JUNE 23, 1871.

MRS. ELIZABETH HONEYMAN GILLESPIE and Husband, *Appellants*, v. JAMES RUSSEL AND SON, *Respondents; et è contra.*

Lease—Boundaries—Mines—Working Minerals near Mansion house and Garden—*A mineral lease prohibited the lessee from working the mines within a certain number of yards from the mansion house, also from the offices, also from the garden, also from any of the steadings.*

HELD (partly reversing judgment), *That the line was to be measured* (1) *not from the exterior upper wall of the mansion house and offices, but from the outside of the foundation of the walls underground;* (2) *that the kitchen court, though unroofed, was part of the mansion-house;* (3) *that the garden was to be deemed that part enclosed within the walls;* (4) *that the offices did not include a dovecot in an adjoining field, nor a pond, nor more of the courtyard than was strictly enclosed between the stable buildings on the three sides of a quadrangle, and therefore, did not include a triangular continuation of the yard which projected beyond the buildings in the quadrangle.*[1]

This was an appeal from a decision of the First Division of the Court of Session. An action of declarator was raised in 1866, at the instance of Messrs. Russel, against Mrs. Gillespie and husband, to have it declared, that the minerals under and round the mansion house and offices of Torbanehill, and the steadings on the estate reserved to them under missives of agreement for a lease of the coal and ironstone in the lands of Torbanehill, and of a minute of agreement with reference thereto, were contained within certain limits and boundaries. In 1850 the agreement for a lease was entered into between Mrs. Gillespie on the one part and Messrs. Russel, whereby a lease was granted of the whole coal, ironstone, iron ore, limestone, and fireclay in the lands of Torbanehill for 25 years. One of the clauses provided, that the lessees should not erect engines or sink pits nor carry on any operations on the surface of the ground nearer than 300 yards in any direction from Torbanehill House, nor nearer to the offices attached to the said mansion house than 30 yards, and no underground working should be carried nearer to the mansion than 100 yards, nor nearer to the said offices or garden than 30 yards, nor nearer to any of the steadings on the estate than 20 yards, without the consent in writing of the proprietor. The garden of Torbanehill was surrounded by a wall, and this wall was surrounded by a belt of plantation about 30 to 50 feet wide, planted with forest trees. The offices consisted of a dwelling house and farm buildings. Near the offices was a horse pond. In a field there was a dovecot standing by itself, and distant about 200 feet from the offices. The parties had disputed as to the mode of settling these measurements. One dispute was, whether the line was to commence from the outer wall of the mansion house, or the foundations of the wall. Another dispute was where the outer line of the garden ended; whether it included the belt of plantation surrounding it, or included the outside of the wall and a footpath surrounding it, or extended merely to the garden wall itself. A third question was, whether the dovecot and pond were included in the offices. The Lord Ordinary, after allowing a proof, made an interlocutor in favour of the pursuers, but the First Division recalled that interlocutor, and they found as follows:—(1) That the reserved minerals were within 100 yards, to be measured, from the exterior walls of the house visible aboveground, and not from the outside of the foundation of the walls underground, and including within the walls of the mansion house, the walls of the kitchen court, containing small offices partly roofed and partly unroofed. (2) The 30 yards from the offices were to be measured from the exterior walls visible above ground, but including the offices and the stable court attached thereto. (3) The 30 yards from the garden were to be measured from the exterior wall as seen above ground. (4) The 20 yards from the steadings were to be measured from the exterior walls of the buildings as seen above ground. The court held further, that the pond and dovecot were not included in the offices or steadings.

Both parties appealed against different parts of the interlocutor.

Sir R. Palmer Q.C., and *Cotton* Q.C., for the appellants, Mrs. Gillespie and husband.—The Court below ought to have measured the 30 yards from the garden, by commencing at the hedge and ditch which constitute the exterior fence of the garden. The Court ought also to have measured the distance from the mansion house, the offices, and steadings, by commencing from

[1] See previous report 6 Macph. 925; 40 Sc. Jur. 529. S. C. 9 Macph. H. L. 130: 43 Sc. Jur. 432.

the outside of the foundation of the walls underground. In measuring from the offices, those which were situated to the north of the road, namely, the pond and the dovecot intersecting the estate, ought to have been included as well as those situated to the south of the road.

The *Lord Advocate* (Young), and *Dean of Faculty* (Gordon), for the respondents, Russel and Son.—The Court below ought not to have included the court yard beside the mansion house as part of the mansion house. The court yard ought not to have been included as part of the stables or offices. The garden ought to have been held to comprehend only what was within the garden wall.

Lord Chancellor Hatherley.—My Lords, in this case, which is one in some respects of a singular character, depending on the construction of the exact terms contained in the instrument by which this mutual interest was created for the purpose of working certain valuable mines, I think the meaning of that instrument comes out plainly, although it is probable enough, that at the time of the framing of the instrument all the exact consequences of the phraseology that is there used were not present to the minds of either side. That is extremely possible, because the circumstances under which they entered into the arrangement were such as did not convey to the minds of those who were then entering into the agreement an exact conception of the characters of the property with which they were dealing. On the one hand, if it were a simple mining lease of an ordinary description, the person who was granting the lease of the right to work the minerals for a certain royalty would be usually desirous of taking care that as great a portion as possible of those minerals shall be worked in order that the royalty might be increased. It so turned out, however, that this mine, which at first was supposed to be merely coal, as if all the seams were simply carboniferous, has turned out to be as valuable as if all the seams were to be metalliferous, and not simply consisting of coal. In consequence of that, it has become of extreme importance to the person reserving certain portions of the land demised with reference to his working, to make those portions as large as possible, and for the other side, of course, to work in the opposite direction.

Now we are spared all controversy as to the construction of the lease, and as to the effect of the reservation: that is settled between the parties, and it is agreed, that everything which is not to be worked by the one proprietor is to be worked by the other proprietor of the mine in question, and all that we have to do is to see, under the terms of this lease, what portions are reserved as portions which are not to be worked by those who have the lease of the mine. We find the clauses which are of any importance are as follows: "The tenants shall not erect engines nor sink pits, nor conduct or carry on any operation of any description on the surface of the ground, nearer than 300 yards in any direction from Torbanehill House, nor nearer to the offices attached to the said mansion house than 100 yards, nor nearer to the said offices or garden than 30 yards, nor nearer to the steadings on the estate than 20 yards, without the consent in writing of the proprietor." I think I need only read a very little further, and that will be all that will be necessary to be read out of the lease. "And no carts or carriages shall be allowed to pass through the park lying on the south side of the said mansion house, nearer than 300 yards from the said mansion house, with power, however, to the said tenants to use the straight road crossing the estate passing on the north side of Torbanehill House and office, without the consent of the proprietor first asked."

Now, the state of things is this: As regards the property to which we are to apply the language of the lease, the house is a house, as to the size of which there is only one question, (and I think it can hardly be called a question,) viz. whether or not the kitchen yard or kitchen court, as it is termed in Scotland, which has a coal cellar, a boiler, and a privy connected with it, and which does not of itself form a very large space—whether or not that is a portion of the house. Although it is true that we are not to construe this instrument, with reference to the prohibitory line, exactly as if we were construing an instrument for the conveyance of the property, because then the house and offices *per se* would pass, there being in this case a difference made between house and offices, in certain matters, yet still, I apprehend, that as regards this kitchen court and the buildings immediately around the kitchen court, they are so intimately connected with the house itself as to make it impossible not to say that that is part of the house.

There is only one other matter regarding the house which has arisen in controversy in this case, and that is a matter which I think may be disposed of very readily. It is this, that the house has a foundation spreading itself somewhat more broadly (one foot three inches in one place) han the visible wall of the house where the wall appears to enter the ground. In most instances, where a strong foundation is desired, the wall does not go perpendicularly into the ground, but spreads out in order to have a wider base or footing to rest upon, and that is called by the technical name in Scotland (it probably has one in England, though I am not aware what it may be) of the scarcement of the house. And one question which has been raised is this, whether or not this scarcement is to be considered as "the house" from which in respect of the surface workings, 300 yards is to be measured. And here the first point occurs in the expression contained in the lease as to the underground working, upon which the criticism made by the Lord Advocate must be taken to be, to a certain degree, correct. It is not very accurately expressed when it is

said, that the working shall not be anywhere nearer underground than 100 yards, because if you take that to mean exactly what those words literally express, it would seem to be enough, if you do not go within 100 yards, whether that 100 yards is measured vertically or whether it is measured upon a horizontal line. But the Lord Advocate conceded at once, that that would not be a sound interpretation of the instrument. Of course the witness could not speak as to the construction of the lease, and it has not been contended by anybody competent to construe the lease, that, regard being had to the subject matter, the restriction of 100 yards of distance would allow you to go immediately under the house, so long as you did not go within 100 yards of the surface. The 300 yards' distance upon the surface and the 100 yards underground, must be taken to be measurements made in the same direction, that is to say, horizontally from the house itself, as if a line were dropped vertically from the house. The question, therefore, is, whether that line should be dropped vertically along the side of the house, that is to say, a plumb line ranging along the side of the house and then continuing downwards upon the one hand, and then a horizontal line carried out to a distance of 100 yards upon the surface, and then another plumb line dropped down in order to shew where the 100 yards were to terminate. The question was, whether it was to fall from the external wall of the house at the surface of the ground, or whether the plumb line should be dropped down at the scarcement where it would be sometimes one foot three inches from the house, and then 100 yards measured from that. It appears, that the coal is so valuable that every small portion of it, measured one way or the other, is of importance.

Now I apprehend it is impossible to say, especially regard being had to this subject matter with which we are dealing, viz. the underground working, the limitation to the approach of which is of course directed entirely to the safety of the buildings, and there being here no question of the amenity of the house, that the simple surface dealing would be all that would be requisite for the parties interested; it must, I apprehend, be taken, that you must not go nearer than a given distance within any portion of the solid brick building of the house. And when it is said in this contention, that there is great inconvenience in digging up the foundation, in order to ascertain whether or not you are starting at a proper distance from the scarcement, I apprehend, that the answer to that is, that it would tend to most extreme uncertainty in the construction of this lease if it was to be dependent upon the question of whether or not the scarcement was or was not laid bare upon one part, and was or was not laid bare in another part, and that the distance was to be measured according to the changeable view of the proprietors in that respect, one of whom might like to have his foundations open, and the other of whom might like to have the foundation covered up in this place. That would be a source of continual mistake and error in the arrangement of the measurements. The only simple course is to say, that the house means the house; and can anybody say, that in any proper sense connected with this subject matter with which we are dealing, the foundations of the house, the part of all others which you would think the parties would look to, would be the part which is not to be looked to for this purpose? If it was a question of view, the foundation would not be of the slightest consequence to anybody, and therefore the measurement would be reasonably and properly made from that part of the house which was likely to be incommoded. But here you find that the whole must be taken together, and that you cannot give one measurement for the surface operations, and another measurement for the underground operations, more especially as part of the surface operations consist of the making pits, and those pits lead you at once to the underground operations, and therefore the surface and the underground operations appear to me to be in a certain sense connected. Therefore, giving the same sense to the word "house" in both cases, I apprehend, that there cannot be the slightest doubt, that the foundation of the house is a part of the house which is to be protected, and there can be no difficulty in ascertaining the proper distance from that, because by boring in different places you could ascertain what the line of the scarcement was.

Now these observations deal with the whole question as to the meaning of the word "house." Then comes the much more important question as to the word "garden." We have to take this lease and to interpret word by word every part as to which a controversy has arisen, and the next controversy is as to the word "garden." The mining is not to go within so many yards, 30 yards, of the garden. Now there happened to be connected with this house at the time of the lease a place which might be called the garden proper, connected with which were what were called the slips. The garden proper was a place surrounded with walls as other gardens are, and upon the other side of the wall in certain parts of it were what were called slips, which appear to be of a considerable length also, I think 20 or 30 feet in width, and which slips were thus constructed according to the evidence. There is some evidence, not very strong evidence, I think, of fruit trees planted against the wall; there was a border which some of the witnesses spoke of, but the only evidence about which border is, that it is dug deeper than a plough would penetrate, and that it had been manured. There were fruit trees planted, (standard trees I think is the expression,) and there was a small path which one of the witnesses mentioned between the border and the belt of trees, some of which might be ornamental trees, such as laburnums and others, and some were forest trees. The slip might be divided into this border and path, and then came the trees and then came the hedge.

Now, it was said, that all this was to be taken into the garden, and to be considered as garden, and that the plan, said to be devised in Scotland by a gentleman of the name of Nicol, was not an uncommon plan of having the garden constructed so that the wall should not be built upon the extreme edge of your garden, but that you should leave a space or slip of this description, and that you should put your wall so that you could train your trees over the wall, or plant fruit trees against the wall, on both sides, so as to get the double use of the wall, as you see sometimes a wall planted in the middle of a garden, and then to make it somewhat ornamental with flowers, and a gravel walk, and then to protect the external part against the wind with trees, and to plant a hedge to prevent cattle entering into this enclosure. Now it is very true that this might be a garden which was so constructed, but really it appears to me, that what we have to decide here is, what was the thing which was called the garden at the time when the lease was made. Now one of the learned Judges in the Court below said, that he should be inclined to say, that he would carry the garden along the gravel walk, and not further, and treat the rest merely as a shrubbery to protect the garden. There might, however, be difficulties as to this part of the case if we were not very materially assisted by the evidence in the Court below. You have the most important witness examined that you could have, a person of the name of John Bryce, who was the gardener living at this very place at the very time when this transaction took place.

Now he says: "I was not there when Mr. Gillespie came to it. I do not remember when he came. I was also with him for a while as gardener, coming and going," so that he was not regularly there at that time. Then he says: "I know the garden very well. There was a gardener's house there. When I was first there it was not in good order. Outside the garden wall there was a plantation and a border and there were apple trees on the outside of the wall." This is a person called by the pursuer. Then he is crossexamined on the part of the defender, and what he says is this: "I was with Mr. Gillespie. I sometimes worked in the garden when I was with him. I never pruned trees in Mr. Gillespie's time. I pruned trees in Sir Richard Honeyman's time. I did so both inside the garden wall and outside of it. There was a border outside the garden wall and a narrow walk four feet broad. I never planted anything in that border except some greens for seed. I did that once. I never put anything in it." That is a statement of a person who was employed about the garden, and about this slip, and he was called to prove the case of the slip being a part of the garden, and that is the most he says for it. The most he did there was to put in some greens for seed. Another witness is James Steele, and he says: "I was for about five years in the employment of Mr. Gillespie at Torbanehill, and I knew all about the place." Then he goes on to describe it, and he says: "The slip is not a part of the garden. He is called on the part of the lessee, and then he is crossexamined, and he is asked, (it is given as a question and answer,) "What was that strip of ground round the outside of the wall generally called while you were there? *A.* Mr. and Mrs. Gillespie called it the orchard, when they spoke of it. I understood by that the ground outside the wall within the hedge. I had charge of the pigeons when I was there; there was a pretty good stock of them at one time. I fed them occasionally." That is about the pigeons. Then the next witness is John Orr; his evidence is exactly the same; he says, "I was employed at Torbanehill at one time. I was sometimes in the garden, and I did what was required about the place. I went there about January 1846, and I was there about a year. The kitchen garden was north from the house." Did you grow anything outside the garden wall? *A.* I believe there were some carrots grown outside the wall, near the house to the south. They were outside the garden on the south side of the road near the house; there was nothing but trees and grass outside the garden wall. There was no gardener's house in my time; it had been taken away. I don't recollect whether there were any trees growing on the outside of the wall. *Q.* Was there any part about the place called an orchard? *A.* Round the outside of the garden was called the orchard at that time; that was the name it got. I don't recollect of there being fruit trees in it. It was not like an orchard."

So that he does not seem to me to say, whether it was a garden or an orchard. The whole place seems to have been in a state of the greatest confusion and wildness, and some of the witnesses say, that inside the garden was just as bad as the slip outside. But I do not think much of the state of disorder of the slip; probably it was in the same state of disorder as the garden, but the question we have to ascertain is this—Was this piece of land which was outside the wall a part of the garden or not? I think we cannot rely upon the evidence of the witnesses who tell you, that very often gardens are constructed upon the principle which has been described. What we have to arrive at is, what did the person who lived there at that time call it? And we find by a witness who lived there in 1841, that it had got the name of "the orchard" in his time. The witness who was living there at the time of the lease being made tells you it was called an orchard, and that being so I apprehend, that if it was called an orchard it was not what the parties meant when they spoke of a "garden" in the lease: and although there seems to have been some doubt and difficulty on this part of the case, I apprehend, that when we come to look at the evidence of the witnesses we do not find ourselves in the difficulty that we should otherwise have been placed in.

The next thing in the lease that we have to construe is, the word "offices." The workings

are not to go within a certain distance, thirty yards, of the offices. But I apprehend that, looking at the external state of things, and comparing that with all the other things we find in the lease, we shall find no difficulty in construing that word. Of course it may have a variety of meanings, but the expression is offices attached to the house, and when it says "offices attached to the house," I take it that it is not meant by the word "attached," surrounded by a wall which encloses them. I do not take that to be the meaning, especially because the lease speaks in a subsequent part of it of reserving a right of way for persons to pass along a road which goes to the north of the house and the offices. I take it, that the "offices" consisted of those offices called the stables, on the north side of which the road does pass, as well as to the north side of the house. But then, if those were the offices, did they include the pigeon house which is situated a considerable distance from that block of building which is on the south side of the road? Now, in the first place, the term "the offices" applies much more to the body of buildings than to separate and detached offices, the expression not being, that the workings shall not go within the offices or any of them, or any offices attached to the house, but being "the offices." And when you find this corroborated by the expression, "the road passing to the north of the house and the offices," I think we are justified in saying, that the word "offices" used all through this lease, means that building which constitutes the stables, which were on the north side of the road. It would therefore exclude the pigeon house. Both in Scotland and everywhere else, the pigeons are kept for the sake of the house, and are attached to the house, but the question under this lease is, whether that is one of the things which the parties were talking of when they were talking of the "house and the offices," whether they included this pigeon house which was situated at a considerable distance from the block of offices, and on the opposite side of the road from that upon which the house and offices were situated. I think, therefore, the pigeon house cannot be taken to be included under the word "offices."

Then the remaining question is, with regard to the stable yard, the yard attached to the stable. Now, as regards the small yard which was alongside of the house, I cannot think that any reasonable doubt exists with regard to that, for the reason I have already given. The question with respect to the stable yard appears to be a very different question from the question with respect to the offices. The offices and garden are one thing, and the stable yard is another. The offices and yard may well be protected, as I apprehend your Lordships will be of opinion they should be protected, to the extent to which they are surrounded or rather enclosed. There is a parallelogram lying between the buildings and the yard, but there might be a line drawn from the end of the building, and then there is a cross piece, and then there is a return wall, the return wall not being quite as long as the first portion of the building. You might draw a diagonal line, and then say, that all that is enclosed by that line might reasonably be said to include the offices proper, which have got the convenience of a yard. The yard is surrounded by a wall, as to which there is nothing to lead us to believe, that it was very solid. It was in the first instance a wall coped with turf, which gives an idea of what the character of the wall was. It was a solid piece of masonry, and one upon which some pains had been expended, but it was first coped with turf, and then afterwards, probably on their finding the weather interfering with it, they added a coping of stone. But it seems to me, that it was a yard used and employed for the convenience of the offices, though what were the exact things done there we are not told. Nothing is told us of the purposes to which this yard was put. But the question with reference to a lease of this description, whether it was thought proper to reserve the distance of thirty yards in addition to the offices, become a serious question; and I apprehend, that we are not justified in saying, that under the term "offices" the yard is included. Steadings are mentioned, but they would be buildings; the steading of a farm would include pretty much what in English we call the homestead; they would mean the enclosure of the farm yard. I think, if the framers of the lease intended to include this yard, they ought to have expressed it more clearly, and not having expressed it clearly, I think we must take it, that this yard, which is of very considerable size, with a wall built round it, would not be considered as requiring anything like the same amount of protection, that a building of a more solid description and roofed in would require.

I think, therefore, upon the whole, that this case should be remitted to the Court below, with a declaration which will require to be put into a distinct shape. My noble and learned friend will read presently the exact form in which the declaration should be put, but the substance of it amounts to this, that the slip round the garden will be held to be excluded, and that the term "house" will be held to include both the small kitchen court and the scarcement. The term "offices" will be held to include the whole of the stables, constituting the offices proper and the office yard. And it will be held, that the term "offices" does not include the dovecot and the pond. I thought at one time, that it probably would have included the pond, but I think it is quite clear, that it does not include the pond. And that declaration being made, the only remaining question would be as to the question of expenses of the suit. And probably your Lordships will be of opinion with the Court below, that neither party having been entirely successful, it is not unreasonable, that each party should bear his own expenses.

Lord Chelmsford.—My Lords, I agree with my noble and learned friend upon all the points upon which he has expressed his opinion.

The first question to be considered is, whether in calculating the distance of the underground workings, the measurement is to be from the foundation or from the visible line of the wall of the mansion house. Now the questions as to the proper limit of the surface operations, and of those underground, are founded upon different considerations. Aboveground the object of restricting the works within a distance from the mansion house is to protect the inhabitants of the house from any annoyance, and to preserve its amenities. With regard to the underground workings the object of the restriction is to prevent injury to the house; therefore the words "Torbanehill House" with regard to the surface operations, and the words "the mansion house" with respect to the underground works, may probably be intended by the parties to bear a different construction. Now I agree with what was said in the course of the argument, that it is probable, that the parties, in preparing this clause, never adverted to the possibility of there being a distinction between the line of the visible wall of the mansion house and the line of the foundation. And, therefore, there is nothing in the intention of the parties from which we can draw a proper construction. But then they use the terms "mansion house," and there being a difference between the parties as to the meaning of that term, the Court is called upon to put a construction upon those words.

Now there can be no doubt whatever, that "mansion house" consists of the foundation and the superstructure. And therefore, it being of course most important with regard to the underground workings that they should not be brought so near to the foundation, as well as to the superstructure of the house, as to endanger the house altogether, there can be no doubt whatever, that in construing those words the Court must come to the conclusion, that the foundation being a part, and a most important part, of the house, the line of measurement is to be taken from the foundation, and not merely from the superstructure.

It has been said, that it is the practice of mining engineers, in measuring the distance within which works are to be brought to a house, to measure from the visible part of the house the part which is aboveground, and not from the under part. Now I am rather doubtful, whether the question was ever presented to the mind of an engineer in that particular shape—that is, as to whether, where the foundation extends, as in this case, in one part of the house fifteen inches beyond the line of the superstructure, and in another part twelve inches, he ever took into consideration in his measurements whether they were to begin from the line of the house aboveground, or from the foundation. Probably the practice has been invariably to measure from the visible part of the house. But then the mere practice of mining engineers will not at all avail to put a construction upon this clause in the lease. If there had been a well known and generally acknowledged custom that the measurement, where there was a restriction of this kind, was to be taken from the upper part of the house aboveground and not from the foundation, then the word "house" in mining leases would have obtained what is called a secondary or transferred sense, and it would then be understood to apply, when used, (and all parties would so understand it,) to the upper part of the house and not to the foundation. But nothing of that kind appears here; and therefore it is impossible, I apprehend, for your Lordships to come to any other conclusion than that it means the foundation part of the house. And the restriction being against approaching to within a certain distance of the mansion house, the foundation itself must be considered as the part of the house from which the works are to be removed to the distance prescribed. I would just advert to an observation which the Dean of Faculty made, that there being a power here in the lease from time to time to survey the underground works, the engineers on both sides met and took the measurement in the way which is contended for upon the part of the respondents. But supposing, that the foundation was not the proper measurement, and that your Lordships are of opinion, that it was not the proper measurement, their mistake and their acting upon that mistake cannot bind their principals, and therefore it can have no bearing whatever upon the question as to the construction of these words, "the mansion house," as to which I apprehend there can be no doubt under the circumstances, that the construction which my noble and learned friend has put upon it is the proper one in this matter.

Now, I turn to the next question, which is with regard to the garden. With respect to the garden, the evidence upon the subject is, that the garden seems to have been originally laid out upon a system which was introduced by a person of the name of Nicol many years ago, and that system was to have what has been called by my noble and learned friend the "garden proper," that is to say, a walled garden, and then to have an exterior slip surrounded by a hedge, but the whole of it together being the garden upon Mr. Nicol's plan. Now, probably this garden was laid out originally upon this system. It appears in the year 1850 to have been in a rude and rough and uncultivated state, both within the walls and without; and there is no evidence whatever, that a portion of what is contended for as the garden, that is, the slip, had ever been cultivated as a garden. There is proof, that there were some few trifling standard fruit trees, giving it more the character of an orchard than of a garden; but, however, there is this most

important evidence of a witness who lived at Torbanehill in 1846, which is four years before the lease. He states, that at that time there was (I think the expression is) round the outside of the garden wall what "was called an orchard at the time;" that was the name it got, and it appears, that Mr. and Mrs. Gillespie, who were the owners and lessors under the lease of 1850, called this slip an orchard.

Then when the question is, what is meant by the term "garden" in the lease of 1850, the fact, that the lessors had for some time previously called the slip an orchard and not a garden, goes very far indeed in my mind to conclude the question, and to lead us to say, that the slip cannot be considered as a portion of the garden, and that the restriction against working within thirty yards of the garden must be confined to that which has been called the garden proper.

Then the next subject I think is with regard to the offices attached to the mansion house. Now, I agree with my noble and learned friend, that the term "offices" includes the buildings and the space between those buildings, but not the wall and the space outside the buildings. And I come to that conclusion, because I think the object of all these prohibitions as to working within certain distances is to protect the buildings themselves, and therefore, so far as anything immediately connected with the buildings is concerned, I agree, that the restriction would of course apply to the space between the offices. But further than that, I cannot think, that there could have been any intention to protect that space beyond the buildings and that wall, which has been described as a wall of not very great importance, and certainly not likely to have been taken into consideration by the parties in giving protection to the buildings.

Then, as to the dovecot, I cannot consider that as one of the offices attached to the mansion house. It is upon the other side of a road which is described as passing on the north side of Torbanehill House and offices, shewing pretty clearly to my mind, that the offices previously mentioned as attached to the mansion house are upon the south side of that road, the dovecot being upon the north. And that observation, I may observe in passing, applies to the pond, which certainly has not been very strongly insisted upon, but that also is immediately on the north side of that road—therefore, of course, not being one of the offices which appear to be mentioned as being on the south side of the road.

These are all the observations that I have to make upon the different points which have arisen in this case. Certainly one very much regrets, that the parties have not been more clear and accurate in their definition of the points from which the different measurements were to be taken. Probably the experience of this case may lead future parties to mining leases to be rather more particular in defining, strictly and particularly, what are the points from which the measurements are to be taken, and so prevent the necessity of these expensive discussions being resorted to. I agree with my noble and learned friend in thinking there should be the declarator which has been suggested, and which my noble and learned friend (LORD WESTBURY) will more particularly mention. And I agree, that as this may be considered as a sort of drawn battle between the parties, there should be no costs upon either side.

LORD WESTBURY.—My Lords, I have written down in a few words, the points in which we agree with the interlocutor of the 12th of June 1868, and the points upon which we differ from it. I will read these, and I will then take the liberty of reading to your Lordships the interlocutor as proposed to be altered; and probably my noble and learned friend on the woolsack will move, that the interlocutor so altered be substituted for the original one. We differ from the Court of Session in this, that the hundred yards are to be measured from the outside of the foundation of the wall, which is underground, and not from the external wall of the house as seen above the surface of the ground. That will be the first alteration. Then we agree with the Court below, in considering, that the kitchen court and the offices contained therein, are to be deemed as part of the mansion house, but we insert in the interlocutor words to direct, that the measurements shall be made from the foundation of the walls of the kitchen court, and not from the walls as seen aboveground; because you will find, that there are projecting foundations, both for the kitchen court and the offices, as well as for the mansion house. Then we agree with the Court below in holding, that the offices intended by the lease are to be regarded as those buildings which are situated to the south of a road running from east to west, and intersecting the estate. This will have the effect of excluding the dovecot, which is the only thing that I part with with some regret. But I think it is indisputable, looking to the word "offices," that it has a different interpretation in one part of the lease, where the word "offices" is put in contrast with the dovecot. I do not think the dovecot can properly be included within the wording. If the word "offices" in this part of the interlocutor means the buildings exclusive of the dovecot, I think the interlocutor of the Court below is correct, with the exception, that here again the measurement must be from the foundation of the walls of the offices, for they too are shewn to have a projecting foundation, extending to about 4½ inches beyond the limits or extent of the upper walls. Then I think it would be desirable further, in the hope of preventing future litigation, not to leave that exclusion to implication, but to add words declaring, that you do not include the rest of the yard. The interlocutor of the Court below gives the parties appealing "the stable court attached

thereto;" but I believe it to be your view, that it should not include the rest of the yard, and I have put that in the exclusion to be submitted to you in words, and the exclusion will also in words sever the pond and the dovecot. The same alteration with regard to the foundation is to be applied to the walls of the stable, for they too appear to have a projecting foundation.

Then the result of the whole will be, if your Lordships agree with these suggestions, that the interlocutor as altered, to be adopted by this House, will run in these words—"Find, that the minerals reserved to the proprietor of Torbanehill by the lease of 30th March and 1st April 1850 are—(1.) The minerals under and within 100 yards of the mansion house, measuring from the outside of the foundations of the walls underground, and including within the foundation of the walls of the mansion house the foundation of the walls of the kitchen court, containing small offices, partly roofed and partly unroofed; (2.) The minerals under and within thirty yards of the offices of Torbanehill situated to the south of a road running from east to west and intersecting the estate, measuring from the outside of the foundation of the buildings underground, but including in the said offices the stable court attached thereto, and the triangular piece of land and buildings therein included within the return wall at the north-east corner of the said stables, but not including the rest of the yard, or the pond, or the dovecot." Then the third declaration in the interlocutor stands unaltered; that relates to the garden, and excluded the orchard. The fourth will be altered in this way: "4. The minerals under and within twenty yards of the steadings on the said estate measuring from the outside of the foundations of the walls of the buildings in so far as the ground within the said measurement is within the bounds of the defender's estate of Torbanehill." If your Lordships adopt this declaration, the effect of it will be to alter the interlocutor, and substitute for it this amended interlocutor, and to remit the cause to the Court below. In this case I heartily concur with my noble and learned friends, that there should be no costs given on either side.

LORD COLONSAY.—My Lords, I have no difficulty about some parts of the case which my noble and learned friends have discussed, more especially about the dovecot or the pond. As they have put it very clearly, the offices referred to in the lease are those upon the south side of the road from the mansion house.

But there are two questions which are of considerable importance, which were not so clear. One was with respect to what is to be regarded as the garden. On that question I think there was a difference of opinion in the Court below; but my own view of the matter is, that the conclusion arrived at by the Court below was the right conclusion. Seeing that the suggestion which Lord Ardmillan made, which I should have been inclined to concur in, was declined by both parties, and that the Court was forced to a decision as between the contention of the one party and the contention of the other, I think there can be no doubt that the garden must be regarded as the part within the walls. I think it is quite an allowable construction, probably that the immediate border outside the walls and the paths might be held to be adjuncts of the garden, but I think it impossible to comprehend the plantation beyond that as part of the garden.

Then we come to the question as to the foundations. That, I admit, is a question on which I have felt some difficulty in this case. I concur with my noble and learned friends who have spoken, that if we are confined to the construction of the document itself, placed nakedly before us, we must regard the measurement as a measurement to be made from the most projecting part of the house. But the difficulty I felt as to this part of the case was this: I was not so clear as my noble and learned friends were as to the application of the rule in this case. I was not certain that that was not pressed a little too strongly, inasmuch as this being a matter more or less of science, namely, the fixing of a limit to these mining operations, and that being done by clauses drawn by professional men in that line, not lawyers merely, but engineers, and for a particular purpose, it occurred to me that their mode of doing it, and the principle upon which the limit was drawn, might be reasonably inquired into; and if it did appear to be the general rule, practice, usage, and custom that a large range was taken with a view to secure the stability of the buildings, whatever might be that variation between the walls aboveground and the walls below, that would be a principle which might be understood to be the meaning of this contract or lease. But I am not certain that we can adopt that in this case, for the reason, that I do not think there is any proper allegation set forth upon the record here, either in fact or in law, that such is the mode in which these lines are drawn, contrary to what would be the ordinary and common reading, and perhaps the grammatical reading of the instrument itself. Whether the evidence which is before us is comprehensive enough to establish the practice may be doubted. And whether or not more evidence might be let in is a matter which I think we cannot inquire into. We have not before us that allegation and the plea on which it is rested, as a reason for overruling what otherwise might be the construction of the instrument. It is on that ground that I have arrived at the conclusion suggested as to what the interlocutor on this part of the case should be. If there had been a proper statement on the record, and a larger amount of evidence as to the general custom and the purposes for which such clauses are introduced, and the reason why that latitude is taken, I am not prepared to commit myself as to the conclusion at which I

might have arrived. But as this case presents itself to us, I concur in the judgment suggested.

Then as to the stable court enclosed by a wall round the stables, it was very natural to enclose that piece of ground. It is detached in a manner different from everything else, but I hardly think it is within the range of the reservation in this case, and I therefore concur in the judgment proposed in that respect also.

Interlocutor varied, and cause remitted.

Appellants' Agents, Morton, Whitehead, and Greig, W.S.; Connell and Hope, Westminster. —*Respondents' Agents,* Burn, and Gloag, W.S.; Walker and Balfour, Westminster.

JULY 28, 1871.

SIR JOHN STEWART RICHARDSON of Pitfour, Baronet, *Appellant,* v. MRS. ISABELLA RATTRAY or FLEMING of Inchyra, and Husband, *Respondents.*

Salmon fishings—Boundary—Excambion of lands—Possession—*In* 1745, *by contract of excambion, a meadow abutting on the river Tay for* 270 *yards, was taken from the lands of I., and added to the lands of C. Nothing was said as to the salmon fishings* ex adverso *of the meadow. For the last* 25 *years the owner of I. had fished* ex adverso *of the meadow, and the owner of C. had never fished there. In a declarator by the proprietor of C., concluding that he was entitled to fish there, it appeared, that both proprietors had a habile title to salmon fishings* ex adverso *of their respective lands of C. and I., as these were before the excambion.*

HELD (affirming judgment), *That the owner of I. was rightly assoilzied, inasmuch as the owner of C. had not proved possession for* 40 *years of such fishings as were applicable to the lands of C.*[1]

This was an appeal from judgments of the Second Division. The appellant, Sir John Richardson, raised actions of declarator to have it declared, that Mrs. Fleming of Inchyra had no right to fish for salmon in the river Tay opposite to a certain part of his lands of Cairnie. In the course of the pleadings it appeared, that in 1745 there was a contract of excambion between Sir John's predecessor of Pitfour and the proprietors of Inchyra, and the result of the exchange was, that a small piece of land adjoining the Tay was given to Pitfour. This piece of land was called Pow Meadow, and abutted for about 270 yards on the river. Nothing was said about the salmon fishings opposite to Pow Meadow. The proprietors of Inchyra had continued to fish as before, for a distance of 86 yards opposite Pow Meadow, though it now formed part of Cairnie and Pitfour. Evidence was given of the state of possession for 40 years and upwards. And it appeared, that the Inchyra fishermen had fished for the last 25 years the 86 yards before mentioned, and the Pitfour fishermen had not fished there. The Court of Session held, that no title to the fishing in the disputed place had been shewn by the appellant, who thereupon appealed.

The following interlocutors and judgments were delivered subsequently to the report in 39 Sc. Jur. 295.

"*29th January* 1868.—Finds, *1st,* That the lands of Cairnie, which form a portion of the estate of Pitfour, the property of the pursuer, Sir John S. Richardson, and the lands and barony of Inchyra, which are the property of the defender, Mrs. Fleming, and in which the parties respectively are infeft under the titles set forth on their behalf on the record, lie adjacent on the northern bank or shore of the river Tay, and, that the line of the march between the said lands of the said pursuer and of the defenders, until the same reaches the said northern bank or foreshore of the river, is that ditch or small watercourse which is referred to in the 5th article of the condescendence for the pursuers, and in the 8th statement of facts for the defenders: *2d,* That under the titles referred to in the record, and which are produced in process on the part of the pursuer, Sir John S. Richardson, he has right to and is infeft, *inter alia,* in the said lands of Cairnie, with the salmon fishings and other fishings in the water of Tay: *3d,* That under the titles referred to and produced on the part of the defenders, they have right to and are infeft, *inter alia,* in certain parts of the town and lands of Inchyra, 'together with the just and equal half of the salmon fishings and other fishings of the said lands of Inchyra:' *4th,* That the other

[1] See previous report 39 Sc. Jur. 295. S. C. 43 Sc. Jur. 448.