Now, upon the construction and effect of the feu-grants I concur so entirely with the views expressed by Lord Mure and Lord Shand, and also by the Lord Ordinary, that I do not think it necessary to say a word. I think these feu-grants conveyed a right of property to the feuars in Barrwood—a right of common property—and that each of the feuars had a proportional *pro indiviso* right of property in the subject, and having come to that conclusion I am therefore of opinion that the title to sue is gone, and that the pursuers cannot advance another step in what may be called the merits of the case, because their author Sir William Edmonstone and his predecessors are divested of those minerals, and they as lessees have no title to inquire where these minerals may be so long as they are not in the party who granted this lease; and therefore I adopt the view which the Lord Ordinary states in the second branch of his note, where he says that "certain *pro indiviso* rights of property were duly created by the original charters and sasine following theron." And it is no use for the pursuers to maintain that the whole minerals are in the superior's title, subject only to such feu-rights as exist over it, for, says his Lordship — "The pursuers are not under their lease entitled to try whether feu-rights which have been given off have ceased to exist, nor are the defenders, who are in possession of the subject, bound to enter into that question with them. It must be shown in a competent action that the feu-right is extinguished, and Sir William Edmonstone has the only title to raise such an action. He has never raised nor indicated any intention of raising any such action. Nor is it even alleged that any of the original feu-rights have become extinct or have lapsed to the superior. Besides, the lease cannot, it is thought, be read as letting to the pursuers minerals of which the superior was once divested, and which he has not shown by a competent action to have been restored to him." I think that expresses most clearly the necessary result of its being established by the production of the original feu-grants that under them those minerals have passed out of the person of the superior into the persons of the feuars. I therefore do not think it necessary to examine the objections which have been stated to the titles in the progress of any one of those existing feuars, because I consider the pursuers of this action have no title to inquire into them. It does not matter whether the titles of the present defenders are well made up or not, or whether they have been well deduced from the original grantees of the feu-rights. Sir William Edmonstone is by the production of those original feu-grants demonstrated to be divested of the minerals, and that put an end at once to the pursuers' right.

Now, it appears to me that as the objection to the title to sue cannot be disposed of without advancing so far into a consideration of the merits of the case, the defenders are very well entitled to say—"We shall not be satisfied with having this action dismissed upon the ground that there is no title to sue, because the exigencies of the case have led of necessity to a consideration of the merits of the question, and therefore we are entitled to a judgment of absolvitor." I think that is a very well founded contention, and it seems to me to be the view upon which the Lord Ordinary has framed his judgment assoilzieing the defenders, which in common with Lord Mure and Lord Shand I am quite prepared to affirm.

Counsel for Pursuers (Reclaimers)—Lord Advocate (Watson) — Kinnear — Balfour — Keir. Agents—Webster Will, & Ritchie, S.S.C.

Counsel for Defenders (Respondents)—Asher — Pearson — Dickson. Agents — Maconochie, Duncan, & Hare, W.S.

Friday, November 1.

SECOND DIVISION.

[Lord Rutherfurd Clark, Ordinary.

EARL OF DALHOUSIE'S TRUSTEES *v.* EARL OF DALHOUSIE.

(*Vide ante*, June 27, 1876, 3 Rettie 882.)

Entail—Improvement Expenditure on Entailed Estate — What included under.

Lord Dalhousie, the institute in possession of an entailed estate, executed various improvements upon it under a clause in the deed of entail which declared that if he or any heir in possession should at any time lay out money "in enclosing, trenching, planting, or draining, or in erecting farmhouses and offices for the improvement of any of the lands and estates thereby disponed, or in making roads, and building bridges, or in repairing or making additions to the mansion-houses or offices of Brechin Castle or of Panmure," the party so laying out money might constitute as a debt against succeeding heirs of entail three-fourths of the money so expended. *Held*, in an action at his instance (during the dependence of which he died, and his trustees and executors were sisted in his room) brought against the succeeding heir of entail for payment of three-fourths of the money so expended, that under the above clause there fell to be included—(1) cottages for farm-servants; (2) a sum paid to a tenant towards the expense of erecting a new steading, it having been found impossible to carry out an agreement in the lease to repair; but (3) (*rev.* the Lord Ordinary—Rutherfurd Clark) that repairs executed on a thrashing-mill—consisting of a new dam and drain, for laying pipes, a new mill-course, and other apparatus, —were not so comprehended.

Counsel for Defender (Reclaimer)—Lord Advocate (Watson)—Kinnear. Agents—Mackenzie & Kermack, W.S.

Counsel for Pursuers (Respondents)—Dean of Faculty (Fraser)—Rutherfurd. Agents—Gibson, Craig, Dalziel, & Brodies, W.S.
