if, in discharging what I believe to be a duty to the respondent, I make reference to certain remarks which have been made with regard to his conduct. I take the liberty of calling the attention of the House to an offer made on his part—

LORD CHELMSFORD—I think we had better not hear anything upon that subject.

LORD ADVOCATE—Only this, my Lords. If I am in order——

LORD CHELMSFORD—You doubt whether you are in order or not. I have no doubt that you are out of order.

LORD ADVOCATE—I certainly should not press any view of mine against the expressed wish of the House; but what occurred to me was that——

LORD CHELMSFORD—We cannot hear you.

Interlocutors appealed from affirmed, and appeal dismissed, with costs.

Agents for Appellants—Messrs T. & R. B. Ranken, W.S., and Messrs Loch & Maclaurin, Westminster.

Agents for Respondents — Messrs Lindsay & Howe, W.S., and Messrs Martin & Leslie, Westminster.

Thursday, June 16.

KEITH *v.* REID.

(*Ante*, vol. v, p. 495.)

Lease — Shop — Auction — Express Prohibition — Inversion of Possession. Held (reversing judgment of Court of Session) that where an lease of any shop has been granted without a express prohibition against sales by auction being held on the premises, it is not an inversion of possession, and consequently not illegal, to carry on such sales without the consent of the proprietor.

This was an appeal from a judgment of the Second Division. The case originally came before the Court of Session on an advocation from the Sheriff-court of Aberdeenshire, of a process of interdict brought in that court by the advocator against the respondent. The advocator was proprietrix of a shop in Union Street, Aberdeen, which was let up to the 1st June 1863 to William Fraser, merchant in Aberdeen, as a wine and grocery shop, under a lease which excluded assignees and sub-tenants, but contained no special conditions with reference to the business to be carried on in the premises. In October 1862 the respondent applied to the advocator for a lease of this shop as Fraser's successor, and obtained a lease for five years from the date of the expiry of Fraser's possession and the lease so granted contained an express prohibition against the use of the shop as an auction room. Subsequent to the granting of this lease, the respondent made an arrangement with Fraser by which he obtained immediate entry to the subjects, taking over the remainder of Fraser's lease, and obtaining the verbal consent of the advocator to this arrangement. The question now was, whether, during the period which intervened before the expiry of Fraser's lease, the respondent was entitled to sell goods by auction in the shop in question? It was, on the one hand, maintained by the respondent (appellant) that there was no restriction upon his use of the subjects during the period in question, either at common law or in virtue of any arrangement to that effect. It was, on the other hand, maintained by the advocator (respondent) that the use of the subjects as an auction room was (1) illegal, as an inversion of the use for which the subjects were let to Fraser; and (2) contrary to an express condition alleged to have been made verbally by the advocator in consenting to the subsetting of the shop by Fraser.

The Sheriff-Substitute granted interim interdict; but, on a record having been made up and proof led, he recalled that interdict and refused the advocator's petition. The Sheriff adhered, and the advocator now brought the present advocation, in which it was agreed to cancel the proof taken in the Inferior Court, and have a new proof before the Lord Ordinary. On advising that proof the Lord Ordinary adhered to the judgment of the Sheriff.

On a reclaiming note the Second Division of the Court held that the use as an auction room of subjects let as an ordinary shop was an inversion of the possession, and was illegal without the consent of the proprietor; that there was no reliable evidence of such consent; and, that being so, it was unnecessary to inquire whether there had been any express prohibition introduced into the consent given by the landlord to the subset by Fraser.

Mr Keith appealed.

SIR R. PALMER, Q.C., and J. T. ANDERSON for him.

The LORD ADVOCATE and PEARSON, Q.C,, in answer.

At advising—

The LORD CHANCELLOR made some critical observations upon the lengthy and costly proceedings in the case, which have lasted for seven years. First (he said), here was the petition for interdict presented to the Sheriff, upon which, after some delay, Mr Keith's estates were sequestrated. The Sheriff found that there was no proof of a prohibition against sales by auction in the said shop. This judgment was then brought under the review of the principal Sheriff, who affirmed it. Then there was an advocation to the Court of Session by Miss Reid, and more time spent in a variety of proceedings before both the Inner and the Outer House. Then a new proof was led, and a judgment pronounced on it by the Lord Ordinary, who found that there was no implied prohibition against sales by auction, and that Margaret Reid had failed to prove that she had imposed any such condition upon the appellant when she gave her consent to the lease, and decided the case in favour of Mr Keith. This was reclaimed by Miss Reid to the Second Division, who reversed on the point of law, holding that the use of the premises for sales by auction was an inversion of the proper use of the premises, and, therefore, that Miss Reid was entitled to interdict, and now the case has come before this House on an appeal against that judgment. He (the Lord Chancellor) could find no evidence of a prohibition of sales by auction, and the fact that, when it was first proposed, Miss Reid's agent did not refer Mr Keith to any agreement binding him in the matter, goes far to prove that there was none such. In the absence, therefore, of this, he held it to be law that, without an express prohibition, there was a right existing on the part of Mr Keith to hold this sale, and he therefore advised the House to reverse, with costs.

LORD CHELMSFORD also lamented the length of the litigation, considering that the matter was so

simple. In England, in such a case, if there was to be any objection as to such sales, it would form the subject of special covenant, and he doubted the law as laid down by the Court of Session judges in Scotland. The question on the proof was as to whether Miss Reid was bound to prove she had given a consent to Mr Keith's lease on the condition that he was not to sell by auction; and, on a review of the proof, he must hold she had not proved such a conditional assent; that, therefore, Keith was free to hold such a sale, and that, therefore, the judgment must be reversed.

LORD WESTBURY said the question was, did the word "shop" in law mean a place for private sales only? Nothing, he thought, could warrant such an interpretation. No doubt a dwelling-house could not be made into a beer-house or a factory, and there were other such cases, but here it could not be said there was any such inversion of the proper use. His Lordship made a violent attack upon the Scotch system of legal procedure. It afforded an opportunity to legal advisers to drag their clients through a disgraceful amount of litigation.

LORD COLONSAY concurred. He thought the interpretation sought to be put on the lease by Miss Reid pressed too hard on the tenant.

Appeal dismissed, with costs.

Agent for Appellant—William Officer, S.S.C.
Agents for Respondent—Hill, Reid & Drummond, W.S., and William Robertson, Westminster.

Friday, June 17.

FRASER *v.* CONNEL AND CRAWFORD.
(*Ante*, vol. vi, p. 214.)

Arbitration—Award—Ultra vires—*Compensation.* Circumstances in which *held* (affirming judgment of the Court of Session) that an arbiter had power to deal with a question of extra work, and to pronounce a finding that a claim for unfurnished work was counterbalanced by a claim for extras.

This was an appeal from a judgment of the First Division in an action for reducing a decree-arbitral pronounced by Mr George Bell, architect, Glasgow, on a matter in dispute between the appellant and respondent. The circumstances are these:—By a minute of agreement and sale, dated 22d February 1858, James Connell, accountant in Glasgow, sold to Alexander Fraser, merchant in Glasgow, an uncompleted house, No. 13 Hamilton Park Terrace, for £1250. By this minute Mr Connell was to paint and paper the premises in a suitable manner, and was to receive £750 on giving a good title to the house, and the remainder of the price in instalments of £100. Mr Bell was by this minute arbiter. Mr Fraser did pay the £750, but there still remained part of the price unpaid, and as to this the present dispute has arisen, Mr Fraser claiming a reduction in respect of unfinished work. The matter was then brought before Mr Bell as arbiter, and he pronounced a decree-arbitral, finding that Mr Fraser had paid in all £1170 of the price, and that Mr Fraser's claim in respect of unfinished work was counterbalanced by a claim which was made by Mr Connell for extra work done, and that therefore Fraser was due Connell £80. Mr Fraser then attempted to overturn this decree-arbitral, on the ground that the arbiter had no right to take into consideration this extra work, as it was a matter not within the submission. The whole question, therefore, turns upon the terms of the minute of agreement, and whether it gives Mr Bell power to deal with these extras. By that minute it is agreed that "any difference that may occur between the parties as to the furnishing, or generally under these presents, is hereby referred to Mr Bell." And again, after narrating certain additional work to be done and paid for by Mr Connell, the minute goes on thus—"Any further alterations or additions not herein enumerated are to be paid for by the said second party," that is, by Mr Fraser. Mr Fraser pleads upon this that it was *ultra vires* of the arbiter to decide the case on the question of extras; but the Court of Session held that Mr Bell was entitled under the minute of agreement to do so.

Mr Fraser appealed to the House of Lords.

LORD ADVOCATE and MELLISH, Q.C., for him.

GORDON, Q.C., and SHIRESS-WILL, for the respondent, were not called on.

At advising—

The LORD CHANCELLOR said that the main question in the case was whether the claim set up by the respondent for extra work was within the terms of the submission to Mr Bell, the arbiter? The submission referred to Mr Bell arose out of the building and completing of a house sold by Mr Connell to Mr Fraser, and all differences that might arise between the parties as to the finishing, or generally under these presents, were referred to Mr Bell; and in the list of additional work it was added that any further additions or alterations were to be paid for by Mr Fraser. Now, this showed that Mr Connell was not bound to pay for the extra work that might be done; and if he had executed such work, it was clear that he was entitled to be paid for it. The consideration of this extra work seems, therefore, to be within the submission. The Lord Advocate had argued that it was a separate contract; but though Mr Connell himself seemed at first to think his claim would not be completely entertained by the arbiter, this was obviously a mistake. The arbiter ultimately entertained it; and though it was alleged by the appellant that he had no opportunity of going into the matter, at all events when the minutes or drafts of the award were sent to the appellant, he then had an opportunity of going into it. He failed to do so, and now it was attempted to go behind the decree. That, however, he could not now do, and the judgment of the First Division was right in holding the decrees binding. The appeal must therefore be dismissed, with costs.

LORD CHELMSFORD concurred, and said the value of the subject matter in dispute was £80, and it was perfectly lamentable to think of the enormous expense that had been incurred in these proceedings. There could be no reasonable doubt that the claim to extra work was competently entertained and disposed of by the arbiter, and that the appellant had an opportunity of objecting to it, and he now tried to set aside the findings of the arbiter.

LORD WESTBURY said the clause for extra work was certainly included within the terms of the reference, which was comprehensive enough to include it. Nothing was more contrary to all principles of law than to allow parties who have agreed to refer their disputes to an arbiter to go after-