LORD MURE and LORD SHAND were absent from illness.

The Court refused the appeal.

Counsel for the Pursuer—D.-F. Mackintosh, Q.C.—Gillespie. Agents—Dundas & Wilson, C.S.

Counsel for the Defender—R. V. Campbell—Ure. Agents—Wylie & Robertson, W.S.

Wednesday, February 27.

SECOND DIVISION.

[Lord Fraser, Ordinary.

BEGG *v.* BEGG.

(*Ante*, vol. 24, p. 367, February 25, 1887; *supra*, p. 81, November 15, 1888.)

Proof—Perjury—Subornation of Perjury.

On 15th November 1888 the Court pronounced the following interlocutor:—"The Lords having heard counsel for the parties on the reclaiming-note for the pursuer against Lord Fraser's interlocutor of 30th June 1888, Recal the said interlocutor *in hoc statu:* Allow the pursuer to amend the record and the defender to answer the amendments, and in order thereto, open up the record, and the amendments and answers having been made of new, close the record as amended: Before further answer, and reserving all questions of expenses, allow the pursuer a proof of her averments with regard to the subornation of Elizabeth Fairbairn and Christina Ramsay Fairbairn: Appoint the same to proceed before Lord Rutherfurd Clark at such time and place as his Lordship shall fix, and grant diligence at the instance of the pursuer against witnesses and havers."

Proof before answer was led, and the Court after considering the proof and hearing arguments, pronounced this interlocutor:—"The Lords having resumed consideration of the cause, with the proof adduced under the interlocutor of 15th November last, Find the averments of the pursuer irrelevant: Dismiss the action: Find the defender entitled to expenses."

Counsel for the Pursuer—Gloag—G. W. Burnett. Agent—Robert Stuart, S.S.C.

Counsel for the Defender—Balfour, Q.C.—Jameson. Agents—Stewart & Stewart, W.S.

Wednesday, February 27.

FIRST DIVISION.

[Lord Trayner, Ordinary.

JAMIESON AND OTHERS (LORD GLASGOW'S TRUSTEES) *v.* CLARK, *et e contra.*

Sale—Sale of Lands—Entry—Rent Due and Payable after Term of Entry.

A disposition of lands provided that the purchaser should have entry at Martinmas 1886, and that he should have right to the rents "due and payable from and after the said term of entry." *Held* that the purchaser was not entitled to a rent which was payable at Whitsunday 1887, but was for a period of possession prior to the term of entry.

Sale of Land—Shooting Rent—Division of Rent between Seller and Purchaser.

The shootings upon an estate were let for the season from 1st August 1886 to 31st March 1887. The lands were sold, the purchaser's entry being at Martinmas 1886. *Held* that the shooting rent fell to be divided, one portion from 1st August to 11th November going to the seller, while the remaining portion went to the purchaser.

By trust conveyance, dated 5th June 1885, the Earl of Glasgow conveyed his whole estates to George Auldjo Jamieson and others as trustees for certain purposes.

On 24th August 1886 the trustees exposed for sale by public roup the lands of Thirdpart and others belonging to Lord Glasgow. The articles of roup provided—"*Tertio,* The entry of the purchaser to the said lands and others shall be at the term of Martinmas 1886, and the purchaser shall have right to the rents to become due for the possession from and after that term, the exposers having right to the rents due for the possession prior to that term, notwithstanding the dates at which the same may be conventionally payable; and the price shall be payable to the exposers by the person preferred to the purchase at the said term of Martinmas 1886, and shall bear interest at the rate of 5 per centum per annum from and after the said term during the not-payment." The lands were purchased at the sale by John Clark, Largs, at the price of £12,500.

By the disposition which followed upon the sale the term of entry was Martinmas 1886. It contained this clause of assignation of rents—"And we, as trustees foresaid . . . assign the rents, feu-duties, and casualties of superiority due and payable from and after the said term of entry."

The lands consisted of two farms, both arable. At Whitsunday 1887 £122, 10s. was due and payable as rent for one of them, and £72, 10s. for the other—in all £195. These rents were payable for the possession prior to Martinmas 1886. Clark claimed these rents, and obtained payment thereof from the tenants.

Lord Glasgow's trustees raised the present action against Clark to obtain repayment of the £195, pleading "(2) the rents of the said farms due and paid at Whitsunday 1887 being for the

possession of the said farms prior to the defender's entry, he has no right thereto."

The defender pleaded—"(1) The rents in question having become due and payable subsequent to the term of the defender's entry, he was entitled to uplift the same. (2) In respect that by the terms of the conveyance in his favour, the said rents belonged to the defender, he is entitled to absolvitor, with expenses."

On 4th July 1888 the Lord Ordinary (TRAYNER) sustained the defences and assoilzied the defenders.

"*Opinion.*—The defender bought the lands of Thirdpart from the pursuers, and he is now infeft therein. By the disposition in favour of the defender the term of entry was declared to be Martinmas 1886, and the clause assigning the rents was expressed thus:—'And we, as trustees foresaid . . . assign the rents, feu-duties, and casualties of superiority due and payable from and after the said term of entry.'

"The rents uplifted by the defender, and which the pursuers seek by this action to recover from him, were due and payable after Martinmas 1886, and therefore, *prima facie*, were assigned to the defender by the conveyance in his favour. But the pursuers maintain that the said rents nevertheless belong to them, because by the articles of roup under which the defender purchased it was stipulated that the purchaser should have right to the rents to become due for the possession from and after the term of entry, and the rents in question, although due and payable after Martinmas 1886, were for the possession prior to that date.

"If the rights of parties were to be held as fixed by the articles of roup I should find for the pursuers. But I am of opinion that the rights of parties are to be determined by the terms of the disposition granted by the pursuers to the defender, that being the ultimate expression of their contract, which cannot be modified or altered by previous writings, negotiations, or conditions of sale.

"Further, by the Statute 31 and 32 Vict. cap. 101, section 8, it is provided that an assignation of rents, in the form there given, shall, 'unless specially qualified, be held to import an assignation to the rents to become due for the possession following the term of entry.' The pursuers, therefore, by using the statutory form, 'We assign the rents,' would have limited the defender's right to that which was expressed in the articles of roup. Instead of doing so, however, the pursuers 'specially qualified' the assignation of rents by adding 'due and payable from and after the said term of entry.' I must suppose that this qualification was intended to have some meaning and effect, otherwise it would not have been expressed, and the only meaning I can give to the qualification is its natural and ordinary meaning as contended for by the defender."

The pursuers reclaimed.

A separate question arose as to the shootings upon the estate. The shootings were let by Lord Glasgow's trustees, at a rent of £100, to a tenant from 1st August 1886 to 31st March 1887. On 21st February 1887 Lord Glasgow's trustees uplifted this rent from the tenants. Clark, as proprietor of the lands, sued Lord Glasgow's trustees for payment of the £100 rent thus uplifted. He maintained that the term of entry to the lands being Martinmas 1886, he had right under the clause of assignation of rents above quoted to the shooting rent because it was payable after his entry. The defenders averred that the shooting rent fell to be apportioned between them and the pursuer, the portion from 1st August to 11th November 1886 effeiring to them, and the remainder to the pursuer.

The defenders pleaded—"(1) The pursuer is only entitled to the portion of the said rents due for the possession of the said lands from and after the term of Martinmas 1886. (2) In terms of the contract between the parties and the provisions of the Apportionment Act 1870 (33 and 34 Vict. c. 35), the said rents fall to be apportioned between the pursuer and the defenders, and the latter are entitled to the proportion thereof effeiring to the period from 1st August to 11th November 1886."

On 4th July 1888 the Lord Ordinary (TRAYNER) decerned against the defenders in terms of the conclusions of the action.

"*Opinion.*—The rents in question, which were for shootings over a portion of the lands of Thirdpart, were due and payable at 31st March 1887. I think they belonged to pursuer, being assigned to him by the conveyance granted in his favour by the defenders. I refer to the opinion expressed by me to-day in deciding the case *Lord Glasgow's Trustees* v. *Clark*.

"The Apportionment Act referred to by the defenders has no bearing upon this case, which is one of contract."

The defenders reclaimed, and argued—The Lord Ordinary had entirely misconstrued the meaning of the clause of assignation of rents. It had the same meaning as the short claim introduced by the Act of 1868, "I assign the rents." This short form was not imperative and it did not follow, as the Lord Ordinary seemed to think, that because the exact language of that short claim was not adopted the parties must have intended thereby to give effect to some other arrangement. The purchaser was only entitled to the rents payable for possession after his entry, and what the disposition carried was an assignation to rents "due and payable from and after the said term of entry," so by common law as well as by the disposition the purchaser could have no right to any rent, whatever might be the stipulated terms of payment, for possession prior to his entry at Martinmas 1886.—*Penman* v. *Campbell*, June 10, 1828, 6 S. 940. The important word was "due," because though the rent might be "due" it might not be "payable" until a conventional term. The construction of this claim now contended for was a reasonable one and was borne out by the following cases—*Stevenson* v. *Moncreiff*, February 12, 1845, 7 D. 418; *Sinclair* v. *Sinclair*, December 1, 1847, 10 D. 190; *Shand's Trustees* v. *Mackie*, February 15, 1850, 12 D. 739; *Murray's Trustees* v. *Jardine*, May 31, 1865, 3 Macph. 845. As regarded the rents of the shootings it was payable on 31st March after the purchaser had obtained possession, but a portion of the £100 was rent due before the purchaser obtained possession and fell to Lord Glasgow's trustees. There ought to be apportionment—Apportionment Act 1870 (33 and 34 Vict., cap. 35), sec. 2; *Maxwell's Trustees* v. *Scott*, November 5, 1873, 1 R. 122.

Argued for Clark—The rents claimed belonged

to the purchaser. The sellers had not availed themselves of the short form introduced by the Act of 1868, which if it had been adopted would have expressed the same meaning as that contained in the articles of roup. In construing the clause of assignation of rents it was not competent to look at the language of the articles of roup or to refer to the communings of parties. The rents in question were "payable" after the purchaser obtained possession, and by the terms of the disposition they fell to him. That was the intention of parties and was so expressed. The authorities cited by the other side were not applicable as they were all prior to the Act of 1868. With regard to the rent of the shootings, the legal term of payment and the term at which the rent was due were the same. The Apportionment Act was not applicable to a case like the present; the whole rent was due to the purchaser.

At advising—

Lord President—In the case in which Lord Glasgow's trustees are pursuers I cannot agree with what the Lord Ordinary has done. The law and practice of Scotland regulating the rights of sellers and purchasers of land with reference to the rents of land sold is well settled and quite consistent, and even supposing there had been no clause of assignation of rents in this disposition at all, the law has settled how the rights of parties are to be arranged.

The purchaser is entitled to rent for the possession which follows after the term of his entry while the rents for possession prior to that period goes to the seller. No doubt this rule may, in the option of parties, be varied by paction, and it has been urged that that is what has taken place here, but in the construction of this clause of assignation of rents it is to be kept in mind that we are dealing with terms which have a definite meaning attached to them by a long series of decisions. I do not consider it at all necessary to go back to the clause in the articles of roup, because it only expresses the common law upon this subject.

But it has been said that the disposition which followed upon these articles of roup abrogated the ordinary rule, and the words which are relied upon as supporting this view are, "and we assign the rents . . . due and payable from and after the said term of entry." Now, these words are substantially the same as those which are to be found in the articles of roup, and that being so it is not necessary for us to decide whether it is competent to go back to the articles of roup in order to construe the clause in the disposition. Rents due or becoming due clearly mean rents becoming due at the legal term. I do not know any other meaning which can be put upon these words except that expressed in the pursuer's condescendence, and I am not upon that account going to alter the law of Scotland. I think that the case of *Penman* to which we were referred is on all fours with the present case. There the rents became due according to a legal term, though they were payable at a conventional term; here the assignation is to the rents becoming due and payable after the term of entry; therefore whatever portion of the rent became due before that period effeired to the seller, and what became due thereafter belonged to the purchaser.

But it has been said that there was an intention here to depart from the ordinary rule, because the short form of the clause of assignation of rents introduced by the Act of 1868 was adopted. Now, I do not quite follow this. Suppose that this short form had not been adopted, then the claim in the disposition must just have stood or fallen according to the meaning of the terms used. All that the parties have done here is to adopt the short form introduced by the Act, at the same time using certain words to express their meaning, and they have thrown aside the statutory forms. This can in no way alter the rights of parties.

As to the other case in which Mr Clark is pursuer, it is to be decided upon somewhat different principles. The question relates to a rent of certain shootings, and the period covered by it was from August 1886 to March 1887.

The right which the tenant enjoyed was the privilege of entering on and using the lands for a certain definite purpose, namely, for sport. There was no actual or annual profit derivable from the lands as in the case of an agricultural lease, but only the exercise of a personal function. It is a possession which can be measured by time, and accordingly when rents are assigned under a clause of assignation of rents in a disposition that portion of the rent which corresponds with the period of occupation by the tenant after the term of entry belongs to the purchaser, while the portion corresponding with the tenant's occupation prior to the term of entry belongs to the seller. In such a case no question of apportionment arises. Prior to Martinmas the shooting tenant possessed under the seller, but subsequent to that date he possessed under the purchaser. I therefore differ from the view which the Lord Ordinary has taken, and think that the rent in question falls not to be apportioned but divided. This may require some adjustment, but as the total rent is £100 counsel can have little difficulty in settling the exact amount due to each party upon the principle which I have stated.

Lord Adam—As regards the first case, all I think that we have to do is to construe the clause of assignation of rents in the disposition of November 1886. In my opinion we should not look back at the terms of the articles of roup, because if from any cause the language in the articles of roup and in the disposition differs it must be presumed that it was intended to do so. The words "we assign the rents . . . due and payable from and after the said term of entry" have a fixed and definite meaning—they mean the rents due from the period of possession and payable therefor. After the period of entry the rent went to the purchaser, and prior to that to Lord Glasgow, who then possessed.

It is not necessary to consider what would have been the effect of the use in the disposition of the short clause of assignation of rents, for the simple reason that the parties have not chosen to avail themselves of it.

As regards the other case, I also concur. Shootings are not in the same position as an agricultural lease. The crop is reaped from day to day, and the rent ought to be divided between the seller and the purchaser just in the proportion that the game tenant holds under each.

Lord Lee concurred.

Lord Mure and Lord Shand were absent from illness.

In the case in which Lord Glasgow's trustees were pursuers the Court recalled the Lord Ordinary's interlocutor, repelled the defender's pleas-in-law, and decerned.

In the case in which Mr Clark was pursuer the Court sustained the first plea-in-law for the defenders, and found the pursuers entitled to £57, 12s. 3d., and decerned.

Counsel for Lord Glasgow's Trustees—Low. Agents—J. & F. Anderson, W.S.

Counsel for Clark—Balfour, Q.C.—Ure. Agents—Mackenzie, Innes, & Logan, W.S.

Friday, March 1.

FIRST DIVISION.

[Lord Kinnear, Ordinary.

RIXON *v.* THE EDINBURGH NORTHERN TRAMWAYS COMPANY.

Public Company—Contract—Fraud—Reduction—Action by Single Shareholder.

A shareholder of a public company brought an action of reduction of a contract, alleging that it had been entered into fraudulently and collusively, and that the directors were thereby serving other interests than those of the company. *Held* that as fraud had been relevantly averred, the action could competently be maintained at the instance of a single shareholder, and a plea of no title to sue *repelled.*

The Edinburgh Northern Tramways Company was incorporated in 1884 by Act of Parliament, by which the company were authorised to construct certain tramways mentioned in the Act in the city of Edinburgh and town of Leith.

By agreements between the Town Councils of Edinburgh and Leith and the promoters of the said Act, scheduled to the said Act, and confirmed and made binding upon the company by the 69th and 71st sections thereof, it was provided that all the works to be executed by the company should form the subject of competition and contract.

On 24th October 1884 tenders having been invited by advertisements, a contract was entered into between the Northern Tramways Company and the Patent Cable Tramways Corporation, Limited, for the construction of the proposed tramways. This contract was, in consequence of certain disputes between the parties, subsequently modified by an agreement dated 22nd July 1886, following upon which a portion of the work contracted for was proceeded with.

In July 1886 the contractors made over their whole present and future interest in the concern to the Debenture Corporation, who in turn subsequently assigned it to the Assets Realisation Company, Limited. From time to time during the execution of the works the contractors became entitled to certain payments, and the Tramways Company elected in terms of the contracts to issue to them in satisfaction thereof shares and mortgages of the company to the amount of the engineer's certificates, subject to the retention of a certain percentage provided by the contract. The shares and mortgages were so issued at the request of the contractors to their nominees. It thus happened that at 28th February 1888, out of the 4500 £10 shares and the £10,170 mortgages in and of the Tramways Company, 3190 shares and £6270 mortgages, issued to the contractors' nominees, were held by certain parties, including the present directors of the Tramways Company, for behoof of the said Assets Realisation Company, Limited.

In January 1888 the Patent Cable Tramways Corporation went into liquidation, and Mr John Annan, accountant, London, was appointed official liquidator.

On 15th June 1888 another agreement (supplemental of that of 22nd July 1886 above referred to) was entered into between the Patent Cable Tramways Corporation, Limited, of the first part, the secretary of the Assets Realisation Company of the second part, the Edinburgh Northern Tramways Company of the third part, and Messrs Dick, Kerr, & Company, contractors, 101 Leadenhall Street, London, of the fourth part, with a view to the construction of the remaining portion of the line originally contemplated at a cost of £75,000.

William Augustus Rixon, of 10 Austin Friars, London, raised the present action against the Edinburgh Tramways Company, seeking to have the agreement last above recited reduced.

He averred that he was a debenture and shareholder of the defenders' company, that the works contracted for did not form the subject of competition as provided by the company's Act of incorporation, and were therefore *ultra vires* of the company. He further averred—(Cond. 17) "The said agreement of the 15th June 1888 has been entered into between the said parties wholly irrespective of the interests of the company, and to the prejudice of the pursuer and the other independent holders of shares and debentures. It was entered into by the defenders fraudulently and collusively with the design of obtaining for Messrs Dick, Kerr, & Company a contract on exorbitant terms free from competition, and such contract, should it be carried out, would have the effect of seriously and unjustly depreciating the shares and debentures held by the other independent mortgagees and shareholders of the company. The directors of the defenders were in fact acting in the transaction only as the agents of Messrs Dick, Kerr, & Company, and of the Assets Realisation Company, as mortgagees of the Patent Cable Tramways Corporation, Limited, and not solely, as should have been the case, as the representatives of the defenders' company, which was not independently advised or represented in the preparation or execution of the said agreement. The sum proposed to be paid for the work, even if satisfied by shares and debentures of the company, is wholly disproportionate to the value of the work to be done, that value amounting to no more than the sum of £22,000." He also alleged that the agreement of 15th June 1888 was not a supplemental agreement as stated, but an entirely new contract, and was not submitted to the shareholders of the company in order to prevent them timeously calling it in question.