What is due to the company is that only which is in fact recoverable by the company. The question is therefore, has the liquidator, standing in the place of the company, a right to recover from a shareholder to whom the company has given a certificate declaring that the whole amount, save £5, has been paid upon his shares—can the liquidator impeach the memorandum, set aside the articles, reduce the certificate, and recover in the right of the company that which the company could not for one moment, as against a *bona fide* shareholder, be entitled to recover?

I entirely adopt, in a few words what fell from my noble and learned friend sitting opposite me (Lord Cairns) in the case of *Duckworth*, which is reported in the 2d volume of Chancery Appeals, where my noble and learned friend used these words:—"The liquidator represents the creditors only because he represents the company, and through the company the rights of the creditors are to be enforced." Now here the appellant is a *bona fide* holder of shares upon which, no doubt, there was a false statement made by the company of which he had no knowledge, and as to which he was under no obligation to inquire, and therefore he cannot be subjected to liability by having imputed to him a knowledge of the falsehood. Could the company recover against him? If there had never been a winding-up order, the question would not have admitted of a moment's doubt; and the winding-up order does not place the liquidator in a better position against the shareholders than the company were in. I therefore entirely concur in the order which has been proposed by my noble and learned friend.

Lord Colonsay—My Lords, I consider this case to be attended with considerable nicety. It differs from the other cases which were brought before us; and I have come to the same conclusion as my noble and learned friends have come. I am not surprised, however, that there was a difference of opinion upon this case in the Court below. I think some of the Judges in the Court below took an erroneous view of the judgment of this House in the Overend & Gurney case (*Oakes* v. *Turquand*), but the distinction between the two cases has been already pointed out by my noble and learned friend on the Woolsack. We have to deal here with the case of Waterhouse alone. In the Court below two other parties were supposed to be in the same position with him. But they are not appellants here, and therefore we cannot deal with them. We can only deal with the case of Waterhouse; and I think the course to be followed in the case of Waterhouse is just that which my noble and learned friend on the woolsack has suggested—that we should reverse the interlocutors of the Court below, and pronounce in terms almost identical with the first question of the First Division of the Court—Whether the petition of the official liquidator ought to be refused in so far as it prays that the list of contributories should be settled so as to include the name of Waterhouse as a contributory?—I think that the petition ought to be refused in so far as it prays that the name of Waterhouse should be included in the list of contributories.

Interlocutor reversed, and cause remitted to the Court of Session, with instructions to dismiss the petition of the official liquidator in so far as it seeks to include the name of Waterhouse among the contributories.

Agents for Appellant—A. & C. Douglas, W.S., and W. M. Wilkinson, Lincolns Inn Fields.

Agents for Respondent—Henry Buchan, S.S.C., and Williams & James, Lincolns Inn Fields.

Thursday, June 16.

GRAY *v.* TURNBULL.

Property — Servitude — Boundary. Circumstances in which *held* (affirming judgment of Court of Session), on a proof, that the respondent was proprietor of a certain small portion of land adjoining the property of the appellant, and that the latter had not a right of way over it.

This was an appeal from a judgment of the First Division of the Court of Session. Mr Turnbull of Bellwood raised an action of declarator and interdict against Mr Gray, solicitor, Perth. The parties were owners of two adjoining fields near Perth, Mr Gray having purchased his field recently. There was a march or boundary between the fields, and at one end of such boundary there was a gate or opening into Mr Gray's field. He cut down part of the fence which Mr Turnbull had lately re-erected, and drove carts into his field over a corner of Mr Turnbull's field, as he alleged. He thereupon raised the present action, as Mr Gray had declined to enter into a reference of the dispute to some third party. The question thus raised between the parties was, whether an angle of the one owner's field, to an extent not larger than eight square yards, was either part of his neighbour's, or at least whether such neighbour had not a right of servitude of way of it, so as to get into his field with carts. The Lord Ordinary, allowing proof, held that the pursuer was right in his description of the proper boundary. The First Division, with a slight variation of description, also decided in favour of the pursuer. Thereupon the defender Mr Gray appealed.

Sir R. Palmer, Q.C., and Mellish, Q.C., for the appellant, said that though it might appear to their Lordships but a small piece of land that was in dispute, still it was of importance, inasmuch as it was the only access to the appellant's field.

Lord Westbury—Is it impossible to find a mutual friend of these two parties who could take charge of this minute quarrel between them and relieve us?

Lord Chelmsford—I see from the description that the extent of land in dispute is about eight yards square. The expense of finding out whose property it is must be considerable.

The Lord Chancellor—This is the third case within the last two weeks where the value of the property in dispute has no proportion to the expense of the litigation. It would be a very proper case for settling in some way.

Sir R. Palmer said he feared that there was no prospect of such a termination of the dispute. Though the land was of no value to the respondent, it was of much value to the appellant.

The Lord Advocate and Mr Mackay, for the respondent, were not called on.

At advising—

Lord Chelmsford — My Lords, the learned counsel for the appellant have argued the case in his behalf with great force and clearness, and they have brought before your Lordships all the evidence which bears upon this question; but I submit to

your Lordships that they have not succeeded in accomplishing that which it was their duty to do, to satisfy your Lordships that the interlocutors appealed from were wrong. This is a question of fact on which there are the concurring judgments of two Courts and of no less than five Judges; and therefore it seems to me to be absolutely essential on principle to hold the appellant's counsel to the necessity of not merely showing that there may be some doubt whether the conclusion at which the two Courts arrived was a correct one, but to satisfy us convincingly and conclusively that their judgments were wrong. Upon a question of fact an appellate tribunal ought not to be called upon to decide, on a mere balance of evidence, which side preponderates. Different minds will of course draw different conclusions from the same facts, and there is no rule or standard which can be referred to by which the correctness of the decision either way can be tested. If we were upon the present occasion to come to the conclusion that the five Judges who have decided in favour of the respondent were wrong, we should be just as likely to be in error in our conclusions from the facts as they were in deciding the other way. And, therefore, if there is to be an appeal on questions of fact (and I regret that there should be), I think that the principle must be adhered to firmly, that we must call upon the party appealing to show us conclusively that the opinion of the Judges on the question of fact was entirely wrong. Now, I cannot help expressing my regret at this unneighbourly litigation. We are here determining a question as to 8 square feet of ground. This small quantity of ground appears to be a very insignificant matter to the respondent, although it may be of great importance to the appellant whether he should have a convenient or an inconvenient access to and egress from his field. And I must say that the appellant appears to me to have done all that he possibly could to accommodate this matter in a neighbourly spirit, and to prevent the continuance of this expensive litigation. He offered to have the small piece of ground valued, and to pay ten times the amount of the valuation, or to refer the matter to a common friend, I suppose, or to exchange a portion of his land at what is called the bottom of his field, that is on the north side, for this piece of land on the south side. The respondent declined all these offers, and I cannot help thinking that he made use of this question with regard to this miserable piece of ground for the purpose of procuring from the appellant that field which he was disappointed in obtaining from Mrs Hay, because, when he refused the terms of accommodation, he offered at the same time to purchase the field from the appellant for the price which he had paid to Mrs Hay. Under these circumstances I must say I cannot help regretting that I am compelled to decide this question against the appellant. Now, I shall not occupy much of your Lordships' time in stating the grounds on which I have come to the conclusion that the appellant has not established that which he was bound to make good, namely, that the Lord Ordinary and the Court of Session were wrong upon this question. The two fields belonging respectively to the appellant and the respondent before the year 1772 belonged to two brothers of the name of Patrick and Robert Gardiner jointly. In or about that year 1772 they agreed to divide these fields, and the one on the west side, which now belongs to the respondent, was taken by Robert Gardiner; the one on the east side, belonging to the appellant, was taken by Patrick Gardiner. At that time there was a line of separation between these two fields, consisting of a balk or a strip of unploughed grass land, 18 inches or 2 feet in width, running from the north from Broompark, down to Mount Tabor Road upon the south; and at the end of the field which is now the property of the respondent there was a thorn hedge, the extent of which will be a question in the course of the inquiry. It will be necessary, with regard to the course of the balk, also to examine closely which was the particular line of direction in which it went, whether it pursued an undeviating line from north to south, or whether, at a particular part of it, it was deflected a little towards the west. The field belonging to the respondent was purchased by a relation of his, Mr Dickson, and came to him by succession. The field belonging to the appellant was purchased by a person of the name of Gilbert Jackson, and it came to David Jackson. David Jackson in 1855 sold it to James Hay, and the widow of James Hay in 1864 sold it to the appellant. In the year 1814 Gilbert Jackson built Mount Tabor House, and enclosed the house and garden with a beech hedge on the north, west, and south sides. He obtained leave from his tenant Sheppard to take this piece of ground away from the field for the purpose of building his house and laying out the garden; and it is said by Mrs Noble, I think, who was the daughter of Sheppard, the then tenant, that her mother told her that it was agreed at that time—"it was part of the bargain," I think her expression is—that there was to be a passage left as an entrance to the remainder of the field, and accordingly, in enclosing the garden, there was a passage left between the west side of the beech hedge and the balk, and the question between the parties is what was the width of the passage? On the part of the appellant it is said that the passage was of an uniform width of 10 feet from north to south. The respondent says that the passage gradually contracted as it advanced from north to south, and that at the south end, near Mount Tabor Road, the width was only 6 feet 4 inches, or as it is now admitted, 7 feet 2 inches. Now, in order to ascertain the width of this passage, and to settle this dispute between the parties, it is necessary, in the first place, to consider what was the original line of the balk—whether it really proceeded, as is contended for by the respondent, in an undeviating course from north to south, or whether, at a particular part of it, it deflected so as to leave 10 feet the entire width of the passage—it being to be observed that if the balk ran in a straight line from north to south without any deviation, then it would contract this passage at the south end in the way described by almost all the witnesses. Now, it is a circumstance to be remarked that there seems to have been no reason at all why the balk, where originally made, should have deviated at all from the straight line; and it is certainly rather a remarkable coincidence, to say the least of it, that, according to the case of the appellant, the balk should have deflected just at the exact point where this passage, which was made about 50 years afterwards, enters from the field. There seems to have been no reason whatever for a deflection at that point, and it is a remarkable circumstance that it should have been a deflection at that exact point where it would leave a 10 feet width of passage uniformly throughout. On the other hand there is this remark to be made

in favour of the appellant's view, that as he was laying out the passage at the time when he built Mount Tabor House, and inclosed the house and garden with a beech hedge, it was rather to be expected that he should make a sufficient entrance from the Mount Tabor Road and not have left the narrow width of 6 feet 4 inches or 7 feet 2 inches when, supposing the balk had run in the straight line, he might have put his beech hedge back so as to give a uniform width of 10 feet. But, however that may be, as a matter of observation on both sides, it is important to remark this, that, according to the concession of Mr Mellish, there being a terminal stone at the south end of the passage and a terminal stone higher up towards the north, it is admitted that if the line of the balk is produced straight from that stone it will bring it exactly to the point which is contended for on the part of the respondent. Now, with respect to the original line of the balk, I lay no stress whatever on the evidence of those witnesses who assume to speak from their observation of its running in a right line, because the deflection being very small, it might strike the eye of persons not giving particular attention to that consideration, as if it were running in a straight line. Nor do I lay any stress on the evidence of those witnesses who state, not from any actual measurement, but from their own recollection, that the passage was, one says seven feet in width at the south end, another says six, and another four-and-a-half feet. But I do lay some little stress on the evidence of Baxter, who went to Mount Tabor House in 1842, and was there 11½ years, who says that he frequently measured the entrance in consequence of the complaints that were made by the farm servants, and that upon that measurement he found that the entrance was seven feet. But the important fact which I think is proved not only by the witnesses on the part of the respondent, but also on the part of the appellant, is that the passage was not of the uniform width of ten feet throughout, but that it contracted and narrowed towards the south end. Now, if the passage had been of a uniform width of ten feet it would have been amply sufficient to enable the carts to get out of the field and to get into the passage again without any difficulty or obstruction. And yet there are witnesses on both sides who positively state that there was great difficulty in getting out of the passage at the south end. Witnesses called on the part of the appellant, who have driven carts through it, state that the passage was too tight; and George MacLaren, for instance, says that the "passage was tight enough, but we got out of it;" and another witness of the name of Mackie says "it was tight work coming out to the Mount Tabor Road." Now, it is quite clear, as I have already said, that if that evidence is correct, and it is evidence on the part of the appellant, the passage could not have been ten feet wide at Mount Tabor Road; because, if it had been so, there would have been no difficulty in getting out—there would have been no tightness or straightness then. And therefore it seems to me perfectly clear that the evidence of that fact is almost conclusive to show that the passage was not of the width contended for on the part of the appellant. But there is some very important evidence given by a person of the name of M'Laren, who was the tenant of this field; and of course what he said is important evidence. Peter Martin says that he recollects "a conversation with William M'Laren about the fields now belonging to the parties. M'Laren said to me that it was an awkward thing not having a right road to get into his field without going on the ground of another man. He further said, the hedge was planted too near the balk, and did not leave sufficient room to get between the hedge and the balk." Now, here is the statement of a person who was the tenant of the field at the time, who had felt the inconvenience of the narrowness of the exit and entrance to the field, and therefore that evidence appears to me to be conclusive in favour of the respondent's view. I should just observe in the evidence of David Jackson, on which stress was laid by the learned counsel for the appellant, he swears that the beech hedge was planted so as to leave something like ten feet—that it was the same width all the way, but that it was encroached upon—by what? "By shifting the balk," which certainly no other witness has ventured to say was ever shifted; and he says that carts could get in very well without touching the beech hedge. Now, the evidence of a variety of witnesses is this—that the beech hedge had grown in size and had contracted the entrance, the consequence of which was that the carts were driven to the west, and encroached on the thorn hedge, and, according to the evidence of the witnesses, broke down a portion of that thorn hedge. And that brings me to the consideration of the question which was considered a crucial question in this case—namely, What was the extent of the thorn hedge, as it originally existed? Did it extend merely to point C? Or did it go to point D, near where there was a terminal stone? Now, upon that question there is contradictory evidence. On the part of the appellant it is said that at point C there was a large thorn, which, in fact, was the boundary of the thorn hedge on the western side. On the part of the respondent, it is proved by witnesses that beyond the thorn hedge, and in the space between C and D, there were originally thorn plants; that those were live plants that were growing there, but that, in consequence probably of the space being contracted by reason of the growth of the beech hedge on the other side, the carts encroached on the balk and went over those live plants of the thorn hedge and broke them down and destroyed them. And there is evidence that the balk was, in fact, completely destroyed towards the south end by the carts going there. One witness says the balk was broken up. Another that the balk was "hashed" at the south end. Well, that of course would account for the destruction of that portion of the thorn hedge which lay between C and D. But, however that may be, there is contradictory evidence on the subject, evidence upon which it was the province of the Lord Ordinary and the Court of Session to decide; and I think your Lordships will not be disposed to come to the conclusion that, having materials for their judgment, and most important materials in the evidence on the part of the respondent, they have come to such an erroneous conclusion as to satisfy your Lordships that they were in error in the interlocutor which they pronounced. There was a portion of the evidence relied on by Sir Roundell Palmer, which was with regard to a bargain (as it was called) made between Hay, the tenant, and Mr Turnbull, as to the enlargement of that passage at the entrance to the field. It really appears to me that that evidence is rather in favour of the respondent than of the appellant, because Mrs Hay says—'My husband once proposed to build upon the

field. He would have done so if he had been spared. He was going to build a genteel house that he might let or stay in.' Then she is asked —'Did your husband ever tell you that he had spoken to Mr Turnbull about widening the entrance?' She says—'Yes, he was to get 3 feet beyond the thorn, and Mr Turnbull was to get ground for it at the bottom.' Now, I think that shows that the passage was not uniformly 10 feet from one end to the other, but the enlargement of 3 feet was to be made beyond the thorn at what is called the top of the field, and Turnbull was to get ground for it at the bottom; and that is confirmed by what is said by Miss Robina Hay, the daughter. She says—'It was agreed, either at that conversation or at another, that my father was to get 3 feet off Mr Turnbull's park at the entrance, and to give Mr Turnbull 3 feet at the bottom of the field.' Therefore, it is quite clear that the bargain which was proposed to be made was not that there should be 3 feet given all along the passage in order to make it uniformly all along 13 feet, but that there was to be 3 feet given at the top, as one witness says, or at the entrance as the other witness says, that being of course at the part near the Mount Tabor Road. That shows clearly, as it appears to me, that it was felt that it was there that the passage required widening; and it could only require widening if it were not of the width of 10 feet, which would have been amply sufficient for carts to pass. Under all these circumstances it appears to me that if I had had originally to decide this question I should have felt myself compelled to come to the conclusion at which the Lord Ordinary and the Court of Session have arrived. But when I am called upon on an appeal from their decision to decide whether they have gone so completely wrong that we cannot doubt that they took an erroneous view of the whole question, I must say that the appellant has failed altogether in establishing his ground to that extent; and therefore I must submit to your Lordships, with very great regret, that I think your Lordships ought to affirm the interlocutors appealed from, and to dismiss this appeal, with costs.

Lord Westbury—My Lords, I entirely agree both in the judgment proposed and in the reasons which my noble and learned friend has given for it. If you were at liberty, as I could heartily wish you were, to decide this case by the rules which even ordinary good nature, and much more the good feeling and kindness that should prevail between neighbours would dictate, then I should most gladly move your Lordships to give judgment for the appellant in all the particulars. I cannot imagine anything more malignant or more abhorrent from a well constituted mind than the feeling of a desire to withhold something most beneficial to your neighbour, and the retention of which cannot be of any possible benefit to yourself. But, my Lords, I will not dwell upon that, because I am not without hope that, even yet, there may be a motive to better conduct on the part of the respondent. It often happens that where there is a dispute about a claim of right the individual would, if there was no such dispute, act in a different manner. He says to himself, I cannot make any concession until the claim of right is finally disposed of. Now, the claim of right will by your Lordships' judgment be finally disposed of in favour of the respondent, and I cannot but hope and trust that when it is adjudicated in his favour better feelings and sentiments will prevail. My Lords, it is to me a constant subject of much grief that there should be in Scotland the power of litigants coming on the most trifling matters to your Lordships' house. As long as the door of this tribunal is open to litigants from Scotland, even on the most trifling matters, we shall be certain finding one or other party resorting to this House. The result is, that the time of the greatest tribunal in the land is occupied with the most insignificant matters; and further, the expense and misery occasioned are augmented indefinitely by this power of prolonged litigation. Now, what is the duty of the final Court of Appeal upon a question of this nature? It is a simple question of fact, perfectly within the competence and power of the most ordinary tribunal to decide. It has been decided once by the Lord Ordinary without any difficulty. It was decided by the Court of Session, on appeal from the Lord Ordinary, without any difference of opinion. Now, unquestionably, there the matter should have ended, according to the analogy afforded by English tribunals. When a question of fact has once been decided by the verdict of a jury it requires an overwhelming case in proof of error by the jury, or it requires that there shall be shown the existence of some rule of law which has been disregarded, to induce the Court to grant a new trial. Unquestionably I should have pressed upon your Lordships to abide by that rule if it had not been that the case now brought before us has unfortunately been decided not on evidence taken in presence of the Court, but upon the written depositions of witnesses, and it has been the practice in Courts of Equity, where that mode of taking evidence prevails, to allow appeals on matters of fact although the Court below has felt no hesitation in the conclusion to be arrived at on the depositions. But if we open the door to an appeal of this kind, undoubtedly it is an obligation upon the appellant to prove a case that admits of no doubt. He ought to prove most satisfactorily to the Court of Appeal that the Court below was wrong on some material point. Now, I am unable, in the present case, to say that the appellant's argument has caused me to feel any serious doubt as to the correctness of the conclusion of fact arrived at by the Courts below. There has been no error alleged as to the admission or rejection of evidence. There is no mistake shown to have been committed by the Judges as to the effect of the evidence—that is, as to the true construction of the depositions of the witnesses. The only allegation is that the Judges in the Court below have not weighed accurately the evidence on the one side and on the other. Now, it cannot be even stated that the evidence of the appellant greatly preponderates over that of the respondent. The whole purport of the argument has been to balance the scales, and weigh with very nice regard the testimony on the one side and on the other. Neither can it be said that there is any antecedent probability or presumption in favour of the present appellant which the evidence of his adversary has been unable to rebut. In fact, there appears to me to be no presumption whatever, and no antecedent probability whatever, in favour of the appellant. The case, therefore, depends simply on the accurate weighing of the evidence; and that undoubtedly it is not the duty of a Court of Appeal to do, after there have been two decisions of five

judges, who were perfectly unanimous in the conclusion at which they arrived. My Lords, if that be so, I think your Lordships will feel it would be a great benefit to suitors generally if the possibility of bringing up such questions as this before you were taken away. But now, for the satisfaction of the parties, I will add a few words for the purpose of showing my concurrence in the observations which have been made by my noble and learned friend, and also my concurrence in the conclusions arrived at in the Court below. First of all, we will take the probability which results from the admitted fact, that there being two march stones higher up to the north than the stone the position of which is in question, the admission is that if a line drawn between these two stones were produced or extended it would terminate at the point where the respondent contends that the ultimate march stone was in reality placed. I think, that being admitted, there is a strong presumption in favour of the respondent. A second circumstance that influences me very much is this, that it was admitted, in answer to a question of mine, that whether there was or was not a thorn hedge running parallel to the highway between the points C and D, was in reality a crucial test of the present case. Now, on that point, whether there was or was not a thorn hedge, I think the evidence preponderates greatly in favour of the case of the respondent, and that it does prove satisfactorily that there was at one time a thorn hedge running from the point C to the point D in the larger plan. If that be so, that thorn hedge exactly fills up and supplies the base of the triangular piece of land adjudged by the Court below to belong to the respondent. And if there was that hedge, the presumption of necessity must be that it was the boundary of that piece of land, and that the space covered by the hedge was never part of the entrance to the field. The attempt on the part of the appellant has been to deny the existence of a hedge, and to account for the testimony of the witnesses about the thorns by the supposition that clay and dead thorns were put in from time to time to fill up that part of the space. I think that attempt altogether fails. The evidence to my mind is conclusive that there was a thorn hedge between these two points, and the fact of the existence of the thorn hedge leads to the conclusion at which the Court below arrived. There is a remaining point which tends greatly to confirm my opinion, and it is a fact in opposition to the theory of the appellant that the strip of land from the north to the south was of uniform width throughout, and that therefore ten feet at the north side was corresponded to by ten feet on the southern side. That contention and presumption are altogether negatived and repelled by the evidence which is given by a variety of witnesses of the respondent, not directly but indirectly, and therefore more convincingly, in this way, that they admit that the entrance at the south side was tighter and narrower than the entrance at the north side. All that renders it impossible to accept the theory that the width of the strip of land was uniform throughout, and therefore was ten feet at each side. The testimony given also with regard to the destruction of the balk, which corresponds with the testimony as to the destruction of the thorn hedge, also leads to that conclusion. It may be satisfactory to the parties to know therefore, that, after the most anxious examination of the case, and with the strongest possible desire to find out anything to justify the appeal rather than to reject it, we are obliged to come without hesitation to the conclusion that the verdict of the Court below on the question of fact is right, and that this appeal must be rejected; and, I am sorry to say, in conformity with the general rule, must be rejected with costs.

LORD COLONSAY—My Lords, I should not have added anything to what has been stated by my noble and learned friends were it not to explain a matter which the leading counsel for the appellant seemed to consider as of great importance, and which, if it had been called to the attention of the Court below, would probably have materially affected the result of the case. I allude to the mistake which I made in stating that the forming of the grounds of Mount Tabor had been done by a feuar, from Mr Jackson not attending to the fact that it had been done in 1814, and that it appeared that the feuar got no title from Mr Jackson till the property was conveyed in 1855. Mr Jackson himself built the house, formed the garden, and arranged the entrance. The whole of the field behind and the garden and grounds belonged to Mr Jackson; but it does not appear to me that that mistake makes any difference in the conclusion that ought to be come to in this case. If it made any difference in the case, I think it would rather make against the appellant, because at the time of forming the garden, as the ground behind belonged to Mr Jackson, he would have taken care to secure an entrance to himself. If he had been feuing the ground with the view of parting with it, he would naturally, when he was parting permanently with the power of hereafter controlling the entrance in any way, be more cautious and careful to secure a full and wide entrance than he would be if, by reason of the ground still continuing to belong to himself, he would be able hereafter to correct any error that had been made in that respect. Therefore I think any argument that could be deduced from the fact of describing it as a feu, instead of the grounds being formed by Mr Jackson himself, would rather tell in favour of the other party. And now, having made that observation in this case, I must concur in what has been said by both my noble and learned friends in the expression of regret that questions of this kind should be brought up here on appeal. It is much to be regretted that this case has found its way here and occupied so much of your Lordships' time. I felt in the Court below, and I believe all my brethren felt, great reluctance in coming to a conclusion against the appellant in this case. We considered that it was a hard case for him, and an unneighbourly proceeding on the part of his opponent. And I ventured at the conclusion of the deliverance of the judgment of the Court to express a hope that the parties would put the matter right. I did think that (knowing something of the parties from my former connection with the district) a suggestion of that kind might be beneficial, and might perhaps influence both parties; but I regret to find that has not been the effect. I hope that what your Lordships have added to that recommendation may still have the effect of leading the respondent in this case to give some accommodation to his neighbour in regard to the beneficial and comfortable enjoyment of his property.

LORD-ADVOCATE—My Lords, before the question is put, I trust you will not consider that I am out of order, or transgressing any rule of the House,

if, in discharging what I believe to be a duty to the respondent, I make reference to certain remarks which have been made with regard to his conduct. I take the liberty of calling the attention of the House to an offer made on his part—

LORD CHELMSFORD—I think we had better not hear anything upon that subject.

LORD ADVOCATE—Only this, my Lords. If I am in order——

LORD CHELMSFORD—You doubt whether you are in order or not. I have no doubt that you are out of order.

LORD ADVOCATE—I certainly should not press any view of mine against the expressed wish of the House; but what occurred to me was that——

LORD CHELMSFORD—We cannot hear you.

Interlocutors appealed from affirmed, and appeal dismissed, with costs.

Agents for Appellants—Messrs T. & R. B. Ranken, W.S., and Messrs Loch & Maclaurin, Westminster.

Agents for Respondents — Messrs Lindsay & Howe, W.S., and Messrs Martin & Leslie, Westminster.

Thursday, June 16.

KEITH *v.* REID.

(*Ante*, vol. v, p. 495.)

Lease — Shop — Auction — Express Prohibition — Inversion of Possession. Held (reversing judgment of Court of Session) that where an lease of any shop has been granted without a express prohibition against sales by auction being held on the premises, it is not an inversion of possession, and consequently not illegal, to carry on such sales without the consent of the proprietor.

This was an appeal from a judgment of the Second Division. The case originally came before the Court of Session on an advocation from the Sheriff-court of Aberdeenshire, of a process of interdict brought in that court by the advocator against the respondent. The advocator was proprietrix of a shop in Union Street, Aberdeen, which was let up to the 1st June 1863 to William Fraser, merchant in Aberdeen, as a wine and grocery shop, under a lease which excluded assignees and sub-tenants, but contained no special conditions with reference to the business to be carried on in the premises. In October 1862 the respondent applied to the advocator for a lease of this shop as Fraser's successor, and obtained a lease for five years from the date of the expiry of Fraser's possession and the lease so granted contained an express prohibition against the use of the shop as an auction room. Subsequent to the granting of this lease, the respondent made an arrangement with Fraser by which he obtained immediate entry to the subjects, taking over the remainder of Fraser's lease, and obtaining the verbal consent of the advocator to this arrangement. The question now was, whether, during the period which intervened before the expiry of Fraser's lease, the respondent was entitled to sell goods by auction in the shop in question? It was, on the one hand, maintained by the respondent (appellant) that there was no restriction upon his use of the subjects during the period in question, either at common law or in virtue of any arrangement to that effect. It was, on the other hand, maintained by the advocator (respondent) that the use of the subjects as an auction room was (1) illegal, as an inversion of the use for which the subjects were let to Fraser; and (2) contrary to an express condition alleged to have been made verbally by the advocator in consenting to the subsetting of the shop by Fraser.

The Sheriff-Substitute granted interim interdict; but, on a record having been made up and proof led, he recalled that interdict and refused the advocator's petition. The Sheriff adhered, and the advocator now brought the present advocation, in which it was agreed to cancel the proof taken in the Inferior Court, and have a new proof before the Lord Ordinary. On advising that proof the Lord Ordinary adhered to the judgment of the Sheriff.

On a reclaiming note the Second Division of the Court held that the use as an auction room of subjects let as an ordinary shop was an inversion of the possession, and was illegal without the consent of the proprietor; that there was no reliable evidence of such consent; and, that being so, it was unnecessary to inquire whether there had been any express prohibition introduced into the consent given by the landlord to the subset by Fraser.

Mr Keith appealed.

SIR R. PALMER, Q.C., and J. T. ANDERSON for him.

The LORD ADVOCATE and PEARSON, Q.C,, in answer.

At advising—

The LORD CHANCELLOR made some critical observations upon the lengthy and costly proceedings in the case, which have lasted for seven years. First (he said), here was the petition for interdict presented to the Sheriff, upon which, after some delay, Mr Keith's estates were sequestrated. The Sheriff found that there was no proof of a prohibition against sales by auction in the said shop. This judgment was then brought under the review of the principal Sheriff, who affirmed it. Then there was an advocation to the Court of Session by Miss Reid, and more time spent in a variety of proceedings before both the Inner and the Outer House. Then a new proof was led, and a judgment pronounced on it by the Lord Ordinary, who found that there was no implied prohibition against sales by auction, and that Margaret Reid had failed to prove that she had imposed any such condition upon the appellant when she gave her consent to the lease, and decided the case in favour of Mr Keith. This was reclaimed by Miss Reid to the Second Division, who reversed on the point of law, holding that the use of the premises for sales by auction was an inversion of the proper use of the premises, and, therefore, that Miss Reid was entitled to interdict, and now the case has come before this House on an appeal against that judgment. He (the Lord Chancellor) could find no evidence of a prohibition of sales by auction, and the fact that, when it was first proposed, Miss Reid's agent did not refer Mr Keith to any agreement binding him in the matter, goes far to prove that there was none such. In the absence, therefore, of this, he held it to be law that, without an express prohibition, there was a right existing on the part of Mr Keith to hold this sale, and he therefore advised the House to reverse, with costs.

LORD CHELMSFORD also lamented the length of the litigation, considering that the matter was so