[16*th April* 1835.]

THOMAS Earl of ELGIN and his Trustees, Appellants and Respondents.—*Lushington — Kaye.*

Sir CHARLES HALKETT Baronet, Respondent and Appellant.—*Tinney — J. A. Murray.*

Lease—Remuneration—Coal.—1. Circumstances in which the tenant of two separate coal fields (between which a coal field of his own was situated), with a right to the use of a level for working the fields let to him, was held (affirming the judgment of the Court of Session) liable to pay the landlord a consideration for the benefit which the tenant derived from carrying the level through his own interjected field in passing onwards to the upper coal field let to him. 2. In estimating the benefit so derived it is competent to take into view the facilities which the tenant enjoyed as to draining his own field, either from the porous nature of the strata, or the possession of another level.

Interest.—Interest allowed on the consideration awarded from the date of the summons.

Process.—After a remit had been made to a judicial inspector to report, and he reported, a remit to the Jury Court refused.

JOHN Wedderburn of Gosford (afterwards Sir John Halkett) was, prior to the year 1769, proprietor of the village and harbour of Limekilns, situated on the north side of the Frith of Forth, and also of the estate of Pitfirrane, distant about two miles farther to the north from that frith.

2D DIVISION.
Ld. Mackenzie.

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Lady Murray Kinnynmond, wife of Sir Gilbert Elliot, was at the same time proprietrix of the estate of Urquhart, which lies immediately adjacent to, and on the north-east side of the estate of Pitfirrane.

The lands both of the estate of Pitfirrane and of Urquhart were richly stored with coal. Each of the fields of coal had a level or drain, for the purpose of removing the water; the one being known by the name of the Pitfirrane Level, and the other by that of the Urquhart Level. The Pitfirrane Level was forty-four feet deeper than the Urquhart Level.

In the month of September 1769 Lady Murray Kinnynmond, with consent of her husband, entered into a contract of lease with John Wedderburn, setting forth that, "Whereas the coal of Urquhart, after men-
"tioned, belonging in property to the said Dame Agnes
"Murray Kinnynmond and her said husband, has for
"some years past been wrought as deep as it can be
"drained by the level called the Urquhart Level, the
"only level in the possession of the said Dame Agnes
"Murray Kinnynmond: But whereas the level of the
"coal of Pitfirrane, which lies contiguous to the Urquhart
"coal, and is forty-four feet deeper than the Urquhart
"Level, by its being communicated to the coal of
"Urquhart will admit of a great deal more of the said
"Urquhart coal to be raised;" she therefore let for fifty years from Martinmas 1768, "to the said John Wed-
"derburn, and his heirs and assignees whatsoever, all the
"coals, of whatever kind, lying under and within the
"lands and estate of Urquhart, in the parish of Dun-
"fermline and shire of Fife, that can or may be
"wrought level-free by the present level of Pitfirrane
"coal, but no more; that is to say, debarring all liberty

" of working any coal deeper than the present Pitfirrane " Level, when brought within the lands of Urquhart." It was further "agreed to by both parties, and provided " and declared, that in case the said John Wedderburn " or his aforesaids shall at any time during the cur- " rency of this lease communicate any level that may " be driven or made by them through the lands of " Urquhart, for working the coal hereby set, to any " third party, proprietors of any neighbouring grounds " or coal, then and in that case the said John Wedder- " burn and his aforesaids shall pay to the said Dame " Agnes Murray Kinnynmond one third part of the " price or consideration-money which he shall receive " for the benefit of the said level;" and it was stipulated, " if, after expiration of this lease, or sooner determina- " tion thereof, the said Dame Agnes Murray Kinnyn- " mond shall communicate the above-mentioned level to " any neighbouring proprietor of grounds or coal, that " then and in that case she shall be obliged to pay to " the said John Wedderburn or his aforesaids two " third parts of the price she or her aforesaids shall " receive, for the benefit of the said level." John Wedderburn was likewise bound " to preserve and secure the " level-rooms in each seam of coal, so as, at the end of " this tack, or sooner determination thereof, each of " them shall be left in such a sufficient secure condition " as people of skill may with ease go through and in- " spect the same, and shall not do any thing that may " hurt or prevent the working of any coal that may be " left in the ground, and lying below the Pitfirrane " Level." His lease was to endure till Martinmas 1818.

In December 1771 John Wedderburn (now Sir John Halkett) granted a lease of the coal and other

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minerals within the estate of Pitfirrane, to William Caddell and Co., for fifty years from and after Martinmas of that year. By this lease it was stipulated "that "the right of communicating Pitfirrane and Urquhart "Levels to any adjacent heritors, and any advantages "arising therefrom, is reserved to the said John Halkett "and his foresaids, without whose consent the lessees are "to make no such communication." And Caddell and Co. became bound "to carry on the levels and work the "coal regularly, so as that what coal may remain in the "foresaid lands at the expiration of this lease, or sooner "determination thereof, shall be left in proper order "and in a good workable way, and the level and level-"rooms in good order, which the said John Halkett or "his foresaids shall have power to inspect, and cause "proper persons of skill to visit from time to time, to "see that the levels are regularly carried on." This lease did not expire till Martinmas 1821. He at the same time executed an assignation in favour of Caddell and Co. of the lease which Lady Murray Kinnynmond had granted of the coal within the estate of Urquhart.

In 1790 Lord Elgin acquired the coal fields of Clune, and of certain other lands which were situated to the north of the estate of Pitfirrane, and lay interjected between it and the lands of Balmule, which, as well as Pitfirrane, belong to Sir John Halkett.

Caddell and Co., in 1799, assigned to Lord Elgin the lease which had been granted of the Pitfirrane coal by Sir John Halkett, and also transferred to his lordship the lease originally granted by Lady Murray Kinnynmond of the Urquhart coal.

The Respondent, Sir Charles Halkett, having succeeded to Sir John, a deed of agreement and submission

was entered into between him and Lord Elgin, on the 13th November 1809, by which Sir Charles agreed to convey to Lord Elgin, his heirs and successors, "all his "property and superiority in the village of Limekilns "and adjacent parts, situated to the south of the road "leading from North Queensferry to Torryburn, and "also his harbour of Limekilns, and shore dues belong-"ing thereto; and also to grant a tack in favour of the "said earl and his foresaids, for the period of 999 "years after Martinmas 1821, of the whole coals and "ironstone belonging to him, and lying under the "lands of Pitfirrane and Balmule, in the county of "Fife, which are presently possessed by the said earl; "and also the exclusive right to waggonway-leave "through his grounds, and to the levels necessary for "working the said coals and ironstone, so far as in his "lands, &c. And for which causes, and upon the other "part, the said earl agrees to pay to the said Sir Charles "Halkett, and his heirs, executors, and assignees, "10,000*l.* sterling, with interest from Martinmas 1808, "being the said earl's term of entry to the said pro-"perty and superiority and harbour, at the following "periods; viz. 5,000*l.* sterling at the term of Candlemas "next, and 5,000*l.*, with the by-gone interest, at the "term of Martinmas in the year 1810, and also such "rent or royalty, in the option of the said Sir Charles "Halkett or his foresaids, for the said coals and iron-"stone, as shall appear to the arbiters or oversmen "after-named fair and reasonable, after deducting the "value of the sum paid as a grassum therefor out of "the said sum of 10,000*l.*, with interest from Martinmas "1808; from which sum of 10,000*l.*, the price or value of "the said property, superiority, and harbour at Lime-

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" kilns is in the first place to be allowed, and the re-
" mainder to be the grassum; and which rent or royalty
" shall be payable at the term of Martinmas yearly, aye
" and until the issue of the tack, or until the said earl
" or his said foresaids shall relinquish it altogether,
" which they are authorized to do at any term of Mar-
" tinmas after the said coals and ironstone shall be
" found to be so worked out or in such a situation as
" not to afford, by fair and ordinary exertions, a royalty
" equal to the amount of the rent which shall be fixed
" by the arbiters, in the event of Sir Charles Halkett's
" choosing at any time to take a rent instead of a
" royalty, and on the said earl and his foresaids giving
" six months previous notice of their intentions so to
" do."

By a subsequent clause the parties state, that, " having
" entire confidence in the arbiters after named, for
" settling the points after-mentioned relative to the said
" agreement, therefore they have submitted and refer-
" red, and do by these presents submit and refer, to
" the amicable decision, final sentence, and decreet
" arbitral to be given forth and pronounced by James
" Stuart, Esq., younger, of Dunearn, and David Black,
" Esq., of Bandrum, or by any oversman whom they are
" hereby empowered to name in case of their differing in
" opinion, what shall be the price to be paid by the said
" earl to the said Sir Charles Halkett for the property
" and rights to be conveyed by him to the said earl as
" aforesaid, and also what rent or royalty, in the option
" of the said Sir Charles Halkett or his heirs and suc-
" cessors, shall be paid yearly for the said coals and
" ironstone, on the terms and for the period before
" mentioned; and with full power to the said arbiters

" or oversman to fix the terms of the disposition of the " said property, superiority, and harbour at Limekilns, " to be granted by the said Sir Charles Halkett to the " said Thomas Earl of Elgin and Kincardine, and of " the said tack to be entered into between the said " parties, according to a fair interpretation of the " articles of agreement herein contained; and, generally, " to ordain the parties to execute the deeds necessary " for carrying the transaction herein agreed on into " complete execution." The arbiters, on the 25th of March 1815, pronounced a decree arbitral, by which they found "that the price of the property and supe- " riority of the village of Limekilns, &c., payable by the " said Thomas Earl of Elgin and Kincardine to the " said Sir Charles Halkett as at Martinmas 1808, is " 7,182*l.* 13*s.* 9½*d.* sterling, leaving a balance of the " said sum of 10,000*l.* amounting to 2,817*l.* 6*s.* 2½*d.*, " which, with interest thereof from Martinmas 1808 to " Martinmas 1821, we hereby declare to be the grassum " for the tack of the said coal and ironstone, as before " mentioned, of which grassum repayment is to be made " to the said earl and his foresaids in the way pointed " out in the said tack, and in no other way; it being " the understanding of the parties, at entering into the " said contract, that the sum of 10,000*l.* was at all " events to be payable by the said earl to the said Sir " Charles Halkett as at Martinmas 1808. 2dly, we " decern and ordain the said Sir Charles Halkett and " the said Thomas Earl of Elgin, as soon as the said " earl makes payment to the said Sir Charles Halkett " of the foresaid sum of 10,000*l.* sterling, stipulated by " the said contract to be paid in equal proportions at

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" Candlemas and Martinmas 1810, with interest from " Martinmas 1808, to subscribe the following deeds, " agreeably to scrolls or drafts thereof subscribed by us " of this date, as relative hereto; that is to say, we de- " cern and ordain the said Sir Charles Halkett to sub- " scribe a disposition of the said property and superiority " of Limekilns in favour of the said earl; and we de- " cern and ordain the said Charles Halkett and the " said earl to subscribe a tack of the said coals and " ironstone, by which tack the said earl and his fore- " saids are specially to be bound, within two years from " this date, to put the level passing through the point " to the south of the office-houses of Pitfirrane, and so " far as at present open, into good order, and to keep it " constantly in the same condition, by clearing, building, " and covering it, so that the surface of the ground may " be all clear."

On the same day a tack was executed, by which, inter alia, Sir Charles let to Lord Elgin " the exclusive right " to waggonway-leave through the lands before de- " scribed, and through the lands excepted from this tack, " and to the levels necessary for working the said coals, " so far as in his lands or belonging to him." The term of entry was declared to be Martinmas 1821, at which time the lease of the Pitfirrane coal, originally granted to Caddell and Co., and assigned to Lord Elgin, expired. Lord Elgin having in the meanwhile, viz. in the year 1813, and subsequently, proceeded to extend the Pitfirrane Level, so as to carry it through the coal situated in his own lands of Clune and others, which lay interjected between Pitfirrane and Urquhart on the one hand, and that of Balmule on the other, a dispute arose between him and Sir Charles Halkett as to the right of his lordship

to close, and thereby take advantage of the level for the purpose of draining the coal situated within his own lands.

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To have this matter settled, another deed of agreement and submission was executed on the 10th of November 1818, proceeding (after a recital of the previous deeds) on this narrative: "Considering that under the autho-
" rity of the lease first above recited (1768-9) the said
" level called the Pitfirrane Level was driven into the
" lands of Urquhart, now belonging to James Hunt'
" Esq., of Pittencrieff, and that the said earl, having
" right under the several leases acquired by him as
" aforesaid to the coal within and under the lands of
" Pitfirrane and Urquhart, and others aforesaid, and
" being also proprietor of extensive fields of coal lying
" to the north of Pitfirrane and Urquhart, it was an
" object of importance to him, in the foresaid trans-
" action with the said Sir Charles Halkett, to obtain a
" communication of the said level called the Pitfirrane
" Level to his said coal lying to the north of the said
" lands of Pitfirrane and Urquhart; and accordingly it
" was understood by the said earl that by virtue of the
" powers conferred by the lease first above recited Sir
" Charles should communicate the said level to the said
" earl for that purpose; and accordingly, upon the un-
" derstanding and in the belief that the lease last
" above recited (1815) conferred the necessary powers
" for that purpose upon the said earl, the said level
" was driven forward by the said earl, from the point in
" the lands of Urquhart to which it had already been
" carried till it entered his own coal field to the north
" of these lands: But the said Sir Charles Halkett
" having a different understanding as to the communi-

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" cation conveyed by the last recited lease (1815), and " the said earl being desirous to remove every doubt " with regard to the communication of the said level by " the said Sir Charles Halkett to him which may arise " from the general terms of the lease last above recited, " or from the term of entry under the same not com- " mencing with (until?) the term of Martinmas 1821, " the said parties have for that purpose resolved to " enter into the agreement herein-after written: There- " fore, on the one hand, the said Sir Charles Halkett, " as authorized and empowered by the lease first above " recited to communicate at any time during the cur- " rency thereof any level to be driven through the said " lands of Urquhart to any third party, proprietors of " any neighbouring grounds or coal, hereby consents " and agrees to communicate the foresaid level called " the Pitfirrane Level from the said coal under the lands " of Urquhart to the foresaid coal fields belonging to " the said earl, lying to the north of the said lands of " Pitfirrane and Urquhart, and, for himself, his heirs " and successors, ratifies, approves, and homologates the " communication thereof already made by the said " earl from the said coal in the lands of Urquhart to " his own coal fields to the north thereof; and on the " other hand the said earl binds and obliges himself, " and his heirs and successors, to make payment to the " said Sir Charles Halkett, Baronet, and his foresaids, " against the term of , of such sum, in name " of compensation for the communication of the said " level to the coal fields of the said earl lying to the " north of the said lands of Pitfirrane and Urquhart, as " Messrs. Robert Bald, civil engineer at Alloa, and " Robert Beaumont, manager of Stevenston colliery,

" arbiters hereby specially appointed by the said parties, " or, in case of the said arbiters differing in opinion, any " oversman to be named by the said arbiters, shall ad- " judge to be a fair and adequate consideration due by " the said earl and his foresaids to the said Sir Charles " Halkett and his foresaids, for the benefit of the fore- " said communication of the Pitfirrane Level to the said " earl's coal fields before mentioned; and the said " parties hereby oblige themselves and their foresaids to " implement and perform to each other whatever de- " creet-arbitral shall be pronounced on or before the " day of by the said arbiters and oversman " in the premises: It being understood, and hereby ex- " pressly declared, that the said Sir Charles Halkett and " his foresaids shall be accountable to the said James " Hunt, Esq., proprietor of the said lands of Ur- " quhart, as standing in place of the said Dame Agnes " Murray Kinnynmond, for one third part of the price " to be received by the said Sir Charles Halkett or his " foresaids for the foresaid communication, in terms of " the lease first before recited. And also declaring, " that all right to the said level, competent to the said " earl or his foresaids in virtue of the lease granted by " the said Sir Charles Halkett to him before recited " (i. e. the lease of 1815), shall remain entire to the " said earl and his foresaids, without any farther com- " pensation therefor than is stipulated by the said last- " recited lease, and that the said right shall not be " in any manner affected by this present agreement."

The arbiters accepted, but having omitted at the end of a year to write out a prorogation of the submission, Lord Elgin maintained that it had thereby come to an end, and he declined to renew it.

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Sir Charles therefore, in the month of October 1822, raised an action against his lordship before the Court of Session, founding on the deed of agreement and submission of the 10th of November 1818, and concluding that it should be found and declared, "that the "said Thomas Earl of Elgin and Kincardine, or "his heirs, successors, or assignees, have no right "under the foresaid tack executed between him and the "pursuer, of date the 23d March 1815, to use the Pit-"firrane Level, except for working the coals thereby "let; and that the said Thomas Earl of Elgin and "Kincardine's right and title to communicate the said "level to his fields of coal lying to the north of the "lands of Pitfirrane and Urquhart is constituted solely "by the before-recited agreement entered into between "him and the pursuer, of date the 10th November, "1818: And the same being so found and declared, "the said Thomas Earl of Elgin and Kincardine "ought and should be decerned and ordained, by de-"cree of our said Lords, to make payment to the pur-"suer of the sum of 10,000*l.* sterling, or such other sum "as our said Lords shall find to be the true worth and "value of the communication of the said level to the "said coal fields lying to the north of the said lands of "Pitfirrane and Urquhart, with the interest of the said "sum from the date when the said communication was "begun to be made."

In defence Lord Elgin pleaded, that by the agreement entered into in November 1809 it was the meaning and intention of the parties that the use of the Pitfirrane Level should be communicated to him, not only for working the Balmule coal, and all the other coal mentioned in the agreement, but also for the benefit of his

own coal fields in the passage of the level onwards to Balmule through those fields.

Lord Mackenzie, on the 27th of November 1823, pronounced this interlocutor:—" Finds it not denied by " the pursuer that the contract and lease between the " parties imply that the defender shall have right to " communicate the Pitfirrane Level to the coal and " ironstone of Bulmule, by carrying it through the " minerals of the defender's own lands: Finds that the " said contract and lease contain no stipulation that the " defender shall keep out the water of his own minerals " from this level so to be carried into them, and that " no evidence is produced or offered to show that this " was understood between the parties; on the contrary, " finds that the exclusive right to the levels necessary " for working the coal and ironstone of Pitfirrane and " Balmule, so far as the pursuer's lands, which includes " the Pitfirrane Level (so far as in the pursuer's lands), " is let to the defender, which appears inconsistent with " the pursuer's retaining, after the date of the lease or " contract, power to sell to the defender, for a price, " any right in the Pitfirrane Level which should operate " during the term of the lease; and, further, finds " strong evidence produced to show that it was actually " the understanding of parties, as well as of their " referees, that the water of the defender's minerals " was to be admitted into the Pitfirrane Level, at least " during the existence of the lease, and consequently " that the pursuer has already received, under the " award of the referees, a valuable consideration for " such admission. For these reasons, and upon the " whole, finds that the pursuer has no right to demand " any further consideration from the defender for grant-

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" ing right to the defender to communicate the Pitfir-
" rane Level to the minerals of the defender's lands
" during the terms of the lease, and to this extent assoil-
" zies the defender, and decerns: And before proceed-
" ing further, ordains the pursuer to put in a minute,
" stating whether, under this action, and at present,
" he insists against the defender for a consideration for
" granting to the defender, by the contract of 1818,
" right to continue the communication of that level to
" the defender's minerals after the lease shall have ter-
" minated, and if he does so insist, to specify the
" amount of such consideration." Sir Charles Halkett having reclaimed, the Court, on the 10th of June 1825,
" recal the interlocutor of the Lord Ordinary com-
" plained of, and find that the pursuer, Sir Charles
" Halkett, has right to a compensation from the defender
" for the use of the Pitfirrane Level, for any coal not
" contained in the agreement and tack between the
" parties; but find that the defender is not liable to
" the pursuer in any compensation for the communica-
" tion of the said Pitfirrane Level to the coal field of
" Balmule: And, with these findings, remit the case to
" the Lord Ordinary, with instructions to remit, before
" answer, to Messrs. Robert Bald and Robert Beau-
" mont, the persons named in the agreement of the 10th
" of November 1818, to ascertain and report to his
" lordship the true worth and value of the communica-
" tion of the Pitfirrane and Urquhart Level to any
" coal fields belonging to or leased by the defender,
" not contained in the said tack by the pursuer to the
" defender, the said report to be put in to the Lord
" Ordinary on or before the first box-day in the ensu-
" ing vacation: Also remit to the Lord Ordinary to

" find the respondent liable in the expenses of process " hitherto incurred." And on a petition by Lord Elgin, with answers, they adhered on the 16th of December 1826.[1]

On the case returning to the Lord Ordinary, he decerned against Sir Charles for the previous expenses of process, and at the same time remitted " to Messrs. " Robert Bald and Robert Beaumont, the arbiters named " in the agreement of the 10th of November 1818, to " ascertain and report on the true value of the commu- " nication of the Pitfirrane and Urquhart Level belong- " ing to or leased by the defender not contained in the " tack by the pursuer to the defender."

Mr. Beaumont being unable to accept of this remit, the parties agreed that Mr. John Williamson should be substituted for him, and he and Mr. Bald accordingly made an examination, but not being able to concur in one, they presented two separate reports. Mr. Bald estimated the value of the benefit derived by Lord Elgin from the communication of the Pitfirrane Level to his coal at 2,800*l.*; while Mr. Williamson was of opinion that it was worth nothing. Mr. Williamson arrived at this result, on the ground that as Lord Elgin had right to the Urquhart Level it afforded him facilities in draining his own coal, and that when taken into consideration along with the fortuitous or necessary drainage arising from the nature of the strata, Lord Elgin was altogether independent of the Pitfirrane Level.

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[1] See 5 S. & D. No. 96, p. 140 (new edition), p. 154 (old edition). In reference to a question as to the competency of remitting to Messrs. Bald and Beaumont, the referees or arbiters mentioned in the deed libelled on, the report bears that the Court " thought that the reference forming part " of the agreement did not fall by the omission to prorogate it, but might " still afford the means of ascertaining the amount to be paid."

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On advising these reports Lord Mackenzie, on the 19th of February 1828, issued the following interlocutor and note:—" Finds, that, in estimating the value of the " communication of the Pitfirrane and Urquhart Level " to the coal fields mentioned in the interlocutor of the " Lord Ordinary dated the 3d February 1827, it does " not seem proper to take into consideration the chance " of that coal being freed of water by fortuitous drain- " age without that communication, but finds, per contra, " that it is proper to take into consideration the faci- " lities which the existence of the Urquhart Level " afforded to the defender to drain said coal indepen- " dently of the said communication, and remits of new " to Messrs. Bald and Williamson, to report in this " view, in terms of the former remit."

" Note.—What is to be estimated is, not what the " pursuer has lost, but what the defender has gained by " the communication. Now, in estimating that, though the " Lord Ordinary thinks the opinion of Mr. Williamson " as to fortuitous drainage too conjectural, yet he does " not see how the existence of the Urquhart Level can " possibly be laid out of view. Suppose the Urquhart " level had been equally deep, and that the sole advan- " tage of the communication with the Pitfirrane Level " had been that it could be made for 100*l.* less than a " communication with the Urquhart Level, could that " circumstance have been overlooked, and the value " of the communication with the Pitfirrane Level esti- " mated as if there was no other alternative for get- " ting rid of the water but by steam-engine? The Lord " Ordinary cannot adopt that view."

Against this interlocutor Lord Elgin reclaimed, praying that it might be altered in so far as it found that it does

not seem proper to take into consideration the chance of Lord Elgin's coal being freed of water by fortuitous drainage without the Pitfirrane Level. The Court on the 29th of May 1829 pronounced this judgment:—" Recal the " interlocutor of the Lord Ordinary, in so far as com- " plained of; remit to his lordship to remit of new to " Messrs. Bald and Williamson, to report on the true " worth and value of the communication of the Pitfir- " rane and Urquhart Level to the Clune and Balridge " coal fields, and other coal fields belonging to the de- " fender, taking into consideration, not only the facilities, " if any, which the existence of the Urquhart Level " afforded to the defender to drain said coal fields, in- " dependently of the said communication, but likewise " what would have been the natural and necessary effect " of the strata in the Clune, Balridge, or other coal " fields belonging to the defender, upon the drainage of " these coal fields into the Pitfirrane Level, indepen- " dently of any direct and artificial communication with " that level, and generally taking into consideration " every circumstance affecting the amount of advantage " gained to the defender by the direct communication " in question; and, in the event of any difference of " opinion between the two reporters, to remit to any " third person of skill, to be mutually chosen by the " said Messrs. Bald and Williamson, to report on the " points of difference that may have arisen in their " opinions; it being understood that, in terms of the " remit of February 3, 1827, the whole shall be before " answer on any of the matters not already fixed by " final interlocutors of the Court."

These gentlemen being unable to agree, again made separate reports, adhering to those which they had pre-

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viously presented, and they suggested Mr. George Taylor as a fit person to report on the points of difference that had arisen between them. Mr. Taylor accordingly made a report, in which he stated that he concurred generally in the opinions of Mr. Williamson, and not in those of Mr. Bald; and he submitted, that 28*l.* 7*s.* 6*d.* was a sufficient compensation for the benefit of the communication, and that 100*l.* should be awarded in respect of coal below the Pitfirrane Level.

This report having been objected to by Sir Charles Halkett, the Lord Ordinary again remitted to Mr. Taylor to report "whether or not he thinks the value of "the communication ought to be greater or less than "he has at present reported." Sir Charles reclaimed, praying the Court "to remit the case to the Jury Court "Roll, in order to have the facts, in so far as still con-"troverted, as well as the just worth and value of the "Pitfirrane Level to the defender, under the agreement "of the 10th of November 1818, finally ascertained by "the verdict of a jury." The Court on the 9th of February 1831 refused the note.[1]

Mr. Taylor thereupon made a new report, stating the value of the communication of the Pitfirrane Level to be 129*l.* 7*s.* 6*d.*, subject to an addition dependent on the view which might be taken of the saving to Lord Elgin by his thereby being relieved of the necessity of clearing out and rendering available the Urquhart Level, which Mr. Taylor reported would, by an expenditure which he estimated at 425*l.*, answer the purpose of draining Lord Elgin's coal, though not so efficiently as the Pitfirrane Level. He proposed to charge Lord Elgin with the one half of this sum, being 212*l.* 10*s.*,

[1] 9 S. & D, p. 412.

in respect that Mr. Hunt (who was now proprietor of the estate of Urquhart) was liable in the other half; and he suggested that if it should turn out that three other parties who were alleged to be under a liability to relieve his lordship of three fourth parts of his half should be found to be so, the benefit derived by him, in availing himself of the Pitfirrane Level in place of the Urquhart Level, would amount to 53*l.* 2*s.* 6*d.* Even this he only considered to afford a proper ground for increasing the compensation, on the supposition that Lord Elgin was, prior to the agreement of 1818, bound to have cleared the Pitfirrane Level. If he was not so bound, then the expense of clearing it (which he had done) greatly exceeded what would have been required to clear the Urquhart Level. If, on the other hand, he was so bound, then the advantage gained by the communication was of the value of the above sum of 53*l.* 2*s.* 6*d.* He farther adhered to his former report as to the 100*l.*

The Lord Ordinary on the 8th of February 1832 pronounced this interlocutor, to which he adhered on a representation :— " Finds, in reference to the said report, " that the Earl of Elgin was under an obligation to " clear the Pitfirrane Level, and, with this finding, " approves of the said report, and appoints the cause " to be enrolled, with a view to further procedure." " Note.—The Lord Ordinary certainly does not mean " to find that the Earl of Elgin is bound under the " lease for 999 years to keep the Pitfirrane Level clear. " He looks to the prior leases as affording the answer " to the question of the reporter. Under these, the " earl having been bound, in 1818, to clear the Pitfir- " rane Level, though in fact he may not yet have im-

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" plemented that obligation, yet (he) cannot on that " account state himself as entitled to a deduction from " the value of the communication of that level acquired " under the contract of 1818, on the ground that it was " communicated to him as an uncleared level." His lordship, by a separate interlocutor, on the 22d of May, found " that the defender does not appear to be " liable for more than one fourth share of the expense " of clearing the Urquhart Level, and that he does " appear to have a right to call upon other proprietors " to pay three fourth parts of that expense, unless they " are willing to renounce interest in that level, which " it is not stated they are willing to do; therefore finds " that the sum of 53*l.* 2*s.* 6*d.*, not 210*l.* 10*s.*, is the sum " to be assumed as the expense to the defender of the " repair of that level: Finds no expenses due to either " party." " Note.—The Lord Ordinary does not see " how these other proprietors can possibly hold shares of " interest in this level without bearing a share of the " expense of keeping it in repair, or how, if liable at " all, they can be liable otherwise than in the way " settled by formal agreements, which are not said to be " recalled."

Both parties reclaimed, and on the 12th of December 1832 the Court pronounced this judgment[1]: —" Adhere to the said interlocutor of the 8th of Feb- " ruary last, and of the 22d of May upon the said " representation and answers, and in so far refuse the " desire of the defender's note: Recal the said inter- " locutor of the Lord Ordinary of 22d May reclaimed " against by the pursuer, and also by the defenders in so " far as regards expenses: Finds that the defenders are

[1] 11 S., D., & B., p. 203.

" liable to the pursuer in the sum of 129*l.* 7*s.* 6*d.* as " the consideration to be paid by them to him for the " communication of the Pitfirrane Level for working " the coal fields in Clune and Balridge, and also find " the defenders liable to the pursuer in the sum of " 212*l.* 10*s.*, as the half of the estimated expense of " clearing the Urquhart Level, which has been saved " to the defenders by their not having occasion to clear " any part of that level, all in terms of Mr. Taylor's " reports, and decern accordingly: Reserving to the " defenders their claims of relief against the other pro- " prietors who are alleged by them to be jointly liable " for the expense of clearing the Urquhart Level, and " recourse, if need be, against all others interested for " any part of the hypothetical compensation of 210*l.* 10*s.* " above decerned for, and to such proprietors and others " their respective defences as accords; and, with these " findings, remit to the Lord Ordinary to dispose of the " cause quoad ultra: Reserving to the pursuer his claim " for compensation for the communication of the Pitfir- " rane Level to the coal in the farms of East and West " Drumtothill and others enumerated in Mr. Taylor's " second report, consisting of 675 acres 18 falls, when " the level shall be carried forward thereto, and to the " defenders their defences as accords."

A question then arose, as to interest, before the Lord Ordinary, who, on the 8th of February 1833, found " the defenders liable to the pursuer in legal interest " on the sums found due to him from the 11th day of " October 1822 until payment;" and the Court adhered on the 2d of March thereafter.[1]

[1] 11 S., D., & B., p. 315.

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Both Lord Elgin and Sir Charles Halkett appealed.

Appellant (Lord Elgin).—1. According to a just construction of the deed of agreement made in 1809, and the relative lease, he acquired the exclusive right to the level necessary for working the coal, situated, not only within Pitfirrane and Balmule, but also within his own lands of Clune and others, which lay interjected between these two estates. At this time the Pitfirrane coal was almost exhausted, and the level was only valuable as a means of carrying off the water of the higher coal fields. But these fields belonged to the appellant himself, and the circumstance of acquiring right to the Balmule coal, situated still farther to the north than the coal in his own lands, clearly indicated that it was the intention of the parties that he should enjoy the benefit to be derived to his own coal field by carrying the level through it onwards to the Balmule coal field. This was obvious, from the terms of the deed itself; but if there was any ambiguity it was removed by the correspondence which, previous to the execution of the deed, had passed between the parties, their friends and agents. To these documents it was competent to refer, in order to clear up any matter which was not perspicuously expressed in the deed. He therefore could not be made liable for any other sum in name of compensation for the benefit of that level, seeing that he had paid the full amount stipulated in the deed of 1809.

2. But supposing that he were so liable, the sum to be awarded ought not to exceed 28*l.* 7*s.* 6*d.*, being the value specified in the first report by Mr. Taylor.

3. Neither ought he to be found liable in interest from the date of the summons, which is the period fixed by the Court below. It ought to be restricted till the date of the final decreet. This is not a case where interest is due ex lege or ex facto, and the sum was not liquidated until the date of that decree. The respondent concluded for the sum of 10,000*l.* as compensation; whereas by the ultimate report of Mr. Taylor the sum due amounts to only about 53*l.* Neither can interest be allowed on the sum of 100*l.* which he has reported should be awarded, in respect it is the supposed value of a prospective or contingent benefit which may never exist.

Respondent.—1. It is incompetent to refer to correspondence or other extrinsic documents to show that the object of Lord Elgin, in entering into the agreement of 1809, and obtaining the relative tack, was not to work the coal of the landlord, Sir Charles Halkett, but to work other and different coal. That deed and the tack had reference exclusively to a conveyance of Sir Charles's coal situated in Pitfirrane and Balmule, and it was quite easy to extend the Pitfirrane Level to the Balmule coal field without carrying it through the coal field belonging to the appellant; besides, the term of entry under the tack granted in 1815 was not to be till Martinmas 1821, and yet the appellant's operations for extending the level into his own field were carried on in the years 1813, 1814, and 1815. It is impossible that he can maintain that these operations were warranted by a deed which was not then in existence; he is therefore bound in equity to pay a compensation to the respondent in respect of the benefit which he enjoys from the increased value thus given to his coal field.

2. So far from the appellant having reason to com-

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plain of the sum awarded by the Court below, the respondent is the party truly aggrieved. It was incompetent, in a question between the appellant and the respondent, to take into consideration any right of relief which the appellant might have against third parties. He ought to have been ordained to have paid the full amount of compensation, leaving him to operate his relief against those who may be liable to him in that relief.

3. As the sum awarded was of the nature of a compensation or price due for the use of a valuable subject enjoyed by the appellant, interest was as much due as in those cases where subjects have been sold for a price, without any formal stipulation as to interest. It has been repeatedly decided that in such cases interest is due[1]; but in the present case interest was awarded only from the date of the summons, although the appellant had been in possession for several years previously.

Appellant (Sir Charles Halkett).—1. By the deed of agreement of 1818 the parties referred the matter of compensation to Messrs. Bald and Beaumont, and this being a submission for the purpose of carrying an onerous agreement into effect, the Court below held that the remit must be made to these arbiters, as the persons originally suggested by the parties. Although Mr. Beaumont was unable to execute the duty, yet Mr. Bald, who had been mutually nominated, was so, and he reported that the value of the communication amounted to 2,800*l.* The Court ought to have been regulated in their decision by the report of Mr. Bald; neither ought they, in judging of this question, to have remitted to the

[1] Wallace, 11 Feb. 1825, 3 S. & D., p. 364 (new edition); p. 525 (old edition). Spiers, 5 June 1827, 5 S. & D., p. 714 (new edition); p. 765 (old edition).

inspectors to take into consideration, "not only the "facilities, if any, which the existence of the Urquhart "Level afforded to the defender to drain said coal fields "independently of the said communication, but likewise "what would have been the natural effect of the strata "in the Clune or other coal fields belonging to the de- "fender upon the drainage of these coal fields into the "Pitfirrane Level independently of any direct and arti- "ficial communication with that level." These were matters altogether extrinsic.

2. As the parties were directly at variance on facts, the court ought, when they came to the resolution to withdraw the matter from Mr. Bald, to have remitted the case for decision to a jury; besides, Mr. Taylor, in his report, did not proceed on the facts which were admitted by Lord Elgin, but made a report on a state of the facts altogether different. It is only in cases where a judicial inspector or valuator makes his report upon admitted facts that a party objecting to his report is precluded from insisting on a remit to a jury. In the present case the report is founded on disputed facts.[1]

3. Under the circumstances of this case, Sir Charles Halkett ought not to have been found liable in any expenses, and those which he has paid ought to be ordered to be repaid.

Respondent (Lord Elgin).—1. The submission fell altogether by the omission to prorogate it on the expiration of the year from its date; and although the Court held that it was expedient to remit the matter at issue to Messrs. Bald and Beaumont, they made this remit to them, not as arbiters, but merely as parties to whose

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[1] Duke of Buccleugh, 17 May 1827, 5 S. & D., p. 632 (new edition); p. 977 (old edition).

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qualifications no objections could be made. The non-acceptance of Mr. Beaumont rendered the substitution of Mr. Williamson necessary; and this was agreed to by Sir Charles Halkett, who therefore cannot insist on the report of Mr. Bald being taken as conclusive; and as the reporters differed it was competent for the court to appoint one or more other valuators, and to direct them as to the legal rights of the parties. As the question here is, not what damage Sir Charles Halkett had sustained, but what benefit Lord Elgin had derived from the level as a means of draining his own coal field, it was competent to take into view all the other advantages which he possessed, either from the porous nature of the strata, or the possession of the Urquhart Level, as means of draining the coal field independent altogether of the Pitfirrane Level.

2. It has been repeatedly decided, that if a party do not object to a remit made to a judicial inspector or valuator to report on the matter at issue, he cannot afterwards insist on a remit to a jury.[1]

3. Expenses were justly awarded against Sir Charles Halkett, and he ought to have been found liable exclusively in the whole costs, as the sums ultimately awarded are greatly below those which he demanded.

LORD BROUGHAM, in the course of the argument, addressing Dr. Lushington, (against whose client his Lordship had indicated an opinion,) stated, that if it would be any convenience to him in his reply to know what the scheme of the decree his Lordship should

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[1] Fraser, 9 March 1824, 2 Shaw's Appeal Cases, p. 37. Dickson *v.* Monkland Canal Company, 29 June 1825, 1 Wilson & Shaw, p. 636. Rowat *v.* Whitehead, 17 Nov. 1826, 5 S. & D., p. 18 (new edition); p. 20 (old edition). Hunter, 20 Nov. 1827, 6 S. & D., p. 89.

recommend would be (provided that his present impression continued), he would mention it now, that he might meet it in the detail as well as on the principle: And Dr. Lushington having acquiesced, his Lordship proceeded:—The interlocutor of the 12th December 1832, I think, is the governing interlocutor; and without saying any thing of the leases of 1768 or of 1771, or of 1815 and 1818, or making any declaration upon them, I should affirm that interlocutor, by which the Court "recal the interlocutor of the Lord "Ordinary of the 22d of May reclaimed against by the "pursuer, and also by the defenders in so far as regards "expenses." The next point relates to the principle of mutuality, or rather the joint nature of the benefit, which is taken into consideration wholly by Mr. Williamson, and partly by Mr. Taylor, and in a great measure adopted by the Court, and is said to be worth, according to Mr. Taylor's estimate, 100*l.*; that is prospective, all the rest is retrospective; the 100*l.* is found to be for the prospective benefit. The second branch of this judgment will address itself to the prospective sum reserved by the interlocutor to the pursuer Sir Charles Halkett,—not that it comes within the scope of the 100*l.* for the prospective benefit. I should then find Lord Elgin liable to Sir Charles in the sum, not of 29*l.* 7*s.* 6*d.*, which the Court found upon Mr. Taylor's principle, but 117*l.* 10*s.*, that is four times the sum of 29*l.* 7*s.* 6*d.*; for this reason, that they have divided the expense to Lord Elgin for the benefit into two, bringing it down from 117*l.* 10*s.* to 58*l.* 15*s.*; then they divided that into two again, bringing it down to 29*l.* 7*s.* 6*d.* There is a difficulty in interfering in respect of the sum of 100*l.*, but not as to this sum of 29*l.* 7*s.* 6*d.* When an arbitrator has stated the grounds on which he awards a certain sum, you have a right to deal with it, if on his

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own statement there is an error in point of law appearing upon the award; but when the arbitrator gives you the sum without showing an error in law, you are bound by that; and therefore, unless he has enabled you to know the ground, and it appears to be a false ground, you are bound by the sum he has fixed. Now Mr. Taylor, in one part of his report, as it is called, has gone upon the principle of mutual benefit, which is the great question between the parties. Wherever I have found it distinctly shown that he awarded too little upon that principle, namely, that he divided by two, then I multiply by two; I reverse his proceeding, because he has given me a clue whereby to trace the error he has committed. Wherever I can see that he has divided it, as, for instance, in the sum of 29*l.* 7*s.* 6*d.*, (which is in fact a sum divided twice,) in that case I know what to do with it, and I reverse the operation, and give the whole; but with respect to the 100*l.*, he does not distinctly state how he gets at that, which is a prospective sum, but is a lumping sum and a precise sum. It is very true, I may say, that I think he has done the same in this case as in the other; the great probability is that he has done so; I do not see why he should all at once have changed his view. But I cannot be sure of this: I have very carefully looked at the case, and he does not say it in so many words; there is not enough to show he has adopted the principle in that case. If Mr. Taylor was a person of exceedingly accurate understanding,—a person whose reasoning was distinct and logical in all its parts, I should have a very confident belief that he argued upon the prospective matter as he did upon the retrospective; but when I see a person arguing, as it appears to me, upon a plain and manifest blunder, what reason have I to suppose that he might not act right in one

case and wrong in another? It is like arguing with an absurd person, and I have no rule by which to proceed in reasoning upon his finding; it is a blunder of so gross a nature that it would not be much more gross if he said that two and two made fifteen; therefore, I have no clue in such a case to guide me as to what is the ground for his report of 100*l.*; and I incline to think that the first finding will be to give the 100*l.*, as Mr. Taylor recommends, and the Court awarded; then to find the 117*l.* 10*s.* instead of 29*l.* 7*s.* 6*d.* We come next to the other branch,—the consideration to be paid for the communication of the Pitfirrane Level for working the coal fields in Clune and Balridge; I have nothing to say against that.

The interlocutor then proceeds, — "and also find "the defenders liable to the pursuer in the sum of "212*l.* 10*s.* as the half of the estimated expense of "clearing the Urquhart Level, which has been saved "to the defenders by their not having occasion to clear "any part of that level." This is wrong if I am right in what I have said before. The alteration I propose to make is this: in the first place, I alter the sum of 212*l.* 10*s.* into 425*l.*, that is doubling it; the words "the "half" must be left out, and then it will stand "as the "estimated expense of clearing the Urquhart Level;" and then I think a further alteration will make it more clear. The Court says, "which has been saved to the defenders "by their not having occasion to clear any part of that "level;" striking out those words I would add these,— "the value of the benefit therefrom derived by the de- "fenders;" then come the words, "all in terms of "Mr. Taylor's reports;" of course I leave out the word "all," and I would say, "partly in terms of Mr. Tay- "lor's reports," "and decern accordingly." Then comes

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the second branch, " reserving to the defenders their " claim of relief against the other proprietors, who are " alleged by them to be jointly liable for the expense of " clearing the Urquhart Level, and recourse, if need be, " against all others interested for any part of the hypo- " thetical compensation of," then, instead of 212*l.* 10*s.* it must be 425*l.*, " above decerned for, and to such pro- " prietors and others their respective defences as accords; " and, with these findings, remit to the Lord Ordinary " to dispose of the cause quoad ultra: Reserving to the " pursuer his claim for compensation for the communi- " cation of the Pitfirrane Level to the coal in the farm of " the East and West Drumtothill and others enumerated " in Mr. Taylor's second report, consisting of 675 acres " 18 falls, when the level shall be carried forward " thereto, and to the defenders their defences as accords." There is, as I understand, a great field not yet worked, except about 50 acres, but which is now working out at the rate of 30,000 cubic yards a year; no part of that, I assume, has been calculated for in the 100*l.* already given. (This was stated from the Bar to be so.)

Then I add this, (and I should advise that the parties do all in their power to render it effectual,) " Remit " to the Court of Session to proceed further in assessing " the prospective compensations, with a distinct reserva- " tion, directing, that in case the defenders shall not " take the offer which the pursuers shall make, on or " before the first day of next session, that is, the 12th of " May, the said prospective compensation shall be ascer- " tained, upon the principle of assessing the value of " the level to the defender's working such part of the " Clune coal as has been made the subject of compen- ' sation in the 212*l.* 10*s.* above assessed." Do you under- stand the frame of this proposed decree, Dr. Lushington?

DR. LUSHINGTON.—The latter part of it I do not know that I do, my Lord.

LORD BROUGHAM. — Nothing can be plainer than this. The Court of Session says, here is so much for what has been already done; there is already 100*l.* prospective, but there is the residue of this benefit, in respect of coal to be got, not yet compensated for; you are to receive a prospective remuneration for that. I feel very desirous to put an end to all litigation; and I say, go back to the Court which has made an incomplete adjudication, and let them at once finish the litigation now, instead of keeping it alive for ever. Then, to avoid an inquiry, I say, if before the 12th of May you make an offer which they accept, there may be, in respect of that, an end of the whole case, and a perfect decerniture in that respect; and let that be confirmed by the Court, so that it may bind your successors and all persons privy. But there is another course to be taken. If you shall not do so, then in that case the Court shall proceed to do it, and shall proceed upon the principle, not of taking Taylor's and Williamson's reasoning about mutuality, but taking the principle on which the Court has proceeded in respect of compensation; this is the course I should propose, if my opinion is not altered, when Dr. Lushington has finished his reply. All this proceeds on the supposition that the Court below is wrong, and that I am right; it is working out the principle, which is the main subject in dispute, whether Taylor and Williamson are right in their principle or not; if they are right in their principle, then I must take the course of affirming the decree of the Court below, and decide against the appellant in the cross appeal. If they are wrong, then I reverse the decree, and decide for the appellant in the cross appeal.

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The last question is as to costs. If I am right in reversing the cross appeal, then the interlocutor of the 9th of February is wrong, as that gave the expenses to be paid by the appellant in the cross appeal, the respondent in that; I must, therefore, reverse that, and those expenses must be repaid, if they have been paid. That is the only alteration I propose to make as to the question of costs in the Court below; but as to the question of costs here, my impression is, that as this is a case of four or five hundred pounds, and they have been held entitled to full compensation by the Court below, they must have their compensation clear of all expenses; and that it would be a most cruel benefit to give them 400*l.*, deducting 600*l.*; that would not be at all giving them a benefit; and therefore I really consider this is a case in which, independent of any other costs, the costs of the appeal must abide the event of the suit. As to the costs of the cross appeal, we cannot give them on any principle whatever. Now, I have stated to you the whole of my view; and you will proceed with your argument.

At the close of the argument—

LORD BROUGHAM.—My Lords, in this case, I shall take the opportunity of reconsidering the arguments urged by the learned counsel for the appellants in reply, particularly with reference to their effect on the matters raised by the cross appeal which have been argued. Undoubtedly, some difficulty arises in respect of that part of the finding of the Court of Session which respected the Urquhart Level, proceeding, as it did, upon the report of Mr. Taylor, and more particularly that part of the finding which excludes all compensation in respect of Balmule. I shall therefore look further into this case, which is in some respects a very complicated

one, and shall endeavour to put the matter into such shape as may prevent recourse to the Court of Session; I should most strongly recommend to Lord Elgin, if the decision of the Court below should be affirmed, that he should make the other party an offer; and I should recommend to the other party, that they should endeavour to accept it, in order to prevent the necessity of further litigation. This is on the supposition that the finding of the Court of Session is right,—that will be modified by the supposition that the respondent (the appellant in the cross appeal) shall be found right in his objections to the moieties given, instead of the whole sums referred to in this finding. I ought to state before the parties leave the bar, that a case has been found, in 1716, in which the House did allow the costs of the appellant,—a small sum, 50*l.*, was given to the appellant as the costs of the appeal, in the case of Hamilton against the Officers of the University of Glasgow; and it is supposed that Lord Loughborough, in a case of great oppression, did something of the same kind.

The case was then adjourned.

LORD BROUGHAM.—My Lords, there are two cases which stand for the judgment of your Lordships: the one of them the case of the Earl of Elgin v. Sir Charles Halkett, a very complicated and difficult case, and a very tedious one, involving the discussion of twelve several interlocutors appealed from by Lord Elgin; every one of which was appealed from also by the respondent, inasmuch as he conceived the judgment, though generally speaking in his favour, was not sufficiently favourable to him in some of its parts. It is needless for me to enter into the reasons which induce me to recommend to your Lordships the judgment I am about

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to propose. I stated at the time of the argument the impression which I formerly had, and in which I still abide; that impression has been strengthened by the best consideration I have since been able to give to the case. I stated generally the grounds of the opinion I had then come to, and what appeared to me to be the fit course for your Lordships to take in finally pronouncing this judgment, — a course adapted neither entirely to the views of the one party or the other, and which consequently will have the fate of many decisions made here and elsewhere,—that of not giving entire satisfaction to either party; but which, however much that is to be regretted, probably does not necessarily, on that account, possess less claim to be considered by your Lordships a just judgment. I stated various particulars, in which it appeared to me that an incorrect view had been taken by the surveyors, and particularly Mr. Taylor, who was consulted; that it appeared to me that there had been great oversights committed in material parts of this case, some by one surveyor, and some also by the other; and I stated to your Lordships, in the presence of the counsel on both sides, that I might have the benefit of their discussion, the propositions on which my opinion rested, and also the course I proposed taking to carry into effect that opinion, in order that I might have the benefit, on the one hand, of their discussion of the grounds of decision, and on the other, the benefit of their suggestions on either side, as to the tendency of that particular mode of disposing of the question between the parties,—the tendencies of that mode to effect the object which I had in view, consistently with the principles upon which the opinion I had come to was grounded. I read those

statements in detail; I referred them to the particular interlocutor to which they appeared to me to be most applicable, and upon which the alteration would be most conveniently engrafted, the interlocutor pronounced on the 12th of December 1832, which is the ninth of the interlocutors appealed from in the original appeal, and also the ninth of the interlocutors appealed from in the cross appeal; for the two parties, as far as the ninth, keep up exactly in a line, each appealing against part of the same interlocutor; the difference is, that afterwards one of them does not appeal against the tenth, but he appeals against the eleventh. Having thrown out the opinions I had formed, in order to have the benefit of a full discussion, which I considered better in a complicated case of detail than stating those opinions after the counsel had withdrawn, it would be exceedingly useless to go through all the particulars of these interlocutors. Upon the whole I am of opinion that five per cent. interest should be given from the date of the summons. Without troubling your Lordships with any further detail as to the alterations, I shall hand them in, and they will be given out to each of the parties; they will see that it is the interlocutor of the 12th of December 1832 which is altered; and all which remains for me is humbly to move your Lordships, before the new order, that these interlocutors, so far as they are appealed against in the original appeal, be affirmed, and that the costs be taxed in the original appeal; and that so far as they are appealed from by the cross appeal, the interlocutors be altered and reversed in the particulars to which I have adverted on a former occasion, and which are contained in the note which shall be handed to the parties.

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The House of Lords ordered and adjudged, That the said original appeal be and is hereby dismissed this House, and that the interlocutors, so far as therein complained of, be and the same are hereby affirmed: And it is further ordered, That the appellants in the said original appeal do pay or cause to be paid to the said respondent the costs incurred in respect of the said original appeal, the amount thereof to be certified by the Clerk Assistant: And it is further ordered, That the interlocutor of the Lords of the Second Division, of the 9th of February 1831, complained of in the said cross appeal, in so far as it finds the defenders entitled to expenses since the date of the interlocutor therein mentioned, and remits to the Lord Ordinary to proceed accordingly, be and the same is hereby reversed: And it is further ordered, That if such expenses have been paid by the pursuer the same shall be repaid to him by the defenders: And in regard to the interlocutor of the said Lords of the Second Division, of the 12th of December 1832, it is declared, That the defenders are liable to the pursuer, as the consideration to be paid by them to him for the communication of the Pitfirrane Level for working the coal fields in Clune and Balridge, in the sum of one hundred and seventeen pounds ten shillings, in addition to the sum of one hundred pounds, making together the sum of two hundred and seventeen pounds ten shillings, instead of the sum of one hundred and twenty-nine pounds seven shillings and sixpence, in the said interlocutor mentioned; and that the defenders are liable to the pursuer in the sum of four hundred and twenty-five pounds, as the full estimated expense of clearing the Urquhart Level, as therein mentioned, instead of the sum of two hundred and twelve pounds ten shillings, in the said interlocutor mentioned, as the half of such expense: And it is further ordered, That the interlocutors complained of in the said cross appeal, in so far as the same are not hereby altered and varied, be and the same are hereby affirmed.

RICHARDSON and CONNELL, — SPOTTISWOODE and ROBERTSON — Solicitors.