town, the question is raised, whether these portions round about are to be regarded as parts of Calseyend or as parts of Cookstown proper, and to be comprehended within the valuation? Now Calseyend had a name at the date of the valuation as a separate possession, but it was a possession, as far as we can find from the decreet, merely for moss mail and nothing more, and the question arises whether that possession, being for moss mail only, is to be interpreted as being possession of all that went under that name. Now the expression undoubtedly is "his possession of Calseyend," and the tenant's name is given, "Alexander Duthie, in Causeyend, pays yearly for his occupation of the lands of Causeyend £44 Scots." Now, does the term "his occupation" necessarily imply that he occupied the whole of what may be called Causeyend? I think not. It is "his occupation of Causeyend;" and accordingly we find expressions of this kind in the decreet, "James Mowat, in Cookstown, pays yearly for his occupation of Cookstown." Does that mean the whole of Cookstown? Certainly not, because the very next entry is "Magnus Mowat pays yearly for his occupation of the lands of Cookstown" so much; and there are other instances to the same effect here, "Richard Bannerman, in Findon, pays" so much; Robert Hunter, in Findon, pays so much "for his occupation;" Robert Anderson, at the mill of Findon, pays for his occupation of the mill pleugh so much for "his occupation," so that it merely means that he pays for that which he occupies in that place so much.

Now that being the condition of matters, let us see what the subsequent titles and proceedings indicate. It appears that in 1736 (I think that is about the next title that we have after the date of the decreet) that the lands of Bishopstown and part of the moss and croft of land there, which is part of what they call here Hairmoss, are "part and pertinent" of the lands of Cookstown. Then we come to the division of the lands, the first lot or the division of Cookstown is called Calsie-end, and is said to contain that part of Calsie-end which lies to the east of the great south road, leading from Aberdeen to Stonehaven. Now "that part of causeyend which lies to the east," I cannot interpret otherwise than as being all that part of it which lies to the east. "Such part of it as lies to the east," would therefore, if read widely, according to that construction, comprehend the whole of the moss. But then it goes on, "and the Cottoun and some folds and detached parts of Cookstown, with a piece of moss, all comprehended within the line following," and so on. Therefore that piece of moss was something in addition to that portion of Causeyend which lay to the east of the great south road. The piece of moss so given is part of what had acquired the name of the Moss of Causeyend, and had naturally enough acquired that name because it was near the causeway end, and near the lands which had got the specific name of Causeyend.

Then we have a distribution of the moss, which comes at a later period. And what is it? The articles of roup speak of the moss of Findon and Cookstown in the parish of Banchory, lying to the east of the King's Highway. The first lot is that which is called Groundlessmyres; it had a specific name at that time, as much as any of the others. The next lot is called Benholme's Stables. Now, I think that this militates strongly against the theory of the minister, that all these lands were part and parcel of Causeyend, which was held at the time of the decree by the tenant for moss-mail allenarly, at a rent of £80 Scots. Different names were then acquired, and the only thing that I can see that makes in favour of the appellant is this—that it is described sometimes as the "moss of Causeyend,"—but that is a natural enough name to give to it, as much as to give to the portion which was occupied by a tenant under the name of Causeyend. I cannot therefore see in this anything substantially in favour of the claim of the minister. The heritor brought in all his lands to be valued. The decreet professes to value the whole, comprehending grass pastures as well as corn lands. It does not require any evidence that the arable lands in that part of the country were not very extensive at that time. There were always large ranges of pastures on lease, and we see some proof of that in the evidence before us—it is the ordinary course of things. But there seems to have been a notion entertained by the minister, and which I think in some degree countenanced by the Lord Ordinary, that wherever he could put his finger upon a piece of land of the same description, that is to say moss land, not expressly named or valued, it is to be held unvalued. No doubt all the moors in that country were more or less interspersed with moss lands, and it would be a very dangerous thing therefore to hold such a proposition.

I think, therefore, that the minister has not discharged the *onus* of proof that was laid down upon him, and that we must affirm the decree of the Court of Session.

Friday, June 23.

RUSSEL & SON *v.* GILLESPIE.

(*Ante*, vol. v, p. 597.)

Agreement—Mineral Lease—Underground Working—Clause. Construction put upon a clause in a mineral lease, which declared that the underground workings should not be carried nearer to the mansion-house, office, garden and steadings, than so many yards. Interlocutor of the Court of Session varied.

This was an appeal by Mr Gillespie of Torbanehill against a judgment of the First Division, pronounced on the 12th June 1868, with a cross appeal by Messrs Russel. The action was raised by Messrs Russel, the lessees of the Torbanehill minerals, against Mrs Gillespie, the proprietrix, and her husband, to have the meaning of certain clauses in the lease determined. The nature of the questions at issue sufficiently appear from the opinion of the Lord Chancellor.

Sir R. Palmer, Q.C., Mr Cotton, Q.C., Mr Asher and Mr J. M'Laren, for appellants.

The Lord Advocate, the Solicitor-General, the Dean of Faculty and Mr W. E. Gloag, for respondents.

At advising—

The Lord Chancellor said that this was an action to declare the meaning of a contract, which, in some respects, was of a singular nature, owing to the circumstances which had since occurred giving rise to meanings which could not have been in the contemplation of the parties, and yet the meaning of the instrument came out very plain. At the time this lease was entered into it was not known what was the precise value of the coal and minerals included in it, but this having been now

discovered, it was of great importance to ascertain who had the right to every inch of these minerals. The lease contained a reservation of part of the minerals round the mansion-house and offices and garden, which were not to be included in the lease, and this reserved space was described in this way: —It was provided that the tenants "shall not erect engines, nor sink pits, nor conduct or carry on operations of any description on the surface of the ground nearer than 300 yards in any direction from Torbanehill House, nor nearer to the offices attached to the said mansion-house than 30 yards; and no underground working was to be carried nearer to the mansion-house than 100 yards, nor nearer to the said offices or garden than 30 yards." Now, the mansion-house of Torbanehill contained what was called a kitchen court, which had no roof over it, but at the side of it was a furnace-house and a coal-house. The only question that could possibly arise as to these was, whether they form part of the mansion-house? Now, they are so immediately connected with the use of the house that there cannot be a reasonable doubt that they do form part of the house, and were meant to be included in that term. Another matter connected with the mansion-house was that the foundation of the walls was more spread out, and extended about a foot or 15 inches beyond the upper external visible walls. This was called the escarpment, and it was contended that in measuring the 100 yards, the line must commence from the extreme edge of this projecting foundation. Now, it had been said that the parties could not have meant to start from this point, because these foundations were sometimes so deep as to be invisible without digging. Nevertheless, the foundation of a wall was so essentially a part of the wall that he (the Lord Chancellor) thought the correct measurement ought to be from the extreme edge of such foundation, and in that respect he differed from the Court below. The next point was as to the garden. There was a belt of plantation round the garden wall, planted with forest trees, and on the outside of the plantation a ditch and hedge. It was said by the appellant that this plantation and hedge were included in the garden. But the important question was,—what was the thing known and called the garden when this lease was entered into? Witnesses were produced, who said it was usual to build garden walls, not on the extreme edge of the garden, but so as to include the use of both sides of the wall, and that that was so in the present case. But when the witnesses who talked about this plantation at the time the lease was made called it not the garden but the orchard, this was sufficient to show that what the parties meant was that the garden ended with the wall, and extended no further outside. It was therefore right to measure the thirty yards from the outside of this wall, and not from the hedge outside the plantation, or from any intermediate point. The next question was as to the offices. Now, the office buildings and stables occupied three sides of a parallelogram, and stood apart from the house. There was an open yard inclosed between the buildings, and also a larger part at the north end not inclosed between the buildings, but surrounded by a wall. In the first place, there was no necessity that the offices should be attached to the house and inclosed within the same wall. There was, however, a difficulty in saying that an open yard adjoining the offices could be deemed part of the offices though included within one wall. In the present case, there was also a pond which stood apart from the offices, and also a dovecot which stood in a field about fifty yards from the nearest office building. The appellant contended that the dovecot and pond, and all the yard inclosed by the wall surrounding the stable buildings, formed the offices. But that could not be fairly deemed to be the meaning of the parties. The reasonable view seemed to be that the dovecot and pond were not part of the offices, and though part of the open yard inclosed between the buildings, which formed three sides of a parallelogram might well be deemed part of the offices, still the part of the yard not so inclosed, and which was north of the buildings, could not be so included. The result will be that there will be some alterations of the interlocutor of the Court below, and, as the appellant has partly succeeded, there will be no costs of the appeal.

Lord Chelmsford said he agreed on all the points mentioned. The object of the parties in providing against coming too near the house with the surface works must have been to preserve the amenity, while the object in preventing the underground operations coming too near must have been to preserve the house itself. Now, in this latter view, the house consisted of the foundations and the superstructure, and the measurement must be taken from the extreme edge of the foundation of the walls, and if that was the correct meaning of the parties as to the underground works, there was no reason for holding that the measurement was to start from a different point as regards the surface works. It was said to be the practice of engineers in measurements of this kind, to start from the external visible wall of the house, but their practice could not alter the meaning of a written instrument, even if it were not an erroneous practice altogether. There was no settled custom of trade in reference to this matter, otherwise that might be taken to be the view of the parties. Then, as to the garden, there was no evidence that the belt or strip of plantation was ever cultivated as a garden. It was usually called an orchard before the date of the lease, and, therefore, when the parties talked of the garden, it may be supposed that they meant something which did not include this orchard. As to the offices, it was reasonable to include all the part of the open yard which lay between the buildings on the three sides, but not the open space lying at the end, in which there was no building; and the dovecot and pond formed no part of the offices. The result was, that as this was a drawn battle between the parties, no costs would be given to either side.

Lord Westbury said he had drawn up the interlocutor of the Court below so as to incorporate the alterations made by their Lordships. Those alterations related to the measurement from the walls of the house, garden, and offices, which their Lordships thought ought to start from the foundation, and not merely from the upper external visible wall. The dovecot and pond were not to be included, nor any part of the yard which was not within the buildings on either side thereof. With these variations, it was proposed to re-issue the interlocutor as the judgment of the House.

Lord Colonsay said he had been satisfied from the first that the mansion-house included the kitchen court, but as to the foundations being in-

cluded he had had greater difficulty. It was perhaps useless to speculate as to the intentions of parties, but inasmuch as the engineers treated this description as meaning only the outer visible wall, he was inclined to accept their view rather than attempt to put a legal meaning on the expression. He was therefore not so clear as his noble and learned friends as to this matter of the foundation being treated as part of the mansion-house. At the same time, he did not differ from their conclusion. As to the garden wall, and the extent of yard to be treated as part of the offices, he entirely concurred.

The findings of the Judgment were as follows:—"Find that the minerals reserved to the proprietor of Torbanehill by the lease of 30th March and 1st April 1850 are—(1) The minerals under and within 100 yards of the mansion-house, measuring from the outside of the foundation of the walls underground, and from the outside of the main-door step, and including within the foundation of the walls of the mansion-house the foundation of the walls of the kitchen court, containing small offices, partly roofed and partly unroofed. (2) The minerals under and within thirty yards of the offices of Torbanehill, situated to the south of a road running from east to west and intersecting the estate, including in said offices the triangular piece of land and buildings thereon at the north-east corner of the east wing or stables of said offices included within the return wall and used as a piggery, measuring from the outside of the foundation of the buildings underground, and also including in the said offices the stable court attached thereto so far as enclosed in the east, west, and south sides by the buildings of said offices, and on the north by a line drawn from the inner or north-east corner of the west wing of said offices to the north corner of the said triangular piece of land at the north-east corner of said stables and used as a piggery, but not including the rest of the yard, or the field, or the dovecot. (3) The minerals under and within 30 yards of the garden, measuring from the outside of the foundations underground of the exterior wall of the garden on the north-east and west sides, and from the northern margin of the said intersecting road as it passes along the south side of the said garden, but not including the orchard or strip of ground under said exterior wall of the garden. (4) The minerals under and within 20 yards of the steadings on the said estate, measuring from the outside of the foundation of the walls of the buildings, in so far as the ground within the said measurement is within the bounds of the defender's estate of Torbanehill: Find that no other minerals are reserved by the said 'lease to the proprietor.'"

Agents for Appellants—Wilson, Burn, & Gloag, W.S.; Walker & Balfour, Westminster.

Agents for Respondent—Morton, Whitehead & Greig, W.S.; Connell & Hope, Westminster.