Friday, January 14.

FIRST DIVISION.

[Lord Rutherfurd Clark, Ordinary.

STEWART *v.* BULLOCH.

Superior and Vassal—Composition—Unlet Shootings—Stat. 1469, *cap.* 36.

Held that in computing the composition payable by a vassal, the shooting rent, where it is of an appreciable value, must be taken into account even where the shootings are unlet.

The defender in this case was the proprietor of the lands of Ballinreoch, in Perthshire, of which the pursuer Sir A. D. Stewart of Grandtully was the superior. Previous to 28th January 1879 the defender was tenant of the house and shootings of Ballinreoch, but having by disposition of that date purchased the lands at a price of £45,000, the lease came to an end. The rent payable under the lease, which was for seven years from 1st November 1874, was £750 per annum. On 27th August 1879 the lands fell into non-entry by the death of the former proprietor, the last entered vassal. The superior claimed that the value of the shootings should be included in estimating the composition payable by the defender. The defender resisted this claim, and in consequence the present action of declarator and for payment of casualty was raised by the superior.

The defender pleaded—"(2) A superior not being entitled to take into account the annual value of shootings in determining the amount of a casualty of composition due to him, the defender should be assoilzied. (3) *Separatim*, the shootings on the estate in question not being actually let to anyone, and no rent being derived therefrom, the pursuer is not entitled to have them taken into account in determining the amount of a casualty of composition."

The Lord Ordinary (Rutherfurd Clark) found that in computing the composition the shooting rent of the subjects must be taken into account as well as the agricultural rent.

His Lordship added the following note:—"The question in this case is, whether in computing the composition payable by the defender as a singular successor the shooting rent shall be taken into account? This question has never been decided, and it is said that the practice has varied.

"The composition payable by a singular successor is a year's rent, or, to use the words of the Act 1469, cap. 36, 'a year's maill as the land is set for the time.' It has, however, been determined that the right of the superior is not limited to the rent which is payable by actual tenants, but extends to the true yearly value of the lands, whether they be let or unlet.

"The question seems thus to be, whether the rent obtained or obtainable for shooting is a part of the rent of the land. The Lord Ordinary thinks that it is. It has been so regarded in a series of cases, of which *Leith*, 24 D. 1059, is the latest, and the rent payable for shooting has been considered as a consideration given for the use of the ground, and not as a delegation of a personal privilege. The true view seems to be that the ordinary return which is or may be obtained for the use of the lands for a year is the sum which is payable to the superior in name of composition."

The defender reclaimed, and argued—No practice of taking the shooting rent into account in estimating the composition had been shown to exist—Bell's Lectures on Conveyancing, 1137. *Leith* and the other cases relied on by the Lord Ordinary did not apply, for they related to questions under the Entail Acts, not under the Statute of 1469, and the principle of the two cases was different. The Statute 1469 must be construed in accordance with the circumstances at the date it was passed, and no question of letting shootings could then have arisen.

Replied for reclaimer—The present case was ruled by the case of *Leith*. The statute there was different, but no tangible difference of principle could be drawn between the two cases.

Authorities—*Leith* v. *Leith*, June 10, 1862, 24 D. 1059, and cases there; *Blantyre* v. *Dunn*, July 1, 1858, 20 D. 1188; *Crawfurd* v. *Stewart*, June 6, 1861, 23 D. 965; *Patrick* v. *Napier*, Mar. 28, 1867, 5 Macph. 683; *Allan* v. *Hamilton*, Jan. 12, 1878, 5 R. 510; *Hill* v. *Caledonian Railway*, Dec. 21, 1877, 5 R. 386; *Christie* v. *Christie*, Dec. 10, 1878, 6 R. 301; *Sturrock* v. *Smith*, May 21, 1880, 7 R. 799; Duff on Deeds, 310.

At advising—

Lord President—The question raised in this case is one of general importance, and, as the Lord Ordinary has observed, it is one which has not previously come before the Court for decision. For this reason we were very anxious to hear everything that could be stated against the Lord Ordinary's judgment, but having given every attention to the very able argument of Mr Kinnear I am not inclined to differ from the Lord Ordinary.

The facts are very simple, but they are also somewhat important in the determination of the case. The defender purchased this estate at the price of £45,000, and obtained a disposition dated 28th January 1879 from Lord Kinnaird and his son, the proprietors. It appears that for some time previous to the purchase he had been tenant of the house and shootings under a lease obtained from these gentlemen, who were the vassals of the pursuer, and that he paid a gross yearly rental of £700 for the house and shootings; but of course after he acquired the lands the lease came to an end, and since then he has possessed the shootings as proprietor. The lands came into non-entry—if one may still use that expression—on the 21st August 1879, in consequence of the death of the person last infeft, and the superior has brought this action, which is a statutory action under the Act of 1874, for payment of a year's rent as his composition for the entry of the defender as his vassal; and the question is, whether in estimating the composition we are entitled to take into account that part of the rent which represents the value of shooting on the estate?

Now, there may be estates in which the value of the shootings has not only never been tested by being made the subject of a lease, but may be of so obviously an insignificant an amount as not to be worth ascertaining at all. There are many such cases. On the other hand, there are numerous cases in which the shootings form no inconsiderable part of the total value of the

estate. It is with a case of this last sort that we are dealing here. Mr Kinnear says that it does not matter what the comparative value of the shootings is, and that the judgment we are to pronounce will apply to every piece of land in Scotland. I hardly think so. If the shootings are of scarcely any appreciable value, I think that our judgment will be inapplicable, just because there is nothing capable of being let. But to every case in which the shootings are either let or capable of being made the subject of a lease our judgment will apply.

Now, it is not disputed that the superior's right to a composition depends entirely on the old Statute 1469, chap. 36, and what he is entitled to require in name of composition is, in the words of that statute, "a year's rent as the land is set for the time." I quite agree with Mr Kinnear that there is no subsequent statute which in any way extends the measure of the superior's right, but, on the other hand, it is perfectly obvious that the words of the statute must be subject to construction, and in practice its words have been construed in a somewhat extended sense. Before, however, we come to consider how far the statute, as it has been construed, will include the present case, I think it advisable to treat the question as if the statute were understood literally, and to put the case on the assumption that the lease which the defender formerly held were still in existence, and that he was not proprietor, but someone else who was seeking an entry with the superior. Now, in such a state of matters would the words "a-year's maill as the land is set for the time" include the rent paid for the shootings. I think they would. If, indeed, it were the law that a right of shootings was a mere personal right—as at one time the Court appeared inclined to hold—there would be a great deal to be said against the application of the words of the statute to a lease of shootings; but I think it has now been laid down in a series of decisions that this is not the nature of a right of shootings, but that what the tenant receives under such a lease is a right of occupation of land, just as in the case of an agricultural tenant. It is for a different purpose no doubt, but it is not the less a right of occupation. The sporting tenant goes on to the land for the purpose of shooting game, just as the agricultural tenant goes for the purpose of tilling the ground; and although the object is different, the one case just as much as the other is an occupation of land under a contract, and I know no other species of contract which will include the present except the contract of lease. I speak of the result of a series of judgments which need not be referred to. Now, if that is so, it is very difficult to say that a year's rent does not comprehend the maills which are payable for the land as set to the sporting tenant, just as much as the maills payable by the agricultural tenant. If, therefore, we had been dealing here with a case of let shootings, I should without difficulty have come to the conclusion that such a case is included in the very words of the statute.

But the case we are dealing with here is a case in which the shootings are not let. It is, however, also one in which the shootings have been let and are of an appreciable value; and the question is, whether the value of such unlet shootings can be brought within the words of the Statute 1469? Now, if the superior could not under that statute obtain anything for the value of lands which are unlet to any agricultural tenant, and are cultivated by the owner, I should have very great difficulty in saying that the shooting value should be included any more than the agricultural value. But it is just here that this ancient statute has been subject to construction; and the mode in which the value has been estimated is explained by Lord Curriehill in *Blantyre* v. *Dunn*, in which he thus paraphrases the result of the decisions—"According to the established construction of this enactment, the measure of the composition payable by such an entering vassal is the rent payable to him by his tenant in the lands at the time of the entry, if they be then set in lease to a tenant, or the sum for which they might then be let if they are in the possession of the vassal himself." I do not think it can be disputed at this time of day that the statute has received this construction, and that what Lord Curriehill gives as the rule is the result of a series of decisions. Now, if that be so, and if the shootings, had they been let, would have been included in the words "a year's maill as the land is set for the time," it appears to me that the shootings must equally be included when they are, as they are here, in the hands of the vassal. I therefore entirely concur in the judgment of the Lord Ordinary.

It has been said that the cases on the authority of which the Lord Ordinary proceeds did not occur under the Act of 1469, but under a very different statute. No doubt that is so. But do the words of the Act of 1469 differ in any essential particular from the words of the statute on which these cases were decided? Just let us see what are the words of the Aberdeen Act which were in question in those cases. What the wife of an heir of entail in provision is entitled to have is a liferent provision out of a certain proportion of the lands and estate, which is thus described as not to exceed "one-third part of the free yearly rent of the said lands and estates where the same shall be let, or of the free yearly value thereof where the same shall not be let." Now, it seems to me that in meaning and extent these words exactly correspond to the words of the Statute 1469 as construed by Lord Curriehill in *Blantyre* v. *Dunn*, and consequently that the decisions on that provision of the Aberdeen Act are authorities in the present question.

Lord Mure and Lord Shand concurred.

Lord Deas was absent.

The Court adhered.

Counsel for Reclaimer (Defender)—Kinnear—Dickson. Agents—Graham, Johnstone, & Fleming, W.S.

Counsel for Respondent (Pursuer)—Asher—Mackay. Agents—Dundas & Wilson, C.S.