the one-half of the properties, for under the recorded titles the second party was at her husband's death vested in one-half *pro indiviso*, and to that half the truster's settlement obviously could not apply.

LORD STORMONTH DARLING—The success of the second party's contention would mean that the testator, having a wife and eight children, and an estate to dispose of among them worth £4900 in heritage and £3337 in personalty, so dealt with it as to give his widow a right of fee in the whole heritage (as well as in £674 of insurances on his life), besides a liferent of the whole personalty, under burden of maintaining and educating such of the children as might at his death be unable to maintain themselves, thereby leaving to the eight children only the fee of the moveable estate at the widow's death. Such a division among widow and children is not perhaps a very likely one for a testator to make. But the widow has in her favour a certain presumption of law that a general settlement by a testator will not evacuate any special destination which he himself has previously made. And the question here is whether the provisions of Mr Morrison's general settlement, read in the light of the surrounding circumstances, are sufficient to overcome that presumption. In my opinion they are, for the following reasons — (1) The conveyance to trustees is of Mr Morrison's whole estate, heritable and moveable, including therein all means and estate over which he had power of disposal by will or otherwise—a description which seems to apply to the three house properties which in 1898 and 1902 had been bought with his own money, but the titles to which he had taken to himself and his wife and the survivor, and to their heirs and assignees whomsoever. There was no other property to which the description could apply, and these destinations were undoubtedly revocable as being *quoad* one-half of the fee donations *inter virum et uxorem*, and *quoad ultra* destinations of the truster's property admittedly testamentary. (2) The total liferent given to his widow after paying debts and expenses, although not absolutely inconsistent with a fee to her of the heritage, is much more consistent with an intention to limit her to a liferent of his whole estate, both heritable and moveable. This view is, I think, strengthened by the power given to the trustees to encroach upon capital, in the event of their being of opinion at any time that the income was insufficient for the comfortable maintenance of the widow and those of the children who might be unable to support themselves, for encroachment could hardly be required if the widow, besides having the liferent of the moveable estate, was also intended to have the fee of the heritable estate. (3) Express power is also given to the trustees to deal with heritage, both by selling and burdening, and there would be no heritage either to sell or burden if it all went to the widow.

I do not think that, in point of practical result, any distinction can be drawn between the whole and the half of the properties specially destined. Either the widow, as the survivor of the spouses, is entitled to the whole, or the destinations in the titles are completely evacuated. I am in favour of answering the questions in the case to the latter effect.

The LORD JUSTICE-CLERK, LORD KYLLACHY, and LORD KINCAIRNEY concurred.

The Court pronounced this interlocutor—

"Answer the first question of law therein stated in the negative: Answer the first alternative of the second question therein stated in the affirmative: Find and declare accordingly, and decern."

Counsel for the First and Third Parties—C. H. Brown. Agents—Smith & Watt, W.S.

Counsel for the Second Party—Valentine. Agent—Henry Smith, W.S.

Friday, June 23.

SECOND DIVISION.

[Sheriff Court of Stirling, Dumbarton, and Clackmannan, at Falkirk.

PRINGLE *v.* CARRON COMPANY.

Mines and Minerals—Right to Support—Feu-Disposition—Construction of Clause—Exemption from Claims for Mineral Damage in Favour of the Disponers and "Other Persons Deriving Right from Them"—Mineral Owner Causing Damage to Grantee of Disponers' Predecessors.

A in 1898 obtained a feu-disposition of a plot of ground from the testamentary trustees of the twelfth Duke of H., with clauses excepting the subjacent minerals from the conveyance, and providing that A should have no claim in respect of injury to the surface caused by the working of the minerals against "the said trustees or their foresaids or their tacksmen, or other persons deriving right from them." At that date the C. company were owners of coal underlying the feu in virtue of a recorded deed of excambion between it and the eleventh Duke dated in 1854, and had also through an unrecorded minute of agreement with the twelfth Duke dated in 1889 right to work such coal by long wall system although the surface might thereby be damaged.

Held that a claim by A for damages for injury to the surface of his feu against the C. Company fell to be dismissed, as the company came under the term "persons deriving right" from the trustees of the twelfth Duke of H.

William Pringle, Hill Cottage, California, near Falkirk, brought an action against the Carron Company, Carron, Stirlingshire, for the sum of £110 sterling for damages caused to the surface of the plot of ground on which Hill Cottage was built,

and of which he was the proprietor, through the working of the subjacent minerals by the defenders.

In 1898 the pursuer had obtained from the trustees of the twelfth Duke of Hamilton a feu-disposition of this ground which was recorded in the Division of the General Register of Sasines applicable to the county of Stirling on 18th January 1899.

The feu-disposition contained, *inter alia*, the following clause:—"But excepting and reserving always to the said trustees and their successors in the ground hereby disponed all ironstone, coal, fireclay, marble, shale, and limestone, and all mines, metals, minerals, and stone of every description which may be found in and under the ground hereby disponed, with power to the said trustees and their foresaids, and their tacksman or others in their name, to work, win, and carry away the said minerals and other substances hereby reserved, and to do everything necessary for working, winning, and carrying away the same, except that they shall not be entitled to sink pits in the ground hereby disponed; and in the event of any loss or damage being caused to the ground hereby disponed, or to the buildings erected or to be erected thereon, or to the water with which the same may be supplied, or to the drainage thereof, or in any other manner of way by or through the past or future workings of the said ironstone, coal, fireclay, marble, shale, and limestone, or other metals, minerals, or stone under or near the ground hereby disponed, no claim for damage or recompense shall on such account lie or be competent to my said disponee or his foresaids against the said trustees or their foresaids or their tacksmen or other persons deriving right from them." . . .

By contract of excambion, dated 18th and 23rd December 1854, and registered in the Register of Entails the 29th June, and in the Books of Council and Session 17th August 1857, between the eleventh Duke of Hamilton and the defenders the Carron Company, the said Duke had disponed to the Carron Company the coal subjacent to certain lands, "with all right, title, and interest, present and future, of the said Duke of Hamilton and Brandon in the said coals, . . . and all right competent to the said Duke with reference to the working of the said coals." Included in the coal so disponed was the coal underlying the portion of ground feued in 1898 to the pursuer.

By minute of agreement entered into between the twelfth Duke of Hamilton, the son and heir of the eleventh Duke, and the defenders the Carron Company in November 1889, the former consented to the latter working their minerals, including those under the land subsequently disponed to the pursuer—"*Third*, . . . By the longwall system, or any other process of complete excavation conducted in a regular and workmanlike manner, notwithstanding that such method of working may have the effect of lowering the surface of said lands. *Fourth*, In respect of said consent the second parties shall in the event of said coal being let to mineral tenants pay to the first party a royalty equal to one-fourth of the lordships or royalties payable to them by their mineral tenants on all coal worked or excavated by them from said lands, and in the event of said coal being worked by the second parties themselves instead of by mineral tenants, the second parties shall pay to the first party a royalty at the rate of one penny per imperial ton on all coal worked or excavated by them from said lands. . . . *Fifth*, The royalties above provided to be paid to the first and second parties respectively shall be in full of and include all claims competent to them for damage that may be caused to the surface of their said respective lands by their respective mineral workings, including any claims competent to them in respect of the lowering of the surface or dislocation of any of the mineral strata by the extraction of the coal, but excluding rent or compensation for ground occupied for mining operations, and compensation for any ground so occupied and left unrestored after mining operations cease, and damage by subsidence . . . to existing dwelling-houses and farm buildings, roads, railways, and the surface of any existing feus or building leaseholds on either parties' lands, all as after mentioned; and so long as the said royalties shall be punctually paid when due, the parties shall free and relieve each other of their respective claims therefor, and for damage to the drains or crops on their respective lands which may be from time to time caused by said coal workings. *Sixth*, In addition to the royalties before provided the parties or their lessees shall pay to each other yearly rent or compensation for all ground occupied by them respectively for pits, coal hills, rubbish heaps, roads, railways, and other purposes in connection with their mining operations, and for all damage, whether by subsidence or otherwise, to existing dwelling-houses and farm and other buildings on their respective lands, . . . and to the surface or buildings of any existing feus or building leases on their respective lands." . . . This minute of agreement was never registered.

In consequence of the operations of the Carron Company in working the minerals the buildings on the pursuer's feu and the surface of his ground suffered material injury owing to subsidence. He brought the present action for damages, and pleaded, *inter alia*—"(1) The pursuer having sustained the loss, damage, and expense sued for, and the defenders having caused the same and being liable to pursuer therefor, decree should be granted as craved. (2) The damage sued for having been caused by the illegal workings of the defenders, the pursuer is entitled to decree."

The defenders pleaded, *inter alia*—"(1) No title to sue. (2) The defenders having been entitled under their titles and the minute of agreement founded on to work this coal so as to withdraw support from the surface of the pursuer's ground and buildings, without incurring any liability

for damage, are entitled to absolvitor. (3) The pursuer being, under his titles, excluded from claiming damage due to subsidence caused by defenders' mineral workings, the defenders are entitled to absolvitor."

The Sheriff-Substitute (BELL) on 29th July 1904 repelled the first, second, and third pleas-in-law for the defenders, and allowed a proof. By consent of parties a remit was made to an architect to ascertain the amount of damage, and decree was subsequently given for the amount so ascertained.

The Carron Company appealed to the Court of Session. The trustees of the twelfth Duke of Hamilton were sisted as defenders and adopted the defences of the company.

Argued for the reclaimers—The pursuer had no right to claim damages from the Carron Company. He never had, on a just construction of the titles, a right to surface support, as that right had been vested in the company from 1854 downwards. By the excambion of 1854 the eleventh Duke, who was possessed of all rights to surface and minerals, conveyed to the company not only the coal, but "all right competent to the said Duke with reference to the working of the said coals," which included his right to surface support. But in any case the pursuer was barred by the express terms of his own feu-disposition, which excluded claims for damages against the twelfth Duke's trustees and "persons deriving right" from them. The present was practically a claim against the trustees because the company had a right of relief against the trustees, and in any event—and this was sufficient for the decision of the case—the company were "persons deriving right" from the trustees, as by the agreement of 1889 they derived right directly from the twelfth Duke, whom the trustees represented. If the trustees were even now to grant a letter of authority to the company to bring down the surface, the pursuer could have no claim, looking to the terms of his feu-disposition. *North British Railway Company* v. *Park Yard Company Limited*, June 20, 1898, 25 R. (H.L.) 47, 35 S.L.R. 950, was cited.

Argued for the respondent — He was entitled to damages. By the excambion of 1854 the eleventh Duke had not transferred to the company the right of support. The right of property in the surface involved the right of support, it being one of the natural rights pertaining to land. Any derogation from it must appear in the title—*Backhouse* v. *Bonomi*, 9 H. L. Cases, 503; *White* v. *Dixon*, March 19, 1883, 10 R. (H.L.) 45, 20 S.L.R. 541; *Bank of Scotland* v. *Stewart*, June 19, 1891, 18 R. 957, 28 S.L.R. 735; *Anderson* v. *M'Cracken Brothers*, March 16, 1900, 2 F. 780, 37 S.L.R. 587. There was no such derogation in the pursuer's title in a question with the company, for the latter were not "persons deriving right" from the twelfth Duke's trustees. This right was derived from the eleventh Duke by the excambion of 1854 taken along with the agreement of 1889 made with the twelfth Duke himself. "Right" in the feu-disposition meant a heritable right to the minerals either by disposition, lease, or otherwise, and not a mere licence to work.

LORD JUSTICE-CLERK—The provisions of the feu-disposition to the pursuer in 1898, by which he obtained no right to minerals, include a clause to the effect that if damage is caused to the surface or to buildings on the subject by mineral workings, whether these be old workings or future workings, there should be no claim competent to the pursuer or those coming into his right against the granters or their successors, "or their tacksmen or other persons deriving right from them."

The Carron Company obtained a certain seam of minerals by excambion in the lands of which the feu of the pursuer forms a part. The excambion took place between them and the eleventh Duke of Hamilton. Subsequent to this there was a minute of agreement between the company and the twelfth Duke, which however was not put upon the record. By that agreement each party got the right of working their minerals so as to take out the whole mineral, any question of damages being met by an agreed-upon royalty on the output. The Carron Company under this agreement have claimed relief against any claim the pursuer may have, and the trustees of the twelfth Duke have been sisted to defend the action.

Taking the clause above quoted by itself, and construing it according to ordinary rules of interpretation, it appears distinctly enough to be a surrendering of any claim on the part of the pursuer to damages resulting from the working of the minerals, the working of which could do injury to his feu, or the erections he might put upon it, and that whether such working was done by his authors or by others who might derive right from them, in whatever form the right to work the minerals might be given.

That being so, the true question in the case is, whether the Carron Company in excavating the coal, were doing so under a right from the trustees of the Duke. The position was this, that the agreement by which power was obtained to work out the entire minerals was dated in 1889. It may be that, as is averred, the pursuer did not know of the agreement. But this does not, as it appears to me, affect the question under consideration. For he had surrendered any claim he might have had to the effect of shutting him out from recovering damages, against the granters or their successors, or their tacksmen or others deriving right from them, apart from all question when or why those having the right shou d bring down the surface, provided always it was done in the legitimate working of the coal according to recognised practice.

I do not go into the matter in detail, as I have had an opportunity of perusing an opinion of Lord Stormonth Darling in which I concur. I would move that the interlocutor under review be recalled, that

the third plea-in-law for the defenders be sustained, and that they be assoilzied from the conclusions of the action.

LORD KYLLACHY—In this case I am not able to agree with the judgment of the Sheriff. I am not sure that I quite understand his particular view. But in any case that view was not, as I think, ultimately maintained to us.

The questions really involved are, I think, two—(1) Whether the pursuer, who acquired in 1898 from the compearing defenders, the testamentary trustees of the twelfth Duke of Hamilton, a feu of a certain piece of ground exclusive of minerals is excluded from claiming support to his surface by the previous recorded titles of the subjacent minerals; (2) whether, if not, the pursuer has, by the terms of his own title—that is to say, his feu-disposition of 1898—renounced as against his superiors, the compearing defenders, and by consequence as against the other defenders (the Carron Company) who are working the subjacent minerals under the authority of the compearing defenders, whatever right of support he might have otherwise had.

The first question turns upon the terms of a certain clause in the conveyance of minerals made in the year 1854 in favour of the defenders the Carron Company by the eleventh Duke of Hamilton, who then owned both surface and minerals in and around the pursuer's feu. That conveyance is contained in the contract of excambion printed in the appendix, and by it there is conveyed to the Carron Company, *inter alia*, certain coal under what is now the pursuer's feu, "with all right, title, and interest, present and future, of the said Duke of Hamilton and Brandon in the said coals hereby disponed by him, and all right competent to the said Duke with reference to the working of the said coals." On this conveyance infeftment followed, and it is not disputed that if upon the just construction of the clause just quoted there was a surrender in favour of the Carron Company of the Duke's right of support, that surrender is conclusive against the present action, which is an action of damages against the Carron Company in respect of injury to the surface by their underground workings. The pursuer, however, construes the clause differently, and contends that, as the decisions on this subject stand, the Duke, although assigning to the Carron Company "all rights competent to him with reference to the working of the minerals," must be held to have done so only to the effect of transferring to the company such rights as he would have had as owner of the minerals if the two estates of surface and minerals had been already separated.

It appears to me to be, apart from authority, somewhat difficult to limit in the way suggested, and to make practically superfluous, the clause referred to, and upon the cases cited I am not satisfied that the difficulty is removed. I do not, however, propose to decide the question thus raised, or to express any decided opinion about it. For it appears to me that assuming the point in favour of the pursuer, the present case may be decided, and I think without much difficulty, upon the second point—the point, namely, as to the effect of the pursuer's own title of 1898.

By that title—I mean the feu-disposition obtained in 1898 by the pursuer from the compearing defenders—the subjacent minerals were, as usual, excepted from the conveyance, and it was further provided that the pursuer should have no claim in respect of injury to the surface by the working of the subjacent minerals "against the said trustees (the compearing defenders) or their foresaids, or their tacksmen, or other persons deriving right from them."

The question is whether the defenders, the Carron Company, who it is admitted have by their longwall workings caused the injury complained of, and have done so by virtue of the agreement made in 1889 between them and the compearing defenders' author, the twelfth Duke of Hamilton, have the benefit of the above stipulation in the pursuer's title as being, in the sense of that stipulation, persons working in the compearing defenders' right.

There could, I think, have been no doubt on that subject if the 1889 agreement had been made by the compearing defenders themselves instead of being made by their author the last Duke. In other words, I am unable to doubt, that if in 1889 the compearing defenders, being still owners of the surface, had (by way of supplement to, or explanation of, the conveyance of, minerals made in the contract of excambion in 1854) granted to the Carron Company the right so to work as to bring down the surface, the said Company, thus working in the compearing defender's right, would have had, as against the pursuer, all the benefits of the clause of immunity contained in the pursuer's title. I say so, because I think it is clear that the clause in question does not require that the right to work, which is to carry with it the immunity, should be necessarily a right conferred in the future, or be a right conferred by a recorded title, or be a right attached to a disposition or tack of minerals, or in short be a right conceived in any particular form or granted in any particular way. All that is, as it seems to me, required is that the Carron Company, or other persons claiming to work with the benefit of the immunity, shall be in fact persons working with the authority of the compearing defenders.

But that being so, does it make any difference that the deed of 1889 was granted not by the compearing defenders—the testamentary trustees of the twelfth Duke—but by the twelfth Duke himself? I am unable to think so. The trustees represent their author. In all questions with third parties they are identified with him. They are bound by his acts and deeds, and the authority which was originally given by him, is now, as a continuing authority, in a quite proper sense an authority derived from them. The case in fact is, so far as I can see, just the same as if the twelfth Duke, having granted the deed of 1889, had lived to grant the pursuer's feu in 1898 and had

also lived to compear, as his trustees have done, in the present action. It seems to me hardly disputable that if he had done so the pursuer's case must have been at an end.

On the whole matter, therefore, I am of opinion that the Sheriff's judgment should be recalled, and that decree of absolvitor should be pronounced in favour of the Carron Company.

LORD KINCAIRNEY—The pursuer Pringle is feuar of a house in the parish of Grangemouth, to which his title is a feu-disposition by the trustees by the late Duke of Hamilton, dated 6th December 1898 and registered 18th January 1899. The minerals under the feu are expressly excepted from the disposition, and I understand that the pursuer makes no claim to them. But he has raised this action of damages in the Sheriff Court at Falkirk for injury to his house and to the surface by the workings of the defenders the Carron Company. The Carron Company admit having worked the minerals under the pursuer's house, and having injured the house in doing so, but they claim that under their titles from the Duke of Hamilton they had right to work the minerals without paying for damage for the subsidence of the surface.

The title of the Carron Company is an excambion between the company and the Duke of Hamilton, dated 18th and 23rd December 1854, on which apparently no infeftment passed. The minerals thereby disponed to the Carron Company consist of the main coal and the Coxrod coal beneath, *inter alia*, what is now the pursuer's house.

An agreement between the Carron Company and the succeeding Duke of Hamilton, author of the trustees who granted the pursuer's feu-contract, is of more consequence. That is a somewhat complicated deed dated in November 1899, and apparently, so far as it bears on the questions raised, it comes to this, that it confers power on the Carron Company to work the minerals in question by long wall although the surface should be thereby let down, and provides that the Duke should relieve the company of all claims for damage to the surface by such working. This was a personal contract on which there was and could be no infeftment. The late Duke of Hamilton died at a date not mentioned in the pleadings, and his trustees are the granters of the disposition in favour of the pursuer Pringle. The position at the date of the Duke's death was this, that it was agreed that the Carron Company should incur no liability to the owner of the surface, that is, to the Duke, on account of damage to the surface by their workings.

The feu-disposition to the pursuer was granted in 1898. It expressly excepts all the minerals from the grant, and reserves them to the granters.

This feu-disposition to the pursuer contains an elaborate and somewhat difficult clause on which the case appears to a large extent to depend and which requires somewhat careful attention. That clause, besides excepting the minerals from the disposition and reserving them to the granters and their successors with power to work them, provides that in the event of injury being caused to the ground disponed or to the buildings erected or to be erected thereon, "or in any other manner of way by and through the past or future workings of the said ironstone, coal, fireclay, marble, shale and limestone, or other metals, minerals, or stone under or near the ground hereby disponed, no claim for damage or recompense shall on such account lie or be competent to my said disponee, *i.e.*, the pursuer or his foresaids, against the said trustees or their foresaids or their tacksmen or other persons deriving right from them."

This clause does not provide that the pursuer shall have no claim for damages on account of surface injury, but only that he shall have no such claim against (1) the trustees, or (2) their foresaids (that is, the successors of the trustees), or (3) their tacksmen, or (4) other persons deriving right from them. In a question with anyone else than those enumerated the pursuer's right to protection of the surface remains, and therefore it would remain in this question with the Carron Company unless the Carron Company is included in this final clause. The clause protects the Duke's trustees and other persons deriving right from them not expressly including the Carron Company, and the questions seem to be these two—(1) does the protection of the trustees from claims for damages involve the protection of the Carron Company because the liability of the Carron Company would involve a claim of relief against the trustees; and (2) can the Carron Company be held to be covered by the words "other persons deriving right from them," that is, from the trustees? I am of opinion that these questions should be answered in the affirmative. It appears unreasonable to hold that the Duke of Hamilton should give up all claim for surface damages against the Carron Company, and that the Duke's trustees should straightway (in manifest derogation of that deed) put a feuar in the position of claiming such damages. That could hardly have been intended, and it seems to me that the words "other persons deriving right from them," *i.e.* from the Duke's trustees, may be read as including persons (such as the Carron Company) deriving right not immediately from the Duke's trustees but from the Duke, whose trustees they are. I am therefore of opinion that the claim of the pursuer for such damages fails, and that the appeal should be sustained and the defenders assoilzied.

LORD STORMONTH DARLING—When the pursuer obtained his feu-disposition of the surface from the trustees of the twelfth Duke of Hamilton in 1898 he got no right to the subjacent minerals. These were expressly excepted and reserved, and it did not matter, so far as this clause was concerned, whether the minerals were at the time the property of the trustees or had been

(as in fact they had been) conveyed to the Carron Company by excambion in 1854, for in either case the pursuer got no right to them. Further, it was provided by the feu-disposition of 1898 that in the event of loss or damage being caused to the surface or buildings thereon through the past or future working of the minerals under or near the ground thereby disponed, no claim for damage or recompense should on such account lie or be competent to the pursuer or his heirs and assignees against the trustees or their successors, or their tacksmen or other persons deriving right from them. It is on this clause that I think the present question turns.

The mineral workings which have resulted in damage to the pursuer's buildings have been carried on by the Carron Company in virtue of the excambion of 1854, which was a recorded contract between them and the eleventh Duke of Hamilton supplemented by an unrecorded minute of agreement between the Carron Company and the twelfth Duke, whereby it was arranged that mutual claims of damages should be settled by each party obtaining the privilege of working their respective minerals by the longwall system or other process of complete excavation, on payment to the other party of certain royalties. Under this agreement the Carron Company have claimed to be relieved by the trustees of the twelfth Duke of any sums to which the pursuer may be found entitled in this action, and the trustees, admitting their obligation of relief, have been sisted as compearing defenders.

The pursuer's case is that he has not surrendered his claim of damages for subsidence except as against the trustees or other persons deriving right from them, and that the Carron Company derived their right to take the coal which has caused the subsidence from the eleventh Duke under the excambion, or if the agreement of 1889 was necessary to complete their right, it was a transaction between them and the twelfth Duke, of which he had no notice, and which was not referred to in his feu-disposition. All that he had the means of knowing, he says, when he acquired his feu, was that his disponers had parted with the subjacent minerals, and therefore he might readily and safely agree to give up any claim of damages for mineral workings against them or those in their right.

I suppose it may be admitted that this question, which is not without difficulty, might have been obviated by a little more precision of language in the feu-disposition. But I am of opinion that the clause in that deed, as it stands, is sufficient to exclude the pursuer's claim. It seems to me that we are not concerned with the considerations which may have led the pursuer to consent to the insertion of this clause in his feu-right. The fact remains that it was inserted and has to be construed. The pursuer thereby agreed to give up any claim of damages for mineral workings, past or future, against the trustees or anybody deriving right from them. The right did not require to be constituted by sale; it might be by lease or by licence in writing. Now, have the Carron Company derived right from the trustees? I think they have, in a substantial sense, because at the date of the feu-disposition, assuming the trustees could have prevented complete excavation by the Carron Company, they were prevented from asserting that right by the fact that their author, the twelfth Duke, had made the agreement of 1889. The fact (which must be assumed in the pursuer's favour) that he did not know of that agreement is not material, because the surrender of his claim of damages was not made conditional on the trustees themselves, acquiring the right to bring down his surface or conferring the right upon others at any particular time or in any particular way or for any particular reason. There might have been a subsequent purchase of the minerals by the trustees, or a subsequent tack or licence to or by them, and still the pursuer would have had no redress. Does it matter that the right or permission given by the trustees to the Carron Company, instead of being a voluntary act, is given because their author, the twelfth Duke, came under an obligation by which they are bound? In short, I think that the pursuer's claim fails if the Carron Company can be said to be deriving right from the trustees in any substantial sense, and that in construing a contract (which is what we are doing here) it is too literal and technical to say that the Carron Company derive their right not from the trustees but from their author. The unreality of the plea appears plainly enough when it is remembered that the claim if successful would have to be borne by the trustees and not by the Carron Company.

I am therefore for recalling the interlocutors appealed against, sustaining the third plea-in-law for the defenders, and assoilzing them with expenses.

The Court sustained the appeal and assoilzied the defenders.

Counsel for Pursuer—Younger, K.C.—Umpherston. Agent—Henry Smith, W.S.

Counsel for the Carron Company—C. K. Mackenzie, K.C.—Chree. Agents—John C. Brodie & Sons, W.S.

Counsel for Duke of Hamilton's Trustees—Campbell, K.C.—Macphail. Agents—Tods, Murray, & Jamieson, W.S.