

lease *eo ipso* void and null, and thereby forfeited; and the appellant contends that this is enough, without any decree of declarator of the irritancy. But the rule of law, that all irritancies are purgeable at the bar, necessarily supposes that all irritancies, to be effectual, must be judicially declared, and consequently, that the bare clause in the deed does not of itself annul the right. This seems according to principle, because it may often happen, that the non-performance is owing to some obstinacy on the part of the landlord. The tenant, in the present case, is willing to pay, and ought not to have penalties and interest exacted from him; and any failure or contumacy on his part, while prohibited from paying, ought not to be so visited, and by a landlord who refuses to receive payment. Both of these facts apply here.

After hearing counsel, it was

Ordered and adjudged that the interlocutors complained of be affirmed.

For the Appellant, *Henry Dundas, Dav. Rae.*

For the Respondent, *Ilay Campbell.*

NOTE.—This case not reported in Court of Session.

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ANDREW WAUCHOPE, Esq. of Niddry, *Appellant;*
EARL OF ABERCORN, and SIR JOHN HOPE, *Respondents.*

House of Lords, 21st Feb. 1780.

LEASE OF COAL—RIGHT OF PROPERTY—SERVITUDE—*OPUS MANUFACTUM*—RECOMPENSE.—Circumstances where the level of a pit was communicated by the lessee to a neighbouring colliery, with *proviso* of the proprietor, that the level should not be communicated into any other neighbouring collieries, for the purpose of working the coal, to the prejudice of his original property; Held, on communication of the level to the neighbouring collieries, that the appellant was entitled to have it shut up; also held, in consequence of such communication, that the recompense due to him must be adequate to the benefit which has been enjoyed by the use of such level. There was a thick wall left in working the Niddry coal, which divided it from the coal of Woolmet, which stood higher up. The wall, consisting of porous coal, did not prevent the water from flowing down from the Woolmet pit to the Niddry coal. The proprietor of the latter was proceeding to make downsets to prevent this, when Sir Archibald Hope brought a suspension, contending that the Niddry coal, being the inferior

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tenement, and lower down, was subject to a natural servitude of receiving the water that came down from the higher colliery. Held, in the Court of Session, that Niddry was entitled to make the downsets. On appeal, remitted for consideration.

This is the sequel to the cases reported *ante*, p. 286 and 338.

By the last appeal, the House found that the appellant was entitled to have the level in question shut up by the respondents, and that they, Sir Archibald Hope, and Mr. Wauchope of Edmonstone, were liable to him in recompense, as may be just and reasonable, for the benefit they had enjoyed, by means of opening and communication of said level to their collieries. And as to the other point in the case, in reference to the procuring the consent of the Earl of Abercorn to the communication of the Duddingstone level to the Niddry coal, it was ordered, that the case may be remitted back to the Court of Session, with power to make the Earl of Abercorn a party to the suit, so that he may appear and plead for his interest, in regard to the lease granted by him to John Biggar.

In consequence of this remit, the case was again resumed in the Court of Session, and the Earl of Abercorn called as a party. In the meantime, the Lord Ordinary, of this date, ordered Sir Archibald Hope forthwith to shut up the level in the Gillespie seam, and to keep it shut in time coming, but Sir Archibald did not do this till October following.

The summons making the Earl of Abercorn a party to the suit, set forth, “ That the level of Duddingstone coal, having
“ been, in virtue of the above lease, communicated by Andrew Wallace to the coal of Niddry, during the currency
“ of the lease of the Duddingstone coal to John Biggar;
“ this communication must be kept free and open, in all time
“ coming, for the draining and carrying off the water from
“ the coal in the Niddry lands; and this being declared, the
“ Earl of Abercorn, and Sir Archibald Hope, should be decreed and ordained to make and deliver a deed to the
“ pursuer, ratifying and approving the communication of
“ the Duddingstone level to the coal of Niddry, and binding
“ and obliging them, jointly and severally, and their heirs,
“ to keep the communication of the said level free and open
“ in all time coming.”

The appellant also amended his original libel against Sir Archibald Hope and Captain M'Dowall, to the effect of setting forth, “ that neither the said John M'Dowall, nor

“ his assignee Sir Archibald Hope, having any right to open
 “ or communicate the said Niddry level, without the pur-
 “ suer’s consent, whereby he was justly entitled to recover
 “ from them such profits and gain as they had made by
 “ communicating the said level, and was likewise entitled to
 “ have the said communication of the level with the coals
 “ of Edmonstone and Woolmet, or any other coals not be-
 “ longing to him, shut up and secured, so as that no water
 “ might thereafter pass from such other coals into his level
 “ or coal of Niddry ; that therefore the said John M·Dowall,
 “ Sir Archibald Hope, and John Wauchope of Edmonstone,
 “ should be decreed, jointly and severally, to account for and
 “ pay to the pursuer, the one half of the free proceeds of
 “ all the said coals raised, or to be raised, in terms of
 “ the clause of the lease, and contract before recited, re-
 “ specting any consideration received for communicating the
 “ said level, with the pursuer’s consent, to any neighbouring
 “ heritor, together with legal interest of the said free pro-
 “ ceeds, from the respective periods when the same were
 “ received by the said John M·Dowall, Sir Archibald Hope,
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The Earl of Abercorn also brought an action against Sir Archibald Hope, Captain M·Dowall, the present appellant Andrew Wauchope, John Wauchope, and Francis Charteris —stating his Lordship’s lease to Biggar now vested in Sir Archibald Hope ; and “ that, in opposition to the covenants “ therein, Sir Archibald was proceeding to communicate the “ level to the Edmonstone and Woolmet coal, without offer- “ ing to make any previous reference for ascertaining the con- “ sideration to be given the Earl, for consenting to such com- “ munication, or making any agreement known to him, for “ restraining further communication without his consent,” and, therefore, that the defendants should be decreed to deliver to the Earl the tenth part of all the coals, stone, minerals, or other things, wrought, or that should be wrought, by means of the said level.

The appellant having found it necessary to make two downsets in different seams of his coal, for preventing the water flowing from the upper collieries and drowning his colliery, the respondent, Sir Archibald, thought fit to challenge these operations by a suspension, contending that the Niddry coal, being the inferior tenement, was subject to a natural servitude of receiving the water that came down from the higher coal of Woolmet.

All these actions, after various reports of miners, &c., were

1780. reported by the Lord Ordinary to the Court, who conjoined
 the processes brought at the pursuer's instance against the
 Earl of Abercorn, and the other defenders, with this process,
 appointed parties to give in memorials, and appointed John
 Saunders, coal surveyor at Airth, to make a plan of the dif-
 ferent seams of coal.

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The appellant maintained four questions.

1. The recompense he was entitled to from Sir Archibald Hope, for his having communicated the level without the appellant's consent.

2. Whether Sir Archibald, as come in place of Biggar, was obliged to procure from Lord Abercorn a perpetual right to the communication of the Duddingstone level to the Niddry coal, in terms of Biggar's lease with the appellant?

3. Whether the level was effectually shut up?

4. Whether the appellant had not right to make downsets in his own ground, and fill them up with clay, or other materials, for preventing the water flowing from the upper collieries and drowning his coal?

June 26, 1778. The Court pronounced this interlocutor, "The Lords find,
 " that the level communicated to the lands of Niddry, by Mr.
 " Biggar, in right of his lease from Lord Abercorn, and in
 " implement of his obligation to Niddry, contained in the
 " lease betwixt Niddry and him, stands secured to Niddry,
 " for the purpose of working the coal within the lands of
 " Niddry, and that Lord Abercorn has no power to shut up
 " that level, to the prejudice of Niddry's coal; but find,
 " that the communication of the level, as covenanted in the
 " lease betwixt Niddry and Mr. Biggar, is, and stands limited
 " by an express provision, that it should not be in the power
 " of Niddry to carry on that communication to the coal works
 " of any neighbouring heritor, without the consent of Mr.
 " Biggar. Find that this negative is now vested in Sir
 " Archibald Hope, and must remain with him and his heirs,
 " succeeding in Biggar's right, to the effect of restraining
 " Niddry from opening and communicating the level to the
 " coal works of any of the adjacent heritors, to the further
 " prejudice of Lord Abercorn's original property; and there-
 " fore find that the recompense due to Lord Abercorn, by Sir
 " Archibald Hope, must be limited to the benefit which has
 " accrued, or hereafter may accrue, to the coal of Niddry,
 " by the communication of the said level, and to the benefit
 " which has accrued to the coals of Edmonstone and Wool-
 " met, from the time the said level was opened, to the time

“ it was shut; and find that Niddry can only be entitled to
 “ a share of the recompense due for the communication of
 “ the level to the coals of Edmonstone and Woolmet, during
 “ the time foresaid, and must concur with Lord Abercorn in
 “ drawing the same in such proportions as shall be ascertained
 “ by the Court: and find, that whenever, and how soon Sir
 “ Archibald and his heirs, shall be discharged of all further
 “ claim of recompense, his negative against opening and
 “ communicating said level to the other heritors shall cease,
 “ and thereafter the level shall become the joint property
 “ of the Earl of Abercorn and of Niddry, subject to their
 “ disposal by joint consent. Further, the Lords find, that the
 “ level formerly opened by Sir Archibald Hope, from the
 “ lands of Niddry, into the superior lands of Edmonstone
 “ and Woolmet, was effectually shut up by Sir Archibald
 “ Hope, upon the _____ and continues so at this
 “ time, and that the same must be kept so shut up, at the
 “ expense of the said Sir Archibald Hope; and also find,
 “ that Mr. Wauchope of Niddry cannot make the downsets
 “ complained of by Sir Archibald Hope, upon any of the seams
 “ of coal within his lands of Niddry, so as to prevent the
 “ natural passage of the water through those seams in its
 “ present course, and thereby occasion a reflux or stagna-
 “ tion of the water, upon the property and coal of the supe-
 “ rior lands of Edmonstone and Woolmet: and find, that
 “ the recompense claimed by Lord Abercorn and Niddry,
 “ for and upon account of the communication of the level,
 “ and of the webs of coal which have been wrought, and may
 “ be wrought in the lands of Niddry, and which have been
 “ wrought in the lands of Edmonstone and Woolmet by that
 “ level, cannot exceed the expense of these webs of coal,
 “ might have been wrought by one or more engines in the
 “ original state of these coals, and supposing the level had
 “ never been communicated out of the lands of Dudding-
 “ stone: and in order to ascertain the expense of such engines,
 “ remit to Messrs _____ Smeaton and _____ Watt, engineers,
 “ and either of them, to report to the Court an estimate of
 “ the expense of erecting an engine upon the lands of Niddry
 “ in the year 1748, before the level was communicated, suf-
 “ ficient to work the coal of Niddry, to the depth of the sea
 “ level, and also the annual expense of maintaining such
 “ machine to the present time, and in time coming; and also
 “ the expense of erecting an engine upon the lands of Ed-
 “ monstone or Woolmet, in the year before the level was
 “ communicated to these lands, sufficient to work the coal

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“ of Edmonstone and Woolmet to the depth of the sea level,
 “ and also expense of maintaining said engine, from the said
 “ year , when the level was communicated to Woolmet,
 “ to the year , when it was shut, and what would be
 “ the value of said engine at the time of shutting up said
 “ level; reserving to the Court to determine, when such re-
 “ port shall be made, what part of said expense shall be paid
 “ by Sir Archibald Hope, as recompense for communication
 “ of said level to the respective coals aforesaid, and also to
 “ determine in what proportions the sum so to be paid shall
 “ be drawn by Lord Abercorn and Niddry.”

Jan. 19, 1779. All parties having reclaimed against such parts of the above interlocutor as they conceived to be against them; Whereupon the Court pronounced this interlocutor: “ Before
 “ answer to Earl of Abercorn’s petition, remit to Messrs.
 “ Smeaton and Watt, and either of them, to report to the
 “ Court, along with the estimate formerly ordered, an esti-
 “ mate of the expense of erecting and upholding an engine
 “ of sufficient power to raise the water from the depth of
 “ the sea level to the earth’s surface, during the time of
 “ working the coal in Niddry ground, below level as well as
 “ above; and also to report any further facts that either of
 “ the parties may think material: Find the petitioner, An-
 “ drew Wauchope of Niddry, is entitled to make downsets
 “ in the seams of coal in his own ground, and to fill up the
 “ same with clay, stone, or other materials, so as effectually
 “ to prevent the water from coming down upon his coal
 “ from the coal of Edmonstone and Woolmet, and, with those
 “ variations, adhere to the former interlocutor, and refuse
 “ the desire of all the petitions.”

The appellant appealed from the first interlocutor of 26th June 1778; and also from that of 19th Jan. 1779; and particularly from such parts of both interlocutors as authorise and order a remit to Smeaton and Watt, or either of them, for the report upon the sundry points therein stated.

The Earl of Abercorn also brought a cross appeal, complaining of the said interlocutors in several particulars.*

Pleaded for the Appellant, Mr. Wauchope.—By your Lordships’ judgment of 20th April 1774, the *quantum* of the appellant’s recompense for the wrongful communication, was to be proportioned to such benefit as, under all the circumstances,

* Sir Archibald Hope did not present any cross appeal against that part of the interlocutor, entitling Mr. Wauchope to make the downsets, to prevent the water flowing from the higher colliery to his inferior tenement; but acquiesced in that judgment.

the then respondents had received from such communication. This rule is plain and simple, and easily complied with. But the Court of Session has, by these interlocutors, determined it a wrong one, and instead thereof, has said that the recompense to be made to the appellant cannot exceed the expense at which the same webs of coal *might* have been wrought in another and cheaper manner, if such could be devised, and, therefore, referred it to two engineers to discover whether, and in what manner these coals could have been wrought cheaper; and in order to puzzle the matter still more, has desired them to direct their attention, and apply their calculations to the year 1748, plainly intimating that the result of the inquiry shall be the rule of any future judgment ascertaining the *quantum* of the appellant's recompense. The appellant, on the other hand, desires to adhere to your Lordships' rule: and that in such manner as the respondent, Sir Archibald Hope, himself cannot object to, being willing to ascertain his demand from Sir Archibald's own books of accounts of the working and sale of these coals. These books of accounts are exhibited in this suit, and by them it appears, that from the 25th of September 1765, when the communication of the level was made, to 24th October 1774, when it was shut, but not effectually, the value of the coals taken out and sold amounted to £40,707. 8s. 2d. The one half of which sum, after deducting all necessary expenses, the appellant claims as his recompense and compensation; and insists that he is entitled to a further compensation for the coals worked by Sir Archibald Hope, and by Mr. Wauchope of Edmonstone, and that they shall be obliged to produce their accounts, from the said 24th October 1774, until such time as the level shall be effectually shut up. The rule prescribed by the Court of Session is inextricable. First, It is a disputed point, and must be proved, whether, at the time the level was communicated, it was possible to have drained the Woolmet coal to the depth of the sea level. Secondly, Supposing that possible, all the accidents and chances attending a fire engine, but which never can happen in working by a level, must be taken into computation. The many repairs and failures in the machinery, which stop the work, and throw the colliers and miners idle for days and weeks together, with many other necessary circumstances, must all be ascertained, before the Court can justly determine how far Sir Archibald Hope has been a gainer by the use of the appellant's level. Besides, the principle itself, upon which the

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rule of the Court of Session is endeavoured to be grounded, is erroneous and unfair—for if a person seizes and uses the property of another without his consent, justice entitles the true owner to all that *de facto* has been produced to, or gained by the wrong doer, during his wrongful possession; and it is no answer to this to say, that the Woolmet possessor might have made an equal profit by the use of some other thing which belonged to himself, or which he might have purchased at a cheaper rate, when he seized his neighbour's property. Further, the decreeing that the appellant is only entitled to a share of the recompense, for the communication of the level to the coals of Edmonstone and Woolmet, “from the time it was opened till the time it was shut, and that he must concur with Lord Abercorn, in drawing the same in such proportions as shall be ascertained by the Court,” is unwarrantable and erroneous. By your Lordships' two determinations, it is established that the appellant has the sole property of the level, within his own estate, and the sole right to prevent or allow its communication; that it was illegally communicated by the respondent, Sir Archibald Hope; and that the appellant was entitled to satisfaction for such illegal communication. Here is not the least allusion to any claim of recompense of the Earl of Abercorn, nor could there be, as he was not before the Court below, nor before your Lordships; and your Lordships' order as to making him a party to the then suit, or instituting a new one, relates only to the communication of the Duddingstone level by Biggar to the Niddry coal. The appellant apprehends that he is now entitled to the same consideration he would have had a right to demand, in case he had previously consented to the communication of the level to Woolmet coal, in which case, he would certainly never have consented to a division of such recompense with Lord Abercorn, or any other person whatsoever; and this goes as well to the recompense, or share of the profits, of all the coal that has been, or shall be wrought in the estates of Edmonstone and Woolmet, by means of the communication of the level since, as before the level was shut up in the Gillespie seam. In point of fact, the level was not communicated to the Niddry coal from lands which, at the time, belonged to Lord Abercorn, but from the lands of *Brunstane*, then the property of Lord Milton, who had then the only right to challenge Biggar for such communication. Long after the level was so communicated through Lord Milton's estate of *Brunstane* to the Niddry coal, the Earl of Abercorn pur-

chased that estate from Lord Milton's heirs, with full knowledge of the level being open and communicated to the Niddry coal; and, therefore, the appellant having thus acquired absolute right to the level, before the Earl of Abercorn's purchase of the Brunstane estate, the Earl is not entitled to any recompense or satisfaction for the communication of that level from the appellant's into neighbouring heritors grounds. Moreover, from the covenant in Biggar's lease with Lord Abercorn, it is beyond all question clear that Biggar had a right to communicate the Duddingstone level to the grounds of any neighbouring heritor; he was at liberty so to do, without any previous consent asked or given by Lord Abercorn. The only condition was, that for such communication Biggar should pay to his Lordship a consideration, to be settled by arbitrators. But, in the present case, the appellant does not derive the benefit of the level directly from Lord Abercorn, but from the then proprietor of the estate of Brunstane. How that proprietor, viz. Lord Milton, acquired a right in the level so many years ago it is not the appellant's business to investigate. The covenant, therefore, requiring *Biggar* to obtain Lord Abercorn's consent, was only in the event of the level being communicated from Lord Abercorn to the appellant's collieries directly; nor does it seem even then to be absolutely necessary; but as that level was made in a different direction, by which he derived it from Lord Milton, whose estate Lord Abercorn has since purchased, the appellant humbly apprehends he has no privity or connection whatsoever with the Earl of Abercorn, either as to a present division of the recompense, or so as to give his Lordship a control on his use of the level hereafter.

The interlocutors find, that the level was effectually shut up by the respondent Sir Archibald Hope, and continues so, though from the proofs the contrary appears, as at this moment coal is wrought at the Woolmet and Edmonstone lands level free, which formerly used to be covered with water; and the manner in which the work has been performed gives little hopes of its long continuing even in its present state. It appears by the depositions of witnesses that a greater quantity of water now comes down upon the Niddry coal, especially through the stair head and great seams, than there did before the level was communicated: and this made it necessary for the appellant to make the downsets in his own lands.

Plead ed for the Earl of Abercorn.—Every extension of

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the Duddingston level to other collieries, without the consent of the Earl of Abercorn, is injurious to his property in the said level, unreasonable, and cannot be supported even by the agreement made between the appellant Mr. Wauchope and Mr. Biggar. 2. Because the giving to the Earl of Abercorn a negative against opening and communicating the said level to other heritors, and making the said level subject to the joint disposal of his Lordship and the appellant Mr. Wauchope, is the only means left to his Lordship of protecting his collieries from being made the common sewer of the whole county, or securing to his Lordship some compensation for that servitude. 3. For that a contrary decision would not only preclude his Lordship from making any advantage of the valuable situation of his property, but would enable the appellant Mr. Wauchope, under a strained construction of one clause in his lease to Mr. Biggar, to engross to himself all the advantages arising from the communication of this level to the collieries, and would, at the same time, be contrary to another express clause in the said lease, whereby the appellant Mr. Wauchope is prohibited from making any communication of the said level without the consent of Mr. Biggar.

The Earl of Abercorn's appeal was therefore brought, 1. In so far as the Court below did not find him entitled to a consideration for the levels being communicated to the Brunstane, in the same way as to Niddry. 2. In so far as they find that the *quantum* of the recompense ought to be determined, not according to a reasonable proportion of the coals wrought, or which may be wrought, by means of the level, but by an uncertain valuation, taken from the supposed difference between working by a fire engine and working by a level. 3. In so far as they find the Earl of Abercorn entitled only to a part of the supposed difference between working by a level and by fire engines. 4. By not determining, before the remit to Messrs. Smeaton and Watt, the proportions of the recompense which ought to be made to the several parties. The Earl maintains that Biggar communicated the level to the coal of Brunstane without any application to, or agreement with him. The mode also of ascertaining the recompense must be uncertain and erroneous, as directed by the interlocutors complained of: while, on the other hand, no sufficient reason is assigned why the Earl ought not to be entitled to the whole consideration payable for the communication of the level.

Pleaded for Sir Archibald Hope.*—As to Mr. Wauchope's

* This is printed Sir John by mistake in the title of this appeal.

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original appeal.—As the communication of the level did not proceed from any wrongful act of the respondent; but was made in consequence of an order of the Lord President, acting as arbitrator, the respondent is only bound in justice to make satisfaction for the temporary use of the level, in proportion to the benefit actually received from it, agreeably to what is declared by your Lordships' judgment of the 19th April 1774; but this benefit, it is clear, cannot possibly exceed what it would have cost the respondent to erect and uphold an engine of sufficient power to drain the water as effectually as was done by the level: and, in order to determine the exact amount of such expense, the only evidence that could be resorted to, was the opinion of persons most experienced and conversant in works of that kind; so that the remit to Messrs. Smeaton and Watt was both proper and necessary. 2. The rule contended for by Mr. Wauchope, of fixing the recompense at a half of the profit made on the whole of the coal wrought in the lands of Woolmet during the time that the communication subsisted, is both unreasonable and a direct contradiction to the former judgment of your Lordships. It is thereby declared, that the respondents are liable "to make the appellant such satisfaction as shall be just and reasonable, under all the circumstances, for the benefit they have enjoyed, *if any*, by reason of the opening and communication of the said level;" whereas the appellant Mr. Wauchope is insisting, that without inquiring whether any, or what benefit has arisen from the communication of the level, or into any of the circumstances of the case, the respondent shall be found liable in a large proportion of the coal raised by him whilst the level was open; the whole of which could have been wrought by an engine, and the greatest part of it without an engine, or the assistance of the level. 3. It is proved that the level has been shut up in the most effectual manner, and thereby the judgment of the 19th April 1774 complied with, so that no complaint lies on that head. 4. As to procuring the consent from the Earl of Abercorn, to a perpetual communication of the level through the lands of Duddingstone to the coal of Niddry, the respondent does not conceive that any such obligation is incumbent upon him. No mention is made in the lease of a perpetual communication. Mr. Biggar only became bound to procure Lord Abercorn's consent to communicate the level to the Niddry coal, and this has accordingly been done. The clause in Mr. Biggar's lease with the ap-

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pellant Mr. Wauchope in 1748 proceeds upon the recital of the previous contract entered into between Lord Abercorn, respecting the communication of the level; and the appellant, knowing the nature of Mr. Biggar's right, could never expect to acquire a better right than Mr. Biggar himself was possessed of; and the right Mr. Biggar acquired by that contract is now fully vested in the appellant. But neither Mr. Biggar nor the respondent became *bound* to warrant the *perpetuity* of that communication. 5. The appellant Mr. Wauchope's new plea, which he has lately made, to have it found that he is entitled to extend the communication of the level beyond the lands of Niddry, and that the negative against his so doing without the respondent's consent, was not binding after the expiry of the lease, is directly contradictory of what he has all along maintained, and even to the judgment of your Lordships 28th January 1773. On the contrary, he founded on the expired lease as his title to have the level shut up.

In regard to the Earl of Abercorn's cross appeal, 1. Any further extension of the level can only be made by Mr. Wauchope, within whose property it has been effectually shut up; and as the respondent, in right of Mr. Biggar, and by terms of his lease, has a title to restrain Mr. Wauchope from again opening the communication, (the benefit of which negative is declared to be invested in the Earl), consequently the Earl's claim to recompense can only be for the communication already made; and the respondent can be liable to no more than a consideration for the communication of the level to the coal of Niddry, and the temporary use thereof enjoyed with respect to the coal of Woolmet. 2. By the appellant the Earl of Abercorn's letter of 3d October 1748, it was declared that the consideration payable by Mr. Biggar, instead of being settled by arbitrators before the work commenced, as originally proposed, should depend upon success of the undertaking, and be settled at a reasonable share of the profit arising from it. In which view of the case, the benefit derived from the communication of the level can never be more than the saving or difference of expense in working the coals of Niddry and Woolmet with the use of the level, and employing machinery to draw the water. And, in order to ascertain this expense, the Court of Session have adopted the only species of evidence which the nature of the thing can admit of, viz. a remit to two persons of skill and extensive experience in works of that

kind. 3. The rule contended for by the Earl of Abercorn to fix the recompense at a tenth of the gross produce of all the coal wrought in the lands of Niddry and in the lands of Woolmet, during the time that the level continued open, is not founded in any practice in Scotland, so far as the respondent has been able to learn, and is in direct contradiction to the rule laid down by your Lordships for ascertaining the recompense to Mr. Wauchope, and to the letter above mentioned. 4. It is not pretended that the carrying the level into the Gillespie seam has occasioned the least damage to the Earl of Abercorn; on the contrary, as is proved by those who examined and reported on the works, it has proved of considerable advantage to the Earl's own coal of Duddingstone.

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After hearing counsel,

LORD MANSFIELD,

“ Previous to making the motion, remitting this cause, entered into a long and circumstantial recapitulation, not only of the original grounds of litigation between the parties, but of the several stages of legal process through which the cause had passed, previous to its having been brought before their Lordships in this last appeal. His Lordship said:—“ The whole litigation originated in a lease, or tack (as it is called in Scotland), of the lands of Duddingstone, granted by the Earl of Abercorn in 1743 to John Biggar, who was now represented by Sir Archibald Hope, the respondent. (He then described the geographical situation of the lands of Duddingstone, Woolmet, Niddry, and Brunstane, which lie south and north, in a gentle descent from the most southern part into the sea northwards,) and pointing out whence the Earl of Abercorn's property is affected by the collieries worked in these lands, what the nature of the Earl's claim was, and what the nature of the claim made by Andrew Wauchope of Niddry, Esq., as well as the defence and grounds of answer to each of these claims, on which the case of the respondent, Sir Archibald Hope, rested. He then described the previous litigation, terminating in a former appeal, noticing each interlocutor that had from time to time been pronounced, and pressing upon the notice of the House wherein these interlocutors were inconclusive in respect to the parties, or inconsistent with each other, and deducing from the whole, the propriety of remitting the cause for the reconsideration of the Court, so as to clear it from ambiguity and doubt.”

“ As an additional reason for remitting, his Lordship laid great stress on the lease of the lands of Duddingstone, which the respondent, Sir Archibald Hope, held (as the representative of Biggar,)

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from the Earl of Abercorn, being to expire in May, which would give the whole matter. as far as it regarded the Earl's claim, and the answer of Sir Archibald Hope, a new turn. He also said, it was absurd to suppose, and he was a little astounded at having heard it seriously argued, that if it were established that a party was bound to pay and satisfy a specific claim for damages sustained, by his having, in the exercise of a right which was granted him to a certain degree, gone further than the right really extended, from a misconception of its extent, that the party was obliged to pay the same claim to two parties, because, in that case, the party to pay would pay double the sum he was bound to discharge."

"His Lordship very obviously proved, that the House could not, as the case then stood, give a judgment upon the appeal, without violating their established rule, of never deciding in the first instance, on what had not before been decided upon in any of the Courts below, without deciding upon some parts of the case which were not then in appeal from either of the interlocutors complained of, nor without sending the cause from their bar, as far at least, from an ultimate adjustment of the claims, and a satisfactory accommodation of the parties, as when they first appealed from the Court of Session; all which difficulties, he conceived their Lordships would wish to avoid :"*

It was therefore ordered and adjudged,

"That the said causes and process be remitted to the Court of Session in Scotland, with liberty to each party to reclaim and amend the process, as he shall be advised. And more particularly, to enquire and find how many, and what communications of the Duddingstone level have been made or granted, at any, and what time respectively, to any, and which of the neighbouring lands, and for how long time have been kept open and used, in fact; and for what terms respectively the same, or any of them have or must continue open of right, and in whom respectively the right of keeping open such communications are vested; at what time or times respectfully, it will or may be competent for the appellant, the Earl of Abercorn, or his heirs, to shut up the same, or any and which of them respectively; and, if it should be found that any of the said communications must be kept open for any future term, so that the said Earl of Abercorn, or his heirs, shall not be at liberty to shut the same up during such term, then, and in that case, to ascertain the value of such servitude or servitudes respectively; and for the time past to enquire and find what benefit hath been derived from the use of the level in question, in unwatering or raising of coals or otherwise, in any other lands than those of Duddingstone; and when such level passing through the lands of both the appellants, had been so used for unwatering or raising of coals, or otherwise, in any lands lying above, or to the

* From a note written to the Edinburgh Solicitor of what passed at the hearing.

“ south, or south-west of Niddry, to apportion the value of the benefit arising therefrom, between the said appellants, according to the local situation and other circumstances of such lands respectively.”

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For Appellant, Mr. Wauchope, *James Wallace, Ar. Macdonald.*

For Earl of Abercorn, Appellant in Cross Appeal,
and Respondent in Original Appeal, *Al. Wedderburn,
Thos. Erskine.*

For Respondent, Sir Archibald Hope, *Henry Dundas, J.
Dunning.*

One point in this case, viz. “ Servitude,” is reported M. 14538.

(M. 15530.)

DAVID ORME, Writer in Edinburgh, - *Appellant.*
JOHN LESLIE of Balquhain, Esq. - *Respondent.*

House of Lords, 25th February 1780.

ENTAIL—LEASES—ALIENATION.—How far leases for four nineteen years’ duration of an entailed estate were reducible as an “ alienation” thereof. Leases sustained, in the special circumstances, for the granter’s life, and the life of the heir who ratified them ; but a lease of a mansion house, offices, and gardens, &c. reduced, and also of the lands beyond the lifetime of these parties.

This is the sequel of the case between Counts Leslie and Leslie Grant, which, after five appeals to the House of Lords, ended in favour of the latter, finding him entitled to succeed to the entailed estates in Scotland of Balquhain and Mains, and of Fetternear. The entail of the estates originally contained a prohibition against leases in diminution of the true worth and rental of the estates ; but by a second entail this restriction was taken away ; and the only prohibitions in this entail were directed against selling, alienating, or dispoing, or doing any other deed in prejudice thereof ; and the question here was, whether long leases were to be held as alienations of the estate ?

In the whole litigations which took place in the former cause, the appellant acted as agent for Leslie Grant, and an account being incurred to him in conducting the cases before the Court of Session and House of Lords, amounting to £3240, Grant executed six several deeds, having the effect of