands, or any part thereof, for the purpose of carrying or conveying any coal or other minerals wrought or won from lands belonging, or the coal or other minerals in which belong to the defender Robert Balfour Wardlaw Ramsay, outside the bounds of the pursuer's said lands; and in particular, from carrying or conveying any such coals or other minerals along, or by the mine now existing in the pursuer's said lands above specified." The summons further concluded for £2000 in name of damages or wayleave.

The Lord Ordinary (MACKENZIE), of consent, on 30th October 1874 remitted to Mr Alexander Simpson, mining engineer, Glasgow, to examine the mines and workings referred to on record and, to report.

Mr Simpson's report, after preface, was as follows:—"The total area under the leasehold held by the Alloa Coal Company from the defender, Mr Ramsay, is about 870 acres, which includes the coal under Mr Blair's lands, extending to about 19 acres. The whole forms one coal-field.

"Under the lease in question, three valuable seams of coal have been and are in course of being worked. These are known as the cherry coal, the splint coal, and the main coal.

"The cherry coal is the upper seam, and the most valuable both in thickness and quality. The splint coal lies about five fathoms under the cherry seam, and the main coal, or lower seam, lies about thirteen fathoms under the splint. There exist other seams of coal in the properties between the surface and the main coal, but these are so thin that the reporter considers them of no marketable value at present. The positions of the cherry coal, the splint coal, and the main coal under the pursuer's lands, and under part of the defender Mr Ramsay's lands, are shown on the section.

"There is a fault or slip running through the foresaid coal-field, the line of which is shown on the plans.

"The seams are by this fault or slip thrown to a lower level to the south of it than on the north, and it will be seen, on reference to the section, that the cherry coal on the south of the fault or slip is nearly on the same level as the main coal on the north of it.

"The same seams of coal are fouud on each side of the fault or slip, and the seams to the south of the slip can be worked by means of pits and mines from the north side of the slip.

"On the north side of this fault or slip, and between it and the river Devon, the three seams

of coal mentioned have been worked before and since the year 1832, according to the plans, from under the pursuer's lands and from under the defender's Mr Ramsay's lands as a continuous field.

"The defenders, the Alloa Coal Company, a few years ago commenced to develope the cherry coal, the most valuable seam to the south of the fault or slip above-mentioned, and they have worked and are now working that seam by means of a pit at the point marked G on the plan, and also by means of the mine in question.

"The reporter will now describe the mine. It leaves the surface on the lands of the defender Mr Ramsay at the point A on the plan, on the level of the turnpike road, and runs in a south-easterly direction under these lands for a distance of about 158 yards. The mine then enters under the west march of the pursuer's lands on the waste of the cherry coal, and it then passes under the pursuer's lands from B to E as shewn on the plan and section, a distance of about 330 yards at a depth from the surface varying from 16 yards on the west to 34 yards on the east; between these points B and E the mine is situated between the cherry and main seams. To the east of the point E the mine is under the defender Mr Ramsay's lands.

"The mine is about 6 feet high and 8 feet wide, is nearly level, and cross-cuts the strata as shown on the section. From the section it will be seen that the mine runs under the pursuer's lands partly in the cherry coal waste and splint coal waste, and partly in other strata, and it reaches the position of the cherry coal on the south of the fault or slip already mentioned. The strata through which the mine passes other than the coal consists chiefly of shale and sandstone, and is of no marketable value.

"By means of the mine in question, splint coal on the north side of the slip is being worked to a small extent under the pursuer's lands, and to a larger extent under the defender Mr Ramsay's lands, and there is still splint coal to be worked by the mine in question from under the pursuer's lands and from under Mr Ramsay's lands all on the north side of the slip.

"The reporter, however, is of opinion that the chief purpose for which the mine was made, has been, and is used, was and is by means of it to carry away coal from under the defender Mr Ramsay's lands on the south side of the fault or slip mentioned.

"The mine is well made and is laid out in a judicious and skilful manner to accomplish the above objects, and it does no injury to the lands below which it is formed.

"The reporter may also state that some water originates in the mine where it crosses the slip under the lands of the defender Mr Ramsay, and this water runs at present along the mine till it reaches the splint coal waste under the pursuer's lands. The water disappears in that waste and does not reach the surface through the mine."

The Lord Ordinary pronounced the following interlocutor:—

"14*th April* 1875.—The Lord Ordinary having heard counsel and considered the Closed Record, Report by Alexander Simpson, No. 16 of process, and plans therein referred to, Nos. 18 and 19 of process, finds, decerns, and declares that neither the defender Robert Balfour Wardlaw Ramsay, nor the other defenders, or any of them, has, have, or had any right or title to carry or convey coal or other minerals wrought or won in lands belonging, or the minerals in which belong, to the defender Robert Balfour Wardlaw Ramsay, outside the boundaries of the pursuer's lands, along the mine now driven through the pursuer's lands libelled on, or along any other mine, road or passage which may hereafter be made or driven through or over any other parts of the pursuer's said lands, whether below or above ground, except where said mine passes through the coal wastes in said lands, or through the lands acquired by the pursuer under the contract of excambion, dated 25th August 1827; and interdicts, prohibits, and discharges the whole defenders from making or using any mines, roads, or passages, whether below or above ground, in or through the pursuer's foresaid lands, or any part thereof, excepting as aforesaid, for the purpose of carrying or conveying any coal or other minerals wrought or won from lands belonging, or the coal or other minerals in which belong, to the defender Robert Balfour Wardlaw Ramsay, outside the bounds of the pursuer's said lands; and, in particular, from carrying or conveying any such coals or other minerals along or by the mine now existing in the pursuer's said lands above specified, and decerns: Reserves all questions of expenses, and appoints the cause to be put to the Roll with a view to further procedure.

"*Note.*—The Lord Ordinary does not see his way to give decree in favour of the pursuer, in terms of the first declaratory conclusion. It does not appear from Mr Alexander Simpson's Report that the mine driven through the pursuer's lands was not made for working the cherry coal in these lands. It is used for working the splint coal, and it may be used for working the main coal situated within the pursuer's lands. The defender Mr Wardlaw Ramsay, and the other defenders as his tenants in the coal under the pursuer's lands, were, the Lord Ordinary thinks, entitled to drive that mine for the purpose of winning and away carrying the coal in the pursuer's lands, which is the reserved property of Mr Wardlaw Ramsay.

It was no doubt decided in the case of the *Duke of Hamilton v. Graham*, 28th July 1871, 9 Macph., p. 98, that a superior, as absolute proprietor of the coal and limestone, is entitled to form in them roads for the underground carriage of minerals between mines in other properties. But in the present case Mr Wardlaw Ramsay, the superior, is not absolute proprietor of the strata through which the mine driven through the pursuer's lands runs. That mine is not formed in the coal which is reserved by him. The mine is nearly level, while the coal and other strata rapidly ascend from the entrance of the mine. The strata are therefore cut across by the mine, and the cherry and splint coal seams are alone cut across during its transit through the pursuer's lands.

"The coal in question is reserved under three separate titles, the first being dated in 1825, the second in 1827, and the third in 1857. In the title of 1825 there is a reservation to Mr Wardlaw Ramsay of the coals and coal-heughs. In the contract of excambion of 1827 there were reserved to Mr Wardlaw Ramsay the whole coal stone quarries, and all other metals and minerals,

and in the disposition of 1857 the coal was alone reserved.

"Under the term metals and minerals all strata seem to be comprehended which are now destitute of or incapable of supporting animal or vegetable life. If this be a correct definition, Mr Wardlaw Ramsay and his coal tenants had right to drive the foresaid mine through the three acres of ground acquired by the contract of excambion of 25th August 1827, with a view to win the coal of other lands beyond those belonging to the pursuer, because the whole strata were his absolute property.

Under the decision in the *Duke of Hamilton's* case the superior as owner of the coal was found entitled to use the coal waste for the underground carriage of minerals from other lands, where it was not proved, as is the case here, that the whole reserved coal had been worked out and exhausted."

"With the foresaid exceptions, the mine in question, where it traverses the pursuer's property, is cut through strata which undoubtedly belong to him. That mine may be used for the conveyance of coals to the surface, the produce of the three parcels of land belonging to him, but no coal from other lands can be conveyed along those parts of that mine.

"Such being the view which the Lord Ordinary takes of the decision in the case of the *Duke of Hamilton* both in the House of Lords and in the Court below (7 Macph. 976), he has pronounced decree under the second declaratory conclusion in favour of the pursuer, subject to the limitations above referred to."

The defenders reclaimed.

Argued for them—The pursuer has no interest. The right reserved is one of property, not of servitude. A reservation of coal is a reservation of the whole coal-field, and the means of working them. In deed of 1825, "coal-heughs" imply a "means of access to coal;" Jameson's Scottish Dictionary.

Authorities—*Davidson* v. *Duke of Hamilton*, 15th May 1822, 1 S. 411; *Hext* v. *Gill*, 7 L. R. Chancery Appeals, 709; *Graham* v. *Duke of Hamilton*, June 30, 1868, 6 Macph. 965, and July 5, 1869, 7 Macph. 976; in House of Lords, July 28, 1871, 9 Macph. 98, and L. R. 2 Scotch Appeals, 166; *Earl of Cardigan* v. *Armitage*, 2 B. and C. 197; *Caledonian Railway Company* v. *Sprot*, 2 Macqueen, 449; *Eason* v. *Jeffcock*, L. R. 7 Exchequer, 379; *Proud* v. *Bates*, 34 L. J. Chancery Appeals, 406.

Argued for the pursuer—The right of the defender is one of servitude only to use the pursuer's property to bring to the surface and carry away coals wrought under that property. This servitude did not extend to adjoining lands.

Authorities—Bell's Principles, 986; *Turner* v. *Ballendene*, March 29, 1834, 7 W. and S. Appeals, 163; *Durham Railway Company* v. *Walker*, 2 L. R. Q. B. 940; *Dand* v. *Kingscote*, 6 M. and W. 174; *Bowser* v. *Maclean*, 30 L. J. Eq. Ca., 273.

At advising—

Lord Ormidale—This case raises some questions of nicety and importance, and in order to arrive at a satisfactory conclusion regarding them it is necessary to ascertain what is the true nature and effect of the rights reserved in the three several titles under and in virtue of which the pursuer's lands are held by him.

The titles referred to are dated respectively in 1825, 1827, and 1857, and although the clause of reservation is not expressed in all of them in precisely the same words, it does not appear to me that there is any such difference as to affect materially the conclusion that should be come to.

In 1825 the pursuer acquired from a predecessor of the defender Mr Wardlaw Ramsay the lands of Langour, but in the titles under and virtue of which the lands so acquired are now held by the pursuer there is an express reservation of "the coals and coal heughs of the said haill lands, to be won and disposed upon by me and my foresaids at our pleasure." It neither was nor could be disputed, having regard to the rule of law as generally stated by Mr Bell in his Principles (sec. 987), and to the decision of the House of Lords in the case of the *Duke of Hamilton* v. *Graham* (Law Reports, Scotch Appeals, vol. 2, p. 166), as well as to some of the English cases referred to at the discussion, that the coals and coal-haughs thus reserved continued to belong as a proprietary right to the defender Mr Ramsay's predecessor, and his heirs and successors, in a sense as full and unlimited as did the lands of Langour themselves before the conveyance of them by him to the pursuer. And neither was it, nor could it well have been disputed, that along with the reserved coals and coal-haughs there was likewise reserved the right to work and bring them to the surface for the purpose of being disposed of, anything defective or obscure in this respect in the terms of the reservation itself being supplied by implication, in as much as an absolute right to the coal infers, independently of express stipulation, a right to work and make it available.

But, on the other hand, I think that this reserved right to work and carry away the coal was not of the nature of a proprietary right but rather of the nature of a privilege, servitude or easement. And it also appears to me to be clear that this privilege, servitude, or easement, must be held to be limited to the coal and other reserved minerals of the lands conveyed, and does not apply to the rest of the coalfield held in lease by the defenders the Alloa Coal Company from the proprietor the other defender Mr Wardlaw Ramsay. This I think is the only interpretation the terms of the reservation admit of; and that it is the true legal interpretation is sufficiently established by the cases of *Turner* v. *Ballendene or M'Whannell*, 29 March 1834, 7 Wilson & Shaw's Appeals, p. 163; and *Bowser* v. *M'Lean*, vol. 30, Equity Cases, Law Journal, p. 273. The case of *Davidson* v. *The Duke of Hamilton*, 15 May 1822, 1 Shaw 411, cited by the defenders as an authority to the contrary, turned upon what was held to be the effect of the special terms of the reservation in that case, and is so remarked upon and distinguished by the Lord Chancellor in *Turner* v. *Ballendene*.

In regard to that portion of his lands, consisting of three acres of Westquarter, acquired by the pursuer in 1827, under the contract of excambion referred to in the second article of the condescendence, the same considerations are, I think, equally applicable, although the terms of the reservation are in some respects different. Be that contract there was expressly reserved to the

defender Mr Ramsay's predecessor, his heirs, and successors, "the whole coal, stone quarries, and all other metals and minerals within the said three acres of the lands of Westquarter hereby disponed, with power to search for, work, and carry away the same, they always paying the said James Blair and his foresaids all damages which may be done to the said lands by the said workings as these damages shall be ascertained by two arbiters to be mutually chosen." It is true that the reservation here is more comprehensive than in the deed of 1825, in as much as, in place of it being limited to "coal and coal haughs," it refers in addition, to "stone quarries and all other metals and minerals," but I do not see how this can affect the judgment, for it must be taken as an ascertained fact in the case that "the strata through which the mine passes, other than the coal, consists chiefly of shale and sandstone, and is of no marketable value." Such is the report of Mr Simpson the engineer to whom it was remitted by the Lord Ordinary, of consent of all parties, to examine into and report upon all the facts necessary for the determination of the disputed question, and not only was the remit to Mr Simpson made of consent of all the parties, but his report has been received without objection and assumed by all parties to be correct and conclusive as to the facts embraced by it. The result is, that although the clause of reservation in the deed of 1827 is differently expressed and more comprehensive than that in the deed of 1825, both may, for the purposes of the judgment, be held, I think, to be to the same effect, viz., a reservation of the coal, and nothing else, it turning out that there is nothing else in the pursuer's lands which can in any reasonable sense be held to fall within the reservation. At the same time, it may be right, as afterwards suggested by me, to frame the judgment so as to meet the possible event of reserved substances other than coal being found in the pursuer's lands. Be this, however, as it may, no distinction at least can be taken between the deed of 1827 and that of 1825 as regards the legal nature and effect of the rights reserved. In the former, while a full right of property in the coals and coal-haughs is reserved, with a right also—not of the nature of property, but of privilege, servitude, or easement—of working and bringing the coals to the surface, so in the latter, while a full right of property in the coal, stone quarries, and all other metals and minerals is reserved, there is added the right, not of property, but of privilege, servitude, or easement of working and bringing them to the surface.

In regard to the remaining or third portion of lands acquired by the pursuer as referred to in the 4th and 5th articles of his condescendence, the same conclusions must be come to with perhaps even less hesitation than in the two former instances, seeing that here the reservation is limited simply and exclusively to coal, with full power to "dig for, work, win, and carry away the same on paying the surface damages which the ground may thereby sustain."

It only requires further to be noticed that according to Mr Simpson's report, and especially the plans therein referred to, not only the strata intervening between the seams of coal in the pursuer's lands is entirely worthless, but that it occupies a space greatly larger than the seams of coal themselves,—the consequence being that it is impossible for the defenders to take up by the mine or level already formed, or by any other mine or level that can be formed in the pursuer's lands, coal or other substances from the grounds outside the boundaries of the pursuer's lands without passing through ground or strata which in no view can be held to belong to them, except for the special purpose only of working, and bringing to the surface the coal or other reserved minerals situated within the limits of the pursuer's lands.

Such being the nature and effect of the rights of the defender Mr Ramsay, reserved in the titles granted to the pursuer of the lands in question, it does not appear to me that the matters to be determined are attended with serious difficulty.

I am therefore of opinion (1) That the right to coal, coal haughs, stone quarries, and other metals, and minerals reserved in the titles of the pursuer is one of property as full and unlimited as is the right otherwise of the pursuer himself to the lands acquired by him.

(2) That the coal, or other wastes, created by the removal or exhaustion of the substances, the property of which was reserved to the defender Mr Ramsay his heirs and successors, belong in the same way in *plenum dominium* to them. And

(3) That in regard to the power of carrying to the surface the reserved coal and others, no proprietary right is reserved, but merely a right of the nature of the privilege, servitude, or easement, and that this right is applicable only to the coal and other substances, the full property of which is reserved in the pursuer's titles, and does not extend to the rest of the coal-field.

In this state of matters, and with reference to the opinion I have just expressed, it appears to me that the Lord Ordinary's interlocutor is well founded and ought to be adhered to, with a slight variation on that part of it which excepts from the interdict the "coal wastes," to the effect of including in the exception in addition to "coal wastes" wastes that may be created by the removal of any of the other reserved substances. I think it right that the variation should be made on the Lord Ordinary's interlocutor to meet the possible although I think very improbable contingency of it yet turning out that such reserved substances are found to be in the pursuer's lands.

The other Judges concurred.

The Court pronounced the following interlocutor:—

> "The Lords having heard counsel on the reclaiming note for the Alloa Coal Company, against Lord Mackenzie's interlocutor of 14th April 1875, refuse said note, and adhere to the interlocutor complained of, with expenses against the reclaimers since the date of the Lord Ordinary's interlocutor; remit to the Auditor to tax said expenses and to report; and remit the cause to the Lord Ordinary with power to decern for the expenses now found due."

Counsel for the Pursuer.—Sol-Gen. (Watson)—Balfour. Agents.—Gibson-Craig Dalziel and Brodies, W.S.

Counsel for Mr. Wardlaw Ramsay—Asher—Robertson. Agents—Maclachlan & Rogers, W.S.

Counsel for the Alloa Coal Company.—Dean of Faculty (Clark) — Guthrie Smith. Agent — Alex. Morrison, S.S.C.

Saturday, October 23.

[Sheriff of Midlothian.

SECOND DIVISION.

ROBERTSON *v.* COCKBURN.

Jurisdiction—Sheriff—Lease.

A raised an action in the Sheriff-court against B for implement of a contract of lease. B denied that he had ever entered into such a contract. *Held*, that as the action involved no competition of real rights, the Sheriff had jurisdiction to deal with it.

This was an appeal from the Sheriff-court of Midlothian in an action at the instance of Andrew Robertson against John Cockburn. The summons concluded that "the defender ought to be decerned and ordained forthwith to implement and fulfil the contract or agreement entered into between him and the pursuer, on or about the 5th day of October 1874, for a lease of the shop No. 64 Grove Street, Edinburgh, for five years, at the rent of £45 for the first three, and £50 for the remaining two years, conform to draft of such lease prepared by the agents of the said pursuer, and revised by the said defender." Then followed the usual conclusion for damages in the event of the defender failing to implement. The defender, in his minute of defence, denied that any lease had been entered into between him and the pursuer, although he admitted that negotiations for a lease had been gone into. He further pleaded *locus penitentiæ*, in respect that there was no written agreement or lease. The plea of no jurisdiction was not however raised by him.

The Sheriff-Substitute (HALLARD) pronounced the following interlocutor:—"Finds that this action is in substance one to have it found and declared that the defender is bound to accept from the pursuer a lease for five years, at the rent of £45 for the first three, and £50 for the remaining two years: Finds that it is *ultra vires* of this Court to pronounce a judgment to the above effect: Therefore dismisses the action; finds the defender entitled to expenses, &c.

"*Note.*—The Sheriff-Substitute has read the authorities to which he has been referred by the pursuer's agent. These bring out pretty clearly that a declaratory conclusion and decree are necessary to give the pursuer the remedy he seeks. This Court is not competent to give that remedy. Moreover, the proposed deed is intended to give a leasehold title to an heritable subject; and the conclusion for damages is subordinate to the leading conclusion, which, as already said, is in substance and effect a declaratory one. See *Robertson* v. *Lindsay*, Dec. 4, 1873."

The pursuer reclaimed to the Sheriff, (DAVIDSON) who upon 12 April 1875 issued an interlocutor dismissing the appeal. The following note was appended to the Sheriff's judgment.

"*Note.*—The case of *Gordon* in 1802 (p.12,245) to which the respondent has referred, and also another case of recent date, *Cox and Others v. Kerr*, Oct. 25, 1873, which followed the case of *Gordon*, were not, at least apparently, quite the same as this. In both these cases there were disputes as to the terms of the dispositions, which in each case the petitioner asked that the respondent should be ordained to deliver to him. Thus, questions of heritable right were clearly involved in these cases.

"But here, supposing the alleged agreement for a contract of lease were to be proved by the petitioner, the exact terms and conditions of the lease to which the petitioner is entitled would or might be subject of discussion, and equally raise such incompetent questions. The petitioner of course means that if he proved his agreement for a lease, the Sheriff should read the written lease to be executed in respect of the agreement, and decide all questions that might arise thereanent. Therefore, though with hesitation, the Sheriff concurs in holding this action incompetent.

"The respondent did not plead incompetency. The Court was, however, *ex proprio motu* entitled to consider that; and it is not thought there should be any modification of expenses inasmuch as the progress of the case has been at once arrested, and no additional expenses caused by the respondent's act."

The pursuer appealed.

Argued for him—The Sheriffs are wrong in holding that this action is in substance one of declarator, or that it involves questions having reference to the title to an heritable subject. It is not even an action to compel a party to grant a lease, but simply to obtain the fulfilment of a bargain which has been entered into. If the defence had struck at the pursuer's title to give the lease it might have been different, but here there is simply a question of fact, with which the Sheriffs can competently deal.

Argued for respondent—This action has for its object the constitution of an heritable right. There is no executed lease, and what the Sheriff has been asked to do is practically to adjust a lease. An action competent in itself when brought in the Sheriff-court, may be rendered incompetent from the nature of the defence. The constitution of the lease is here denied, and this renders it incompetent for the Sheriff to deal with the action.

Authorities cited—*Hall* v. *Grant*, May 19, 1831, 9 Shaw 612; *Corbet* v. *Douglas and Jarvie*, March 5, 1808, Hume 346; *Robertson* v. *Paton*, May 23, 1815, Hume 658; *Murdoch* v. *Wyllie*, March 8, 1832, 10 S. 445; *Gordon*, February 6, 1802, M. 12,245; *Earl of Aberdeen* v. *Laird*, February 7, 1822, 1 Shaw 294; *Earl of Moray* v. *Pearson*, June 11, 1842, 4 D. 1414; *Harley Maxwell* v. *Glasgow and South Western Railway Company*, February 16, 1866, 4 Macp. 447; *M'Laren's Trustees* v. *Kerr*, October 25, 1873, 1 Rettie 60; *Robertson's Trustees* v. *Lindsay*, December 20, 1873, 1 Rettie 323.

At the debate it was pointed out by the Bench that the summons was defective, inasmuch as it failed to show how the lease was to be implemented. Accordingly, with the approval of the Court, a minute was lodged amending the summons by setting forth that the lease was to be implemented by the defender "entering into possession of the premises and paying the rent when due."