question to be brought before your Lordships; but I will only say, this point of law is not one on which Mr Fraser, the appellant, had a right to demand the judgment of your Lordships. Under these circumstances, I think your Lordships will concur in the judgment given below. This is a case in which he ought to have the expense of that discussion fall upon him. I shall therefore humbly move your Lordships that the judgment be affirmed, with L.100 costs. April 15. 1824.

Appellant's Authorities.—2. Stair, 2. 1.; 2. Ersk. 7. 19.; 2. Stair, 11. 5.; 2. Ersk. 5. 1.; 2. Ersk. 7. 22.; Redfern, March 7. 1816, (F. C.); Heriot, June 26. 1668, (6901.); Gall, Feb. 6. 1729, (10,306.); Sutherland, Dec. 1. 1664, (7229.); Argyll, Feb. 13. 1730, (10,306.)

Respondent's Authorities.—2. Ross, 239.; Mackenzie's Observations, 1663, ch. 3.; 2. Stair, 2. 5.; 2. Bank. 11. 8.; 4. Ersk. 1. 2.

A. FRASER—J. BUTT,—Solicitors.

(Ap. Ca. No. 31.)

WILLIAM DIXON, Esq. Appellant.—*Warren—Fullerton.* No. 24.

W. F. CAMPBELL, of Shawfield, Esq.—*Murray—Abercromby—Walker.*

Mutual Contract—Landlord and Tenant—Coal.—A lease of coal having been granted, with a stipulation that if the coal, 'by unforeseen accidents' occurrence, dykes, or 'troubles not occasioned by irregular or improper workings, it shall become, in the 'opinion of skilful men, mutually chosen by the parties, incapable of being wrought 'to advantage,' the tenant should be entitled to abandon; and men having been appointed, who reported, that, so far as physical difficulties existed, the coal was capable of being worked, but that, from the state of the markets, &c. this could not be done to advantage;—Held, (qualifying the judgment of the Court of Session,) That the tenant was not entitled to abandon.

IN the month of June 1815, the respondent let to the appellant a lease of part of the coal in his lands of Woodhall, for 19 years, at a fixed rent of L.900, or, in the landlord's option, of a lordship of 6d. for each cart. By the lease it was inter alia declared, that 'in the event of the coal becoming exhausted; or that by unforeseen accidents' occurrence, dykes, or troubles not occasioned by 'irregular or improper workings, it shall become, in the opinion of 'skilful men, mutually chosen by the parties, incapable of being 'wrought to advantage, then, and in that case, it shall be in the 'power of the said William Dixon, and his foresaids, to relinquish the work, and to renounce and give up the present lease April 30. 1824.

2D DIVISION. Lord Reston.

April 30. 1824. ‘thereof at the first Whitsunday or Martinmas after an inspec-
‘tion and report to that effect is made; in which event, these
‘presents are declared to be from such term void, and at an end,
‘to all intents and purposes, the same as if the whole years
‘thereof were naturally elapsed.’ The appellant accordingly proceeded to work the coal, but afterwards alleging that certain dykes or troubles had occurred, and that the dues payable for transporting coals to Glasgow, (where his market was), through the Monkland canal, had been greatly increased, whereby it was impossible to work the coal to advantage, he gave notice of his intention to abandon the coal-work. In consequence of this, the agents for the parties addressed a letter to Messrs Hugh Baird and Robert Bald, civil engineers, in which, after mentioning that they had now put into their hand the lease of the coal-work, and after reciting the above clause, they stated, that ‘With refer-
‘ence to the clause now quoted, we nominate and appoint you to
‘inspect the works, consider the lease, and report your opinion,
‘Whether the coal in question is now become incapable of being
‘wrought to advantage under the said lease?’ In consequence of this appointment, these gentlemen examined the work, and made up a report, in which, after entering into a detail, they stated, that, ‘taking into our consideration the state of the col-
‘liery, we are of opinion that, although the slips before-men-
‘tioned have been, and must be attended with considerable extra
‘expense in the workings, particularly from the magnitude of
‘the large slip, and the circumscribed limits in which pits are
‘allowed to be sunk; yet the coals are not considered by us as
‘unworkable: but, upon considering the circumstances of the
‘coal trade when the lease was entered into, the occurrences
‘which have taken place, both in regard to the alteration of
‘canal dues, and the present low price of coals in the Glasgow
‘market, where the principal sale must be, we are of opinion
‘that the Woodhall colliery cannot, under these circumstances,
‘be wrought with advantage to the tacksman under the present
‘lease.’ In consequence of this report the appellant abandoned the work, and the respondent having given him a charge of payment for rent, he brought a suspension, and also an action of declarator, in which he concluded to have it found, that the tack was null and void from the period when the coal became unworkable to advantage. These processes having been conjoined, the Lord Ordinary, ‘in respect of the change which has taken
‘place since the date of the lease in the expense of working the

'coal, state of the markets, and other circumstances, suspended 'the letters simpliciter.' April 30. 1824.

Thereafter, on advising a representation, his Lordship, before answer, remitted to Messrs Baird and Bald to make a new report; in consequence of which these gentlemen reported, inter alia, that 'had the state of the market of coals been the same at 'the date of that report as we have since found it, we would have 'given it as our opinion, that the Woodhall colliery would have 'been workable with advantage to the tacksman under the present lease. But we beg leave to remark, that the great quantity 'of coals which must be put out at this colliery in order to cover 'the high fixed rent, being forced into the market, may have the 'effect of lowering the price of coal in Glasgow, and it may even 'be the means of reducing the price so much as to render the 'colliery not workable with advantage to the tacksman, as at the 'date of our last report; because, from its great distance, and 'high fixed rent, it must be amongst the first that suffers from 'any competition in, or depression of, the coal market.'

His Lordship then reported the case to the Court, accompanied by the following note:—'The second report of Messrs 'Baird and Bald leads the Ordinary to doubt, not of the prin-'ciple of the former interlocutor, but of the facts necessary 'for its application. He remains of opinion, that the market-'price must always be an essential ingredient in the question of 'workable or not workable in a coal lease; and the word "oc-'currence" in the present lease is broad enough to include an 'extrinsic circumstance of this nature. Nor does its requiring 'an inspection of neutral persons of skill at all affect this inter-'pretation. Although the price fall, it may happen that the coal 'may become more easily wrought than formerly, so as to re-'main workable with advantage to the tenant. The first report 'here was formed partly on the slips in the mine, and partly on 'the depreciation in the market-price.

'But although the market-price be an important ingredient in 'the result, it is not to be inferred that the tenant is not to bear 'all reasonable risk in the variation of price. A tenant who has 'made profit for years, could not reasonably renounce his lease 'on the occurrence of a few weeks of temporary depression. 'The depression, to avail him, must be considerable, and likely 'to be permanent. The Lord Ordinary is inclined to think, 'from the second report, that such depression has not, in this 'case, yet taken place.

'It was said, that a report favourable to the tenant being once

April 30. 1824. ‘ given, his right of renouncing cannot be affected by a state of ‘ the market, occurring even a few weeks after the date of said ‘ report. But it rather appears that this is not giving the same ‘ equitable interpretation to the mutual contract which is asked ‘ from the landlord.’

‘ Doubts were likewise hinted as to the accuracy of the second ‘ report. The lease, however, excludes other evidence.’

When the case came before the Court, their Lordships, before answer, again remitted to Messrs Baird and Bald, to reconsider their former reports, ‘ and to inquire into and specify ‘ more particularly the occurrences alleged to have taken place ‘ regarding the expense of carriage, and the causes which have ‘ occasioned the alleged downfall of the price of coal in the ‘ Glasgow market since the lease was entered into; and how far ‘ these occurrences and consequences appear to have been un- ‘ foreseen at that period; and whether from their nature they are ‘ likely to be permanent, or only temporary and fluctuating; and ‘ to report their opinion as to the average price the coals in ‘ question ought to bring, in order to render them workable with ‘ advantage, in terms of the lease.’ A proof was then taken by them, under a power to that effect, as to the prices of coals, which they found had varied between 1813 and 1819, from 5s. 7d. to 4s. 5d. per cart; and they stated, that ‘ in taking these ‘ averages, the principles upon which we have proceeded have ‘ been, to take the periods and prices of each year as given us by ‘ the witnesses, without regard to the quantity; and this principle ‘ was necessary, as we had taken the periods and prices in fram- ‘ ing our former report, and not the quantities. In our opinion, ‘ therefore, the price of coals is likely to fluctuate and be lower ‘ in the Glasgow market than prior to 1817, and that while the ‘ out-put of so many collieries can with ease more than supply ‘ the demand.’

On advising this report, the Court, on the 9th of February 1821, found ‘ that in hoc statu there is not sufficient evidence to ‘ instruct that the coal in question is incapable of being wrought ‘ to advantage;’ and therefore repelled the reasons of suspension, assoilzied from the declarator, and found no expenses due.

An appeal was then entered by the appellant, who contended that the judgment of the Court was erroneous,—

1. Because, as it was expressly stipulated in the lease, that if the coal ‘ shall become, in the opinion of skilful men mutually ‘ chosen by the parties, incapable of being wrought to advantage, ‘ then, and in that case, it shall be in the power of the said

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'William Dixon, and his foresaids, to relinquish the work;' and as two men of skill had been mutually chosen, and given their opinion that the coal could not be worked to advantage, their report was equivalent to a decree-arbitral, which it was incompetent for the courts of law to review on the ground that their decision was erroneous; and therefore, in terms of the contract, the lease had come to an end. And,

2. Because it was not competent for the Court of Session to order subsequent reports from these gentlemen; and as their judgment rested upon these reports, it was founded in error. To this it was answered,—

1. That the stipulation in the lease had plainly reference to the coal not being workable on account of physical difficulties, and not on account of the state of the markets, or the expense of carriage: that Messrs Baird and Bald had in their original report expressly stated, that, in regard to physical difficulties, 'the coals 'are not considered by us as unworkable;' and that although they no doubt reported, that, from the state of the markets, it could not be wrought to advantage, yet they were not entitled, in terms of the clause, to take that circumstance into consideration. And,

2. That, supposing they were so entitled, still as it was necessary to take into consideration the state of the markets for a considerable period of time, and as they had now reported that the coal might be worked to advantage, the appellant was not entitled to abandon it.

The House of Lords found, 'That in hoc statu it was not in 'the power of William Dixon to relinquish the work, and give 'up the lease. And therefore it is ordered and adjudged, that 'the interlocutor of the 9th February (signed 13th February) '1821, complained of, which, in the suspension, repels the reasons of suspension, finds the letters orderly proceeded, and 'decerns; and which, in the action of declarator, sustains the 'defences, assoilzies the defender from the conclusions of the 'libel, and decerns; and which finds no expenses due to either 'party, be, and the same is hereby affirmed: And the Lords 'further find, that, under the circumstances of this case, and in 'respect of the preceding finding, it is unnecessary to make any 'order in regard to the several other interlocutors complained of.'

LORD GIFFORD.—It is not usual for the person who has the honour of advising your Lordships in matters judicial, to detail the reasons upon which his opinion is founded, if that opinion shall go to an affirmance

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of the judgment below; but although I shall conclude with a motion to that effect in this cause, I think it necessary, from the nature of these proceedings, to trouble your Lordships with a few observations.—

My Lords,—This question depends upon the construction to be put upon a clause in the lease of a coal-mine; and it merits consideration, that this clause occurs immediately after the stipulations respecting the mode in which the lessee shall work the colliery. This lease was executed in 1815; and it appears that, in two years afterwards, the lessee seems to have conceived that such circumstances had occurred as entitled him to call for the opinions of persons of skill, who might decide whether, under the above clause, he was entitled to get free of the lease. There had been an ex parte report, which I lay entirely out of consideration; but afterwards there was a report from men mutually chosen by the parties, the terms of which are of great importance in the decision of this cause. In the first place, they say, 'Taking into our consideration the state of the colliery, we are of opinion, that although the slips before mentioned have been, and must be, attended with considerable extra expense in the workings, particularly from the magnitude of the large slip, and the circumscribed limits in which pits are allowed to be sunk, yet the coals are not considered by us as unworkable.' So far, this report can give no ground for annulling the lease. But, (the reporters go on to say), 'upon considering the circumstances of the coal trade when the lease was entered into, the occurrences which have taken place, both in regard to the alteration of canal dues, and the present low prices of coal in the Glasgow market, where the principal sale must be, we are of opinion, that the Woodhall colliery cannot, under those circumstancess, be wrought with advantage to the tacksman under the present lease.' No such expression as tacksman' occurs in the clause which I have just read from the lease. It merely says, 'incapable of being wrought to advantage.'

My Lords,—The appellant contends, that on a fall in the price of coals he was entitled to get rid of this lease, as this was one of the unforeseen circumstances, the possibility of which had been contemplated as forming the stipulation in question. But I hold this not to be the right construction, and am of opinion, that parties must have had in view occurrences in the mine, and not in the price; otherwise, if the fall had been so inconsiderable as to afford in any one year a rent of L. 850, instead of L. 900, the tenant might have thrown up the lease. In the course of 19 years there must necessarily be some variation in the prices, of which parties could not fail to be aware when they entered into the contract. The word 'occurrence' comes immediately after the words 'unforeseen accidents.' If the coal had been exhausted, then indeed the lease must have been at an end; but if the quantity brought had only diminished, it must still remain in force. At the same time, my Lords, I cannot throw the prices entirely out of consideration, as accidents, or obstructions, or troubles in the mine, might affect the price.

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In conclusion, my Lords, I may observe, that the appellant has held the report of the two referees as equivalent to a regular decreet-arbitral. But supposing these gentlemen had possessed powers to conclude the parties, the Court below were, and your Lordships are now entitled to look at the grounds of their opinions; and if these grounds, as detailed in their several reports, are found to be unsatisfactory, your Lordships may and must decide upon the facts as they appear in the cause.

Upon the whole, my Lords, I humbly offer it as my opinion, that the last interlocutor of the Court of Session ought to be affirmed. There may be some difficulty as to the findings in some of the previous interlocutors, for which reason I would propose to delay giving formal judgment until Tuesday next.

SPOTTISWOODE and ROBERTSON—J. CHALMER,—Solicitors.

(Ap. Ca. No. 33.)

Sir WILLIAM F. ELIOTT, Appellant.—*Sugden—Whigham.* No. 25.
GEORGE POTT, Respondent.—*Moncreiff—Jeffrey.*

Bona Fides—Violent Profits.—Circumstances in which (affirming the judgment of the Court of Session) a party was found not liable for violent profits, prior to the first term after the judgment of the House of Lords setting aside the lease as contrary to the terms of an entail.

May 10. 1824.

1ST DIVISION. Lords Gillies and Meadowbank.

AFTER the judgment of the House of Lords, pronounced on the appeal of Sir William Francis Eliott, of Stobs, against George Pott, tenant of two of the farms on that estate, finding that his lease was contrary to the terms of the entail of the estate, and therefore reducing it, (see ante, Vol. I. p. 16.) the case returned to the Court of Session, to decide upon a demand made by Sir Francis for payment of the violent profits. In reference to this claim, the facts were these:—

By two judgments of the Court of Session, in 1793 and 1798, it had been found, that as the heir of entail of the estate of Stobs was laid under no restriction, he 'had power to grant leases at 'the former rents, and take grassums.' Previous to this time, the appellant's grandfather, who was then in possession, had, in 1784, let to the father of the respondent the lands of Langside, part of the entailed estate, for 19 years, at a rent of L.195; and, in 1790, he again let him the lands of Penchrise, also for 19 years, at the