speaks of the House as having been satisfied in the course of the argument, that that was the only course that they could be justified in pursuing, considering the nature of the case. The order made in that case was, "That the cause be remitted back to the Second Division of the Court of Session in Scotland, to review generally the interlocutor complained of, with an instruction to the Judges of that Division to order the case to be argued by counsel before the whole of the Judges, including the Lords Ordinary, and to report their opinions thereon to the House. And this House does not think fit to pronounce any judgment upon the said appeal, until after the said interlocutor shall have been so reviewed, and the opinions thereupon shall have been reported, according to the directions of the House."

I submit to your Lordships, that it would be wise and proper to adopt that form of order on the present occasion, and I move your Lordships accordingly.

LORD BROUGHAM.—My Lords, I have no doubt whatever, that this is the right course to be taken.

LORD CRANWORTH.—We all concur in it. Of course it will be understood at the bar, that none of your Lordships express or intimate any opinion upon the case.

The following *order* was pronounced by the House of Lords:—

"*Die Veneris*, 19° *July* 1861.

"After hearing counsel," etc., "Ordered by the Lords Spiritual and Temporal in Parliament assembled, that the cause be, and is hereby, remitted back to the said First Division of the Court of Session in Scotland, to review generally the interlocutor complained of, with an instruction to the Judges of that Division to order the same to be argued *vivâ voce* before the whole Judges, including the Lords Ordinary, and to report their opinions thereon to this House; and this House does not think fit to pronounce any judgment upon the said appeal, until after the said interlocutor shall have been so reviewed, and the opinions thereupon shall have been reported according to the direction of this order."[1]

For Appellants, Theodore Martin, Solicitor, London; Inglis and Leslie, W.S., Edinburgh.—*For Respondents*, Connell and Hope, Solicitors, London; Tods, Murray, and Jamieson, W.S., Edinburgh.

JULY 29, 1861.

The Honourable Dame GRACE C. MENZIES, *Appellant*, *v.* SIR ROBERT MENZIES, Bart., *Respondent*.

Game—Fishings—Locality—Entail—Provision to Wife—*A deed of entail empowered the heirs in possession of the estate "to provide and infeft their wives, by way of locality allenarly, in competent liferent provisions, the same not exceeding a fourth part of the said lands and estate." A disposition of locality having been granted under the permissive power, with a clause of parts and pertinents:*

HELD *by the Court of Session*, 1. *That it carried in favour of the widow an exclusive right of shooting, hunting, and fishing* (*except salmon fishing*), *over the locality lands.* 2. *That the value of these shootings, &c., although they had never been let, was to be taken* in computo, *in ascertaining whether the locality exceeded one fourth part of the lands and estate.*

On appeal to the House of Lords, the parties having consented to their Lordships disposing of the case on the information before them as arbitrators, in order to save the necessity of a remit for further investigation, findings were pronounced in similar terms to those of the Court of Session.[2]

The Court of Session had remitted to a Mr. Syme, W.S., to prepare a scheme of locality, and various reports were made from time to time.

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[1] See *Fife* v. *Duff*, *post*, 27 Mar. 1863.

[2] See previous report 17 D. 1090; 24 Sc. Jur. 365; 27 Sc. Jur. 554. S.C. 33 Sc. Jur. 718.

The Court ultimately pronounced the two following interlocutors :—" 10*th* (23*rd*) *June* 1858. —The Lords having considered the report of Mr. Syme, No. 78 of process, and heard counsel for the parties, approve of the same : Find, in terms thereof, that in addition to the renunciation and reconveyance of the whole of the locality hill of Foss, including the shootings as well as grazings thereof mentioned in the interlocutor of 10th March 1857, the defender is bound at same time to renounce and reconvey to the pursuer the additional locality lands of Foss, called the croft of Dalvoist, and the farm of Kinnardochy, together with right to the peats, fowls, and carriages, from Perth to Rannoch Lodge, performable by the tenant of Kinnardochy, all as mentioned in the report; and ordain the defender, accordingly, to execute such renunciation and reconveyance of said hill of Foss, and lands and others above mentioned, and that at the joint expense of both parties; but reserve right to the defender and her tenants, on the estate of Foss, to cut, win, and take away peats from the moss of Foss as heretofore: Find further, that it is necessary to fence the high ground from the low grounds of Foss, and that by a wall of the height of five feet nine inches eastward to the Kinnardochy march, as explained in said report, and marked on the relative sketch No. 77 of process, which is to be erected and kept in repair at the expense of the parties in the proportions of four fifths payable by the pursuer, and one fifth by the defender, and decern."

10*th* (23*rd*) *June* 1858.—The Lords having resumed consideration of this case, allow Sir Robert Menzies one third of the taxed expenses, including Mr. Syme's fee, and all other expenses connected with the remit to him; allow an account of said expenses to be lodged, and remit to the Auditor of Court to tax the same and to report."

Lady Menzies appealed to the House of Lords, maintaining that the interlocutors of the Court of Session should be reversed—1. Because the appellant's husband, the late Sir Neil Menzies, in granting the deed of locality, in the exercise of the power contained in the deeds of entail, was not bound to take into computation the value of the game upon the said estates, which was unlet and unproductive at the date of the locality, and which, in the uniform prior administration of these estates, had never been made a source of pecuniary gain. *MacPherson* v. *MacPherson*, 5 Bell, Ap. 280. 2. Because the principle of valuation, approved of and given effect to by the Court, is inequitable and erroneous in respect the shootings of the locality lands were valued, not in their actual and existing state, as regards accommodation, and otherwise, in 1844, when the disposition of locality was executed in favour of the appellant, but upon the footing of being let, as at that date, with two shooting lodges to be built upon the lands by the tenants of the game. 3. Because—assuming the correctness of the principle of valuation according to which the locality shootings are valued upon the footing of being let with two shooting lodges to be built upon the lands—the sum of £700, at which the cost of their erection was estimated by the reporter, and approved of by the Court, is inadequate for the purpose; and because the Court, in adopting the reporter's estimate, not only proceeded in the absence of all information as to the size and situation of the proposed lodges, the cost of transporting materials, and the expense of making the roads by which the access to the lodges was to be obtained, but refused to allow the appellant a proof of the averment which she made and offered to instruct, that it was impossible to erect two lodges upon any part of the locality lands of Rannoch at the estimated cost.

The respondent (in a cross appeal) maintained in his case, that—1. According to the sound construction of the power to provide wives in liferent provisions in the entail under which the estate of Menzies and Rannoch is held, the widow had no right to the shootings over the lands on which her liferent provision was secured. 2. According to the sound construction of the deed granted by the late Sir Neil Menzies, the appellant had no right to the shootings over the lands mentioned in that deed. 3. Even although the appellant were held to be a proper liferenter of the lands, she had no right to the shootings.

In the event of the cross appeal not being sustained, the respondent maintained in his case, that—In estimating the amount of provision to which the appellant was entitled, the value of the whole shootings over the entailed estate, whether let or unlet, by the late Sir Neil Menzies, ought to be taken into computation.

The *Attorney General* (Sir R. Bethell), and *Anderson* Q.C., for the appellant, Lady Menzies.

Rolt Q.C., and *Sir H. Cairns* Q.C., for the respondent.—(The hearing of this case was several times adjourned to permit of a compromise, and ultimately both parties consented to leave the final decision of the case to the Lords as arbitrators, keeping in view the legal principles involved. The arguments, therefore, do not admit of a report; but as the judgment contains observations on some points of law it is added, and was as follows) :—

LORD CRANWORTH.—When the argument in this case closed it was suggested, that very possibly their Lordships might think it necessary to make a remit to the Court of Session for some further investigation; but being very anxious, indeed, to prevent that, they asked the counsel on both sides, whether they would agree if their Lordships saw their way to arrive at a conclusion, which, if not absolutely exhausting the justice of the case (so to say), would be a very near approximation to it, to authorize their Lordships to come to such a decision, in order to save

further litigation. The counsel for Lady Menzies did agree to that. The counsel for Sir Robert Menzies very properly said, that he had no authority to give such consent, his client being in Italy. Sir Robert Menzies afterwards sent a written paper which we have looked at, and we do not quite understand whether it amounts to a positive unequivocal consent, that we should dispose of the whole case, in which case their Lordships would feel, that they should be somewhat in the nature of arbitrators, and not only arbitrators, but arbitrators avowedly deciding something which might possibly not be absolute justice. Before, therefore, we proceed upon that which, in our opinion, would be a very desirable course to take, we want to know whether both sides are willing to authorize it to be entered upon the minutes of parliament as being done with their consent.

Mr. Anderson.—On the part of Lady Menzies, I am authorized to say, that she gives an unequivocal consent to your Lordship's proposition without any condition.

LORD CRANWORTH.—Does Sir Robert Menzies consent?

Mr. Hope.—Sir Robert does the same. He only wished in his note to bring certain observations before your Lordships.

LORD CRANWORTH.—They will not have very much influence upon our determination, but their Lordships will bear them in mind. Then it will be entered upon the minutes of the House, that the parties gave an unequivocal consent, that their Lordships may dispose of the case in the way that they think will be the nearest approach to substantial justice.

Now, my Lords, I am prepared to give my opinion to your Lordships in this very unpleasant sort of case. This case arises upon a deed of entail under which the late Sir Neil Menzies, who died in the year 1844, held possession of the estate. The deed of entail was dated in the year 1778, and is framed in such a way, that Sir Neil Menzies became in fact tenant in tail. There was this power in the original deed, that "it shall be lawful for the said heirs male of my body, and the other heirs of tailzie above mentioned, to provide and infeft their wives, by way of locality, allenarly in competent liferent provisions, the same not exceeding a fourth part of the said lands and estate, in so far as the same shall be free and unaffected for the time with prior liferents and annual rents of personal debts that do or may affect the same, excepting always from the same power of providing wives in locality the foresaid mansion house and manor place of Castle Menzies.

Now, first of all I say, and about this there is no doubt, that what was meant was, that the heir of entail might give by way of locality to his wife, if she should survive him, so much of the value of the settled lands as should not exceed one fourth of the fair annual amount. That is the clear meaning. The question is, What is the annual value of the whole lands, and who is the tenant, for the time being, authorized to assign by way of locality to his wife any portion of those lands which he thought fit to select, not exceeding one fourth of the annual value?

Sir Neil Menzies, being tenant in tail, did execute a deed giving to his wife, now his widow, the present appellant, certain lands by way of locality, consisting of some of the lands which may be described as the Rannoch Lodge Estate.

That deed was executed in the month of February 1844, but in the course of two or three months thereafter Sir Neil Menzies died. A question might arise as to the time when the value was to be calculated, whether at the date of the death or at the date of the deed. I believe, that has been decided. I have not looked into that point minutely, but we were told, that we need not trouble ourselves with any inquiry of that sort, for the two events happened so near to one another, that it may be assumed, that there was no practical difference in which way the value was taken.

Upon the death of Sir Neil Menzies, which happened soon after the execution of this deed, Lady Menzies, the widow, entered upon the lands which had been so assigned, the Rannoch Lodge Estate. After a time her son, the present respondent, raised this question. He said—"The locality lands do not carry with them, by that locality, the right of shooting over them." The widow was infeft in a liferent, and Sir Robert, the son, was infeft in the fee, and his first contention was, that he, as owner of the fee, had a right of shooting over those lands; and that, if he was not right in that, he had it at least concurrently, if not exclusively.

That question is raised by what is called the cross appeal. It was disposed of first of all by the Lord Ordinary, and afterwards by the Court of Session. The Lord Ordinary pronounced his interlocutor upon the 13th of December 1850, in which he decided against the pursuer, that the disposition of the locality carried with it, during the life of the widow, all the usual incidents of property; or, at least, this incident, the right of shooting, just in the same way as if she had been the owner in fee. That question was afterwards carried to the Inner House, which entirely adopted the view, that had been taken by the Lord Ordinary; and by their interlocutor the Inner House, on the 26th February 1851, decided that, as owner of the locality lands, she had the right of shooting over these lands.

In that view of the case we all entirely concur, and it is unnecessary to go into the subject. The case has been fully decided by the Lords of Session, but I shall only trouble your Lordships

by reading one or two passages from their judgments. Lord Medwyn says, "I am not aware of any principle on which these rights," that is, the rights of shooting, "do not attach to the widow who is in possession of the locality lands, as one of the usual incidents of property. She is, during her life, feudally vested in these lands. She is infeft in them, and holds them under the heir as superior, by resigning on the procuratory in the deed, or she might get her base infeftment confirmed. Though the heir also is infeft in the fee of the lands, his beneficial use of the lands is restricted, nay, excluded, by the liferent right of the widow, competently granted by his predecessor in virtue of the very title which conveys the estate to him." Then he goes on to shew a little more at large, that this must carry the right of shooting.

Then Lord Moncreiff says, "I shall endeavour to express my opinion as shortly as possible, for really, until I heard the discussion which has taken place, I could not have supposed, that it is a question on which any serious doubt could exist. The question is, What rights did this title confer on the widow when she came into possession of the lands under it?

"The particular thing here in question is not mentioned in the deed, neither was it necessary, that it should be mentioned, unless it were intended to except or exclude a right and power naturally incident to such a title. And, therefore, it seems to me to be essentially necessary to the right understanding of this question, to consider what the nature of the title thus constituted was in itself." Then he goes on, after two or three pages, to say—"It seems to me to be an attempt to limit a title of property, contrary to its legal import, of which I am not aware of any example; on the contrary, in all the discussions which have hitherto taken place on the case of let and unlet shootings, it has always been assumed, and I think correctly, that the title to the shootings, or rather—(now this seems to me to go to the very root of the question)—the power of searching for and destroying game upon the lands, must pass to the liferent proprietor as a pertinent, or incident to the lands themselves. It cannot be stated otherwise. If it is made productive by being let, it is part of the fruit of the lands; and whatever may be the effect of its not being let, which is a separate question which remains for consideration, it is still a natural fruit of the lands which the proprietor enjoys for his own benefit. I have thus taken a very plain and simple view of this question, and I had not imagined, from the terms of the summons or the titles relied on, that any other view of it could be taken."

In that view of the case I most entirely concur; and I believe none of your Lordships have the smallest doubt upon the subject. Therefore, that disposes of the cross appeal, so far as relates to that point. The cross appeal also complains of everything else which the pursuer thinks is to his prejudice in the interlocutors.

Now, my Lords, that question having been so disposed of, another question was introduced about which there was great difference of opinion, but which has also been disposed of, and is not now pending. Therefore I come now to the main question which has been raised by this appeal.

The first interlocutor which is complained of is the interlocutor of the 11th March 1852, whereby "the Lords, having resumed consideration of this cause"—I do not quote the Lord Ordinary's interlocutor—"find that the value of the shootings over the lands conveyed as locality lands, although not let by the deceased Sir Neil Menzies, ought to be taken into computation with the value of the other shootings on the estate, in ascertaining whether the provision made by the said disposition in locality does in real value exceed one fourth part the lands and estate belonging to the granter of the disposition in locality."

Now, upon that point also, I believe none of your Lordships have from the first had any doubt whatever. It having been decided, that shootings let are to be taken into account, I cannot imagine how it can possibly be argued, that shootings unlet are not also to be taken into account. Shootings not let are in truth shootings retained, because the owner of them thinks it more expedient, more convenient, or more agreeable to have them in hand rather than to get money for them. It is upon exactly the same principle, that, in estimating property in this country which is in the hands of the owner, the Court of Chancery always sets an occupation rent upon it. The value is just the same whether you retain it or whether you let it; it can make no difference in principle. If you let it, what you get for it is of course the clear value of the subject let. If you choose to retain it, then you must as well as you can find out what would have been the value if it had been let, and charge the owner for what is kept. Therefore we have no hesitation—at least I have none, and I believe neither of my noble and learned friends has—in saying, that that is perfectly right.

Then, we want to ascertain whether, that which has been allotted by way of locality is or is not in excess over that which he had a right to allot; that is, in this case, whether the Rannoch Lodge estate, with right of shooting over it, or that portion of it over which shootings can be exercised, does or does not amount to one fourth of the annual value of the whole, or whether it is more than one fourth of the value of that which is retained by the (tenant in tail) heir in possession under the entail. Now, for that purpose, the Lords of Session proceed in this way, "And in respect of the averments of the pursuer as to the value of the shootings over the locality

lands, as increasing the value of these lands to such an extent as to exceed to a material extent the one fourth part of the lands and estate, remit to Thomas Syme, W.S., to value the shootings as well on the locality lands as on the lands and estate held by the said Sir Neil Menzies under the deed of entail, referred to in the disposition of locality, with power to him to take such evidence as he may think necessary for his own guidance or for the information of the Court, and to report the value of the same; and, at the same time, to report whether to any and to what extent the lands conveyed by the said disposition of locality, along with the value of the shootings on the same, exceed one fourth part of the said entailed land and estate in point of value, the value of the shootings over the rest of the lands being taken into account, as well as the value of the shooting on the locality lands. I think a portion of that interlocutor was not strictly right. The latter part is right, because Mr. Syme is to ascertain whether to any and to what extent the lands conveyed by the said disposition of locality, along with the value of the shootings on the same, exceed one fourth part of the said entailed lands and estate in point of value, the value of the shootings over the rest of the lands being taken into account. That is the true principle. I think, that the former part of that direction as to the value of the shootings to be taken by themselves was superfluous, though I should not have quarrelled with that interlocutor merely because it directed something to be ascertained that need not have been ascertained. The latter part of the interlocutor, however, comes to the very point in the case, as it directs the only inquiry which ought ever to have been directed, and therefore I will assume that interlocutor to be perfectly right. Mr. Syme, however, soon found that he was in embarrassment, because he did not know whether he was to calculate the value as it was when he was looking at the lands, or whether he was to calculate the value as it was in 1844. Therefore he came to the Court and stated the embarrassment he was under, and the Court then made a further interlocutor on the 20th May 1853, and found, that the state of things to which Mr. Syme was to direct his attention was not that of the existing period, but the state of things in 1844. That also was perfectly correct. There is something more in that interlocutor, which is unimportant, but I think, that, if the matter had rested there, the Court of Session would have been perfectly right.

Mr. Syme proceeded with this inquiry, and there, I think, he first got into error, because he did not calculate what the whole value of the property was, including the shootings as an incident to the property; but, assuming, that all the parties were agreed in what the whole was, independently of the shootings, he calculated what the shootings were worth. The shootings upon the locality lands, he said, "are worth very little, because there is not a lodge for them." And I think he adopted, perhaps, not an unreasonable mode of inquiry in pursuing the directions, which, from time to time, were given by the Court of Session. But that was not the correct principle upon which he ought to have proceeded. In order to relieve himself from embarrassment, he goes into a somewhat ingenious but strange calculation of what the value of the shootings would be, supposing the owner of the locality lands to build lodges upon them, and to borrow money for building lodges, and to pay an interest for that money, and to pay also an insurance upon her own life, because her interest may come to an end. He finds, in doing that, that there would be, first, £35 a year to pay for interest of the money, which it would be necessary to borrow for building the lodges; and next, another sum of £35 a year for insurance of her life, and that that must be deducted from the value of the shootings which was to be added to the value of the Rannoch Lodge estate. Now, that was, as I have already pointed out, a wholly erroneous principle; but upon reporting to the Inner House what he had done, they made another interlocutor of the 13th July 1854, whereby they remitted back to Mr. Syme to report what rent the shootings of the land, occupied by the pursuer and defender respectively, would have yielded in 1844, to Sir Neil Menzies, as matters then stood, which I understand to mean without any lodges at all; and, specially, what rent the shootings on the locality lands would have yielded, if let by Sir Neil Menzies in 1844, without Rannoch Lodge. And then the Court gave some special directions as to a particular part of the locality lands called Cruach, as to which it was contended, that a very great deduction ought to be made in respect of the shootings upon that land, because it was of a peculiar form, being a narrow strip of land which was used for grazing purposes; and that, inasmuch as the grazing value had been taken into calculation in valuing the land, and would be materially damaged by letting the shootings upon it, that ought all to be subject to correction. That is all perfectly true; but the very necessity for such an inquiry confirms me in my opinion, that, from the first moment that Mr. Syme and the Court departed from the original interlocutor, which was quite correct, namely, a direction to ascertain what was the value of the whole, they got into an entanglement from which they have never extricated themselves.

Mr. Syme then proceeds under this direction, and he makes his report in conformity with the inquiry which he had made, and the result of his report is, that the shootings in the locality lands in Rannoch are to be valued as if they were let without Rannoch Lodge, because it was not necessary to let Rannoch Lodge with the shootings. You have got Rannoch included in the value of the land, and you must estimate what the shootings would be worth without Rannoch

Lodge. This would make it still more difficult; and then it was also referred to Mr. Syme to say whether, looking to the nature of the land of Cruach, a deduction ought to be made in the value of the shootings. A portion of the shootings of the other lands of the tentants in tail had been let in the lifetime of Sir Neil Menzies. Mr. Syme calculated, and the Court very properly adopted his calculation, that the rent which had been paid for the lands on Foss was £180 a year, of which £25 is to be imputed to the furniture of the house, and, therefore, that reduced it to £155. Part of those shootings were on the locality lands, and part on Sir Robert's land; and £25 was allotted to the shootings upon the locality lands, and £130 to the shootings on the lands of the tenant in tail.

Then there was another remit back. And Mr. Syme made a further report, to the effect, that a reduction ought to be made in respect to Cruach; and finally, by the interlocutor of the 11th of March 1856, the Lords approve of his report, and proceed thus—"They find, that by the report the value of the lands conveyed by the deed of locality in favour of the defender, including therein the value of the shootings on the same, exceeds one fourth part of the value of the whole lands and estates of Menzies, Rannoch, and Foss, at the date of the death of the granter of the deed of locality, by the sum of £159 0s. 1¼d.; and then they find, that the defender is bound to reconvey to the pursuer such a part of the lands and farms comprehended under the deed of locality, as may correspond with the amount of excess above specified, and remit to Mr. Syme to consider what portion of the locality lands ought to be reconveyed."

Upon this Mr. Syme proceeds to select certain lands to be reconveyed, but he comes back to the Court again and says—I cannot do this perfectly because I am not a surveyor. I wish to have some further assistance. And then there is a further remit to him to look it over again with a surveyor. After that the Court find, that, "in order to meet the excess of £150, certain lands are to be reconveyed to the pursuer," and there is an end of the case in the Court below.

The question therefore is, whether your Lordships can, in this embrangled state of things, come to any conclusion, that is sufficiently satisfactory to enable you to do that which the real interests of the parties require, namely, to stop further litigation by at once cutting the knot, and in the belief, that in taking this course we are deciding what is right to be done. I am prepared to advise your Lordships, and I believe my noble and learned friends concur, that while in point of form the Court below have proceeded upon erroneous grounds, we think, that the conclusion in point of amount at which Mr. Syme has arrived is either accurate, or so nearly accurate, that we may properly allow it to stand. The way in which he has arrived at that conclusion is this: He has said, in order to make the shootings over the locality lands available, you must build lodges, for which you must borrow money, and you must charge the interest of that money; you must also insure her life, and those two charges together make up £70 a year. I believe all your Lordships think, that Lady Menzies is not bound to build lodges, or to enter into any speculation; but I believe, that we may take, as a fair measure of the diminished value of the shootings in the Rannoch Lodge estate, from the circumstance of there being no lodges upon it, what it would have cost to build those lodges.

I am far from saying, that this will do complete justice in the case. Complete justice could only be done by setting aside all the interlocutors after the second—a sort of scandal, from which this House would be anxious to refrain, for here there has been a fresh remit, and a fresh report every year for six years past, and now to set aside all those interlocutors, and to remit the case back to the Court to go through with it again, upon the principle of the first interlocutor, it would have been most revolting to our feelings to have felt ourselves bound to do so, and I most sincerely rejoice, that the parties have agreed to our cutting the knot as it were, which, however, we should not have done had we not seen our way to come to the conclusion which, if not perfectly right, is in substance so near an approximation to right, that I am sure, that it would be, even in a pecuniary point of view, infinitely better for the parties to be bound by it than to go on with any further litigation.

What I therefore propose to your Lordships is this: The first, the cross appeal, is certainly altogether wrong, and ought to be dismissed with costs. Whether the second appeal was quite right or wrong, we cannot tell, but we think we may safely affirm the interlocutor appealed against, for the reasons I have suggested, but we think it must be affirmed with costs.

Mr. Rolt.—Your Lordships said the first appeal; ours is the second.

Mr. Anderson.—The second in time.

LORD CRANWORTH.—I mean the respondent's cross appeal, which raises the question whether the locality lands carry the shootings with them. That must be dismissed with costs, because there was no ground for raising such a question. With regard to the other appeal it must be dismissed without costs. We need say nothing more, because, although the result has been arrived at by a wrong road, we think it so near the right result, that it should be affirmed.

LORD WENSLEYDALE.—My Lords, I entirely concur in every word that has fallen from my noble and learned friend.

LORD CHELMSFORD.—I will only say, that I entirely agree with my noble and learned friends.

Mr. Anderson.—With regard to the costs below, we have actually paid under the interlocutor of the Court of Session one third of the costs, and those costs were in your Lordships' opinion altogether a misdirection. I submit, that neither party should pay any portion of those costs.

LORD CRANWORTH.—We have thought of that, and we think, that we must leave the interlocutors just as they are.

As regards the original appeal, the interlocutors appealed from affirmed, and the appeal dismissed. And as regards the cross appeal, the interlocutors appealed from affirmed, and the cross appeal dismissed with costs.

For Appellant, Maitland and Graham, Solicitors, London; James Robertson, W. S., Edinburgh.—*For Respondent,* Connell and Hope, Solicitors, London; Tods, Murray, and Jamieson, W.S., Edinburgh.