terminated the lease, had let the colliery to a new tenant, and undertaken to give possession to the new tenant at the next term. If he failed to do so he would be liable in damages to the new tenant, and it would be no defence that he was prevented from doing so by the *bona fide* resistance of the present defenders. It seems plain also that if the present defenders were wrong in maintaining possession, however much they acted in good faith, they must relieve the pursuer of the damages which he would be subjected in to his new tenant, who had been wrongously kept out. In short, I think I may say that when breach of contract has been committed and damages result, the *bona fides* or honest belief of the party who commits the breach can never excuse him from making good the loss.

Lord Neaves was absent.

The Court pronounced the following interlocutor—

"The Lords having heard counsel on the reclaiming note for the pursuer against Lord Curriehill's interlocutor of 26th July 1875, Recal the said interlocutor: Find that the defenders having wrongfully retained possession of the colliery in question after the period at which they were bound to remove; are liable to the pursuer in reparation for such injury as has been thereby occasioned to him; and, before further answer, allow a proof to both parties in regard to the amount of damages thereby incurred; Find the defenders liable in expenses since the date of the interlocutor reclaimed against, reserving in the meantime all other questions of expenses: Remit to the Auditor to tax the expenses now found due, and to report."

Counsel for Pursuer — Asher — Moncrieff. Agents—Murray, Beith, & Murray, W.S.

Counsel for Defenders — Balfour — Mackintosh. Agent—Alexander Morrison, S.S.C.

Saturday, January 8.

SECOND DIVISION.

[Lord Curriehill.

WILSONS *v.* WADDELL.

Property—Minerals—Reparation.

Circumstances in which *held* that the lessees of a colliery had no claim against the lessees of an adjoining colliery on a higher level for damages caused by surface-water, which collected in subsidences in the surface caused by the workings in the higher mine, found its way into said workings, and from thence into the lower mine, nor for the expense of pumping or otherwise removing the water from the lower mine.

Reparation—Property.

Opinions that the owner of a mine on a higher level than an adjoining mine has a right to work the whole of his mine in the usual and proper manner, for the purpose of getting out the minerals from every part of the mine, and that he is not liable for damage caused by any water which as a consequence of his workings flows by gravitation into the adjoining mine.

This was an action at the instance of John & James Wilson, coalmasters, Glasgow, against James Waddell, also a coalmaster in Glasgow, concluding for £2000 damages, and further, that the defender should be ordained to make such operations in or on the ground in which he carried on his coal-workings as to carry off the surface-water from the ground, and thereby prevent its passing through the same into the defender's workings, and thence into the pursuers' coal-workings; or otherwise, that the defender should be ordained to remove the surface-water from the pursuers' coal-workings by pumping or in some other way.

Both parties held leases from Mr Houldsworth of Coltness, of co-terminous parts of the same coalfield. The defender's lease had extended from 1855, while the pursuer's began in 1860. The portion of the coalfield tenanted by the defender was upon the rise, and that tenanted by the pursuer upon the dip. The Caledonian Railway passed between the two collieries. The pursuers were taken bound by their lease not to work "within five yards of the boundary of the subjects let, or of the Caledonian Railway," and the defenders were likewise bound not to work "within five yards of the boundaries of the subjects." This limitation insured at least forty yards of ground between the two collieries. The pursuers, by agreement with the landlord, exceeded the limitation in the lease, and worked nearly through the barrier.

The following were the material averments of the pursuers, and the defender's answers:—

"(Cond. 3) The defender's operations in working out his coals have caused the ground above the same to subside over an area of about five acres, and the said subsided ground forms a basin into which surface-water from an area of about twenty acres falls; and the said water having no other escape, owing to the failure of the defender to make provision for its passing on, passes down through the said ground by means of breaks, holes, or sits in the same, caused by its having subsided as aforesaid into the coal-workings or wastes of the defender, in which it collects, and thence through the barrier or wall foresaid into the foresaid mines or coal-workings of the pursuers. The said surface water consists to a large extent of water which, but for the said breaks, holes, or sits, would not come upon the said five acres. The defender has no right of servitude or otherwise in respect of which he is entitled to pass on the water as foresaid into the workings of the pursuer, and he is bound to provide for its passing over the surface of the said five acres, by making surface repairs, constructing surface drains, or other means, and providing pillars or other supports of the said surface in his mines. Further, the defender is bound under the terms of his tenancy to work out his coals as near the outcrop as can be done consistently with keeping up the surface, to work his pumps and bring them on air daily,

so as to prevent as much as possible water coming through into the pursuers' working, and to form and leave sufficient pillars under all water on the surface; and he has failed to implement his said obligations, and in consequence of his said failure the water foresaid comes into the said workings of the pursuers.

"(Ans. 3) Denied, subject to the explanation, that at the extreme rise of the defender's field the ell coal crops out, and that in working it to the outcrop, where the roof became thin, slight falls or holes in the surface occurred prior to Martinmas 1874; but these did not, and do not, receive water to any extent beyond the direct rain-fall or ordinary surface-water. Similar falls or holes have occurred on the surface over the workings of the Coltness Iron Company, and of Messrs Boyd and Simpson before referred to. The defender was entitled and bound under his lease from Mr Houldsworth, the common landlord of the pursuers and the defender, to work out the ell coal-seam to the outcrop, and his whole mineral workings and relative operations were conducted in conformity with his lease, in the ordinary and proper mode, and with due and reasonable care. By agreement between Mr Houldsworth and the defender, dated 28th February 1870, Mr Houldsworth bound himself to free the defender of all damages from infallen holes at the outcrop.

"(Cond. 4) During and since the year 1872 the said water has been coming, as described, into the pursuers' workings foresaid, whence the pursuers have had to pump it back to the surface—a height of 100 fathoms or thereby, and that by means of an engine working underground pumping the said water up from their dook-workings to the pit bottom, whence it is pumped to the surface by means of another engine working at the pit mouth. The pursuers have all along complained to the defender of the said surface water coming into their workings; and in particular, in the beginning of 1874, they called his attention to the matter through their agent, who at the same time intimated their right to compel the defender to prevent the injury, and their title to damages from him for injury already done. Notwithstanding the representations of the pursuers, however, the defender refuses, or at least delays, to prevent the said water passing into the pursuers' workings foresaid.

"(Ans. 4) Admitted that a complaint was made by the pursuers in January 1874; and explained that the landlord Mr Houldsworth then cut a cross ditch for the purpose of preventing as far as possible, water from finding its way into the falls or sits. *Quoad ultra* denied."

The pursuers pleaded—"(1) The pursuers having suffered loss, injury, and damage through the fault of the defender, as condescended on, they are entitled to reparation. (2) The sum concluded for as reparation being just and reasonable, the pursuers are entitled to decree, as concluded for. (3) The defender being bound to prevent the surface-water in question coming into the mines or coal-workings of the pursuers, the pursuers are entitled to decree, in terms of one or other of the alternative conclusions of the libel. (4) The defender being bound to prevent the surface-water in question coming into the mines or coal-workings of the pursuers, the pursuers are entitled to decree as concluded for, for amount of expenses incurred by them in removing from their said workings any such said water coming into the same on or after the date of citation herein."

The defender pleaded—"(1) The pursuers' averments are not relevant or sufficient to support the conclusions of the summons. (2) The defender not having been in fault in reference to the matters complained of, he is entitled to be assoilzied. (3) The defender's operations having been conducted in the ordinary and proper mode, and with due and reasonable care, the action cannot be maintained. (4) The defender's operations having been carried on in accordance with his powers and obligations under a lease from the common landlord of the parties, granted prior to the pursuers' lease, there are no grounds of action against the defender. (5) The influx of water complained of being due to the pursuers' own operations, the defender is entitled to be assoilzied."

On 8th June the Lord Ordinary allowed a proof before answer, and the result of the evidence appears from the opinions of the Judges.

The Lord Ordinary pronounced this interlocutor:—

"*6th July* 1875.—The Lord Ordinary having taken the proof and heard counsel for the parties on the proof and whole cause, Assoilzies the defender from the conclusions of the summons, and decerns: Finds the defender entitled to expenses, and remits the account thereof when lodged to the Auditor to tax and to report.

"*Note.*—The averments which the pursuers undertake to prove are contained in the third article of their condescendence as amended. The relevancy of these averments was discussed when the case was heard in the Procedure Roll, and before answer a proof was allowed. The proof has now been led; and the result, in my opinion, is that the pursuers have failed to prove their averments, so that any decision as to their relevancy is unnecessary.

"Before considering the proof, it may be expedient to state what appears to me to be the general legal principles upon which cases like the present should be decided. No better exposition of the law can be found than in the passage from Erskine (ii. 9, § 2):—"Where two contiguous fields belong to two different proprietors, one of which stands upon higher ground than the other, nature itself may be said to constitute a servitude on the inferior tenement by which it is obliged to receive the water that flows from the superior. If the water, which would otherwise flow from the higher ground insensibly without hurting the inferior tenement, should be collected into one body by the owner of the superior in the natural use of his property for draining his lands or otherwise improving them, the owner of the inferior tenements, without the positive constitution of any servitude, is bound to receive that body of water on his property, though it should be damaged by it, but as this right may be overstretched in the use of it, without necessity, to the prejudice of the inferior ground, the question, how far it may be extended under peculiar circumstances, is arbitrary." In the case of *Campbell* v. *Bryson*, the present Lord President (then Lord Justice-Clerk), in commenting upon the doctrine of Erskine,

says :—'Now, I think we have here not only a statement of general doctrine applicable to the case in hand, but we have also a very careful statement of what is the proper qualification of that doctrine. In the last sentence of the passage that I have read he says that it must in every case be an arbitrary question how far this right is to be stretched under the particular circumstances—that is to say, if the inferior heritor complains that the superior heritor is unduly pressing his right, and making the servitude intolerable to him, he will have the right to come to the Court with his complaint, and the Court will be entitled to regulate the matter between the two upon equitable terms. This is the true meaning, I apprehend, of the qualification which Mr Erskine adjects to the general statement of the doctrine, and to the doctrine with that qualification I unhesitatingly subscribe.' It may be that Erskine was dealing principally with questions of surface-drainage; but there seems no reason why a principle applicable to surface-water, and to operations upon the surface of land, should not be applied to operations under ground and to water which is found there. And accordingly, I find that the principle has been adopted in several cases in England as the rule for decision. The first of these cases is *Baird* v. *Williamson*, 13th November 1863, 15 C. B. 376 (N. E.) There the defendant pumped water out of his mine, which was the upper mine, into a level trough, whence it flowed into the plaintiff's mine, which it never could have reached but for the pumping. In deciding the case, Erle, C. J., said:—'The owners of the higher mine have a right to work the whole mine in the usual and proper manner, for the purpose of getting out any kind of mineral in any part of that mine; and they are not liable for any water which flows by gravitation into an adjoining mine from works so conducted. We think that the law was correctly laid down to that effect in *Smith* v. *Kenrick*.' Then he goes on to contrast that case with an operation of man made for the purpose of introducing foreign water on his own lands, and he goes on to say:—'The defendants, as occupiers of the higher mine, have no right to be active agents in sending water into the lower mine. The plaintiffs, as occupiers of the lower mine, are subject to no servitude of receiving water conducted by man from the higher mine. Each mine-owner has all rights of property in his mine, and among them the right to get all minerals therefrom, provided he works with skill and in the usual manner. And if, while the occupier of a higher mine exercises that right, nature causes water to flow to a lower mine, he is not responsible for this operation of nature.'

"Now, in the case of *Smith* v. *Kenrick*, 14th February 1849, 7 C. B. 515, which was thus adopted by the Court in *Baird* v. *Williamson*, an upper owner had worked out his coal, though he knew that the water from his workings must of necessity flow into his neighbour's through holes which his neighbour had made in his own coal. He was held entitled to do that; and Cresswell, J., said—'It would seem to be the natural right of each of the owners of two adjoining coal-mines, neither being subject to any servitude to the other, to work his own in the manner most convenient and beneficial to himself, although the natural consequence may be that some prejudice will accrue to the owner of the adjoining mine, so long as that does not arise from the neglect or malicious conduct of the party.'

"Then, in *Rylands* v. *Fletcher*, July 1868, English and Irish App. (H. L.) L. R., vol. iii. p. 330, which contains the most authoritative exposition of the law, the defendant had made an artificial reservoir on his ground, and brought the water into his workings, whence it flowed into his neighbour's; and he was held responsible for that. In giving judgment, Lord Chancellor Cairns said—'The principles on which this case must be determined appear to me to be extremely simple. The defendants, treating them as the owners or occupiers of the close on which the reservoir was constructed, might lawfully have used that close for any purpose for which it might, in the ordinary course of the enjoyment of land, be used; and if, in what I may term the natural user of that land, there had been any accumulation of water, either on the surface or under ground, and if, by the operation of the laws of nature, that accumulation of water had passed off into the close occupied by the plaintiff, the plaintiff could not have complained that that result had taken place. If he had desired to guard himself against it, it would have lain upon him to have done so by leaving, or by interposing some barrier between his close and the close of the defendants, in order to have prevented that operation of the laws of nature.

"As an illustration of that principle, I may refer to a case which was cited in the argument before your Lordships—the case of *Smith* v. *Kenrick*, in the Court of Common Pleas.

"'On the other hand, if the defendants, not stopping at the natural use of their close, had desired to use it for any purpose which I may term a non-natural use—for the purpose of introducing into the close that which, in its natural condition, was not in or upon it—for the purpose of introducing water, either above or below ground, in quantities and in a manner not the result of any work or operation on or under the land; and if, in consequence of their doing so, or in consequence of any imperfection in the mode of their doing so, the water came to escape, and so pass off into the close of the plaintiff, then it appears to me that that which the defendants were doing, they were doing at their own peril; and if, in the course of their doing it the evil arose to which I have referred—the evil, namely, of the escape of the water, and its passing away to the close of the plaintiff, and injuring the plaintiff—then, for the consequence of that, in my opinion, the defendants would be liable. As the case of *Smith* v. *Kenrick* is an illustration of the first principle to which I have referred, so also the second principle to which I have referred is well illustrated by another case in the same Court—the case of *Baird* v. *Williamson*, which was also cited in the argument at the bar.'

"The next two cases (to which I do not think it necessary to refer more particularly, because they are merely illustrations of these principles) are—*Crompton* v. *Lee*, 4th November 1874, 19 Equity Cases, L. R., 115; and *Smith* v. *Fletcher*, 11th February 1874, 9 Exchequer Cases, L. R., p. 64—the question in the latter case being left to the jury, whether what was done by the defendants was done by them in the ordinary, reasonable, and proper mode of working the mine.

"The main question, therefore, in the present case is—Were the operations of the defender conducted by him in the usual, reasonable, and proper mode of working his mine? I think that after the evidence of Mr Landale, one of the witnesses for the pursuers—and the evidence, indeed, of all the witnesses—it is impossible to say that the workings of the ell coal at the out crop (because that is said by the pursuer to be the *origo mali*) were not done in the usual, reasonable, and proper, and indeed, as Mr Landale says, in the necessary manner. It was an obligation imposed upon the defender in his lease that he should work out his coal to the out crop; and Mr Landale, who superintends these matters for Mr Houldsworth, the landlord, seems to have gone with him to the ground and arranged that it should be worked out in this particular manner, which he says was the usual manner of working it out. The object of both landlord and tenant was to get as much coal as possible, and the only way of doing so was by removing the pillars. Owing to the proximity of the out crop of the coal to the surface, and the friable nature of the roof, it was impossible to take out every pillar—or at least to take out every pillar in its order—and the consequence was, that some pillars remained while the ground crushed in round about them. That resulted in inequalities, and in some instances in holes, in the surface of the ground. I think the pursuers have undoubtedly proved that, through the sits thus occasioned, water to some extent found its way into the defender's mine. But I do not think it is proved that very much found its way there, and Mr Landale is clear that little or none of that water found its way into the pursuers' mines. Still, I think that some of the water did find its way to the pursuers' mines, and the pursuers are entitled to the benefit of that consideration, whatever it may be worth. I think, however, that the pursuers have failed to prove that any water entered the sits except what fell upon the surface of the subsided ground in the shape of rain or snow. It therefore appears to me that, so far as regards the mining operations of the defender, they are proved to have been usual, reasonable, and necessary operations, and to have been performed in the usual and proper course of working this mine. There does not appear to me to be any proof whatever of anything like *æmulatio vicini* in his working, or of any undue interference with the rights of his neighbour Mr Wilson. No doubt Mr Landale said it would have been more neighbourly if he had deferred the excavation of the pillars at the douk or lower part of the ell coal waste, where the Caledonian Railway forms the barrier between the fields of the pursuers and defender, until a later period of his lease; but Mr Landale also admitted that there was no impropriety in working it out in that way—that it was a very tempting piece of coal to take out—and that he (Mr Landale), who regularly inspected the workings on behalf of Mr Houldsworth, the common landlord of the pursuers and defender, never objected to it, but, on the contrary, was quite satisfied with the way in which the defender had conducted the operations as tenant. I therefore think that the proof is in favour of the defender upon that matter. He has not, in my opinion, overstretched his rights; indeed, everything seems to have been done by the defender which he was bound to do—and even more, because he seems to have taken certain precautions to prevent, so far as possible, the surface-water from higher ground from going down to the pursuers' coal-field. The catch-drain, to which many of the witnesses refer as having been made immediately above the sits at the out crop of the ell coal, appears no doubt to have been made by the landlord; but that, I suppose, was done by arrangement between the landlord and the defender. And it certainly prevented a great deal of water from flowing down which would naturally have flowed down into those sits, but which must have been carried away by the catch-drain, and so been kept out of the sits. But, besides that, I think there can be no doubt that a considerable part of the water in the defender's ell workings, from whatever source it comes, is carried off into a lodgment, which has been referred to, at the side of the pit No. I., and from that it finds its way down to the defender's main coal, whence it is pumped up to the surface and carried away entirely from the pursuers' mine.

"But even assuming that the whole of the surface-water which finds its way through the sits into the defender's ell workings is not so disposed of, and that a part, or even the whole, finds its way into the pursuers' coal-field, the question remains—Is there any duty upon the defender to do anything more? Is it his duty either to fill up the sits which have been made, or to take the water which enters by these sits into the bottom of his own works, and then pump it up again? Now, I do not see any duty incumbent upon him to fill up the sits. The object of filling up sits is, in the general case, to restore the surface so that it may be used again for agricultural purposes. But that is a matter in which the tenant of the coal has no interest, unless the landlord and the tenant of the surface require the restoration. In a coal-field adjoining the defender's, belonging to the same landlord, and tenanted by a person named Boyd, it has been proved that sits were filled up, but that the landlord and his mining engineer came to the conclusion that it was a mistake to do so, and that it was better for the sake of the estate to leave the ground as it had fallen in, and to plant it. And accordingly they resolved that the sits on the defender's coal-field should not be filled up. But, apart from this, I can see no obligation upon the tenant of the coal-mine, who has done his duty under the lease in working his coal out to the out crop, to do anything in the way of restoring the surface, if his landlord does not call upon him to do so; and if water finds its way in by the operations of nature—the water from the heavens, for really, I think, that is all that is proved to come in this particular case—if it finds its way into the inner workings in that manner, that is just the result of the proper working of the mine, and the defender is not to be held responsible for it. Nor do I see any reason for calling upon him to pump out water which does his own workings no harm, and does not interfere with his winning the coal. He does, as I have said, all that is necessary for his own purposes, and in the usual and proper manner; and that, I think, is all that he is bound to do.

"It is right to say that Mr Landale, whose testimony is entitled to great weight in this case, is

of opinion that of the water which finds it way from the defender's ell workings into the pursuer's coal-field a very small quantity is surface-water, and that the bulk of it is the natural product of the coal and surrounding strata, and that he attributes the influx of water not to the sits at the out-crop, which the pursuers blame, but to the removal of the pillars in the defender's waste at the dip of the ell workings, 46 fathoms underground, an operation which the defender was quite entitled to perform. It is, further, not immaterial to observe that the alleged increase of water in the pursuers' mine was contemporaneous not only with the sits caused by the defender working out his ell coal at the out-crop, but also with the pursuers' own operations, by which they excavated a large portion of the coal under the Caledonian Railway, which by their lease was intended to form a barrier between their coal-field and that of the defender. Mr Landale no doubt thinks that enough coal was left to form a sufficient barrier, but very many of the other witnesses are satisfied that if the pursuers had not wrought out the coal under the railway little or no water would have permeated to their mine.

"On the whole, I think that the pursuers have failed to prove their averments, and that the defender must be assoilzied, with expenses."

The pursuers reclaimed.

Argued for them — The proprietor of an estate was not entitled to drain his surface and then allow the drainage water to flow into a coal mine; and the same principle applies here. In *Campbell* v. *Bryson* the Lord Justice-Clerk went largely upon the ground that the damage done was very slight indeed. There the water dealt with was in a reasonable drainage flow, but the question came to be whether the superior proprietor was entitled first of all to drain his land in the ordinary way into a ditch, and then afterwards to drain it again into the workings below the land by removing the coal and thus to give the water access to the lower workings. This was a diversion of the natural flow of the water, whether there were drains or not. The law, as stated in Stair ii. 7, 8, was precisely that on which the claim of damages was based, for there was a distinction between the operation of the laws of nature and other works.

Argued for the defenders—No sound distinction could be drawn between underground water and water which came into a mine from the surface in consequence of the reasonable and proper working of that mine. The authorities showed that a distinction was taken between a body of water either above or beneath the surface flowing in a known regular channel and water not so flowing, and a person tapping such a regular stream would be in a very unfavourable position. The distinction recognised in the authorities was not between surface and subterranean, but between gathering and flowing water. The true position of the defenders was this — (1) That in taking out the coal they were making a natural use of their property; (2) they were so doing for their own benefit—not maliciously for the purpose of drowning out their neighbours; (3) their operations had been conducted with reasonable skill, and in the ordinary way. The position of the pursuers was very much less favourable than if this had been a litigation between adjoining proprietors. The cases referred to on the other side were those of feuars, and thus *ab initio* different. This was the case of one proprietor who could deal with different parts of his property as he thought fit, and he had given the defenders a right to work up to the surfaces and even to bring the surface down.

Reclaimer's authorities — *Campbell* v. *Bryson*, Dec. 16, 1864, 3 Macph. 254; Erskine, ii. 9, 2; Stair, ii. 7, 8; Digest, xxxix. 3, 13; *Cowan* v. *Kinnaird*, Dec. 15, 1865, 4 Macph. 236; *Smith* v. *Kendrick*, 7 C.B. 515; *Baird* v. *Williamson*, 15 C.B. 376 (N.E.); *Rylands* v. *Fletcher*, 3 L. R. (Eng. and Irish App.) 330; *Smith* v. *Fletcher*, 9 L.R. Ex. 94; *Crompton* v. *Lee*, 19 L.R. Eq. 115; *Brand & Son* v. *Bell's Trs.*, Nov. 6, 1872, 11 Macph. 42.

Respondent's authorities — *Aikin* v. *Dewar*, Bell's Illustr. vol. ii. 119; Elch. (Property), 1, 1764; *Baird* (and Erle, C.J., there), 15 C.B. 376, (N.E.); *Acton* v. *Blundell*, 1843, 12 M. & W. 324, (and Tyndall, C.J., there); *Ross* v. *Taylor*, 1855, 11 Exch. Hulrston & Gordon, 369; *Broadbent* v. *Ramsbotham*, 11 Exch. H. and G. 602 (and Alderson, B., there); *Chasemore* v. *Richards*, 7 H. L. cases, Clark's Repts. 349 (and Lord Chelmsford there); *Samuel* v. *Edin. & Glasgow Ry. Co.*, Dec. 12, 1850, 13 D. 312; *Wood* v. *Wand*, 3 L.R. Exch. 771; *Taylor*, 11 Exch. 369 (and Park, B. there); *Irving* v. *Leadhills Mining Co.*, Mar. 11, 1856, 18 D. 833.

At advising—

Lord Ormidale — In this care some questions of importance have been raised in relation to the respective rights of the pursuer and the defender as conterminous lessees of different parts of the same coalfield.

The leases of both parties are held from Mr Houldsworth of Coltness. The defender's lease is considerably earlier in date than the pursuers', being for nineteen years from Martinmas 1855, while the pursuer's is for nineteen years from Martinmas 1860.

The defender's workings are situated on the north to the rise, and the pursuers' on the south to the dip. The Caledonian Railway passes between them from west to east.

The pursuers are expressly taken bound by their lease "not to work, without first obtaining the sanction of the landlord, any of the coal within five yards of the boundary of the subjects or of the Caledonian Railway." In like manner, the defenders are bound by one of the conditions of their lease "not to work any of the minerals within five yards of the boundaries of the subjects let." Having regard to these boundaries, and to the explanations given at the debate in connection with plans and other evidence, the barrier or ground contemplated to exist between the two collieries in question extended in breadth to at least 40 yards.

The pursuers conclude against the defender, *inter alia*, for £2000 of damages; and the grounds of their action, as stated in the third article of their condescendence, are to the effect that "the defender's operations in working out his said coals have caused the ground above the same to subside over an area of five acres, and the said subsided ground forms a basin into which surface water from an area of about twenty acres falls; and the said water having no other escape owing to the failure of the defender to make provision

for its passing on, passes down through the said ground by means of breaks, holes, or sits in the same, caused by its having subsided as aforesaid into the coal-workings or wastes of the defender, in which it collects, and thence through the barrier or wall into the mines or workings of the pursuers." On the other hand, the defender, while he generally denies the pursuers' statements, and maintains that his own workings have been regular and proper, avers in his answer to the second article of the condescendence "that the pursuers, whose mineral field lies along the line of the railway on the south or south-west side thereof, have, at various times and in different localities, worked out the barrier stipulated under their lease to be left unwrought, namely, the coal under the ground occupied by the railway, the result of which operations has been to admit of the access of water to the pursuers' workings, not only from the workings of the defender, but also from those occupied by the Coltness Iron Company and those formerly occupied by William Boyd and G. Simpson, mineral tenants of Mr Houldsworth, all situated to the rise of the pursuers' mineral field." And in reference to this statement the defender's fifth plea is that "the influx of water complained of being due to the pursuers' own operations, the defender is entitled to absolvitor.

How far the respective statements of the parties have been established, depends on the view that may be taken of the proof. Without deeming it necessary to enter into a minute examination or analysis of the proof, I think it sufficiently shows (1) that in consequence of the defender's operations to the rise at the outcrop of their ell coal, a considerable subsidence of the ground and numerous sits or holes occurred; (2) that the defender took no means, or at any rate no effectual means, for filling up or securing the sits or holes so caused; and (3) that the consequence was the coming down into his workings of a large quantity of surface-water, which, finding its way through the division barrier, passed on into the pursuers' workings, to their loss and damage. If the case had rested there I should have been disposed to adopt a different view from that of the Lord Ordinary, and to have held that the defender was liable in reparation to the pursuers. But in saying so I do not feel that I require to question the general principle of law upon which the Lord Ordinary proceeds. On the contrary, I concur with him in holding that, as a general principle, every one is entitled to use and enjoy his own property in every lawful way he pleases. This principle is not, however, to be taken as of universal or unqualified application. On the contrary, while every one is, as a general rule, entitled to use and enjoy his own property in every lawful way he pleases, he can only do so subject to the qualification that he does not unnecessarily and by operations of an improper description injure his neighbours or their property. As stated by Mr Bell (Prin. sec. 964) the absolute use of property is subject to many well known and well established limitations. While, therefore, an upper heritor is entitled in the usual and proper cultivation of his lands to collect into drains the water arising therein, and pass it down upon the lands of another situated at a lower level, as illustrated by the recent case of *Campbell* v. *Bryson*, 16th Dec. 1864 (3 Macph. 254) he is not entitled so to construct works as to collect the water on his property into a large and unusual quantity, and then, either purposely or owing to its not having been sufficiently secured or safely carried away, to allow it to overflow on adjoining lands, to the injury and damage of the owner or occupier thereof, as illustrated by the case of *Samuel* v. *The Edinburgh and Glasgow Railway Company*, 3d March 1849 (11 D. 968), and 12th Dec. 1850 (13 D. 312). Accordingly, in the present instance I cannot hold that the defender, as long as he confined his operations within the boundaries of his own portion of the coalfield, and so long as these operations were in themselves of a usual, reasonable, and proper character, could be made answerable for loss or damage arising to the pursuers as lessees of that portion of the coalfield situated at a lower level in consequence of water coming down into it from his (the defender's) mineral field situated above, providing that the water so coming down was only the natural and necessary product of the higher field. But if the water so coming down and causing loss and damage to the pursuers as lessees of the minerals situated at the lower level was not the natural product of and did not arise in the defender's mine, but was foreign water, so to speak, introduced into his mine from the surface, through operations of the defender carried on in an unusual, unreasonable, and improper manner, and thence passed into the pursuers' workings, I should hold it clear that the defender would be liable in the consequences. The case of *Smith* v. *Fletcher and others* (11 Feb. 1874, Law Reports of Exch. Cases, p. 64) is an authority in point, for in that case, which was very similar in its circumstances to the present, it was held by the Court of Common Pleas that the question for the jury was, "whether what was done by the defendants was done by them in the ordinary, reasonable, and proper mode of working the mine."

Applying the principles to which I have now adverted to the present case, it appears to me, on the proof, that there was negligence and blame imputable to the defender in allowing the sits or holes in the ground, which in consequence of his operations had subsided at the surface, to remain open and unsecured, so as to admit large quantities of water, not the natural product of his mine, into his workings, and thence passing on into the workings of the pursuers, to their loss and damage; or, in other words, I think the proof shows that in not filling up and securing the sits or holes, his operations were not usual, reasonable, or proper. Mr Robertson, the pursuers' engineer, says, "I observed that the defender's workings at and near the outcrop of the ell seam had caused the ground to subside in a very irregular manner. There were large holes in it. The irregularity had been caused by the pillars underneath having been taken out in an irregular manner." And he then proceeds to explain how in consequence a very large quantity of water entered his mine which would not otherwise have been there, and thence passed through the barrier into the pursuers' workings. And he afterwards states—"In practice it is contrary to regular and good working to allow irregular sits or holes to remain at the outcrop." And "so far as I saw, there had been nothing unusual or improper in the defender's working of the coal, but with regard to the crop working and leaving

those open sits it had been decidedly improper;" and afterwards, "the object in filling up sits is to keep the surface-water out, so as to prevent it interfering with the working of contiguous collieries." Mr Landale, the landlord's engineer, as I read his evidence, substantially corroborates Mr Robertson; and I would especially refer to what he says. When asked if it is "consistent with usage that surface-water should be introduced into mines," he answers, No. Mr David Rankine, another engineer, says, "The rainwater that gets into these pits goes into Waddell's (the defender's) ell coal workings. I have frequently seen ground pitted—not so bad as this, however—but I never saw ground allowed to remain in such a state. It is generally filled up." There is more evidence to the same effect, and there is no direct or distinct contradiction of it anywhere that I can discover.

I am not, however, to be understood as saying that the defender was not entitled to work out the whole coal of his field to the very crop, and in the course of his operations for that purpose to create sits or holes, and thereby introduce, irrespective of the pursuers or their interests, into his own mine any quantity of water he pleased, provided he secured it there and prevented it passing down into the pursuers' workings; but not having done this, I could have entertained very little doubt, having regard to the authorities which were referred to at the debate, that if the case had been left there he would have been liable to the pursuers for the injurious consequences thereby sustained by them. Thus, in the case of *Fletcher* v. *Rylands and Another*, as decided in the Exchequer Chamber (Law Reports, 1 Eq. Cases, p. 255) and House of Lords (Law Reports, 3 Eng. and Irish Appeals, p. 330), it was held (1) that where the owner of land without wilfulness or negligence uses this land in the ordinary manner of its use, though mischief should thereby be occasioned to his neighbour, he will not be liable in damages; but (2) that if he brings upon his land anything which would not naturally come upon it, and which is in itself dangerous and may become mischevious if not kept under proper control, though in doing so he may act without personal wilfulness or negligence, he will be liable in damages for any mischief thereby occasioned; and (3) that on these principles the owner of a mill situated above mine workings who, in constructing a reservoir on his own ground, by neglecting to secure and fill up certain old shafts or openings, allowed a quantity of water to go down into the mine below, was held liable in the damages thereby occasioned. The ground upon which this liability was found is explained by the Lord Chancellor (p. 339 of the House of Lords Report), where he says that "if the defendants, not stopping at the natural use of their close, had desired to use it for the purpose of introducing water which in its natural condition was not in or upon it, and if in consequence of their doing so, or in consequence of any imperfection in the mode of their doing so, the water came to escape and to pass off into the close of the plaintiff, then it appears to me that that which the defendants were doing they were doing at their own peril, and if in the course of their doing it the evil arise to which I have referred—the evil, namely, of the escape of water, and its passing away to the close of the plaintiff, and injuring the plaintiff—then, for the consequences of that, in my opinion, the defendants would be liable."

The principle of decision in that case applies, I think, to the circumstances of the present. Here, as in it, what may be called foreign water —that is, water which did not naturally arise in, or was the natural product of the defender's mine—accumulated on the ground above, which had subsided, and in which there were openings or sits caused by the defender's operations, in the conduct of which he had neglected the usual reasonable and proper precautions—was introduced or allowed to come into his mine, and thence to pass into the pursuer's, to their loss and damage. For that loss and damage, therefore, I would have been disposed to hold the defender liable, were it not for the pursuer's own acts, now to be noticed, which appear to me to have been of such a description as to bar and preclude their claim for reparation.

It has been clearly proved, I think, that the pursuers, in place of keeping within the boundaries of their own coal-field and leaving the barrier betwixt it and the coal-field of the defender intact and untouched, which, if they had done, no loss or damage would have arisen to them, they not only encroached on that barrier, but in the course of their operations worked nearly through and destroyed it. On this point it might be sufficient to refer to the evidence of the engineer William Robertson, their own witness, who says, in answer to a question from the Court—"If a barrier had been left between the coal-fields of the pursuers and defender of the full width of the railway, and five yards on each side, I think it would have kept the water pretty well out. I do not think the pursuers would have been troubled with water in that case. I was in the pursuers' workings immediately to the south of the railway. According to the plan, the five yards barrier upon their side has not been left. It is all out, and besides that, the coal field under the railway has been cut into from the pursuers' side. There has also been similar working from the defender's side. The plans show that the barrier mentioned in the leases has been disregarded by both parties. Through the barrier being reduced in this way the passage of water is very much facilitated." Mr Telfer, the pursuers' manager, and also a witness called and examined for them, says—"I do not know of any agreement by which the pursuers wrought out some of the coal under the railway, but I remember working out coal there. We wrought out the coal under the railway opposite the defender's waste, north-westwards from the Waterloo Road, which crosses the railway between Benthead and Overtown. We finished our workings under the railway opposite the defender's waste a few months ago." And although this witness, the pursuers' own manager, goes on afterwards to state that the coming in of water from the defender's waste did not increase through the encroachment on the barrier, I must, from the nature of such an operation, as well as from the evidence of other witnesses, hold he is mistaken in this. Mr Landale, the engineer, also called as a witness for the pursuers, removes indeed any doubt that could be entertained on the subject.

I cannot therefore have any hesitation in hold-

ing that the pursuers seriously encroached upon the barrier that ought to have been left between them and the defender's mine, and that such encroachment was, to a great extent, if not entirely, the cause of the inroad of water upon them of which they complain. And if so, they must be held to have brought the mischief upon themselves, and are consequently barred in law from maintaining the claim for damages now concluded for by them in the present action. Nor do I think it of any consequence that the defender also encroached on the barrier, of which there is some evidence, although scarcely enough to be altogether relied on, for beyond all question the pursuers, if they were not the sole transgressors in this respect, were so to by far the greatest extent, and cannot therefore maintain a claim for loss or damage resulting from their own contributory fault.

It was argued, however, for the pursuers, that as they, by separate agreement, dated 16th August 1870, with their landlord, obtained his permission to work out the coal under the railway, their doing so cannot be any fault on their part. I am unable to concur in this view. The landlord's permission may be a good answer by the pursuers to any claim of damages against them at his instance, but I am unable to see how it can avail them in the present dispute with the defender, who was no party to the alleged agreement. It was, besides, entered into by the pursuers and their landlord long subsequent to the defender's lease, and after a great deal of water had in the knowledge of the pursuers accumulated in his waste. It must therefore, I think, be considered, as in a question with the defenders and in reference to his rights and interests, a reckless and improper proceeding on the part of the pursuers, with or without the permission of their landlord to interfere as they did with the barrier between their and the defender's workings.

The result is that, in my opinion, the interlocutor of the Lord Ordinary ought to be adhered to, although not for the reason assigned by him.

Lord Gifford—I have come to the same conclusion, although perhaps on somewhat wider grounds, and I agree that the interlocutor of the Lord Ordinary assoilzieing the defenders from the conclusions of the summons must be affirmed.

I agree with the opinion just expressed by Lord Ormidale, that the pursuers have failed to prove that the loss and injury which they have sustained on account of the water which has flowed into the pursuers' workings from the workings of the defenders which are at a higher level has been occasioned by the fault of the defenders. The pursuers were bound to trace the damage complained of directly to the defenders' fault—that is, to show that the damage was occasioned solely and directly by the illegal conduct of the defenders, and I think the pursuers have failed to do this. On the contrary, I agree in thinking that, to some extent at least, the pursuers have themselves contributed to or facilitated the flow of water of which they complain. Instead of leaving the broad barrier below the railway, which naturally separates the upper part of the coal from the lower, and leaving five yards in addition of unwrought mineral, probably making in all a barrier of from thirty to forty yards, the pursuers have chosen under special bargain with the landlord to work out the whole or nearly the whole barrier under the railway, and it is impossible to doubt that, there being now no barrier or a very thin barrier from the rise to the dip portions of the seam, water from the upper portion must flow directly and freely into the pursuers' workings.

But I am prepared to rest the judgment upon a broader ground. I think that the defenders in everything they did in working the upper seams —that is, the seams to the rise from the railway —have acted legally, and that although the consequence of such legal working may be that additional water finds its way into the workings to the dip from the railway, the defenders are not answerable for this, and not liable in damage to the pursuers.

Admittedly, where a dipping seam or seams of coal belong to different proprietors, or are let to different tenants without any special stipulation as to water, the lower part of the seam must receive all the water that flows naturally into it from the upper part, and if the proprietor or tenant of the upper part works out the whole coal therein, he may do so without leaving pillars or without making any provision whatever for the water which may naturally accumulate in or flow through the wastes. If the whole coal is taken out, either by the long-wall system, or by finally removing the pillars, this will cause subsidence, and dislocate the upper strata to a greater or less degree, so as to occasion a much greater percolation of water which will necesarily find its way to the lower workings than would have been the case had the coal been left unwrought, or if the wastes had been supported by pillars. Still this is just one of the natural burdens which lower coal workings must sustain. They must take the water that comes in the course of ordinary legal working, be it more or less, and no claim will arise though the quantity of water be increased by the workings of the upper coal owner.

Accordingly, in the present case it was ultimately conceded in argument, and whether conceded or not I think it is quite clear in law that the pursuers have no claim whatever against the defenders on account of the defenders having first taken out the coal in the dook and then removed the dook pillars. It is plain on the evidence that this operation largely increased the flow of water into the pursuers' workings chiefly by dislocating the superjacent strata, and also by creating a reservoir, as it were, a great accumulation of water, with great pressure of the water, which ultimately forced its way through the barrier. Still, the defenders' workings being legitimate, no claim for damage can result.

In like manner, the other workings of the defenders seem to me to have been equally legal, equally within their powers and rights as mineral tenants, and equally incapable of founding a claim of damages at the pursuers' instance. I think this is the result of the evidence. The defenders did nothing that they could have been interdicted from doing—nothing unusual or improper so far as merely working the minerals is concerned.

Ultimately, the point chiefly relied on by the pursuers was, that in working out their coal to

or very near the surface they broke up the surface of the ground, so as not only to destroy the whole agricultural drains, but so as to leave deep pits or gullies, or, as they are sometimes called in the evidence, plumps or ditches, over a considerable extent of surface—that the defenders failed to repair the drainage, and failed to fill up these pits or gullies, plumps, or ditches, so that the rain-water falling in or near the fields where the surface was so destroyed, found its way into the coal workings of the defenders, and from thence into the inferior coal workings of the pursuers.

It is of this water—this surface-water flowing in through the sits or plumps—that the pursuers complain, and on account of this they claim damages. I am of opinion that this claim is not well founded.

It was hardly contended—I think it cannot successfully be contended—that the defenders were not entitled to break down the surface, or to crack and rend it by taking out the coal at or near the out crop. I think it is clear that the defenders were entitled to take out every ounce of coal to the very surface—that is, to the very outcrop, however much this operation might injure the surface. With the questions of surface or agricultural damage the pursuers have nothing to do. Now, according to the evidence, the coal at the out crop could not be taken out without producing serious injury to the surface to a greater or less degree, and ultimately the pursuers' contention was, that after these pits or gullies were made the defenders were bound to have filled them up again, so as to prevent rain-water from flowing into them, and from them into the workings.

Now, I cannot find grounds in law sufficient to lay this obligation on the defenders. I take the matter in steps, thus—Suppose the surface at and near the out-crop had never been drained at all—that is, had no agricultural drains constructed. Of course it can never be maintained that a proprietor is bound or could be compelled to make agricultural drains in his own ground for the sole benefit or behoof of a neighbouring mineral owner. In like manner, and as the next step, suppose that the previously existing agricultural drains have been cracked or destroyed by the subsidence from the mineral workings below, an adjoining mineral owner could never compel the replacement or repair of these agricultural drains if the proprietor of the injured surface refused to do so. Now, this failure or declinature to repair the agricultural drains is really part of what the pursuers complain of in the present case. The agricultural drains near the out crop were broken and dislocated, and were not repaired. No doubt it is usual to repair such drains, and this is the ordinary practice, but then this is done for the benefit of the surface, or of the farmer, and not in the least in the interest of an adjoining mineral owner. The adjoining mineral owner has nothing to do with this, although, if the drains were repaired, he would derive benefit by the water being carried off that would otherwise reach his workings.

Now, to take the last step, is the case different when by means of legal mineral workings not only are the agricultural drains destroyed, but besides cracks and rents, it may be of considerable size, are made in the surface of the ground? Can a neighbouring mineral owner, who has no right either to that surface or to the minerals immediately below it, insist that these cracks and rents shall be filled up at the expense of the miner who made them or of his landlord. I think not. They may increase the water which reaches the neighbouring mines, and which would otherwise flow somewhere else over the surface; but this is an accidental burden which the inferior mine owner must bear.

For—and this is the essential point—no water goes down these sits or cracks but the natural rain-water of the field where they are situated. This seems to me to be the cardinal distinction. If the defenders, by breaking up their own surface, had tapped a river or a streamlet, or any established flow of water coming from a distance, the case would have been otherwise. So, if the defenders had tapped a lake or a pond or a reservoir, they would have been bound to keep it from entering their pits, if by so doing it would reach the pursuers' workings. But there is no such rule with the rain-drops which fall on the surface above the defenders' own workings. There is no obligation to carry these rain-drops, the natural rain-fall of that surface, anywhere else. In the sense of this argument the rain-fall of the defenders' surface—that is, the surface above their mines—is not "foreign water" wrongfully introduced. It is the natural water belonging to the surface, and which the defenders are under no obligation to prevent from percolating below. In the present case there is no question regarding any other water than the natural rain-fall of the field at the out crop. The defenders and their landlord have arranged for their own benefit to leave that field with disturbed and unrestored surface—in short, to sacrifice the surface as it is called, as that surface agriculturally is not worth the restoration. I think they are entitled to do so without being liable in damages to the pursuers.

Lord Justice-Clerk—In this case I am of opinion, *firstly*, that the defenders were working their lease in a perfectly legitimate way in taking out the coal as they did, even although by such a course they should produce sits, plumps, or gullies, as they are termed; and *secondly*, I do not think that there was an obligation on the upper proprietors to fill up these sits, plumps, and gullies. The upper tenant was not bound, nor could he have been compelled, to repair the agricultural or surface damage caused by his mining operations; he could not have been interdicted from working out the coal to the surface as he did, and this brings me naturally to the third question, as to whether he was bound to prevent the rain-water collected in the depressions and openings in the surface caused by his workings from getting into the workings of the pursuers. Now, it is clear that if by breaking the ground at the surface he had tapped a river or lake, then he would have been bound to repair an injury such as that, but I do not think that he is bound, as here the pursuers seek to have him bound, to stop the rain-water, for it is nothing more, from getting down into their workings.

The broad ground of law is that upon which Lord Gifford has, in the first place, based his opinion, namely, that the pursuers have failed to

show that the defender acted illegally in working his coal, and generally conducting his operations as he did. The narrower view is that the pursuers have failed to trace the damage they have suffered to the defenders' action. This last is the view of Lord Ormidale, in whose opinion in that respect I concur entirely, as I also do in the last ground adopted by Lord Gifford. My own view is that the working of the minerals towards the surface was not a regular thing, but that question appears to me to be quite overridden by the fact that the pursuers have failed to trace the damage to the defender's fault.

Lord Neaves was absent.

The Court adhered.

Counsel for Pursuers—Dean of Faculty (Watson)—Lee—Harper. Agent—Henry Buchan, S.S.C.

Counsel for Defender — Balfour — Alison. Agent—J. Gill, L.-A.

Thursday, January 13.

FIRST DIVISION.

[Sheriff of Lanarkshire.

GIBSON & STEWART *v.* BROWN & CO.

Compensation—Contract—Damage—Defence.

Storekeepers received a quantity of grain from the owners for storage without express contract. In a petition at their instance for warrant to sell a portion of the grain which remained in their hands undelivered, in payment of their storage account, — *held* that an illiquid claim of damages for injury received by the grain when in the petitioners' hands, restricted to the amount of the account sued for, was a competent defence.

This was an appeal from the Sheriff-court of Lanarkshire in a petition at the instance of Gibson & Stewart, general storekeepers, Glasgow, against Brown & Co., starch manufacturers there. The petition set forth that the petitioners had received into their stores in Ann Street, Glasgow, from 29th June to 8th July 1872, 2000 bolls of Indian corn or maize belonging to the respondents; that this corn had been re-delivered to the respondents to the extent of 1792 bolls, 208 bolls still remaining in the stores; that the respondents were owing the petitioners sums for storage of the grain, &c., to the amount of £111, 4s. 10d.; that the respondents had declined to pay their charges, and that further charges for storing were still being incurred; that these charges would exceed the value of the grain still in store, unless it were forthwith removed. The petitioners therefore prayed, *inter alia*, for warrant to sell the grain, and after deducting the expenses of process and sale, to apply the free proceeds *pro tanto* in the liquidation of the charges, amounting to £111, 4s. 10d., due by the respondents to the petitioners, reserving to the petitioners their claim for any balance which might remain due to them for storage or otherwise, after deducting the free proceeds of sale.

In their answers to the condescendence the respondents admitted the correctness of the charges of £5 for receiving, of £3 for hoisting, and of £11, 4s. for weighing, but they resisted the other charges, viz., £21, 17s. 6d., being charges for turning the corn, and £70, 13s. 4d., being the rent for storage from 29th June 1872 to 14th April 1875, and stated that when the grain was re-delivered to them as above it was found to have got damaged "by heating or other causes unknown to them while in the petitioners' possession." They further averred that the damage was caused by the manner in which the petitioners had piled the grain, and by their failure to turn it and use sufficient care in storing it. Their loss was stated at £125.

The petitioners denied that the damage, if there were such, was caused by their fault, and explained that the grain was in a heated state when they received it. They further pleaded, *inter alia*, "(2) The claim of damage stated in the defences is illiquid, and cannot be set off against the petitioners' claim for rent and charges."

On 30th June 1873 a joint minute by the parties was put in process, in which they consented to the sale of the grain and the consignation of the free proceeds of the sale, reserving the rights of the parties.

After proof had been led, the Sheriff-Substitute (Guthrie) found upon the facts for the petitioners apart from the question of the competency of the defence.

On appeal to the Sheriff (Dickson) the judgment of the Sheriff-Substitute was recalled by the following interlocutor:—"Having heard parties' procurators on the defenders' appeal, and considered the record and proof, for the reasons stated in the note hereto, recals the interlocutor appealed against: Finds that the grain in question was stored in the pursuers' stores for the time specified in the petition, and that their proper charges therefor are £111, 4s. 10d.: Finds that it was the pursuers' duty to have said grain properly stored and turned while in their hands, but that they failed in that duty, in consequence of which the grain deteriorated in quality and value, and the defenders suffered loss to an extent equal to, if not greater than, the pursuers' said claim: Therefore sustains the defences to that extent and effect: Finds that the pursuers were not justified in refusing to deliver the portion of the said grain which they retained under their lien for store charges, and that the price thereof falls to be paid to the defenders: Accordingly appoints the Clerk of the Court to pay to them the sum consigned: Finds the pursuers liable in expenses: Allows an account thereof to be given in: Remits the same when lodged to the Auditor of Court to tax and report; and remits to the Sheriff-Substitute to decern for the amount of said expenses when taxed, and decerns."

In a note the Sheriff stated that he "had great difficulty upon the only question debated before him, viz., whether the pursuers neglected to take proper care of the grain when in their store, their procurator having admitted that any claim by the defenders to damages on that account was a good defence to the claim for storage, rent, &c."

The petitioners appealed to the Court of Session, and argued—The claim for damages was illiquid, and was incompetent as an answer to a petition like the present. It was no argument to say the rent claimed by the petitioners