date, viz., the date of the Act of Parliament which enabled Major Herbert Buchanan to sell the old entailed estate, and with the price of that entailed estate to buy other lands in Scotland to be entailed. I am of opinion that the old entail is not the entail of this estate, and that seems almost something like a truism at first sight. It is not the existing entail. It contains a conveyance of the lands of Arden, and it subjected the heirs who succeeded to the estate of Arden to the fetters of a strict entail. But Arden is fee-simple and not under the fetters of the entail, and the only lands that are entailed now are those lands which were bought under the Act of Parliament of 1866. They have no connection with the old lands—they are even situated in a different county—and how the entail of 1784, which entailed the estate of Arden in Dumbartonshire, can be held to be the deed of entail of the estate that the petitioner now holds in Stirlingshire it is not very easy to see. But the truth is, this matter is quite settled upon the construction of the 28th section of the Act 11 and 12 Vict., which provides —"For the purposes of this Act the date at which the Act of Parliament, deed, or writing placing money or other property under trust, or directing lands to be entailed, came into operation, shall be held to be the date at which the lands should have been entailed in terms of the trust; and it shall also be held to be the date of any entail to be made hereafter in execution of the trust, whatever be the actual date of such entail." The case of *Lord Dunmore*, which occurred in this Division of the Court not a great many years ago, and the previous case of *Black* v. *Auld*, I think, are conclusive authorities on the question before us. It appears to me not to admit of serious doubt that the date of the existing deed of entail of the lands of Throsk and Popiltrees in the county of Stirling is the date of the Act of Parliament which received the royal assent upon the 16th of July 1866.

Lord Deas—I concur in the opinion which your Lordship has given.

Lord Mure—I am quite of the same opinion. I think the estate is held by the express words of the Act of Parliament under a new entail, and a different entail altogether from that which existed in 1784 as regards the estate of Arden.

Lord Shand—I entirely concur. The question turns exclusively, I think, upon the effect of the 28th section of the Act of 1848, and I think, in terms of that section, it is quite clear that the date of this entail is the date of the Act of Parliament providing that the lands shall be entailed. The effect upon the petitioner might have been saved if the private Act of Parliament had in one or other of its clauses declared that any new entail of the lands to be bought in lieu of those which had been sold should be taken as of the date of the old entail; but there is no clause of that kind, and that being so, the case must be ruled by the Act of 1848.

The Court remitted to the Lord Ordinary to refuse the petition.

Counsel for Petitioner—Jameson. Agent—F. J. Martin, W.S.

Counsel for Respondents—Begg. Agent—J. H. Jameson, W.S.

HOUSE OF LORDS.

Monday, March 19.

(Before the Lord Chancellor, Lords Blackburn, Watson, and Fitzgerald.)

FLEMING *v.* NEWPORT RAILWAY COMPANY.

(*Ante*, Nov. 12, 1879, vol. xvii. p. 93, 7 R. 179.)

Superior and Vassal—Feu-Contract—Railway—Access—Railway Clauses Act 1845 (8 *and* 9 *Vict. c.* 33), *sec.* 6.

A railway company having obtained an Act enabling them to pass through certain lands, served a statutory notice to take part of a field which the proprietor was engaged in feuing. Before the notice was served the proprietor had granted a feu of part of the field as laid down on a plan referred to, "with free ish and entry thereto by the streets laid down on said plan, but in so far only as the same may be opened and not altered in virtue of the reserved power after mentioned," which reserved power was "full power and liberty to vary and alter the said plan or streets or roads delineated thereon, in so far as regards the ground not already feued, in such manner as they shall think fit." The railway was not formed for five years after this feu was granted, during which time there was an access for carts across the part of the field on which the railway was to be formed, but there was no road. When the railway was formed the vassal claimed compensation under section 6 of the Railway Clauses Consolidation Act 1875, on the ground that the operations, though they did not touch his feu, were injurious, as they cut off the existing access and prevented the superior from making the roads he was bound to make under the feu-charters. *Held* (*dub.* Lord Chancellor) (*aff.* judgment of First Division) that as the superior was not bound under the feu-contract to construct a road, the vassal had no claim under section 6 of the Act against the company.

Observed (*per* Lord Watson) that if the vassal's feu-right had conferred a right to have the street opened up at a future date, the superior's reservation of power to alter the feuing plan would have afforded the company no answer to the vassal's claim for compensation.

In Court of Session November 12, 1879, *ante*, vol. xvii. p. 93, and 7 R. 179.

Mr and Mrs Fleming appealed to the House of Lords (suing *in forma pauperis*).

Mr Fleming was heard in person in support of the appeal, and counsel for the respondents were also heard.

At delivering judgment—

Lord Blackburn—My Lords, in this case the majority of the First Division of the Court of Session (Lord Deas dissenting) pronounced an interlocutor affirming that of the Lord Ordinary (Rutherfurd Clark) interdicting the appellants from proceeding with a claim against the railway company for compensation in respect of their lands having been injuriously affected within the meaning of the Railways Clauses Consolidation Scotland) Act.

The railway company had in July 1872 given notice to Mr Just to take a strip of land running across Wellgate Park from east to west. Wellgate Park lies on the face of a brae sloping upwards from the Firth of Tay, which lies to the north of this brae. The railway company afterwards took that land, or at least part of it, and made their railway along it, on an embankment, so as completely to prevent the passage of carriages from north and south across that line of railway. In January 1872 (six months before the notice was given) Mr Just had, by a feu-charter containing references to a plan, conveyed to Mr William Reid a plot of building ground lying at the upper or south side of Wellgate Park, for the purpose of erecting a villa, which was afterwards erected on it. In May 1874 Reid conveyed this feu to the present appellants.

The strip of land taken by the railway company did not include any part of the feu itself, which lay entirely on the south or upper side of Wellgate Park above the railway, but, as already said, the works of the railway presented the possibility of the owners of that feu ever having a right of carriage-way towards the north, and there seems no doubt that the absence of such a carriage-way would affect the selling value of the feu, probably to a considerable extent, but it is enough to say to some extent; and consequently I think that there is no doubt that the appellants were damnously affected by the works of the railway. But it is now too well established to be questioned in a Court of law that it is necessary in order to give a claim to compensation that the lands should be injuriously affected. And if the apellants' author had by the feu-charter of January 1872 acquired a right-of-way for carriages from his feu on the south of the turnpike road, which was along the south bank of the Tay, the works of the railway have injuriously affected his land by cutting off that right of carriage-way.

The majority of the First Division of the Court of Session have held that the construction of the deed of January 1872 was not such as to give that right. The Lord President and Lord Shand gave their reasons for so holding; Lord Mure, who agreed with them, did not give his reasons; Lord Deas held otherwise, and gave his reasons. At the close of the argument at the bar of the House I thought that the interlocutors were right. But the noble and learned Lords then present were not unanimously of that opinion. The Lord Chancellor then entertained doubts, not I believe yet entirely removed. I need not say that I have considered those doubts carefully, but I still retain the opinion which I had previously formed.

The owner of an estate which he is endeavouring to feu generally exhibits a plan showing how he proposes that the feus are to be carried out. I do not doubt that it is competent to make a feu of one parcel of the land, with references to the plan, insuch terms as to bind the superior in any event to give to that feuar access along the roads which, as indicated by the plan, it is proposed should be ultimately made.

The Lord President gives very good reasons for thinking that it would be improvident in a superior to bind himself to do this at all events, and I think it is not too much to say that both he and Lord Shand imply that it is not usual in the course of Scotch conveyancing to draw up the feu-charters in such a manner as to do so. But I take it that it is perfectly competent so to contract.

But it is also competent—and I incline to think from what those learned Lords say that it is usual—for the superior in effect to say to the feuar —"I mean to carry out the feuing as proposed; and I mean, as the feus progress, to see that roads are formed and opened, of which you will, as they are formed and opened, have the benefit; but I will not tie myself nor my successors down to this at all events, for I do not know what may happen. It will probably be, and I hope it will be, for my interest to do this, and it will be shabby in me not to do it, unless something happens to make it unfair in you to require me to do it. If you, on the reasonable expectation of this benefit coming to you, choose to take the feu, do so; but I do not tie myself down at all events."

And if this is the true construction of the feu-contract of January 1872, it seems to me to follow that the appellants, though they have been deprived of the benefit of a carriage-way which they reasonably expected that the owners of the feu would have, and so have had their feu damnously affected, have not had their feu "injuriously affected."

It has been doubted whether a construction which gives to the grant to the feuar "some operation *in præsenti* from the execution of the deed ought to be preferred, if the words of the deed will bear it, to one which suspends it upon future and uncertain events which may never happen." And if the interest of the feuar was alone to be regarded, I think there would be great force in this. But the interest of the superior is also to be considered. I do not think that if the words of the deed are not clear there is any reason for preferring a construction which would certainly cast upon him an obligation which it would be improvident and, I think from what is said by the Lord President and Lord Shand, unusual for a superior to incur. Lord Shand seems to go so far as to say that to make good the case of the respondents (appellants before this House) "it would have been necessary to have a much more special obligation in the contract."

I do not myself know anything as to the practice of conveyancers in Scotland, and I disclaim acting on any ground depending on that. But I think that there is no reason for preferring the construction which is favourable to the feuar to that which is favourable to the superior. And it certainly seems to me, for the reasons given by the Lord President, which I do not repeat, that the intention of the parties as appearing from the deed of 1872 was to give the feuar a right of carriage-way over the streets indicated on the plan only from the time that they were opened, and not before. The proposed street to the north along the west side of the appellants' feu may have been opened as far as their feu extends before the railway interfered. It certainly seems to me never to have been opened at all further north than that, certainly not so far north as the point where the railway crosses the proposed street.

I therefore think that the interlocutors should be affirmed and the appeal dismissed, and I so move. As the appellants sue *in forma pauperis*, nothing need be said about costs.

Lord Watson — My Lords, the late Rev. Thomas Just was proprietor of a considerable area of ground, known as Wellgate Park, near to Newport in the county of Fife, which is bounded

on the south by a road called the Kirk Road, and on the north by the turnpike road between Newport and Woodhaven. Mr Just prior to 1870 gave off several feus on the north and north-west of Wellgate Park, one of them having a frontage to the Kirk Road on the south, and in August 1870 a feuing plan was prepared showing the mode in which it was proposed that the remainder of the park should be disposed of in lots for building purposes.

By feu-contract dated 2d and 5th January 1872, William Reid acquired one of the lots, which is described in the title as bounded on the south by the Kirk Road, on the north by a road or street 20 feet in breadth, on the east by another lot of ground still unfeued, and on the west by a road or street of 24 feet in breadth as shown upon the feuing plan. The lot is disponed "together with free ish and entry thereto by the streets laid down on said plan, but in so far only as the same may be opened and not altered in virtue of the reserved power after mentioned." The plan referred to in the contract of feu is admittedly the feuing plan of August 1870, and a cursory examination of the streets laid down on it is sufficient to suggest that free ish and entry by these would be of great importance to the occupier of Reid's feu, and especially access by one road 24 feet wide on the west of it, which communicates directly with the turnpike road to the north of Wellgate Park. But at the date of Reid's feu-contract none of the lots to the north on either side of that road or street had been feued out, and although the architect employed by the superior had marked off upon the ground the various lots for the information of intending feuars, I think the evidence led in the Court below shows that at that date nothing further had been done towards the formation or opening of the street.

Immediately after the acquisition of this feu, William Reid proceeded to erect three dwelling-houses upon it, and these he conveyed, together with his whole right and interest in the feu, to the female appellant upon the 8th of May 1874.

The respondent company on the 26th of July 1872 gave statutory notice to Mr Just of their intention to take, for the purposes of their railway, a strip of ground, then unfeued, running through Wellgate Park from east to west, a little way to the north of the appellants' feu. That strip included part of the *solum* of the street referred to in Reid's feu-contract, and shown in the feuing plan of 1870 as leading northwards to the Newport turnpike road. It was not until the year 1877 that the railway company commenced to execute their works, the effect of which has been this—that the railway, which crosses the street already referred to about 15 yards to the north of the appellants' feu, occupies the greater part of the 24 feet shown as street on the feuing plan, leaving open a narrow subway for foot-passengers only. Since July 1872 the whole of Wellgate Park then unfeued, so far as not taken or interfered with by the railway company, has been feued out in practical conformity with the plan of 1870, and in particular the 24 feet street or road bounding the appellants' feu on the west has been opened throughout to its full breadth with the exception of that portion of it which is occupied by the railway of the respondents.

The appellants in July 1878 gave due notice to the respondents of a claim to be compensated for injury to their feu by reason of the respondents' interference with its accesses. The respondents thereupon raised the action in which this appeal is taken in order to have the appellants interdicted from proceeding upon their notice, in terms of the Lands Clauses Consolidation (Scotland) Act of 1845, on the ground that the appellants had and have no legal right whatever to the accesses said to be interfered with.

Whether the appellants or their predecessor had or had not in July 1872, when the railway company gave their notice, such right of ish and entry by the streets or roads interfered with by the company's operations as will sustain a claim for compensation under section 6 of the Railways Clauses (Scotland) Act 1845, depends upon the construction of the feu-contract of January 1872. The right of the appellants to have free ish and entry by means of a street 24 feet wide bounding their feu on the west and leading northward to the Newport turnpike road, which for the purposes of this case may be dealt with as if it were the only access claimed—was rested in argument upon these two propositions—first, that the street in question had, in the sense of the feu-contract, been "opened" by the superior before the respondents gave their notice to take in July 1872; and secondly, that, on the assumption that it had not already been "opened," the terms of the contract gave the feuar a legal right to have it opened at some future time for his use.

I have no difficulty in assenting to the appellants' contention that the contract of January 1870 gives the feuar an indefeasible right of access by the streets or roads shown on the feuing plan from the moment that these streets are "opened" within the meaning of the deed. But it is obvious that "opening" was understood by both parties to the feu-contract to mean something more than merely indicating the intended lines of street by means of pegs or other marks showing the boundaries of each feuing lot, because that had been already done. It may be difficult to say with precision what circumstances would amount to "opening;" but I am disposed to think that in order to constitute "opening" within the meaning of the contract something must have been done or permitted by the superior plainly implying his will and intention that the street or road should thenceforth be dedicated to his feuars, and used by them as accesses to and from their several properties. Nothing of that kind is proved in the present case. On the contrary, I think it is proved that at the date of the respondent company's notice the unfeued part of Wellgate Park to the north of the appellants' feu was an arable field, and that although Reid and another feuar had by permission carted building materials across the field, there was no road either formed or existing in the line of the access now claimed by the appellants. I am accordingly of opinion that the first proposition maintained by the appellants fails, because though well founded in law it is without foundation in fact.

The appellants' second proposition involves no disputed question of fact, and depends entirely upon the construction of the original feu right in favour of their author William Reid. It does not admit of doubt than an obligation to give the feuar ish and entry at a future time, by a particular line of street through the as yet unfeued lands

of the superior, may be effectually constituted by such a deed, so as either to bind the superior and his personal representatives or to run with the lands of the superior, into whose hands soever these may come. It is unnecessary in the present case to consider a distinction which might possibly be drawn between the legal effect of a real obligation attaching to the lands of the superior which were taken by the railway company, and the effect of a mere personal contract with the superior upon which no possession had followed. Under the conveyance which the respondent company obtained from Mr Just's trustees in the year 1876, they undertook to settle, and so to relieve the trustees of, all competent and legal claims for damages which any of the feuars of Wellgate Park might have against the superior or his representatives in respect of the company taking or interfering with the streets or roads shown on the feuing plan. They took the lands *cum onere* of the superior's obligations arising from personal contract, and the question therefore comes to be, whether any legal right, real or personal, to the street in question was conferred upon the vassal by the feu-contract of January 1872? I am of opinion with the Lord Ordinary, and the majority of the Judges of the First Division of the Court of Session, that the feu-contract gives no such right.

I am not prepared to hold that the terms of the appellants' feu-contract impose on the superior a legal obligation to feu out the whole ground comprehended in the feuing plan, or all the ground on both sides of the streets marked thereon as bounding the appellants' feu. Such references to a feuing plan as occur in the deed in question may have the effect of binding the superior, if he proceeds with his feuing, to adhere to the plan, so far as the vassal has an interest in seeing that it is adhered to, unless the superior reserves a power to alter. But an obligation which would restrain the superior from disposing of the unfeued lots shown on the plan otherwise than by feuing them out for building purposes is a burden so exceptional in its character that it could not be effectually constituted except in express terms or by implication plain. Very few proprietors, contemplating a feuing scheme of considerable magnitude would be so rash as to warrant its completion; and in such cases the earlier feuars generally contract with the superior in the expectation, more or less reasonable, that the scheme will sooner or later be carried out to their benefit as well as to the advantage of the superior; but that is an expectation which may be defeated, either by the public declining to take up the remaining feus, or by the superior finding more beneficial uses for his unfeued ground. It appears to me that the provisions of the feu-contract of January 1872 show that William Reid contracted on that footing with his superior, the Rev. Mr Just. In the dispositive clause, and in the conditions and provisions declared to be real burdens affecting the feu, the general feuing plan is referred to solely for the purpose of describing the lot of ground disponed, and the streets or roads by which the feuar is in certain events to have ish and entry. And the mutual provisions which are made as between William Reid, his heirs and assigns, and other future feuars, may be naturally and intelligibly read as having reference to possible feuars, and do not necessarily imply an obligation on the part of the superior to create these feuars. None of the Judges in the Court below—not even Lord Deas, the sole dissentient,—gave the least countenance to the view that any such obligation was incumbent on the superior.

Had there been an implied obligation by the superior to prosecute his feuing scheme for the benefit of the appellants, they would plainly have had a vested interest *de futuro* in the roads and streets shown on the feuing plan, sufficient to sustain a claim of compensation under the Railways Clauses Act of 1845. It by no means follows that because the appellants have not a right to insist upon the feuing plan being carried out they have no right or interest in the roads and streets shown on that plan. These roads and streets are not, like the feuing plan, referred to for purposes of description merely, but are made matter of special stipulation in the feu-contract. In the absence of any such special stipulation it might have been urged on behalf of the appellants that the very description of the subject feued gave them an implied right of ish and entry to it, by means of the "road or street of 24 feet in breadth" by which it is said to be bounded on the west. It might have been argued that, as was held by the Court in the case of *Crawford* v. *Field*, October 15, 1874, 2 R. 20, the vassal could not get possession of the subject described until that street was opened.

But the stipulation which the parties make is this, that the feuar shall have free ish and entry by the streets and roads shown on the feuing plan, in so far only as the same may be opened and not altered in virtue of the power reserved to the superior. According to my apprehension, the purpose and effect of that stipulation is that the feuar is to have no right or interest in any of these streets unless and until it is opened, and that he is to have no cause of complaint should the superior in the course of feuing alter the line of the streets in such a way as to render them less convenient for the purposes of access to his feu. The provision appears to me to have been framed for the purpose of protecting the superior from claims of ish and entry at the instance of his vassal in the possible event of his Wellgate Park property, or part of it, remaining from any cause unfeued, or of his choosing to alter the line of the streets shown on the plan of 1870 in the course of carrying out his feuing scheme.

I venture to think that the subsequent conditions of the feu-contract show that it was not in the contemplation of the parties to it to impose upon the superior an obligation to open these roads or streets except in the possible event of his feuing out the ground on both sides of them. The obligation laid upon William Reid and his successors to form, level, and make half the breadth of the streets *ex adverso* of their lot on the north and west does not take effect until these streets are "opened" throughout their whole length, it being expressly declared that they shall not be so opened, "except in the option of the said Thomas Just and his successors, until the ground to the east and north thereof is feued on both sides." The meaning of that declaration does not appear to me to be doubtful. It gives the superior a right to open these streets at any time before his remaining land is feued, if he shall find it to be for his advantage to do so, and thereby to bring into play

the feuar's obligation to make the half of the streets opposite his feu. But in the event of the superior not exercising that option, the obligation of the feuar to make and maintain the streets does not emerge until the whole ground has been feued on both sides of these streets.

To me these conditions seem to imply that the obligations undertaken by the feuar in regard to streets, and his right to have them opened, are, in event of the superior not choosing to exercise the option conferred upon him, both made dependant upon the completion of the feuing scheme; and being of opinion that the superior is under no obligation to feu out the whole or any part of the ground along the line of these streets, I have come to the conclusion that the interest of the appellants' author in that portion of street shown on the feuing plan which was taken by the respondent company in July 1872 consisted *in spe* and not *in obligatione*.

The case of *Henderson* v. *Nimmo and Colquhoun* 2 D. 869, which is noticed in the opinion of Lord Deas, was strongly founded upon in argument by the appellants. The circumstances of that case as they appear from the report and the pleadings, which I have examined, were these. The superior, Sir James Colquhoun, who was feuing out the burgh of Helensburgh according to a general plan, in the year 1828, opened up a street called Glasgow Street to the width throughout of 60 feet as shown in the plan. In the same year he feued eight lots fronting Glasgow Street, which were subsequently acquired by the defender Nimmo. In the autumn of 1833 the pursuer Henderson entered into negotiations with the superior for another building lot in Glasgow Street, and in September 1833 he was permitted to begin the erection of buildings on the faith of a feu-contract being adjusted. The feu-contract was not executed until the 26th April 1834, but in it the lot conveyed was described as bounded by Glasgow Street on the west. Meantime, by feu-contract dated 13th February 1834, the superior had feued five new lots to Nimmo, all described as bounded by Glasgow Street on the east, and by the same deed he separately feued to Nimmo a strip of Glasgow Street 25 feet wide *ex adverso* of his thirteen lots. The Court reduced the feu-right thus granted to Nimmo in so far as it related to the strip taken off Glasgow Street. They held, I think rightly, that the pursuer Henderson and the superior had transacted on the footing that Glasgow Street was to remain of the full width of 60 feet to which it had been already opened. The *mala fides* of the superior was obvious; and the terms of the conveyance accepted by Nimmo showed that he knew it to be in violation of the rights of other feuars. The case of *Henderson* v. *Nimmo and Colquhoun* has, therefore, no analogy to the present, because in that case the pursuer's title admittedly conferred upon him an immediate right to access by a street 60 feet wide; and what the Court decided was that his right to that access was not impaired by a transaction entered into *in mala fide* between Nimmo and the superior before the formal title to the pursuer's feu was executed.

I desire to add, that if it had been established that the appellants' feu-right conferred upon them a legal interest entitling them as matter of right to have the street in question, as shown on the feuing plan, opened up at some future time, I should have held that the superior's reservation of power "to vary and alter the plan, or streets or roads delineated thereon," afforded no answer to the appellants' claim of compensation. The compulsory taking of part of the superior's estate cannot, in my opinion, be regarded as equivalent, either in fact or law, to an exercise of the power reserved by the superior himself. That was virtually decided by the Second Division of the Court in the case of *The Solway Railway Company* v. *Jackson*, March 12, 1874, 1 R. 831, where the company gave notice to take compulsorily part of a considerable area of ground let as a clay-field under a lease which provided that the proprietor should be entitled "to resume and except from the clay-field any part of the lands at his pleasure." The company settled with the proprietor, and then sought to stop by interdict proceedings taken by the tenant for recovery of compensation, on the plea that they came in place of the landlord, and had only exercised the power of resumption to which, as representing him, they were entitled. The Court unanimously refused to grant interdict, on the ground that the occupation of the company was attributable to their statutory powers, and could not be ascribed to the option which the former proprietor had under the lease.

I am accordingly of opinion that the interlocutors appealed from ought to be affirmed.

Lord Fitzgerald—My Lords, I have given this case most careful consideration, and regret to have come to the conclusion adverse to the appellants, as there can be no doubt that they have sustained damage from the works of the company, but not damage of that character which the law regards as an actionable injury.

My Lords, I concur in the result arrived at by the noble and learned Lords who have preceded me, and in the reasons which they have expressed for their judgments.

The whole question before your Lordships arises on the construction of that passage in the feu-contract so often read, viz., "together with free ish and entry thereto by the streets laid down on said plan, but in so far only as the same may be opened and not altered in virtue of the reserved power after mentioned;" and I have felt coerced to come to the conclusion that when the railway company in July 1872 gave notice of their intention to take the portion of Wellgate Park which they required, the feuar William Reid (the appellants' author) had no legal interest in or right to ish or entry by the street or road laid down on the plan, and across which the company subsequently carried their works. Whatever interest the feuar might otherwise have acquired is made conditional by the words "but in so far only as the same may be opened," and until the roads were so opened by the superior (an event which might never happen) the feuar had no interest *in præsenti*, and had an expectation only of an interest to arise on an uncertain event. The expectation was no doubt fair and reasonable, but it rested not on obligation but on the will of the superior.

My Lords, it appears to me that the construction put on this portion of the contract by the majority of the First Division of the Court of Session, and by my noble and learned friends and which I have adopted, is supported by refer-

ence to its general provisions, from which we cannot fail to see that whilst numerous conditions are imposed on the feuar and his foresaids, and declared to be real burdens affecting the feu, the utmost care is taken to protect the superior from "obligation." Thus, for example, on declaring the feuar's obligations as to the roads when opened, we find interposed, and rather out of place "(but which shall not be opened, except in the option of the said Thomas Just or his successors, until the ground to the east and north thereof is feued on both sides);" and again, "but which drain shall not be made, unless in the option of the said Thomas Just or his foresaids, until the lots on both sides of said streets running north and south be feued; and it is hereby expressly provided and declared that the said Thomas Just and his foresaids shall have full power and liberty to vary and alter the said plan, or streets or roads delineated thereon, in so far as regards the ground not already feued, in such manner as they shall think fit." The same spirit and intention seems to pervade the whole contract, in which the actual obligations of the superior seem confined to the grant of the particular lot of ground and to warrandice of that lot.

My Lords, the superior having thus by the contract made "ish and entry" depend on the "opening" of the roads, and reserved to himself the right to determine when, if at all, that event was to take place, we cannot fail to adopt the conclusion of the noble and learned Lord opposite (Lord Watson) that the roads cannot be taken to have been "opened" by being merely laid out on the contemporaneous plan, and that "opened" must refer to some subsequent action on the part of the superior once and for all determining the lines and limits of the respective roads, and indicating their dedication to the use of the feuars.

My Lords, in my opinion the appellants fail because they had not in July 1872 any legal right or vested interest in the subject of controversy, the invasion of which would have then given them a right of action.

Lord Chancellor—My Lords, I have felt more difficulty than the rest of your Lordships as to this case, and I have been disposed to think that I could see my way to a construction of the feu-contract which would have led to a result more favourable to the appellants; but as your Lordships, after considering the reasons which I thought it right to submit to you in favour of that construction, all concur in opinion with the majority of the learned Judges in the Court below, and as no question of general principle is involved in the difference between that opinion and the view which I have myself been disposed to take, I do not think it necessary to say more than that your Lordships' judgment must necessarily be in accordance with the conclusion at which my noble and learned friends have arrived.

Interlocutors under appeal affirmed, and appeal dismissed.

Counsel for Appellant — Party. Agents — Simson, Wakeford, & Co.

Counsel for Respondents — Lord Advocate (Balfour, Q.C.)—Webster, Q.C. Agents—William Robertson for Thomas Thornton & Co.

Monday, March 19.

(Before Lord Blackburn, Lord Watson, and Lord Fitzgerald).

WHITES *v.* WILLIAM DIXON (LIMITED).

(*Ante*, 22d December 1881, vol. xix. p. 266, and 9 R. p. 375.)

Property—Mines and Minerals—Support—Surface Damages—Injury to Buildings—"Breaking Surface."

On a construction of the titles of the owner of the surface of certain property, and of the owner of the underlying minerals, both of whom derived right from a common author—*held* (*aff.* judgment of First Division) that the owner of the surface had not surrendered his right to require the owner of the minerals in working the same to leave sufficient support for buildings erected upon the lands.

A superior reserved the minerals in lands feued, with full power and liberty to work and win the same "so as not to break the surface of the said lands or injure the springs therein, upon paying to the feuar any damage that may be occasioned to the said lands by working of said . . . minerals." *Held* that this clause did not entitle the superior so to work as to cause subsidence of the surface on condition of paying for any damage thereby occasioned to the feuar.

In Court of Session 22d December 1881, *ante*, vol. xix. p. 266, and 9 R. p. 375.

The defenders appealed to the House of Lords.

At delivering judgment—

Lord Blackburn—My Lords, the respondents (pursuers below) are feuars of two plots of land on which they have erected extensive works near Rutherglen. The appellants, the trustees of the late William Smith Dixon, hold a feu of the minerals under certain lands, including those of which the respondents are feuars of the surface, and the other appellants William Dixon (Limited) are lessees of the minerals under them. The respondents (pursuers below) brought a summons of declarator. The First Division of the Court of Session have recalled the interlocutor of the Lord Ordinary, and remitted the case to him to dispose of other questions which may arise, but with this finding "that nothing contained in the titles of the parties, pursuers and defenders, has the effect of taking away or derogating from the right of the pursuers to insist that the defenders in working out the minerals under the pursuers' lands shall leave sufficient supports to sustain the surface uninjured." The only question before your Lordships is whether this finding is or is not right, and the answer to that must depend on what is the true construction of those titles. It is stated—and I see no reason to doubt the accuracy of the statement—that this question is of great pecuniary importance to each of the parties. There is no controversy now as to what is the law both of England and of Scotland as to the ordinary rights of the owners of the upper strata, and of the subjacent minerals when these have come into different ownerships. The owner of the upper strata has a right of support from the subjacent strata. The owner of the minerals has