July 11, 1831. these circumstances, we are to consider whether or not the costs should be given, which is now the only question before your Lordships. Without saying that the interlocutor, in its material part, is wrong, I would yet move your Lordships to affirm the judgment, with a declaration, which I shall pen myself, that the mention of these pools shall not affect the question touching the boundary line. There may be still some litigation as to the course of that line, and it is better that we should express, in words, that which is the understanding of the parties, and the feeling of your Lordships. But no costs of appeal can be given.

The House of Lords ordered and adjudged, That the interlocutors complained of be affirmed, with this declaration, that the mention of Pool-Oure and Pool-Breakenord, in the said interlocutors complained of, shall not prejudice, bind, or at all affect the question touching the course of the boundary line, nor decide whether the said line was below or above the said two pools.

RICHARDSON and CONNELL,—MONCRIEFF, WEBSTER, and THOMSON,—Solicitors.

No. 28. JOHN BURNS and ROBERT GRIER, Appellants.—*Lord Advocate (Jeffrey)—Lushington.*

DUNCAN STEWART, Respondent.—*Rutherford—Stuart.*

Contract— Landlord and Tenant.— Circumstances in which it was held (affirming the judgment of the Court of Session) that a tenant was not entitled to a stipulated deduction of rent, in respect of not being provided with a road in terms of his lease, a road equally good being enjoyed by him.

July 27, 1831. ON the 20th of February 1818 a contract of lease was entered into between M'Neill of Raploch (of whom Stewart was the disponee) and Burns and Grier, by which M'Neill let to them the coal within the lands of Raploch for the space of thirty-one years, while they, on the other hand, bound themselves to pay to M'Neill a money rent of 92*l.* 10*s.*, or, in M'Neill's option, a certain lordship. From the first year's rent they were empowered to retain 30*l.* towards making and repairing the roads

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to the colliery; and the tack farther contained this clause: "And "the said R. M. Hamilton M'Neill having engaged to use his "influence to get permission from the family of Hamilton for "the tacksmen to make a road to the coal pit through the Duke "of Hamilton's property to join the turnpike road betwixt "Larkhall and Betton's Yett, it is agreed, that if that permis- "sion is not obtained the tacksmen shall be allowed a deduction "of 7*l.* 10*s.* out of each year's rent to be paid by them to the "proprietors." July 27, 1831.

Soon after this time a new line of road between Glasgow and Carlisle was begun, which Stewart alleged had the effect, when formed, to supersede the necessity of the road contemplated by the clause; that of this Burns and Grier were so satisfied that they never applied to M'Neill to obtain the above permission, and that accordingly they opened a communication with the new road (for the expence of doing which they retained, under the general allowance for road-making, a sum of 30*l.* out of the first two years' rents)—used it from 1821 to 1823, and paid the full rent during these years.

On being charged for payment of the rent due at Nov. 1823, Burns and Grier presented a bill of suspension, claiming deduction of 7*l.* 10*s.* for each of the two preceding years, on the ground that the clause as to the road had not been implemented. The bill having been passed, Lord Alloway pronounced this interlocutor: "In respect it is stated on the part of the charger "(Stewart), that he offers to procure for the use of the sus- "penders the road in question, and that the suspenders (Burns "and Grier) agree to accept of the offer so made, appoints the "charger, within four weeks from this date, to procure for the "above purpose the necessary authority or permission from the "Duke of Hamilton, or other proprietors of the grounds "through which the said road is to run, and to lodge the same "in process, the above appointment being before answer." To this judgment his Lordship adhered, by refusing a represen- tation on the part of the charger; and the cause having been thereafter remitted to Lord Eldin, he (Jan. 22, 1825) ordained the charger to "furnish the road in question to the suspenders "within six months from this date." Feb. 10, 1824.

The process was then allowed to fall asleep, and on being wakened a record was prepared in terms of the Judicature Act.

July 27, 1831. The cause having come before Lord Corehouse in place of Lord Eldin, he, before answer, remitted to a surveyor "to inspect "the roads in dispute between the parties, and to make out a "plan thereof, and, at the same time, to report his opinion "what, under a bonâ fide construction of the clause in the lease, "and taking into consideration the alteration which has been "made upon the turnpike road between Glasgow and Carlisle, "would be the most eligible line of road for the suspenders, to "be made from the working pit to the said turnpike, and to "state the same in the plan to be prepared by him."

The surveyor having reported, "that the change in the line "of the Glasgow and Carlisle turnpike has superseded the "necessity of crossing any part of the Duke of Hamilton's lands, "to reach the said turnpike," the Lord Ordinary (Newton) repelled the reasons of suspension, and found expences due. To

March 8, 1830. this judgment the Court adhered.*

Burns and Grier appealed.

Appellants.—1. The interlocutors of Lords Alloway and Eldin, being final, and proceeding on an offer made by the respondent, it was incompetent for the Court to deviate from them, and the appellants are entitled to have effect given to them.

2. Independent of the preceding plea, as it was expressly contracted that the appellants were to have a deduction from their rent in the event of their landlord failing to procure the road there stipulated, and as that road has not been procured, he is not entitled to enforce the contract without giving the deduction there stipulated.

Respondent.—1. The interlocutor of Lord Alloway was specially before answer, and was, besides, abandoned by the appellants, who acquiesced in the remit to the surveyor. If that interlocutor had been conclusive, then such a remit would have been incompetent and superfluous, but the appellants acted on the footing that it was proper and competent. Besides, it

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* Shaw and Dunlop, 641.

merely had the effect to ascertain whether the new road was not a sufficient substitute for the one stipulated. July 27, 1831.

2. The appellants have no substantial interest to insist on the road mentioned in the lease being made. The surveyor has reported that the new line of road entirely supersedes the necessity of it, and the appellants have themselves acted upon that footing. If the parties had been aware, when the lease was executed, that the new line was in contemplation, it is quite manifest that the stipulation would never have been made.

Earl of Eldon.—My Lords, having heard the arguments of counsel at your Lordships bar, I have since looked with the greatest attention through the whole of this case; and, having done so, I cannot satisfy myself that the judgment of the Court below ought to be reversed; and, on the other hand, I do not think that this is a case in which I ought to recommend to your Lordships to give costs against the appellant for coming here; and, following the practice of this House, in which it has not been usual to state the reasons which induce the House to form that opinion, where it is an affirmance without costs, I will merely move your Lordships that the judgment be affirmed.

The House of Lords ordered and adjudged, That the interlocutors complained of be, and hereby are affirmed.

Appellants' Authorities.—Pollock, Feb. 24, 1777 (No. 4, Appendix, Tack); Graham, 1789; noticed in Mackenzie, Dec. 13, 1811; F. C. M'Intosh, Feb. 1, 1798 (No. 5, Appendix, Tack); Henderson, Feb. 24, 1802, 10,054; Frazer, Feb. 25, 1813, F. C.

RICHARDSON and CONNELL—J. M'QUEEN,—Solicitors.

CATHERINE MUNRO, Appellant.—*Jeffrey—Lushington—Sandford.* No. 29.

DRUMMOND and others, Respondents.—*Brougham—Keay—Miller—Alison.*

Tailzie—Decision—Held (affirming the judgment of the Court of Session) that an entailed estate held by an heir in possession under a strict entail, on which infeftment had followed in his favour, was liable to be adjudged for personal debt, contracted subsequent to the infeftment, but prior to the recording the entail,