

[17th June 1835.]

FRANCIS GRAHAME, Appellant.—*Lord Advocate Murray—Dr. Lushington.*

STEWART JOLLY, Respondent.—*Stoddart.*

Lease.—Circumstances in which, it having been found by the House of Lords, on a former appeal, that the tenant of a farm was entitled at the end of the lease to meliorations for houses and biggings, in so far as the original houses and biggings on the farm had been improved, or others suitable to the farm had been erected, but not for any other houses and biggings built of new—Held (affirming the judgment of the Court of Session), that the tenant was entitled to various specific sums for meliorations.

Process.—A party who has closed a new record is not entitled to refer to the old record as qualifying or contradicting the new.

Appeal — Expenses.—A respondent was found entitled to expenses in the Court of Session, and on appeal the case was remitted on the merits with special findings, and the interlocutors were, in so far as inconsistent with them, reversed—Held that the reversal did not apply to the expenses, and that the respondent was entitled to them.

2^d DIVISION.
Ld. Mackenzie.

WILLIAM GRAHAME, the father of the appellant, and heir of entail in the possession of the estate of Morphie, granted in the year 1762 a lease to William Gibson of the lands of Morphie-Meikle and of Pilmour (with the exception of a small appendage) for the period of fifty-seven years.

It contained, inter alia, the following stipulations as to the houses and fences:—“ And in order to encourage

“ the said William Gibson and his foresaids to make
 “ parks and enclosures upon the said farm, and
 “ to plant hedges and trees along the dykes, ditches, or
 “ fences thereof, the said William Grahame hereby
 “ binds and obliges himself and his foresaids to furnish
 “ to the said William Gibson and his foresaids, gratis,
 “ whatever plants of hawthorn, any young trees they
 “ shall call for, from time to time, for planting hedges,
 “ for enclosing these parks or enclosures, and also for
 “ planting trees along these hedges, or other dykes,
 “ ditches, or fences enclosing the same; and also, at the
 “ issue or expiration of this tack to pay or allow to the
 “ said William Gibson and his foresaids the value of
 “ all those dykes, ditches, hedges, and other fences and
 “ trees to be so planted, according as the same shall be
 “ then valued and appraised by two neutral skilful men
 “ mutually to be chosen both by the heritor and tenant,
 “ seeing the heritor will then have the benefit of all
 “ those fences and trees. Furthermore, it is hereby
 “ provided and declared, that the whole houses and
 “ biggings on the said farm, except the dwelling house
 “ after mentioned, are to be estimated and appraised
 “ over to the said William Gibson, at his entry
 “ thereto, by two neutral men mutually to be chosen
 “ by both parties; and as the dwelling house presently
 “ possessed by the said Jean Smith is in a ruinous con-
 “ dition, therefore the said William Gibson hereby
 “ binds and obliges him and his foresaids, at his entry
 “ to the said land, to build a new dwelling house on the
 “ ground where it stands, not less than thirty-six feet
 “ in length and fifteen feet in breadth within the walls;
 “ and the said William Grahame binds and obliges
 “ him and his foresaids to furnish whatever timber

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“ shall be necessary thereto for making it a good and
 “ sufficient farm-house, with a loft therein, and also to
 “ pay to him 120*l.* Scots for helping to defray the
 “ charges of the work, and that at the first term of
 “ Whitsunday or Martinmas after the said William
 “ Gibson shall finish the said dwelling house; and the
 “ said William Gibson binds and obliges him and his
 “ foresaids to transport the said timber from Montrose,
 “ or any place of the like distance, and to furnish all the
 “ other materials, workmanship, and charges for com-
 “ pleting the said dwelling house, after which that
 “ house is also to be valued and appraised by two
 “ neutral men to be mutually chosen as aforesaid;
 “ and the said William Gibson and his foresaids are to
 “ uphold these houses and biggings during the whole
 “ space of this tack, and at the expiration thereof
 “ they are again to be valued and appraised by two
 “ neutral men to be mutually chosen by both parties;
 “ and if at the said last appreciation the appraised
 “ value of these houses and biggings, including the
 “ dwelling house so to be built, shall exceed the values
 “ thereof at the first appreciation, then the said William
 “ Grahame and his foresaids shall be bound to pay or
 “ allow the meliorations to the said William Gibson or
 “ his foresaids; and, on the contrary, if at the last
 “ appreciation the appraised values shall be less than at
 “ the first, the said William Gibson and his foresaids
 “ shall be bound to pay the deterioration or deficiency
 “ to the said William Grahame or his foresaids.”

Gibson entered into possession, and proceeded to erect his dwelling house, but no valuation took place. On the death of William Grahame he was succeeded by his son, Robert Grahame.

In 1785 Robert granted a second lease to Gibson of the appendage which had been excepted from the former lease. This second lease was to endure for all the years of the former, and it contained a clause as to the valuing of the houses in the same terms with the provisions of the former lease. The houses on this appendage were valued at 15*l*. Robert died in 1793, and was succeeded by his only son, Robert William, who died in infancy, in 1794, without issue, and was succeeded by his brother the appellant, who made up titles as heir of tailzie to the estate of Morphie and also of Balindurg, the entail of which latter estate had not been recorded at the dates of the leases. These leases were homologated by the appellant, and in November 1799 Gibson assigned them to the respondent, Mr. Jolly, who entered into possession.

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On the leases being about to expire, a dispute arose between the appellant and respondent as to the liability of the appellant to implement the obligation as to meliorations, and if so to what extent. The respondent refused to pay his rent unless credit was given for the meliorations; and the appellant therefore presented a petition to the sheriff of Kincardineshire for warrant to sequestrate and sell, while the respondent applied also by petition to have the value of the meliorations ascertained and decerned for. Both cases eventually came into the Court of Session by advocacy, and the Second Division, on the 25th February 1824, pronounced this interlocutor:—“ The
“ Lords having advised the mutual informations for the
“ parties, they, in respect of his own approbatory acts,
“ find the said Francis Grahame liable to the said
“ Stewart Jolly in implement of the whole clauses and
“ conditions in the two leases originally granted by the
“ deceased William and Robert Grahame to William

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“ Gibson, and assigned to the said Stewart Jolly : Find,
 “ separatim, that the said Francis Grahame, in respect
 “ of his having succeeded to the estate of Balindurg, and
 “ that the entail thereof was not recorded till after the
 “ dates of the said tacks, is liable to implement the said
 “ obligations, suo ordine ; and in order to ascertain the
 “ quantum of meliorations for which the said Francis
 “ Grahame is liable, remit to the Lord Ordinary to
 “ hear counsel for the parties thereon, and to do therein
 “ as his Lordship shall see cause.” The Lord Ordinary
 then ordered a record to be prepared, which was done ;
 and the case was afterwards reported to the Court, who
 pronounced this interlocutor :—“ The Lords having
 “ advised the mutual cases for the parties, and heard
 “ counsel thereon ; find that the advocator, Stewart
 “ Jolly, is entitled to meliorations for houses and big-
 “ gings, whether repaired or built of new, in so far as
 “ the same are necessary and suitable for the farm ; and
 “ remit to the Lord Ordinary to proceed accordingly,
 “ reserving entire all questions of expenses.”

In the meantime Grahame presented another petition
 for sequestration, which was also advocated and con-
 joined with the other actions ; the Lord Ordinary (14
 June 1828) pronounced a special interlocutor, by which
 he, inter alia, “ finds said Francis Grahame liable for
 “ the expenses of resisting the sequestrations in the
 “ inferior Court, and advocating these two processes to
 “ this Court, but to no other expenses after these
 “ advocations were brought into this Court except as
 “ above specified.”

Both parties reclaimed, and the respondent raised a
 supplementary action against the appellant, in which he
 concluded for interest.

The Court pronounced this interlocutor :—“ Adhere

“ to the interlocutor of the Lord Ordinary, and refuse
 “ the desire of both reclaiming notes; and, farther, find
 “ the said Stewart Jolly entitled to legal interest on the
 “ balance found due to him for meliorations from the
 “ date of the expiry of the lease in 1820, when the same
 “ became due, and till payment, and decern.”

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The expenses were afterwards taxed and decerned for to the amount of 205*l.* 3*s.* 9*d.* sterling, besides the expense of extract.

Grahame appealed, and the House of Lords, on the 29th of January 1831, pronounced this judgment:—“ The
 “ Lords spiritual and temporal, in Parliament assembled, find that the advocator, Stewart Jolly, is entitled
 “ to meliorations for houses and biggings, in so far as the
 “ houses and biggings on the farm at the dates of the
 “ tacks are improved, or others suitable to the farm
 “ built in lieu of the same, and better than the same, at
 “ the expiration of the tack; and find that he is not
 “ entitled to meliorations for houses and biggings built
 “ of new, except as aforesaid: And it is ordered and
 “ adjudged, that the several interlocutors complained of
 “ in the said appeal, so far as the same are inconsistent
 “ with the above findings, be and the same are hereby
 “ reversed: And it is further ordered, that the cause be
 “ remitted back to the Court of Session, to do therein
 “ as shall be consistent with the said findings, and as
 “ shall be just.”¹

The cause now returned to the Court of Session, and the Lord Ordinary ordered a new record to be made up on the points remaining for discussion, which was done.

¹ 5 W. & S., p. 280.

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Those on the merits were of a special nature, viz., Whether the claims made by the respondent fell within the rule laid down by the House of Lords? Two others were also raised:—1, Whether the appellant was entitled to refer back to the original record in explanation of statements made by him on the new record, or whether he was to be held bound by those statements? and, 2, Whether it was competent to decern against him for the expenses awarded prior to the appeal?

The Lord Ordinary pronounced this interlocutor, which sufficiently shows the special matters in dispute between the parties:—“13th May 1834.—The Lord
“ Ordinary having considered the remit from the
“ Second Division, &c., I mo, in relation to the principal
“ dwelling house on the farm of Morphie libelled,
“ finds that the tenant, under the lease which was
“ assigned to the pursuer, was bound to erect a dwelling
“ house on that farm of dimensions not less than cer-
“ tain dimensions specified, and that at his own expense,
“ with certain furnishings of wood and money by the
“ landlord, in order to assist him in said erection, but
“ without any claim at the end of the lease on account
“ of that erection; but finds that the tenant was by the
“ said lease entitled to claim against the landlord at the
“ end of the lease for any meliorations made on the
“ said house after the erection and valuation of the
“ same, not being unsuitable to the farm: Finds that it
“ was agreed that there should be a valuation of the
“ same after it was erected, but that this valuation does
“ not appear ever to have been made: Finds that the
“ value of the wood furnished by the landlord towards
“ the erection of the said house appears to have been
“ 27*l.*, and the money to have been 10*l.*; but that the

“ said sums cannot be taken as the estimated value of
 “ the house erected by the tenant in terms of his obli-
 “ gation ; and finds a deficiency of any precise evidence
 “ to supply the place of the valuation which the parties
 “ neglected to have taken ; but finds, considering the
 “ small value of the wood supplied,—which formed the
 “ whole wood used in the house,—and the small sum
 “ furnished by the landlord, as his share of money for
 “ the building thereof, it must be presumed that the
 “ said house was originally not of large value, and that
 “ the sum of 150*l.* may safely be taken, in absence of
 “ precise evidence, as a valuation, which the said house
 “ certainly did not exceed : Finds the value of the said
 “ dwelling house, with its meliorations, at the end of the
 “ lease, proved to have been 254*l.* 3*s.* 7½*d.* ; and finds
 “ it proved that these meliorations were not unsuitable
 “ to the farm ; and finds the pursuer entitled to the dif-
 “ ference, being 104*l.* 3*s.* 7½*d.* 2do, Finds it proven
 “ that the true value of all the houses or biggings on
 “ the farm of Morphie, except the principal dwelling
 “ house on that farm above mentioned, at the entry of
 “ William Gibson, the original tenant under the lease
 “ libelled, must be held to have been 51*l.* 6*s.* 9*d.*, which
 “ sum in toto is to be set against the total sum of the
 “ value of the houses and biggings for which the pur-
 “ suer is entitled to claim, as being left on the said farm
 “ at the expiry of the said lease, i. e. being either the
 “ old houses and biggings, or being meliorations of or
 “ in lieu of the same ; and in relation to the said houses
 “ and biggings last mentioned finds as follows :—viz., 3tio,
 “ In respect to a stable and bothy for which a claim is
 “ next made, finds it admitted by the defender that they
 “ were built by the pursuer near the site of one of the

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“ old houses of the farm, the foundations of which were
 “ cleared away before the stable was built; and finds it
 “ expressly averred by the pursuer, and not sufficiently
 “ denied by the defender on record, that the old house
 “ was of the same nature as the stable and bothy erected
 “ in lieu thereof, and finds it not proved that the said
 “ stable and bothy were unsuitable for the farm;
 “ therefore finds the pursuer entitled to claim for the
 “ value of the same, as at the termination of the lease,
 “ which finds to have been 156*l.* 3*s.* 4*to*, In respect
 “ to a granary and poultry-house for which a claim is
 “ next made, finds it not proven that the granary was a
 “ melioration of or in lieu of any of the old houses or
 “ biggings on the farm, and that therefore the pursuer
 “ is not entitled to claim for its value; but sustains his
 “ claim for the poultry-house, as coming in lieu of an
 “ old poultry-house, and not appearing to be unsuitable
 “ to the farm, and finds the amount thereof to be 11*l.* 9*s.*
 “ 5*to*, In respect to a cattle-shed and pigstye for
 “ which a claim is next made, finds it not proved that
 “ the same were on the farm, or were meliorations of or
 “ in lieu of any old buildings on the farm, and therefore
 “ repels the pursuer’s claim. 6*to*, In respect to two
 “ barns for which a claim is next made, finds it suffi-
 “ ciently proved that these were built in lieu of other
 “ old buildings of the same kind on the farm, and not
 “ proved that they were unsuitable for the farm, and
 “ therefore sustains the claim for the value of them at
 “ the expiry of the lease, which finds to be 24*l.* 12*s.* 9*d.*
 “ 7*mo*, In respect to the byres, oxen-byres, and cattle-
 “ shed, for which a claim is next made, finds that the
 “ erection of the byres, in lieu of old byres existing on
 “ the farm, is averred and not denied on the record,

“ and therefore sustains the pursuer’s claim on account
 “ of the value of them, and finds that it amounted, at
 “ the termination of the lease, to 63*l.* 17*s.* 5*d.* In
 “ respect to the oxen-byres and cattle-shed, finds it not
 “ admitted or proved that they were meliorations of or
 “ erections in lieu of old buildings of the kind existing
 “ on the farm, and therefore repels the pursuer’s claim
 “ in respect to them. 8vo, In respect to the servants’
 “ houses, with byres, on account of which a claim is
 “ next made, finds it not denied that one of these houses
 “ was on the farm at the commencement of the lease,
 “ and is still used as a servants’ house; finds no precise
 “ evidence of its separate value at the termination of the
 “ lease; but finds it must have formed a considerable
 “ part of the total value of 55*l.* 18*s.* 6*d.*, at which this
 “ article is estimated; finds, therefore, that its value may
 “ be taken, as claimed by the pursuer, at 15*l.* 4*s.* 9no,
 “ In respect to the next article on account of which a
 “ claim is made, viz. servants’ houses and byres west
 “ from the steading walls, finds that it is in substance
 “ admitted by the defender that these are or were
 “ erected in lieu of old houses or biggings that were
 “ upon the farm; and finds the value, at the termination
 “ of the lease, proved to have been 31*l.* 8*s.* 1*d.* 10mo,
 “ In respect to the garden walls, on account of which a
 “ claim is made, finds it not proved that the same were
 “ erected in melioration or in lieu of any garden wall
 “ existing on the farm at the date of the lease, or that
 “ the same are useful to the farm as ordinary fences, and
 “ therefore repels this article of claim. 11mo, In
 “ respect to twelve cot-houses, for which a claim is made,
 “ finds it admitted that there were eleven of them on
 “ the farm at the date of the lease, and finds that the

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“ value may be taken to be proved, as the pursuer now
 “ states it, viz. 89*l.* 6*s.* 9*d.* 12mo, Finds the pursuer
 “ entitled to legal interest from the 31st day of Decem-
 “ ber 1820 to the 14th day of July 1830, on the
 “ meliorations due to him, but this under deduction of
 “ any sums due to the defender for rent or otherwise.
 “ 13mo, Finds the pursuer entitled to the sum of
 “ 205*l.* 3*s.* 9*d.* of expenses of process, as now claimed by
 “ him ; and, with these findings, appoints the cause to be
 “ enrolled, in order to decerniture or other procedure.”

“ Note.—The Lord Ordinary certainly holds the de-
 “ fender bound by the closed record in the usual way.
 “ That may not, however, bar reference to the former
 “ papers as evidence under the closed record ; but it
 “ precludes reference to any paper as contradicting or
 “ qualifying the new record.”

His Lordship afterwards (24th May) decerned “ in
 “ terms of the findings contained in the interlocutor of
 “ 13th May current for the sums thereby found due to
 “ the pursuer, Mr. Jolly ;” and found him entitled to
 expenses, modified to the sum of 70*l.*

Against these interlocutors both parties reclaimed to
 the Court, in so far as they respectively considered them
 unfavourable, and on advising the reclaiming notes the
 following interlocutor was pronounced (24th June
 1834) :—“ The Lords having considered the reclaiming
 “ notes for both parties, with the other proceedings,
 “ and heard counsel thereon, find, that in addition to
 “ the sums allowed for meliorations by the Lord Ordi-
 “ nary’s interlocutor, the pursuer is entitled to the sum
 “ of 80*l.* 0*s.* 3*d.* as the value of dykes and ditches on
 “ the farm of Morphie, also to the further sum of
 “ 56*l.* 3*s.* 5*d.*, in addition to the sum of 63*l.* 17*s.* 5*d.*

“ allowed by the interlocutor of the Lord Ordinary as
 “ the value of the oxen-byres and cattle-shed on said
 “ farm: Find, that from the sum of 89*l.* 6*s.* 9*d.* allowed
 “ by the Lord Ordinary as the value of the cot-houses
 “ on the farm there falls to be deducted one twelfth
 “ part, or 7*l.* 8*s.* 10 $\frac{3}{4}$ *d.*, in respect there were originally
 “ only eleven cot-houses on the farm: Find, that in
 “ addition to the sum of expenses found due to the
 “ pursuer, he is further entitled to the dues of extract,
 “ being 4*l.* 4*s.* 1 $\frac{1}{2}$ *d.*, being in all 209*l.* 7*s.* 10 $\frac{1}{2}$ *d.*: Find
 “ the pursuer entitled to interest on the several sums
 “ found due to him, at the rate allowed by the bank,
 “ from and after the date of consignation, and decern;
 “ varying and altering, in so far, the interlocutor of the
 “ Lord Ordinary. Quoad ultra, adhere to the inter-
 “ locutors of the Lord Ordinary reclaimed against, and
 “ refuse the desire of the notes, and remit to Lord
 “ Moncrieff to proceed accordingly.”

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The case having been exhausted by an interlocutor by Lord Moncrieff, Grahame again appealed, maintaining, 1. That the interlocutors were erroneous; but as this entered into a minute and special detail, it is unnecessary to report it; 2. That they were erroneous in holding him bound by the new record; and, 3d, That the former judgment of the House having reversed the interlocutors, it was incompetent to decern against him for the former expenses.

The respondent met this latter point by maintaining that there was not an absolute reversal, but only so far as inconsistent with the findings; that the expenses had been awarded as to the question of the appellant's liability

¹ 12 S., D., & B., p. 789.

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as an heir of entail, which had been decided against him, and the decision affirmed. Consequently the necessary finding of expenses must also be regarded as confirmed.

LORD BROUGHAM.—My Lords, when 'this case first came before me this morning, not having the least recollection of the circumstances that were detailed previously, and not having read the papers till this morning, I had very great doubts whether the Court of Session had not made an extravagant allowance to the defender, either under the remit of your Lordships, or at the date of the transaction in 1762, in respect of a very large proportion of those rents reserved; but with respect to the lease granted seventy-two years ago, the rent must have increased four or five, or perhaps seven or eight times. This was the first impression that existed on my mind, on finding that it was the old rent that was fixed upon, and that the new rent was a great deal more. I should think the parties would be able to tell, as far as fifteen years ago, what Grahame let the land for in 1820.

Mr. Stoddart.—My Lord, I understand it is about 800*l.* a year.

Lord Brougham.—Probably it has come down now; but, however, we are to look to the value, not as now, but as it was at the end of the term in 1820. That being effaced from my recollection altogether, the sole question resolves itself into the various forms in which the allowance has been made by the Lord Ordinary in his interlocutor, and as far as additions have been added by the Court. First of all, the question is as to the dwelling house; but I shall not enter into that farther than to observe, that if I am to look to the contract by which

the parties are bound, I am bound by it. I should think that the Court of Session, instead of allowing too much for the house, has allowed too little. The house is now, or was in 1820, worth 254*l.*; they have deducted from that 150*l.*, and allow 104*l.* only; but Mr. Grahame or his ancestor, in 1762, bound himself to agree to a deduction that was formerly much less than now (as it was to be a deduction of the newly-appraised value, or, as it is called, the appreciation of 1762). It was so very important, that, in my humble apprehension, it would have been very difficult (if the words were not express and clear in the lease) to affix any such meaning to the parties; for if by some magic it had been possible to preserve the houses in the very same situation,—every inch of brick and mortar, and wood and iron,—if every particle had been kept in the same situation in 1820, as in 1762, the new increase of the value of the commodity, in proportion to the depreciation of the value of money, would have entitled the assignee at the end of the term to a sum of money. I will read some provisoes of that lease to your Lordships to show there is no mistake in the view I take of it. I am quite confident that if it were so, it must have struck every one as the most unheard of and the most improvident bargain that ever was made. This lease says, “It is provided and
 “declared that the whole houses and biggings on the
 “said farm, except the dwelling house after men-
 “tioned, are to be estimated and appraised over to the
 “said William Gibson at his entry thereto by two
 “neutral men mutually to be chosen by both parties.”
 Now, that is a valuation to be instantly made at the entry. There is no doubt of the terms. Then it goes on to say, “And as the dwelling house presently pos-

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“ sessed by the said Jean Smith is in a ruinous condition,
 “ therefore the said William Gibson hereby binds and
 “ obliges him and his foresaids, at his entry to the said
 “ land, to build a new dwelling house on the ground
 “ where it stands, not less than thirty-six feet in length
 “ and fifteen in breadth within the walls; and the said
 “ William Grahame binds and obliges him and his
 “ foresaids to furnish whatever timber shall be neces-
 “ sary thereto for making it a good and sufficient farm-
 “ house, with a loft therein, and also to pay to him 120*l.*
 “ Scots for helping to defray the charges of the work,
 “ and that at the first term of Whitsunday or Martin-
 “ mas after the said William Gibson shall finish the
 “ said dwelling house; and the said William Gibson
 “ binds and obliges him and his foresaids to transport
 “ the said timber from Montrose, or any place of the
 “ like distance, and to furnish all the other materials,
 “ workmanship, or charges for completing the said
 “ dwelling house; after which that house is also to be
 “ valued and appraised by two neutral men, to be
 “ mutually chosen as aforesaid. And the said William
 “ Gibson and his foresaids are to uphold these houses
 “ and biggings during the whole space of the tack, and
 “ at the expiration thereof they are again to be valued
 “ and appraised by two neutral men, to be mutually
 “ chosen by both parties; and if at the said last appre-
 “ ciation the appraised value of these houses and big-
 “ gings, including the dwelling house so to be built,
 “ shall exceed the value thereof at the first apprecia-
 “ tion,” (which they would be sure to do,) “ then the
 “ said William Grahame and his foresaids shall be
 “ bound to pay or allow the meliorations to the said
 “ William Gibson or his foresaids; and, on the con-

“ trary, if at the last appreciation the appraised value
 “ shall be less than at the first, the said William Gibson
 “ and his foresaids shall be bound to pay the deterioro-
 “ ration or deficiency to the said William Grahame or
 his foresaids.” The question now is, what were the melio-
 rations then meant? for if it were only intended to
 have deducted them from the value of the new house,
 that would be more reasonable when they deduct 150l. ;
 but that is impossible to be supposed the meaning of the
 lease. They have positively agreed that the one valua-
 tion is to be made in 1762, and the other in 1820; and
 it is perfectly clear that the one last made is to be de-
 ducted from the other, for they say,—“ If at the said
 “ last appreciation the appraised value of these houses
 “ and biggings, including the dwelling house so to be
 “ built, shall exceed the value thereof at the first appre-
 “ ciation,” then he shall be bound to do what? He
 shall be bound to pay for the deteriorations only, which
 would admit of some precise arithmetical statement of
 the deficiency, by the difference between the valuation of
 1762 and an appreciation similarly made in 1820.
 Now, that gives rise to my present doubt in this case,
 namely, that the Court of Session appears to have gone
 into somewhat of a different view of the case than as
 appears by the terms of the contract in awarding for
 the dwelling house, and in awarding for the outhouses.
 In awarding for the dwelling house they have gone upon
 a rational view of what ought to have been taken by the
 parties as the value, in 1820, of a house built in 1762,
 otherwise they never could have awarded 150l. ; but then,
 have they done the same thing in respect of the out-
 houses or out-buildings? No such thing; for there
 having been no appreciation made in 1762 of the out-

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houses, as was contemplated, they in 1792 proceed to supply that want of previous appreciation. They then agree to have a new appreciation ; but upon what terms was it to be made? Not an appreciation agreeably to the terms in 1792 when it was made, but upon a speculative valuation of what would have been in 1762 the value of the out-biggings ; that is clear. What does the Court do? It takes the position, that eighty odd pounds formed the valuation in 1792 of the buildings existing in 1762, and that is all that they deduct from the new appreciation of the outhouses ; that is to say, it is all that they deduct in terms ; but now it appears to me they deduct a little more than that, as appears upon the interlocutor, according to the statement on the last page of the respondent's case. If your lordships come to look at the interlocutor of Lord Mackenzie, you will see another deduction was made ; for he says, in speaking of the eighth article, he “ finds no precise evidence “ of its separate value at the termination of the lease, “ but finds that it must have formed a considerable part “ of the total value of 55*l.* 18*s.* 6*d.*, at which this article “ is estimated.” Then he “ finds, therefore, that its “ value may be taken, as claimed by the pursuer, at “ 15*l.* 4*s.*” Now, I cannot conceive that 15*l.* 4*s.* is arrived at in any other mode but by making a very considerable deduction. Then as to the ninth article, he says,—“ In respect to the next article on account of “ which a claim is made, viz. servants' houses and “ byres west from the steading walls, finds that it is in “ substance admitted by the defender that these are or “ were erected in lieu of old houses or biggings that “ were upon the farm ; and finds the value at the ter- “ mination of the lease proved to have been 31*l.* 8*s.* 1*d.*”

Then as to the tenth article,—“ In respect to the garden walls, on account of which a claim is made, finds it not proved that the same were erected in melioration, or in lieu of any garden wall existing on the farm at the date of the lease, or that the same are useful to the farm as ordinary fences, and therefore repels this article of claim.” Then as to the eleventh article, he says,—“ In respect to twelve cot-houses, for which a claim is made, finds it admitted that there were eleven of them on the farm at the date of the lease; and finds that the value may be taken to be proved, as the pursuer now states it, viz. 89*l.* 6*s.* 9*d.*” Now, that interlocutor makes the eighth article 55*l.* 18*s.* 6*d.*, and they have only allowed 15*l.* 4*s.* In the next place, they do not find that one of those houses was used as at the date of the lease, and is still used, and for which there ought to be allowed a separate sum. Then they do not allow any thing for the other houses; they have only allowed for one upon the footing, that if new houses are added, they are not to take them into consideration as meliorations. Now, just look at the interlocutor or judgment of your lordships as it appears on page 11 of the appellant’s case. Your lordships found “that the advocator, Stewart Jolly, is entitled to meliorations for houses and biggings, in so far as the houses and biggings on the farm at the dates of the tacks are improved.” Now stop; that is all that the Court have here done,—“or others suitable to the farm,” — not upon the farm in 1762, for that is the meaning of it,—“or others suitable to the farm, built in lieu of the same, and better than the same at the expiration of the tack.” I find that the Court have allowed that. Then they find “that he

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“ is not entitled to meliorations for houses and big-
 “ gings built of new, except as aforesaid ;” and that
 may reconcile the interlocutor, which I was apprehensive
 was not reconcileable with your lordships’ judgment in
 that case. Now we will look at the Lord Ordinary’s
 interlocutor again. That may undoubtedly show that
 it may stand together with it, and that that 15*l.* 4*s.*
 may probably have been the value at that time, as it is
 a reasonable sum. It says, — “ In respect to the ser-
 “ vants’ houses and byres west of the steading walls,
 “ finds that it is in substance admitted by the defender
 “ that these are and were erected in lieu of old houses
 “ or biggings that were upon the farm, and finds the
 “ value at the termination of the lease proved to have
 “ been 31*l.* 8*s.* 1*d.*” That is exactly the sum. Then
 it says,—“ In respect to the garden walls, on account
 “ of which a claim is made, finds it not proved that
 “ the same were erected in melioration, or in lieu of
 “ any garden wall existing upon the farm at the date
 “ of the lease, or that the same are useful to the farm
 “ as ordinary fences, and therefore repels this article of
 “ claim. In respect to twelve cot-houses, for which a
 “ claim is made, finds it admitted that there were eleven
 “ of them on the farm at the date of the lease ; and
 “ finds that the value may be taken to be proved, as
 “ the pursuer now states it, viz. 89*l.* 6*s.* 9*d.*” — they
 deducting 40*l.* for one house. Now, I do not under-
 stand how they arrive at that sum of 40*l.* for one house ;
 how one twelfth of 129*l.* should be 40*l.* I do not com-
 prehend. They deduct for one 89*l.* 6*s.* 9*d.*

Mr. Stoddart.—One of the houses was a smith’s
 house, and of course of greater value than the others.

Lord Brougham.—Was that the one that was built anew ?

Mr. Stoddart.—Yes, my lord, it was, and we do not claim for it.

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Lord Brougham.—Then I may state, that the only question is, as to whether the Court of Session have done right in adopting one view of the terms of the contract, when it makes deductions for the outhouses, and another view of the terms of the contract when it makes a deduction for the dwelling house. My opinion is, that the two principles of the finding of the Lord Ordinary and the finding of the Court are not easily reconcilable, upon the grounds I have stated; but when I come to consider that the error, if any, is rather in deducting too much for the dwelling house than too little for the outhouses, it is clear that I cannot recommend to your lordships any proposition as to rectifying or amending the interlocutor in that respect; if it had been the other way, and if they had turned the scale against the appellant, instead of against the respondent, as to the meliorations in adopting the contract, it would have been necessary, before affirming the interlocutor, for the respondent to give in an answer to that objection. Whether he has an answer or not, it is not now for me to conjecture; but the question is, whether the Court have allowed the respondent too much, or the appellant too little? It is unnecessary to waste more time upon those points. As to the other points, they are merely relative to the expenses below, and the costs of the present appeal. The costs below are of necessity to be allowed, because they have been allowed in the former case; and the remit having been made upon reversing certain interlocutors, and directing the Court to proceed upon the ground of their former interlocutors (except as far as reversed), the

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question is, whether any part of the reversal touches any part of those interlocutors? I have read this case over, and it is clear the interlocutors were entirely untouched. That judgment of 1831 was a judgment by this House, affirming, not reversing, the judgment of the Court below allowing the expenses. Then as to the expenses of the extract, they are quite consequential; and as to that sum of 74*l.* (the expense attending the new litigation) I think they are entitled to that expense. As to the costs of the present application, I think your lordships ought to give the respondent the costs of this appeal.

The House of Lords ordered and adjudged, That the said petition and appeal be and is hereby dismissed this House, and that the interlocutors therein complained of be and the same are hereby affirmed: And it is further ordered, That the appellant do pay or cause to be paid to the said respondents the costs incurred in respect of the said appeal, the amount thereof to be certified by the clerk assistant.

WILLIAMS, BROOKES, POWELL, and BRODERIP --
ANDREW MACRAE, — Solicitors.