Interlocutors affirmed, and appeal dismissed with costs.

Appellant's Agents, Mackenzie and Kermack, W.S.; Loch and Maclaurin, Westminster.—*Respondents' Agents*, Hamilton, Kinnear, and Beatson, W.S.; Grahames and Wardlaw, Westminster.

JULY 28, 1871.

THE DUKE OF HAMILTON, *Appellant*, *v.* JOHN GRAHAM BARNS GRAHAM, Esq. of Cambuslang, *Respondent*.

Mines—Property—Reservation—Right to use underground passages after minerals worked—*H. being the superior of the lands of C. and other adjacent lands, granted a feu charter of the lands of C., reserving the mines in the lands of C., and right to make shafts, and free ish and entry to the lands to win and take away the minerals, compensation being made for damage by sinking shafts, roads, etc.*

HELD (reversing judgment), *That H. retained his entire right of property in the strata under the surface of the lands of C., and was not restricted to a mere servitude, and that he had a right to use all the underground passages to convey minerals to and from his other adjacent lands, so long as any of his strata was unworked.*[1]

This was an appeal from a judgment of the First Division of the Court of Session, assisted by Judges of the Second Division. The respondent, Mr. Graham of Cambuslang, raised an action against the Duke of Hamilton, concluding for declarator, interdict, and damages by reason of the Duke and his lessees using certain underground roads and passages under the respondent's lands to convey coal from other estates of the Duke. The respondent, Mr. Graham, was proprietor of the lands of Cambuslang, which were feued from the Duke, who was proprietor of the barony, and superior. The conveyance dated 1657, to the respondent's predecessor, contained a reservation to the Duchess of Hamilton and her heirs and successors of all the coal and limestone of the said lands, and power to sink shafts, and win the coal and limestone under all the said lands, and free ish and entry to the same, she making satisfaction for damage done by the working of the coal. The Duke had large coalfields in Cambuslang, Clydesmiln, and Morriston, and his lessees were in the habit of carrying the Clydesmiln coal through the underground passages of Cambuslang to the opposite bank of the Clyde. It was to prevent this that the action was raised. The Lord Ordinary (Barcaple) assoilzied the defenders, but the First Division ordered the case to be argued before seven Judges, and a majority of five decided in favour of the pursuer—Lords Deas and Ardmillan dissenting; whereupon this appeal was brought.

Sir Roundell Palmer Q.C., and *Anderson* Q.C., for the appellant.—The interlocutor of the Court below was wrong. The property in the coal and limestone having been reserved out of the feu charter by the granter who had previously the *plenum dominium* of the lands, this necessarily implied, that the superior retained all the former rights vested in him connected with the underground strata. Coal thus reserved has been held to be a feudal estate—*Burly* v. *Syme*, M. 9630. It is true that he could not work the coal so as to endanger the surface, which was granted to the vassal; still all the other rights of property remained in him, subject to that qualification—*Dunlop* v. *M'Nair*, 20th June 1809, F. C.; *Proud* v. *Bates*, 34 L. J. Ch. 406. If then the whole property in the coal were retained by the Duke, he can use that property in any way he thinks fit, and may or may not work the coal. At the date of the feu charter, the Duke was working the coalfields of Cambuslang and Clydesmiln together, and might use one in connection with the other, and if he could do so before the charter, he can equally do so since the date of the charter. The object of the reservation was obviously to save such a right. In *Davidson* v. *Duke of Hamilton*, 1 S. 411, it was held, that the Duke was not prevented under a similar reservation from working coal in the adjacent lands in connection with the shafts made in the surface. The reservation does not amount merely to a privilege or servitude, but is an exception from the grant and is a right of property—Craig, ii. 8. 17; Menzies on Convey. 599 (3d ed.). Nothing that the appellant now claims interferes with the surface, and the surface was all that his predecessor conveyed away to the respondent's predecessor.

The Lord Advocate (Young), and *Pearson*, Q.C., for the respondent.—The interlocutor appealed

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[1] See previous report 7 Macph. 976; 41 Sc. Jur. 547. S. C. L. R. 2 Sc. Ap. 166; 9 Macph. H. L. 98; 43 Sc. Jur. 491.

from was right. The effect of the charter with the reservation was to vest absolutely in the vassal the fee of the lands, excepting only the right to dig and carry away the coals found under such land. The vassal, on becoming vested in the *dominium utile* of the lands, was absolute owner of everything on and below the surface. The kind of access which the superior had to the mines was entirely accessory to those mines, and ceased when the mines were worked out. The superior had no right to interfere with the *solum* of the lands for any other purpose. What the superior had was therefore a servitude, and nothing more—*Durham Railway Co.* v. *Walker*, 2 Q. B. 940: *Earl Cardigan* v. *Armitage*, 2 B. & Cr. 197; *Dand* v. *Kingcote*, 6 M. & W. 174. Under the reservation the superior could not have used shafts and roads on the surface to carry away the minerals from other lands, and neither could he use the roads below the surface for such a purpose. The appellant, therefore, has no more right to go through the respondent's underground passages than he would have to go through the respondent's house. He is infringing one of the rights of property by so doing.

Cur adv. vult.

LORD CHANCELLOR HATHERLEY.—My Lords, in this case a great difference of opinion existed on the part of the learned Judges in Scotland with reference to the true conclusion at which the Court there should arrive, regard being had to the somewhat singular character of the possession of the property of Cambuslang, which is divided into two separate properties, as it were, the one being the property in the surface and the other the property in the mines beneath the surface. Questions of the same character have arisen in this country from time to time, and have been much discussed, but I am happy to find from one of your Lordships now present (LORD COLONSAY), and from the argument which we had addressed to us at the bar, that there appears really to be no distinction whatever between the law of Scotland and the law of England with regard to this question. The reasoning of the learned Judges, both of those who took the one view and of those who took the other in the Court below, entirely pursued the line of argument which has prevailed in this country, when questions arising from a similar complication with reference to the holding of property have occurred here.

The case may be stated very shortly indeed, and without entering into any minute detail. There is a certain property which originally belonged to the Duke of Hamilton called Cambuslang. That property was at a very remote period, in fact nearly as long as two centuries ago, divided as it were into two separate portions, viz. the property in all except the minerals, that is to say, the coal and limestone, and the property in the coal and limestone. I will read to your Lordships the form of reservation in the deed, which was the same as that which was adopted in all the various cases in which any of the immediately surrounding property belonging to the Duke of Hamilton had been feued out. The reservation is given repeatedly in different condescendences, and occurs in exactly the same form, but I will take that which your Lordships will find in the fourth article of the condescendence. The property of Cambuslang is feued out "with and under the reservation to the said noble Duke and his foresaids of the coal and limestone, that shall be found within the haill bounds of the 12*s.* land above specified; so that the said noble Duke and his foresaids shall have liberty to set down coalpits, sinks, and shanks," and so on, including a variety of other works which are necessary or proper for the working of the minerals upon the surface of the land, and also generally for the purpose of working. There is therefore a general power of working their mines and winning the minerals.

That being the form of the reservation, the question which really arises in the present case is—What is the effect of the reservation with regard to the property reserved, viz. the coal and limestone, that being a part of the very soil of the lands which are feued out? The pursuer's complaint is this: He says—True it is, that there was reserved this right in the coal and limestone, but my complaint now is, that the coal and limestone have been in a particular portion of the property worked out, (or rather, I should say, the coal only, for there is no averment as to the limestone, and the pursuer does not condescend to very minute details on the subject,) and the Duke is now conveying minerals from other properties through the wastes which have been occasioned by the withdrawal and the subtraction of the coal. I standing in the place of the original owner of everything except coal and limestone, and the Duke standing in the place of the owner of the coal and limestone, he is now working, not the mines which are under the lands of Cambuslang which I hold, but he is working the coal and limestone which belong to him in other property not situate under the surface, which is mine, and for that purpose he is using the wastes under the lands of Cambuslang. He is thereby doing that which he has no right to do, because he only reserved the coal and limestone,—the coal is gone; it is at an end, and he is not entitled to pass through the wastes (that is to say, the spaces which have been left) for the purpose of working any other coal and limestone than that which is situate under the same property of Cambuslang. It seems to be admitted, that he might pass through the wastes for the purpose of working the coal or limestone under the lands of Cambuslang. The pursuer therefore asks for a declaration, that the Duke is not so entitled to use the wastes as a way leave (for that is what it really comes to) for the conveyance of the minerals from other mines, and he

also asks for an interdict to prevent his so doing for the future, and he asks further for damages, which are put nominally at £10,000; the damage done being, that the Duke has been using a right which the pursuer says is a valuable right, for the use of which he might claim payment, which payment he has been deprived of by reason of the Duke having made an unlawful use of the property without making compensation for so doing.

That is the way in which I apprehend the case is put, though I must say at the outset, that it is not stated so clearly as I should have supposed it might have been. There is no evidence whatever upon the subject on the part of the pursuer; he has left the case wholly bare of evidence; but the evidence in the case is this, not that the whole of the coal and limestone down to the last particles of coal, still less of limestone, has been worked, (indeed as to the limestone nothing is said,) but there is an averment, although there is no distinct proof, that the coal has been worked out in certain parts of Cambuslang, and, that along the waste occasioned by the working out of the coal, minerals from another property belonging to the Duke are carried. As far as the evidence goes, it is quite clear, that there is a good deal of coal remaining yet to be worked in Cambuslang, although possibly not (it is said not) in this very place, as to which complaint is made of the minerals from another property being hauled and wrongfully drawn without a wayleave. In those places with respect to which the complaint is made there remain certain pillars of coal still unworked, but there is no more detailed information with reference to the precise state and condition of the passage which is here called the waste, along which this carrying of minerals is said to have taken place. I apprehend that it is important, when we ascertain what the law would be upon the subject generally, to see, that the pursuer has made out and proved a case which entitles him to a remedy by way of declarator, interdict, and damages, in respect of the trespass which he alleges upon his property. He has over and over again undoubtedly called it passing through his property. We shall see presently what the exact nature of his property is in the place in question.

I am relieved in this case from a great deal of difficulty, as I said before, by the views of the learned Judges in the Court below, who have given their opinions on the one side and the other as to the exact state of the law in Scotland. As regards the law of England, I have had occasion to consider that myself on the previous occasion in the case of *Proud* v. *Bates*, 34 L. J. Ch. 406, which was cited in the argument at the bar. I do not cite that decision as an authority—I am only referring to it as a case in which I stated the view which strikes me as the true view of the law of England on this subject, for I have seen no reason to withdraw from that decision. The law of England I apprehend is this: When you demise a property, saving and excepting out of the demise a certain part of that property; for instance, if you demise the surface and save and except the minerals, then there is no demise of the minerals whatever to the lessee of the rest. The person who takes the interest in the surface has no ownership in the minerals. The general rule which prevails where a property is demised, that is, demised in absolute right, so that the whole property *usque ad cælum* in the one direction and *ad inferos* in the other direction belongs to the person who is the owner of the property, is at once intercepted when you find certain strata of the property reserved and excepted out of the demise, so that those strata remain in the lessor, and he has not parted with them or transferred them to the lessee. The lessor has as full, complete, and perfect interest in them, and they are as much his own property, as before the demise was made. The lessee takes no interest or right whatever in them.

If, on the other hand, (and both these circumstances occurred in *Proud* v. *Bates*,) you reserve certain rights and interests, parting with the property, whether you use the word "except" or not, (there is no magic in words,) the thing done is this: You have parted with the property; the right reserved cannot therefore be an exception out of what you granted, because you have not excepted any part of the property, but the whole is disposed of, and when you reserve or except a right, (whatever phrase you choose to use for that purpose,) it is in effect a right which must be reserved to you by way of regrant from the person to whom you make the disposition of the whole property.

The distinction is kept very clear in our English law, and I think I shall be able to shew by the opinion of the learned Judges in the case before us, that it is quite as plain in the Scotch law, between, on the one hand, reserving out of a grant or disposition any right in the person who makes the disposition, and, on the other hand, reserving simply a right to be exercised over property the whole of which the granter has disposed of out and out. The view of the learned Judges appears to me, as I have said, to be exactly in accordance in this respect with my view of our English law. I will take first of all the judgment of Lord Cowan, because he is one of the learned Judges who has taken a view on the whole case which is favourable to the contention of the pursuer. After stating the original reservation, Lord Cowan says this: "The coal and limestone within the bounds of the lands thus reserved remained the property of the superior under his title to the *plenum dominium*. And it cannot be doubted, that as a separate estate it might at any time have been conveyed to a third party. What was reserved was a proprietory right in the subject of the reservation, namely, coal and limestone." I will read afterwards what he says subsequently, because it will have a bearing upon another part of the case. He lays that

down as undoubted law. He is followed by Lord Deas, who takes the opposite view in favour of the defender ; and Lord Deas, notwithstanding that full and complete statement on the part of Lord Cowan, thought it right to fortify his view by citations which I need not repeat from Erskine and other text writers, shewing, that it is clear and undoubted, as a point of law, that there may be a direct feudal title in Scotland to certain portions of land, and that there may be a direct feudal title also to certain strata of land interposed between the centre of the earth and the surface of the earth which may belong to another proprietor by a distinct feudal title, and that those titles may be dealt with and disposed of as if they were two separate tenements in every respect. I will put an illustration which will, I think, shew very clearly the distinction between a reservation of the land itself and a reservation of a right or privilege. If you reserve only a servitude, or as we should call it an easement, all the Judges agree that the law of Scotland (like our English law) is, that you cannot use a servitude for any other purpose than the particular purpose for which it was originally created, just as you cannot use an easement for any other purpose than that for which it was originally granted. Take, for instance, the case of the adjoining parks belonging to A. and B. A. has no access to his mansion house except through a road which runs through his neighbour B.'s park over which he has acquired by grant a right of way for the purpose of enabling him and all other persons coming to his house to enjoy a privilege of driving along it, and so reaching a road in his own park and proceeding to his house. In doing so it is quite clear that he could not use the portion of road over which he has only a right of way, viz. the portion of the road in B.'s park, for any other purpose than that of obtaining access to his own house. As regards his own park, of course, it is quite clear that he might use the road then for any purpose he thought fit, for conveying manure to his fields or anything else. It is his own property, and as to that there could be no question of any right of way or anything of the kind.

Then suppose he sells to B. his own park, reserving only his lawn and shrubberies, and still residing in the residence to which he requires an access ; if he conveys his own park out and out to B., reserving to himself over it the right which he had over B.'s own property of access to his house for the use of himself and his friends, it is quite clear that then he would not be able to use that which had been originally his own, but which he had now parted with and disposed of, in any way he pleased, but he could only use it as a means of access (that is to say, for the purpose for which he had reserved it) for himself and his friends to his house, of which he still retains possession. But suppose, in order to have complete dominion over the road, as far as he had had dominion up to that time, to his own house, instead of reserving a right of way over what he is selling, he reserved the road, and said—I convey my park to you, excepting and reserving that road which runs from such and such a point to such and such a point—being the whole road through his own park, I apprehend it is perfectly clear, that he might do whatever he pleased with that road. He might fence it off, and prevent B. having any access to his house, leaving B. to make a new road for himself. A. would have the sole control and dominion over the property in the road, the property being his just as much after he had executed the conveyance as before, because it was excepted out of the conveyance, no right or interest having passed over it to B., and B. would have no right to interfere with it, or say that A. was trespassing, whatever might be the purpose for which he might think fit to use his own property. That is an illustration of the difference which exists between a reservation of a thing itself, and a reservation of a mere right of user of the thing.

Some stress was laid in the argument upon this : The reservation of the mines was accompanied with the phraseology I have read, so that "the defender may work them," and so forth. But does the stating of the reason why he chooses to reserve his property in the mines diminish aught from his right of property which he has reserved, or does it pass any right in the minerals to the grantee who takes everything but them, but is expressly stated in the deed to take no interest whatever in the m? I apprehend not, any more than it would have made any difference in the case I put (which I put partly for the purpose of illustrating this point) if the owner had said, I grant you a full conveyance in fee of my park, excepting the road, and reserving that, so that I may continue my access to my house as heretofore. If he chooses to part with the whole property, the whole property will be parted with. He can only retain such rights as he chooses to reserve ; but if he chooses to reserve the property itself, the true conclusion of law must be, that the stating the reason why he reserves it can make no difference in the fact, as to whether he has or has not granted it, or whether he has or has not reserved it. That is the question on which really the whole case must turn.

Now, in the first place, it was said by the learned Judges who took a different view of the case, that whether the reservation of the right of working in the mines had been expressed or not, they would have thought that it would follow as a necessary consequence from the reservation of the mines. The English law, I apprehend, would there agree with the law as enunciated by the learned Judges, taking both views of the case in Scotland. Some controversies have arisen on the subject with reference to copyholds, but generally speaking there are authorities shewing, that if there is a special reservation of the mines, the right incident to the working of those mines

would follow from it. But whether that be so or not, the right was especially reserved in this case of working upon the surface, and it was said by the learned Judges who took the adverse view to the defender, that it was admitted that the right on the surface could not now be exercised, that is to say, the right to sink pits for the purpose of reaching the coal under the Cambuslang lands could not be exercised for the purpose of reaching any other coal ; for instance, with a view of hauling coal from the adjacent lands to Cambuslang up by a pit upon the lands of Cambuslang. That is true, but I apprehend that it all depends upon the distinction which I have endeavoured to point out. If it is only an easement, or servitude, as the Scotch law calls it, which you have reserved to yourself, with reference to the lands which you have granted out and out, that servitude you can only use for the express purpose, for which it is specified in the reservation that it shall be used. That, my Lords, is a case entirely different from that which is before us, and it raises again entirely different considerations. The question really is—What is the right of property which you have reserved ?

In the course of discussion in the case in the Courts below, there was, as I have said, a vast difference of opinion among the learned Judges. The Lord Ordinary entertained an opinion favourable to the defender, not entirely on the same grounds as those which I have been venturing to set forth, but he happened on that occasion to cite another case which had been before the Scotch Courts, *Davidson* v. *Hamilton*, 1 S. 411 ; upon which the learned Judges in the higher Court said, that great doubt had been thrown, and I apprehend justly thrown. That was a case where the question was as to reserved rights, and not as to reserved property. There seems to have been some expression used by LORD BROUGHAM in the House of Lords by which doubt was thrown upon that case, and the Judges threw doubt upon it in their decision in the present case. However, whether it was rightly decided or not, it seems to have been decided with reference to a reserved privilege of working, and the person who had reserved to himself that privilege had been allowed to exercise it, with regard to other minerals than those as to which it was expressly reserved. If the case, when stripped of all its adjuncts, is reduced to that naked form, the decision could not be upheld. But it has no bearing upon the present case, and, as Lord Ardmillan said in the present case, looking to the Lord Ordinary's judgment, it is hardly doing justice to the Lord Ordinary to say, that he relied upon it. He merely stated that the case that came before him was new in many respects, and that there was not much light thrown upon it, and he mentioned the decision in this case simply as bearing in his view upon the subject, without saying that he relied upon it at all for his own conclusion.

If my observations be correct, I apprehend, that upon this view of the case it would be incumbent upon the pursuer to shew, that what the Duke is doing is an interference with any property in which he, the pursuer, has acquired a right. He clearly has not acquired a right, for the reason I have assigned, in any portion of the coal, or in any portion of the limestone whatsoever in the estate of Cambuslang. He therefore is bound to shew, that a trespass has been committed upon his property by the acts complained of on the part of the Duke. It appears to me, that there is plainly a want of evidence of anything of the kind having been done. I come, therefore, to the conclusion, on the principles I have enunciated, that (as Lord Deas expresses it, and it is as clear a way of putting the case as any,) it was competent for him in whom the absolute ownership of the mineral property in these strata existed to do what he liked with regard to that property. He might have made a tunnel through that property, and if he had, he could not have been said, while making that tunnel, to have been trespassing on the property of another person, because that other person had not one single inch of that property granted to him. If the Duke had made such a tunnel, he might have used it for any purpose he thought fit.

I find, in this case, as Lord Deas has observed, no evidence whatever shewing, that what has happened has resulted in the coal or limestone being so worked as to bring the Duke on to the *solum* of the pursuer. Of course if there was neither coal nor limestone remaining, a different question might arise. If the coal and limestone were both entirely gone, the Duke could not introduce his waggons or his horses except by causing them to pass over the *solum*, which is included in the grant to the pursuer's author, so that he would be distinctly a trespasser upon the pursuer's land. Then, no doubt, the case would assume a different aspect ; and whatever other questions might be in the back ground, upon which it is not necessary to express any opinion at present, with regard to the total character of the demise from one end of the coalfield to the other, for the property seems to have belonged to the Duke for some acres on either side, a very grave question would arise, and one which, without specially considering it, I apprehend, as at present advised, would have to be determined in favour of the pursuer, if it was shewn, that the Duke was trespassing upon land demised to the pursuer. Then it might be held, that he was doing that which in law he was not entitled to do. But as Lord Deas says in his judgment, and as is perfectly clear on looking through the evidence, we have no evidence to shew, that the coal or limestone is so wholly removed at the *locus in quo*, where the Dukes's operations are going on, as to shew that the pursuer has acquired any right to stop his proceeding.

Now, the strongest form in which the argument favourable to the pursuer was put by the learned Judges was, I think, in the course of reasoning which was adopted by Lord Cowan immediately after the passage I have already read, and which I said I should have occasion to

refer to subsequently. I read the passage where he says distinctly, that what was reserved was a proprietary right in the subject of the reservation, viz. the coal and the limestone. Still, subject to that exception and limitation, the feuar was proprietor of the estate *de centro usque ad cœlum;* and when the reserved subjects were exhausted the right thereto necessarily would become extinct, (that means the right to the coal and limestone,) and thus the property right in the vassal to the whole subject of his feu becomes free from burden, limitation, or reservation. With the submission which one ought to express in dealing with a question as to the law of Scotland, and which I should express far more strongly if it were averred in any way that the Scotch law in this matter differed from the law of England, I must confess that I cannot arrive at the conclusion which the learned Judge has arrived at, when he assumes, that the whole subject of the pursuer's feu became free from burden, limitation, or reservation, meaning thereby, that that which had been reserved and expressly excepted out of his feu is part of his feu, because the whole subject of his feu under the deed was all that which was not coal or limestone, and no authority has been cited to shew, that by the law of Scotland in such a case the rule *de centro usque ad cœlum* applies in this sense, that when you find an intervening stratum which has clearly been reserved by the person who made the original grant, and has never been vested in the person to whom the grant was made—that because that stratum has had the particular subject matters, which are called coal and limestone, removed from it, therefore the intermediate space—that space which was never demised to him, because it was occupied with this coal and limestone,—should thereby become his property.

It would be a very singular state of things indeed, as it appears to me, if you were to say, that this was the exact consequence which ensued, because the question arises—When does it become his property? Does he become the owner of that which was never demised to him at all? Does he become the owner of that which I may call the aërial space occupying the position from which the minerals in the reserved stratum were displaced by degrees as they were worked out and exhausted? Does he become the owner of one-half of it whilst the other half remains. Or of three-fourths of it when three-fourths of it is worked out? Is the learned Judge right, therefore, in saying, that "the property right in the vassal to the whole subject of his feu became free from burden, limitation, or reservation"? Free from burden it would be, if it was a servitude, but, as the learned Judge has already said, it is not a servitude at all, but it is a property; therefore, "burden" is not a term which could possibly be applied to it with correctness. It is free from reservation only in this sense. The learned Judge means—You have reserved the coal and limestone; you have gotten that, and when you have gotten that, your interest in the whole is determined. Granting that that is so, supposing that the interest of the defender has determined, has the pursuer acquired it? If so, how did it pass? I do not know that any authority has been cited to shew, that that which originally was not granted to him, because it was excepted, that which formed the very substance and body of the earth, that which was in itself a proper feudal subject which could have gone on for centuries and centuries, and might have been reserved all the time as a separate feudal subject to be continually granted out, has passed to the pursuer. It seems to me, that no authority has been cited for saying, that there is any difference in that respect between our law and the law of Scotland, or shewing, that a person, to whom no grant whatever was made of this particular portion of property which was specially excepted out of his grant, has the space vested in him, because the subject matter excepted and reserved is a chattel, and when it is treated as a chattel it is gone. The reservation of it was as a feudal subject to be dealt with according to the feudal rights. It was not reserved as a chattel, it was not reserved as so much coal when worked, or as so much limestone when worked, but it was reserved as part of the very earth, the remainder of which was given, so that the rule *de centro usque ad cœlum* could not possibly apply at the time of the grant, because there was a large interposing barrier of matter which had been entirely and wholly excepted out of the grant.

It appears to me, that there is a fallacy running through the whole of the pursuer's condescendence, which is this: He says—"You, the defenders, are taking this coal through my property." Let me put this case. Supposing you granted your house either in fee or by demise, and you reserved one room where you kept your books, you might say, in ordinary parlance, (although it would be a fallacy in legal parlance,) that the man to whom you granted the house was walking about in your house, but it is his house to a certain extent, and he might be only walking about in that part of the house which is his. The term "house" is ambiguous. "House" means in ordinary parlance all that is covered by one roof. "My house," in legal parlance on the part of the man to whom the demise was made, would mean all the house *minus* the library; therefore, if he was not walking in the library, he would not be walking in your house. So that when the pursuer says, the Duke is carrying his minerals through "my property," he means through that which physically may in one sense be designated as Cambuslang. But he has not the whole property in Cambuslang. So that, although the Duke may be taking the minerals through Cambuslang, he is not taking them through the property, because the pursuer has not shewn, that he has any property in this particular place where it is alleged that the trespass has occurred.

I apprehend, that if the defender had no way of conveying his minerals through this space but by drawing them over part of the granted property, great difficulties would present themselves. If he had that difficulty to encounter, a question of trespass might well arise ; but I do not think, on the case as averred, still less on the case as proved, that it has been shewn to us, that the Duke is in any way trespassing on what may be called this gentleman's property, that is to say, that which was granted to him. There being some evidence to that effect, the pursuer is not entitled, as it seems to me, to the declaration which he asks for, inasmuch as no wrong has been done to him, and no injury, as I think, is even sufficiently averred, still less proved, and of course, therefore, he is not entitled either to the interdict or to the damages that he asks for.

I think, therefore, the proper course in the present case is not perhaps simply to reverse the decision of the Judges of the First Division of the Court of Session, which would have the effect of re-establishing the decision of the Lord Ordinary, because the Lord Ordinary sustained the 4th plea in law of the defenders. Those of your Lordships who concur with me in the opinion which I have expressed would probably not think it right that the Lord Ordinary's decree should stand in that form. I think that the better course would be, to reverse the decision of the Judges of the First Division, but not thereby to revive the decision of the Lord Ordinary, but simply to declare, that the defender is entitled to an absolvitor, with the expenses.

LORD CHELMSFORD.—My Lords, considering the difference of opinion which prevailed amongst the learned Judges in Scotland upon this case, it is impossible not to feel that it is one of difficulty as well as of importance, and that no conclusion can be arrived at without some hesitation and doubt of its correctness. I need not say, that under this impression I have carefully and anxiously considered the case in all its bearings before I made up my mind which of the opinions most commend itself to my judgment. I regret that in the result I have the misfortune to differ from the conclusion at which all my noble and learned friends have arrived.

The action is one of declarator and interdict, in which the pursuer (the respondent) claims to have it found and declared, that the defender (the appellant) had no right either by himself or others to make or use any roads or passages, whether above or below ground, through the pursuer's land of Cambuslang for the purpose of carrying or conveying coal, limestone, or other minerals raised from lands other than the said lands of Cambuslang ; and that the defenders should be interdicted from using any roads or passages for that purpose.

The Duke of Hamilton is proprietor of the barony of Drumsargat, within which the lands of Cambuslang and other lands called Clydesmiln are situate. In the year 1657 a portion of the lands of Cambuslang were conveyed by feu charter by the Duchess of Hamilton to Mr. Gabriel Hamilton, from whom the respondent derives title. By this charter the absolute property in the lands was vested in Mr. Hamilton, subject to the following reservation : "Reserving always to us, the said Duchess of Hamilton, our heirs and successors, all and whole the coal and limestone within the whole bounds of the lands above disponed, *so that* we and our foresaids may set down coal pits, shanks, and sinks, and win coal and limestone within any part of the said lands, and may have liberty to make all engines and easements necessary, with free ish and entry for the making, keeping, sale, and away taking thereof, we and our foresaids always giving satisfaction to the said Gabriel Hamilton and his foresaids for any loss, skaith, or damage they shall sustain by the down setting of any such coalpits, sinks, or shanks, or by the winning of the said coal and limestone, or by the roads and passages for the away carrying of the same."

The coal and limestone under the lands of Cambuslang and Clydesmiln form one continuous mineral field, from which the minerals have not been exhausted. The Duke of Hamilton in 1852 let the coal in Clydesmiln, and a portion of the coal under the respondent's lands of Cambuslang, and the lessees have been working the coal under both these lands, bringing the coal from Clydesmiln under the lands of Cambuslang, and thence by other coal fields to a distant pit, from which the coal is brought to the surface.

The respondent questions the right of the Duke or his lessees to use the way or passage under his lands of Cambuslang, for any other purpose than that of the "away taking" of the coal and limestone got within the bounds of these lands, and he relies upon the words of the reservation in the charter of 1657 as shewing, that the coal and limestone were not reserved absolutely to be used in any way the granter might think proper, but "so that" she might win them, and have free ish and entry for the away taking and away carrying thereof.

The Duke, on the other hand, insists that the coal and limestone, under the reservation in the original feu charter, remained the property of the superior as an estate separate and distinct from the lands granted to the respondent's predecessor, and that he as absolute owner has a right to use and to authorize others to use the strata of coal and limestone as a way or passage generally, provided no injury is thereby done to the respondent's lands.

The nature and extent of the interest which remains in a grantor upon an exception of mines or minerals in a grant of the surface, appear to me not to have been precisely defined in the few cases which are to be found upon the subject, and they all seem to me to assume, that by the exception of mines and minerals in a grant the land remains in the grantor, not to be used in its natural state at the pleasure of the owner, but as a species of property which can be made

profitable only by removal, and which therefore carries with it as necessarily incident a right to use all proper means for obtaining the minerals, but nothing further.

The passage cited from Erskine (ii. 6, 5), which states that a coal mine is sometimes made a separate tenement from the land, gives no information as to the nature of such tenement, nor of the rights which are incident to it ; and in *Forbes* v. *Livingstone*, cited by Mr. Anderson from the Faculty Collection, 31 Jan. 1822, F. C. ; 1 W. S. 657 ; 6 S. 127 ; where it was found, that, by virtue of a reservation of coal and limestone in the original feu charter, those minerals continued part of the estate belonging to the grantors, there is no explanation of the nature of such reserved estates, it being wholly unnecessary to be considered with a view to the decision.

I cannot find any case which has decided, that the exception of minerals in a grant of the surface of the land carries with it a right to use them for any other purpose than that of removal. The case of the *Durham and Sunderland Railway Company* v. *Walker* (2 Q. B. 940), which was claimed by Mr. Pearson as a strong authority in favour of the respondent, appears to me to have no bearing upon the question. That was not the case of an exception or reservation, (although so called in the deed), but of a power granted to the Dean and Chapter under a lease granted by them to the defendant, with an exception of the mines, quarries, and seams of clay under the lands, with full and free authority and power to dig, win, work, and carry away the mines, quarries, and seams of clay, and with free ingress, way leave, and passage to and from the same, or to and from any other mines, and with power of laying, making, and granting waggon ways in and over the premises or any part thereof. Chief Justice Tindal, in delivering the judgment of the Court of Exchequer Chamber, said, "A right of way reserved (using that word in a somewhat popular sense) to a lessor, as in the present case, is in strictness of law an easement newly created by way of grant from the grantor or lessor, and the Court decided that the right given to the Dean and Chapter was only that of making and using ways, of granting way leaves for the purpose of getting the excepted minerals, not for carrying coals and minerals from other mines, though belonging to themselves." It is clear, that this case decided nothing as to the rights incident to excepted mines. The lessors would have had no right to make waggon ways upon and over the surface, unless there had been an express stipulation in the lease for the purpose, and the restriction of this right to the purposes of the mines under the lands leased depended entirely on the words of the (so called) reservation.

So the case of the Earl of *Cardigan* v. *Armitage* (2 B. & C. 197) was not a question as to the rights possessed by a grantor under an exception of coal mines out of a grant, but whether a purchaser of the mines from the heirs of the grantor was entitled to sink and dig pits, the exception limiting the right to the time during which the grantor and his heirs should continue owners of demesne lands. The Court held, that the exception retained the coals to the grantor and his heirs, with power, incident and implied, to take them away when they would, and that this power could not be retained by a special power given in the affirmative. Mr. Justice Bayley, in giving judgment, said the coals were part of the thing granted, part of the land, and *in esse* at the time. "The consequence, therefore, according to Coke Littleton, 47 A. is, that if this was an exception, the coals *semper cum* Sir T. D. *fuerunt*. And according to the rule mentioned from Shephard's Touchstone, 78, a right as incident to get the coals, and to do all things necessary for the obtaining them, would have been excepted also." If, as insisted upon by the appellant, the exception gave the grantor an unqualified right to use the coal mines for all purposes at his will and pleasure as his absolute property, one is naturally led to ask, what necessity there was for Mr. Justice Bayley to specify the rights which were excepted with the exception, and why he restricted them to what was necessary for getting the coals?

The case of *Dand* v. *Kingcote* (6 M. & W. 174), cited by the counsel for the respondent, was also a case in which it was not necessary to consider what incidents belong to an exception of mines and minerals, but, like the case of the *Durham and Sunderland Railway Co.* v. *Walker*, was a question, whether an easement annexed to an exception of coal mines could be used for the carrying away coals got under other lands than those to which the exception applied.

The case of *Proud* v. *Bates* (34 L. J. Ch. 406), before my noble and learned friend, the LORD CHANCELLOR when Vice Chancellor, was strongly relied upon by the learned counsel for the appellant, as establishing his right to use the coal and limestone remaining under the respondent's lands as a means of conveyance of minerals got from under other lands. But, as I read the case, it does not establish any such right. In that case the lease contained a reservation of mines and quarries, with full power and free liberty to seek for, win, and work the same, with all liberties, privileges, and conveniences necessary and convenient for the winning, working, and management thereof, with free way leave and passage to and from and along the same on foot and horseback, and with all manner of carriages excepted and reserved to the lessor, his heirs and assigns. The Vice Chancellor held, that the lessor and those claiming under him were entitled not merely to a right for the purpose of working the reserved minerals, but to an absolute way leave, which might rightfully be used for the purpose of working minerals not under the demised property. The reasons given for the judgment shew, that it proceeded upon special grounds, and that it decided nothing as to the rights which belong to the owners of excepted mines. The Vice Chancellor

said, that "the reservation of the mines and quarries must be considered not to be a reservation of the whole ownership, but a grant as it were to be taken out of the property demised." And adverting to the case of the *Earl of Cardigan* v. *Armitage*, where it was held, that when once you reserve mines you reserve everything that is necessary for working them, including the way leave for carrying away the minerals, he observed, "that this was a ground for supposing, that when the reservation was expressed as it was expressed in the case before him, it was not intended to be restricted to the limited right;" and he added, that as the lessor was entitled to the property in the whole manor within which the mines were situate, looking to the probable intent and purpose of the parties, his view was strengthened, that "what was expressed to be absolute was meant to be absolute, and that the lessor had reserved to himself the full, complete, and absolute right of going through this property with carriages and horses for any purpose whatever, and for any limited right he might think fit."

The examination of the case shews it to be no authority for saying, that when minerals are excepted out of a grant or lease they may be used for any other purpose than that of carrying them away, nor does that seem from his language to have been at that time the opinion of my noble and learned friend, although, from what he has told your Lordships, I have probably misconstrued his meaning.

LORD CHANCELLOR.—As to the excepted mines, I held, that the owner had an absolute right to do what he pleased with them, and that he therefore had a right to carry his coals through them.

But this curious thing happened in that case: in order that a horse might have his head moved whilst backing the vehicles, they had to chip off part of the mines which had not been excepted, but as to which the right had been reserved. And in that part of my judgment where I am dealing with the right reserved as distinguished from the mines excepted, I distinctly say, that the form of reservation appears to be general.

LORD CHELMSFORD.—I am obliged to my noble and learned friend, of course, for correcting any inaccuracy into which I may have fallen, but I was taking the language of my noble and learned friend as far as my own view of it was worth anything; it seemed to me to justify the observation I have been making to your Lordships, because my noble and learned friend speaks of the reservation of the mines and quarries as not being "a reservation of the whole ownership," and of the exception of the mines, giving the lessor "the restricted right of working them." And as far as I can understand, my noble and learned friend decided the case upon special circumstances, and particularly on the ground, that if the way leave were restricted to the limited right of carrying away the excepted minerals, the reservation would give the lessor nothing which he would not have had without it, and therefore, as it was capable of a more enlarged and general meaning, it must be construed according to the probable intention of the parties as reserving an absolute right of using the way leave for any purpose whatever.

The result of my consideration of the cases has been to lead me to the conclusion, that although, where mines or minerals are excepted out of a grant or lease, they may be regarded as an estate or tenement separate from the surface land, yet the property in them is of a peculiar and limited character. It is rather a right to take away a part of the land for the profitable enjoyment of it than to possess it in its undisturbed natural state. If, under an exception of mines or minerals, a grantor or lessor has the same property in them as any other absolute owner has in the land belonging to him, the appellant would have a right to grant way leaves over the coal and limestone excepted to any person or number of persons to carry minerals from other mines, which he might find to be a more profitable application of his property than gradually to exhaust it by working out the minerals.

Very nice and difficult questions will arise, if the appellant's view, that the exception of this peculiar description of property gives a right to use it in any way in which land may be used at the will of an absolute owner, is adopted. For instance, if the coal and limestone are worked out for a certain space, whether the right to carry minerals from other mines does not cease, as it cannot be exercised without passing over what may be said to have become the respondent's property by the exhaustion of the superincumbent portion of the land belonging to the appellant, or whether, (as suggested by Sir Roundell Palmer,) if all the coal and limestone is exhausted, the appellant will not have a right to continue to use the subjacent stratum as he had previously done. But as I do not agree in the view which the appellant takes of his rights, it is unnecessary for me to consider these questions.

I cannot, however, forbear noticing the argument of Lord Ardmillan against the appellant having only a right restricted to the removing of the coal and limestone under the respondent's land. He supposes the Duke of Hamilton to grant some ten or twenty feu rights of half an acre each, reserving in each conveyance his property in the coal, the whole coal being one continuous field. And he asks, whether it can be "reasonably contended as the meaning or effect of such a transaction, that the Duke was not entitled to such continuous working, but was bound to take out the coal under each half acre through the surface of that half acre, and bound to stop his continuous working on the demand of any one of the feuars." If the incidents which accompany

the exception of mines are only those which are necessary for working and carrying away the minerals, it is of course immaterial whether the lands under which they lie are of large or small extent, and if the Duke were disposed to let out his lands under which there was a continuous coal field in small parcels, there would be no difficulty in inserting in each lease a reservation of a right of passage from every part of the mine over the part excepted, and thus preventing the inconvenience suggested.

If the exception of the coal and limestone in the original feu grant to the respondent's predecesssor carried with it the right to the minerals which remained in the grantor for the purpose merely of winning and getting them, but not further, or for any other use and purpose, (which is the opinion I entertain,) the respondent, upon the assertion of a right more extensive than that which belongs to the appellant, is entitled to the negative declarator, that the right does not exist, and also to an interdict from his exercise of it.

I have bestowed much anxious consideration upon this case, in which, although my opinion is supported by that of many learned Judges in Scotland, it is opposed by an almost equal number, and also by my noble and learned friends. It is I hope unnecessary for me to say, that, in these circumstances, I feel very far from confident when I express my opinion, that the interlocutor appealed from ought to be affirmed.

LORD WESTBURY.—My Lords, I regard this case as depending on the true legal construction and effect of the reservation contained in the grant of the *dominium utile* to the pursuer's author. I think that that question must be settled entirely by the principles of real property law which have been established in Scotland; and I think it will be found that those principles are amply sufficient for the purpose.

In the first place, it must be recollected what was the position of the Duke of Hamilton, the grantor at the time of the grant in question. He was the owner *in pleno dominio* of three particular estates, being parts of the same barony. There was the estate of Clydesmiln, the estate of Cambuslang, and the estate of Morriston, the estate of Cambuslang being interjected between the estate of Clydesmiln and the estate of Morriston. Beneath all three of these estates there was one large continuous coal field capable of being worked continuously, and in fact worked at that time continuously. The coal lying beneath the one estate, and the mode of winning the minerals there, was made to a certain extent subservient to the mode of working and winning the minerals under the other estates. Now, the Duke of Hamilton made a grant to the author of the pursuer, and that grant amounted to nothing more than a grant of the *dominium utile* in a part of the lands of Cambuslang. The effect of the reservation in that grant was to shew, that the Duke intended to retain the *plenum dominium* over the mines. One of the things leading to a right apprehension of this question is the true perception of the fact, that what the Duke got by virtue of that reservation was not any new emerging right, but that the reservation amounted to nothing more than a manifestation of the intention of the parties, that the Duke should remain *in pleno dominio* of the mines underneath those lands, of which he had granted the *dominium utile* to the pursuer's author.

That being the state of the case, the Duke, being desirous of adding to the right which he had as a feudal proprietor of the mines, certain additional powers formed the second part of the reservation. They were powers rendered necessary, or at all events very expedient, by virtue of the grant which he had made of the *dominium utile* in the surface of the lands to the pursuer's author. They were powers to break through the surface of the lands for the purpose of the more convenient winning of the coal lying beneath the lands, and of which the ownership remained intact, and undiminished in the Duke. The extraordinary character of the present contention of the pursuer is this, that those things which were superadded to the rights incident to the feudal estate, the feudal *dominium*, are now made use of for the purpose of limiting, restricting, and contracting the ownership and right of enjoyment incident to the feudal estate. Can anything be more absurd? You cannot possibly say, that the whole *plenum dominium* reserved in the mines, and belonging to the Duke, was qualified and restricted by virtue of a thing which was reserved out of the grant with respect to the surface for the very purpose of rendering more complete, in point of facile enjoyment, that very ownership which never entered into the contract or into the grant to the pursuer's author at all.

That, in point of fact, is the whole question. It depends entirely on this: Is a field of coal, or of any other mineral lying beneath the lands of which the *dominium utile* is granted to another person, the field of coal belonging to the superior making the grant and not being included in the grant,—is that a feudal estate, or is it not? The answer is beyond the possibility of a doubt. It is not to be converted into a mere right of entering within the lands to win the minerals which were on the estate, which would be in the nature of an easement or an incorporeal right; but it remains an absolute estate to which all the privileges and all the incidents of the ownership of an estate belong. That is put beyond the possibility of doubt by the cases which have been cited, and the instances which are collected in Lord Deas's opinion, I think, and also in Lord Ardmillan's.

Is it possible then to say that, founding yourself upon this reservation, you can restrict and

qualify the right of ownership and enjoyment which is incident to the undiminished, undeteriorated absolute estate in the mines which is not contracted, and never was intended to be affected by the grant to the pursuer's author? Certainly not. That estate remains; and therefore the subject of the estate may be enjoyed in every way in which it was competent or fit to enjoy it antecedently to the grant of the *dominium utile;* you may approach it laterally from another estate for the purpose of winning the minerals; you may use the strata which you have reserved to yourself, or rather declared to remain in yourself, (for the word reservation introduces some obscurity and confusion of thought into the matter,) in any manner consistent with ownership. You may traverse it from any adjoining land you have. You may create a road or a tunnel through it, as long as you keep within the boundaries of your estate. And you may through your road or tunnel carry either the minerals or any other proceeds of an adjoining field.

You therefore have, for there is nothing to restrain you, the same universal right and unlimited power of enjoyment of the estate that remains in you as you had antecedently to the grant of the *dominium utile*, and the enjoyment of which that grant of the *dominium utile* in no respect impairs or affects.

If that be so, tell me what you find in the grant of the *dominium utile* that interferes with the old right of enjoyment? There is not a word. But in order that the old right of enjoyment may be declared to remain, you find certain words which you call a "reservation," and immediately you set to work to attribute to this alleged reservation all the characteristics of a new grant, and then you come to the conclusion, that what is retained by what you denominate the "reservation" is not the entire estate, but is a right of winning a certain portion of the estate by virtue of powers which are expressed in the reservation. Now, I hold that to be an utter misapprehension of the nature and the effect of the reservation, and of the true construction of the ownership of the property. Having regard to the feudal law of Scotland, I hold, that anything that remains in the superior *in pleno dominio* is capable of being won, enjoyed, and dealt with precisely as if there had been no grant to the author of the pursuer.

The same thing would take place in England, but I am very reluctant, upon a matter of this kind, to have recourse to English authorities or English rules at all. Suppose now, that in one of the chalk counties I granted an estate to a person, retaining to myself the strata of chalk lying beneath the surface. We all perfectly well know that many a stratum of chalk lying beneath the surface is 50, 60, or 80 feet deep. Is it meant to be said that I have not a right to run a tunnel through that stratum of my own property which is thus reserved to me, and to use that tunnel for any collateral purpose of the estate adjoining that stratum so reserved?

But it is unnecessary to appeal to the principles of English law, and it is very much more desirable in a matter of this kind to keep within the recognized boundaries of Scotch law. I take it that, the Duke of Hamilton being the superior of this property, and having the *dominium utile*, and also the *dominium eminens*, if it be conceded to me, that when he granted the *dominium utile* in respect of the surface, declaring that it should not extend to the mines, he kept his old estate and his old *plenum dominium* in the mines, then I say it is impossible to find in the terms of this grant anything to qualify the nature of that ownership or the power of enjoyment which is incident to its possession upon those grounds, which, I believe, when clearly understood, will exclude and supersede a good deal of what has been introduced into this case in the Court below, grounds which are very clearly illustrated by Lord Deas and Lord Ardmillan. I entirely concur with my noble and learned friend on the woolsack, that this interlocutor should be reversed, and that a decree of absolvitor in favour of the defender should be substituted for it.

LORD COLONSAY.—My Lords, I concur in the opinion which has been expressed by the majority of my noble and learned friends. I think that, in the reasoning which has taken place in the Court below, a great deal of difficulty has been introduced into the case by not fully and clearly keeping in view the distinction between a right of property and a right of servitude. The case is in some respects a novel one, and I am not surprised that there has been a difference of opinion in regard to what might be the rights of the parties with respect to certain views of contingent interests such as those arising in the event of the exhaustion of the minerals, and I am not surprised that there has been some difference of opinion here with regard to what was the meaning of this reservation. But it is quite clear in principle—it is quite obvious to all feudalists, that the right of the Duke of Hamilton rests not upon the deed which he granted to Mr Graham of Barns, but that it rests upon his right to the barony and lands under his original infeftment, and that the deed to Mr. Graham of Barns only shews, that that part of his original estate which has been spoken of, having been reserved, has not been given away. He keeps for himself certain rights in the estate which he has given away, in order that he may more easily exercise the ordinary mode of turning to benefit the minerals, that is to say, the estate which is reserved by him.

It is a great mistake to say, that the Duke of Hamilton has no right to use that estate, that is to say, those minerals below the surface, except for the purpose of bringing the minerals to the surface. That is a radical error. He may use his estate in the way which is most beneficial to

himself. For instance, it may be that his object in reserving that stratum of minerals was this: He may have reserved the stratum of minerals merely in order to prevent his adjoining minerals from being flooded by water that was accumulating in other minerals on a higher level, in order to make it a barrier between them and him. That would be a beneficial enjoyment of it without bringing it to the surface. He may also use it in another way; he may be the possessor of minerals lying upon a certain inclination east and west of these, and the water may be accumulating upon his minerals to the west, and he may use the stratum of minerals he has reserved for the purpose of enabling him to conduct the water through those minerals down to the lower level on the east, and so get rid of it. There are various ways in which he may turn the minerals to account without bringing them to the surface, and I cannot understand that so long as those minerals, that is, the estate which remains to him, and is not given away, continues to exist, he cannot use it in any way that is beneficial to himself, unless he uses it to the injury of his neighbour.

Now, that being the position of the parties here, I think that there is a radical mistake in the grounds upon which the reasoning and the opinions of some of my learned friends, the Judges in the Court below, have proceeded, and particularly in the leading opinion in the case, in which it is said, that "it is not alleged that pits opened on the surface of Cambuslang estate could be used for the winning of coals wrought in adjoining coal fields. Any attempt to do so would be at once interdicted as contrary to the clear rights of the pursuer under his feudal title, and having no support from anything contained in the clause of reservation:" that I entirely agree with. The opinion proceeds: "On the same principle, I hold it to be equally objectionable to bring the coals of an adjoining estate into Cambuslang, and carry them underground through that property into an adjoining coal field. This could not be done on the surface of the lands, and it can as little be done in the evacuated waste forming a tunnel underground." That is placing the rights of the Duke of Hamilton in the minerals upon no higher footing than the right he has upon the surface. It is placing a right of property in the same position as a right of servitude. There is no doubt that the Duke of Hamilton was not entitled to increase the burden of the servitude on the surface by bringing the minerals from his other property over the surface. The surface was the servient tenement, and the minerals under that tenement were the dominant tenement in regard to that particular right of servitude. But that principle does not apply in regard to the right of property, and to say, that he is carrying the minerals through the property of the pursuer at all is a mistake. There is a want of keeping in view the distinction between the rights of property and the rights of servitude here, which seems to me to have led to an erroneous judgment in the case. I conceive, that so long as there exists any of the mineral property which the Duke of Hamilton has, he is entitled to use any of that property in the mode which is most beneficial to himself.

It does not appear from the record, that the mineral property has been exhausted: on the contrary, there is a great deal of it there still; but more than that, it does not appear to have been exhausted even on those parts of the property, over which the minerals from the adjoining property are drawn. It is said it is in the waste, in the places where you have worked out the minerals, that you draw the minerals from the adjoining property. But it appears, that there are a great many pillars left yet, and those pillars may be worked out when they are no longer required to sustain the surface. There is a right to work them. It does not appear, that the whole pavement of coal is worked out, or that the limestone is worked out. There is no averment to that effect on the record, nor in the evidence is there any trace of proof, that while the appellant is carrying the minerals along under the Cambuslang estate, he is touching anything that is not part of that which he retained for himself. He is within the ambit, for aught we see, of that property which has been his all along as being part of his original infeftment, which he has not granted away to the respondent.

Upon these grounds, I am of opinion, that the demand of the pursuer here, that is to say, the respondent, cannot be sustained, and that we must alter the interlocutor, and assoilzie the defender. But I observe, that in the summons here, the declaratory conclusions, as well as the others, have reference to the surface as well as to the property underground, and it is necessary that we should guard ourselves from assoilzieing the defender, or pronouncing any judgment which would have the effect of rendering any question with regard to the rights upon the surface a *res judicata*. The pursuer prays to have it found, that the defender is not entitled to make or use any roads or passages, whether above or below ground, and that is repeated afterwards in effect. The Lord Ordinary guarded it, and I think we ought to guard it, with a reservation, reserving the right to the pursuer to challenge upon any competent ground any operations upon the surface of the lands by the defender, or his tenants or successors.

LORD WESTBURY.—My noble and learned friend will forgive my interrupting him. I should submit, that it would be a very injurious thing to make a reservation which is not warranted by any existing facts. There is nothing before us to shew that any right on the surface is at all affected or intended to be affected by these proceedings. If any question of that kind should hereafter arise, the conclusions that we arrive at would not interfere with the rights of the pursuer, in respect of

a new state of things, but if we were to make a reservation in this decree it might only give rise to an erroneous notion, with regard to the effect of that reservation, and it might be interpreted into a judicial determination of some point which has not yet arisen. I think my noble and learned friend will probably agree with me, that as there is nothing in the facts of the case rendering any reservation necessary, it is not a usual thing, or a desirable thing, to make a reservation which is uncalled for by the circumstances in the decree which we propose to pronounce.

LORD COLONSAY.—I do not think that that would be the result afterwards. I only propose that we should decline to pronounce anything with regard to the surface.

LORD WESTBURY.—There are no facts calling upon us for any judicial declaration as to that.

LORD CHANCELLOR.—Will my noble and learned friend who has just been addressing the House be kind enough to state, whether there is anything in the action from which the defender would now be assoilzied, which puts in dispute any questions in respect to the surface. I am not aware that the defender in any way raises a question as to the rights upon the surface.

LORD COLONSAY.—The defender does not set up any such right.

LORD CHANCELLOR.—Then no prejudice to the pursuer in this action could possibly arise in any new action, upon a totally different cause of action.

LORD COLONSAY.—It was to prevent any question of that kind arising, that the reservation was inserted in the interlocutor of the Lord Ordinary.

LORD WESTBURY.—The summons contains a declaratory conclusion, upon which in truth we have no necessity to come to a determination, by reason of there being no facts warranting it. If there should be hereafter facts to warrant any such conclusion, then that would not be interfered with by our present decision.

Lord Advocate.—If I am not out of order, will your Lordships permit me to suggest—

LORD WESTBURY.—I think you are out of order. We cannot hear any further argument now.

Lord Advocate.—I must appeal to your Lordships' indulgence. I am stating no argument. I merely wish to ask my LORD COLONSAY to inform your Lordships, that the word "absolvitor" has a technical meaning in Scotland, and that it imports a judgment upon the merits—upon the substance of the conclusion.

LORD WESTBURY.—That raises an argument. We shall necessarily have a contradiction and contention upon that. I think it must remain as we have put it.

Lord Advocate.—Surely, my Lords, your Lordships will hear one word.

LORD WESTBURY.—We never do so after we have decided a case; we do not hear a supplemental argument. If we were to give way, and grant an indulgence to any one who desired to say anything more, we should have a repetition of the whole argument from beginning to end.

LORD COLONSAY.—I must say I think the safest course would be to put in the reservation.

Lord Advocate.—There is a reservation generally in absolvitors in Scotland in similar cases.

Interlocutors reversed, defender to be assoilzied from the whole conclusions of the libel. Pursuer to be liable to defender in expenses.

Appellant's Agents, H. and A. Inglis, W.S.; Gregory, Rowcliffe, and Rawle, London.—*Respondent's Agents*, Graham and Johnson, W.S.; Loch and Maclaurin, Westminster.

FEBRUARY 19, 1872.

ERSKINE BEVERIDGE AND CO., and JAMES ADAMSON BEVERIDGE, surviving Partner, *Appellants*, *v.* ROBERT BEVERIDGE and Others, *Respondents*.

Partnership—Provision to continue business after death of Partner—Manager for a Firm—Powers as against Partners—*A partnership deed between A. and B. provided, that in the event of A.'s death the partnership should continue between B. on one hand, and A.'s trustees on the other hand. The firm had appointed R. to be manager of the business of the firm, and A. having died, R. was one of A.'s trustees. R. having done acts which were challenged by B. as* ultra vires, *and having claimed to have the powers of a partner:*

HELD (affirming judgment), (1.) *That R. was entitled merely to manage for the firm* qua *manager for all parties, and not to exercise the powers of a partner;* (2.) *That he was not entitled, without B.'s consent, to leave blank cheques to be filled up in the name of the firm by clerks in his*