Wednesday, July 14.

FIRST DIVISION.

SIMMIES *v.* BURNET & REID (GORDON'S TRUSTEES).

Process——Jury Trial—Motion for Postponement.

The defenders in an action set down for trial by jury in the Summer Vacation moved the Court to postpone the trial until the Christmas following, in order that the result of a commission to recover letters in India might be learned. *Held* that there had been undue delay in the inquiry as to the existence of the documents in question, and motion *refused.*

Observations by Lord President and Lord Ardmillan on the circumstances in which the Court would grant such a motion.

The defenders in this action, which was for the reduction of a codicil executed by the late Miss Gordon in favour of Mr Reid, advocate, Aberdeen, moved the First Division of the Court for a postponement of the trial. The case was set down in the list of Jury Trials for the ensuing vacation, but under the motion it would have been delayed until the Christmas recess. In support of the motion it was urged that it had become necessary to learn the result of a commission granted *in causa* for the purpose of recovering any letters bearing on the case which might be in the possession of a person now in India. On the other hand the pursuers opposed the motion, and *inter alia* stated that one of their witnesses was now very aged and infirm, and that there might be considerable risk of his not surviving until another recess.

At advising—

LORD PRESIDENT—This is a question for the exercise of the discretion of the Court. Now, before the Court can exercise its discretion in favour of such an application we must feel satisfied that the party making it has been reasonably diligent, for a pursuer in such a case as the present might suffer by any unnecessary postponement.

The summons in the action before your Lordships was executed on the 23d of March last, and it may fairly be supposed that there had been intimation of an intention to challenge the deed made to the defenders before that date; but even were that not so, the defenders put off to the very last moment any enquiry as to whether any letters exist of the nature alleged, and now, at the eleventh hour, it occurs to them that this person in Calcutta may have such letters. I am not disposed to encourage such dilatory proceedings, and I am therefore for refusing the motion.

LORD DEAS—I concur.

LORD ARDMILLAN—I have come to the same conclusion. This case is not on the same footing as one in which the evidence to be recovered under the diligence is *known* to exist, but the delay is asked in respect of an enquiry for the purpose of *ascertaining* whether any such evidence does exist.

LORD MURE—I quite concur. The parties here might, by telegram or otherwise, have had more information.

The Court refused the motion.

Counsel for Pursuers (Simmies) — Dean of Faculty (Clark), Q.C., and Balfour. Agents—J. & R. D. Ross, W.S.

Counsel for Defenders (Gordon's Trustees)—Solicitor-General (Watson), Asher, and Keir. Agents—Pearson, Robertson, & Finlay, W.S.

Friday, July 16.

FIRST DIVISION.

PETITION—MACKENZIE.

Appeal to House of Lords—Loss of Evidence pending Appeal.

This was a petition for leave to appeal to the House of Lords.

The petitioner stated that the only question of law in the case arose on the title to sue, and that there was really nothing else appealable. The objection taken was on the ground that valuable witnesses might die during the time the appeal was pending, and it was stated that, provided it were agreed in such an event to take the judge's notes of evidence at the last trial, no further opposition would be offered. A letter to that effect having been put in process, the Court granted the prayer of the petition.

Counsel for Petitioner—Dean of Faculty (Clark), Q.C., and Balfour. Agents—Drummond & Reid, W.S.

Counsel for Respondents — Solicitor-General (Watson), and Trayner. Agent—P. S. Beveridge, S.S.C.

Friday, July 16.

FIRST DIVISION.

[Lord Curriehill, Ordinary.

PETITION—JAMES GORDON OSWALD.

Entail—Lands Clauses (Scotland) Act, 1845*—Consigned Money.*

In a petition by an heir of entail for authority to purchase an estate with compensation money for land taken compulsorily by a railway company,—*Held* (*First*) that it was no objection that the estate proposed to be purchased was situated at a distance from the original estate; (*second*) that the value—(1) of the mansion house; (2) of timber necessary for the protection and beauty of the mansion house; and (3) of the shooting, could be competently paid out of the consigned fund; (*third*) that it was not competent to pay out of the consigned fund — (1) the value of houses other than the mansion house, or (2) of growing timber.

This was a petition by James Gordon Oswald, Esq. of Scotstoun, for authority to uplift and apply money received from the North British Railway Company and the Clyde Navigation Trustees, in compensation for a portion of the entailed estate of Scotstoun compulsorily taken by them. The case was reported to the First Division by the Lord Ordinary, and the circumstances appear

from the following note, which his Lordship appended to his interlocutor.

"*Note.*—The petitioner is heir of entail in possession of the entailed estate of Scotstoun, situated in the county of Renfrew, on the north bank of the Clyde, near Partick, one of the suburbs of Glasgow. A considerable part of the estate has been taken compulsorily by the North British Railway Company and the Clyde Navigation Trustees for the purposes of their respective works; and the compensation money, which amounts to £19,765, 12s. 6d., has been deposited in bank, in terms of the Lands Clauses Consolidation Act, 1845. The petitioner now desires to uplift £19,000 of the consigned money in order to pay for the estate of Aigas, in Inverness-shire, which he has purchased conditionally on the transaction being sanctioned by the Court, with the view of entailing it in the same way and on the same heirs as Scotstoun.

"By interlocutor dated 20th February 1875, I remitted to Mr R. B. Ranken, W.S., to inquire into the facts and to report, and to Mr W. Grant, factor to the Earl of Seafield, to inspect the lands of Aigas, and to report as to the value of the same, and the eligibility thereof as an addition to the entailed estate of Scotstoun, and to report; and reports have now been received from both these gentlemen. The purchase appears to be in itself an eligible one in many respects. The estate is reported to be worth £19,194, and it evidently possesses many advantages as a country residence, which the remaining portions of Scotstoun do not possess. Mr Ranken, however, has very properly brought under notice several points which require consideration before the transaction can be approved of. These are so fully explained in his report that I shall merely state them with the addition of the views which have occurred to me regarding each.

"I.—*Is the purchase of land to be entailed situated at a great distance from the original estate of Scotstoun the most expedient mode of applying the consigned money?*

"The statute does not require that the lands purchased with consigned money in order to be entailed shall be contiguous to the original estate, and I think that the position of Scotstoun—the great alteration which is yearly taking place in its character—its unsuitability for the residence of the proprietor—and the difficulty, or rather the impossibility, of acquiring on reasonable terms land in the vicinity—all show that if land is to be purchased with the fund in question it must be at a distance from Scotstoun. I do not think that the money can be applied with advantage to any of the other purposes to which such money may under the provisions of the statute be applied, except perhaps in repayment of improvement expenditure as noticed by Mr Ranken in his report. But as I understand that such application would not nearly exhaust the consigned money, it will probably be more expedient to apply the money, or the greater part of it, in the purchase of land.

"On the whole, therefore, I am inclined to think that if the estate of Aigas shall be held to be in other respects a suitable one, its remoteness from Scotstoun should not be regarded as an objection to the proposed purchase, and that part of the consigned money may be properly applied thereto.

"II.—*As to the eligibility of Aigas as an investment of the consigned money.*

Several points arise here for consideration:—

1.—*Wood and Houses.*

"The estate is valued at £19,194, but in it are included the following:—

Timber, ...	£3000
Mansion house, . . .	660
Other houses, . . .	750

"It was decided in the case of the *Duke of Hamilton*, referred to by Mr Ranken in his report, that consigned money is not to be applied in paying the price of lands to be entailed in so far as that price contained the value of minerals, houses, and wood. The reporter is of opinion, and I concur with him, that the value of the mansion house (£660) may fairly be allowed as part of the price; but as regards the other houses (£750), the petitioner, if the purchase shall otherwise be sanctioned, must pay that sum out of his own pocket. And in like manner the value of the timber (£3000) must also be paid for out of his own funds. These two sums, which amount together to £3750, when deducted from £19,194, the value of the property, leave a balance of £15,444 as the extent to which the consigned money might be applied in payment of the price of £19,000, and the difference between these sums (£3556) the petitioner, by minute, No 23 of process, states his willingness to advance out of his own funds. His counsel, however, stated at the bar that notwithstanding that minute he desires to be heard upon the point, and particularly with reference to the question whether the value of the timber, in so far as ornamental (which is estimated by Mr Grant at about £400 or £500, should not be allowed out of the consigned fund. My opinion, as I have already stated, is that no part of the £3556 should be allowed to be taken out of that fund.

2.—*Shootings and Fishings.*

"The value of the estate, as reported on by Mr Grant, includes £4000 as the value of the shootings and fishings. Mr Ranken is inclined to think that this sum may be allowed as part of the price to be paid out of the consigned fund. I confess that I entertain considerable doubts on the point. I think that in many respects the value of shootings (the fishings are here of small importance) must be regarded as precarious; and that if any part of the value is to be allowed in this case the sum should be considerably reduced. I am not aware that the question has ever been raised in any similar case; and as it is a novel one it is desirable that the opinion of the Court should authoritatively be expressed upon it.

"At the request of the petitioner, I have reported the case in this form instead of by a verbal report, as being a more convenient form for obtaining the views of the Court on the new and important points which have been raised."

Authorities—*Boyd* v. *Boyd*, March 2, 1870, 8 Macph. 637; *The Duke of Hamilton, petitioner*, June 12, 1858, 20 D. 1134.

At advising—

Lord President—The Lands Clauses Act does not limit the right to buy land with consigned money to the same or an adjacent county, and in absence of such a provision we are not entitled to introduce any such limitation.

The other points which arise under this petition are more difficult. The valuation of the estate is £19,194, and that is sufficient almost to exhaust the consigned fund. The price which is asked for the estate is £19,000. That includes timber valued at £3000, mansion house £600, other houses £750, shooting and fishing £4000. The question is, whether as to these different items we can authorise payment to be made out of the consigned fund, or whether the petitioner must pay them out of his own pocket.

As to the mansion house I have no difficulty. It is very moderate, in fact a mere shooting box. As the other houses, however, I am equally clear that we cannot allow them as part of the investment. The Duke of Hamilton's case decides that point.

In regard to the timber, a great part of it is growing timber, which although a great amenity to the estate, can at any time be cut down by the heir of entail in possession, and so is not a part of the estate in which the consigned money can be invested. If, however, there is part of the timber of such a nature that the heir could not cut it down and carry it off, that is a proper subject for investment. Here we are told that from £400 to £500 worth of timber is of such a nature, being necessary for the protection and beauty of the mansion house. In the case of *Boyd* v. *Boyd*, March 2, 1870, 8 Macph. 637, the Court decided that the heir of entail could not cut down and carry off timber of that sort. So, following that case, I think that £400 should be allowed for timber, but beyond that the petitioner must pay out of his own pocket.

The only question which remains is as to the fishing and shooting. The former need not have been mentioned, for it is only the ordinary right of trout fishing in loch and stream which goes with all properties in the north. But the shooting may raise the rent of the estate, and £4000 is set down as the capitalized value of the shooting. Now this is a highland sporting estate, and I am of opinion that the shooting value is a portion of the estate which may be paid for out of the consigned fund, just as much as the agricultural value.

So I think that the Lord Ordinary should require the petitioner to provide out of his own funds £2600 for timber and £750 for houses, but that the remainder of the price may be paid out of the consigned money.

The other Judges concurred.

The Court pronounced the following interlocutor:—

"Find that the estate of Aigas in the proceedings mentioned is a competent and proper investment of the consigned money, or so much thereof as may be necessary; find that the value of the mansion house (£660) and of the shootings (£4000) may be stated as part of the price to be paid out of the consigned money; find that the value of the timber to the extent of £2600, and the value of houses other than the mansion house, are not to be stated as part of the price to be paid out of the consigned money; and remit to the Lord Ordinary to proceed farther as shall be just and consistent with these findings."

Counsel for Petitioner—Thoms. Agents—R. & J. A. Haldane, W.S.

Saturday, July 17.

FIRST DIVISION.

[Lord Shand, Ordinary.

CADZOW *v.* LOCKHART.

Process—Damage—Game—Proof—Jury Trial.

Circumstances in which *held* that the defender in an action of damages for injury caused by game had shown good cause why the case should not be tried by jury.

This was an action of damages for injury caused by rabbits, at the instance of William Cadzow, against his landlord, Sir Simon Macdonald Lockhart of Lee. The pursuer was tenant of two farms belonging to the defender, under leases containing respectively the following clauses:—"Reserving also to the proprietor and his foresaids the sole right to the whole game and fish of every kind within the lands hereby let, with full power to himself and to those having his permission to hunt, shoot, or fish and sport on the farm without liability in damages; and the tenant shall be bound to preserve the game of all kinds to the utmost of his power, to interrupt poachers and unqualified persons, and to give information of them to the proprietor and his foresaids, or those acting for him or them; and it is hereby expressly declared and agreed that the tenant shall have no claim whatever for any damage he may sustain from game, hares or rabbits, during the lease, this being held to have been calculated upon and allowed for by him in offering for the farm." "Reserving also to the proprietor and his foresaids the sole right to the whole game, including hares and rabbits of every kind, and to all the fish in the rivers and burns within the lands hereby let, with full power to himself and to those having his permission to hunt, shoot, or fish and sport on the farm, without liability in damages: and the tenant shall be bound to preserve the game of all kinds, including hares and rabbits, to the utmost of his power, to interrupt poachers and unqualified persons, and to give information of them to the proprietor and his foresaids, or those acting for him or them: and it is hereby expressly declared and agreed that the tenant shall have no claim whatever for any damage he may sustain from game, hares and rabbits during the lease, this being held to have been calculated upon and allowed for by him in offering for the farm."

The pursuer moved that the case be tried by jury, but the defender opposed the motion on the ground that the case principally turned upon the construction of the above clauses, and the case was therefore better fitted for trial by proof before the Lord Ordinary than by jury.

The Lord Ordinary allowed a proof, and the pursuer reclaimed.

At advising—

Lord President—The question is whether the defender in this case has shown good cause why it should not be sent to a jury. The clause of reservation of game in the lease is peculiar, and questions of delicacy may arise as to what kind of proof is required to enable the tenant to get the better of the clause. The result of the case will thus depend upon what is held to be the construction of the clause—a question which the Lord Ordinary