and so jumped about in the box that she got choked with the collar. I think that is the cause of death, and I do not see any dubiety about it on the proof. There might have been a *post mortem* examination, but I do not enter into the question who was responsible for its not having taken place. That being so, where does the responsibility lie in respect of the non-delivery of the horse at the termination of the journey. It was delivered to the railway company in good health, and at a certain stage of the journey it was found dead in the box. The death arose from circumstances which we have to inquire into, and investigate. We have to consider the length of the rope by which she was attached to the ring in the box, the presence of the owner of the horse at the time it was tied up, and the fact that the collar was left on her when she was shut in; so that we may assume that the death arose from the combined operation of these different causes. I hold it to be clear, in point of law, in the first place, that had the man not been present, and the horse had been handed over to the railway servants at Drem, there was an obligation on the railway company to see that she was properly secured in the box, and tied up in the usual way. I know of no better evidence that this was regarded as the duty of the railway company than this, that there were hung up in the box halters intended to be used for that very purpose. I think the railway company was bound to see that the horse was properly secured, just as much as a shipowner or ship-master is bound to see that goods handed over to him for shipment are properly stowed in the vessel. Whose fault is it that a length of rope of from 4 to 6 feet was left for the horse to play upon? It is said the horse was brought there with a halter, and then it was tied up in the box. Now, was that properly done? I think not. It seems to me impossible to say it was properly done, otherwise it could not have got on its back in the way it was found when the train arrived in Edinburgh. The inference I draw from the evidence is, that in shortening the rope there must have been a noose put upon it, and the efforts of the animal to get quit of the halter had drawn out the noose. Now, I think that was an improper and erroneous way of tying the animal, and I cannot excuse the person whose duty it was to tie it up. The question is next—Why was the collar left on? and that leads to another difficult question. The farmer brought the horse to the box. I do not think that the man being present (who was proved not to have been a skilled man in these matters) ought to exonerate the railway company from the duty of seeing that the horse was properly secured. I think the company must be held responsible, and that the presence of the farmer cannot prevent liability from attaching to them. As to the collar being left on, it seems that the animal, having too great a length of rope, jumped about, and so caused the collar to press upon the windpipe, and led to strangulation. Now, it seems to me impossible that this should have happened if she had been tied up with only two feet of rope. With regard to the argument of the Solicitor-General on the terms of the receipt, I am quite satisfied that a clause of that kind introduced into the receipt, and not embodied in a contract subscribed by the party, cannot have any effect if fault and negligence on the part of the company be proved. Therefore I do not think that the circumstance that fear or restiveness may have led the animal to jump about can be held to be a good defence on the part of the railway company. Moreover, it is not established that the restiveness and fear did cause its death. They may have led to its making more efforts than another animal would have done, but is not the limitation of the length of rope to two feet for the very purpose of preventing an animal of that restive disposition from getting away from the ring? I think the cause of death can be traced to the fault of the porter who placed the horse in the box, and that the railway company are responsible for that.

Lord Neaves—I am of opinion that under this contract of conveyance there was a duty on the railway company properly to truck the horse, including the duty of seeing that it was duly tied with a view to its safety. They undertook and proceeded to discharge that duty, but they or their servants (for whom they are responsible) did it ill, whereby the horse met its death from strangulation.

Agents for Pursuer—Millar, Allardice, & Robson, W.S.

Agents for Defenders—Dalmahoy, Wood, & Cowan, W.S.

Wednesday, November 2.

FIRST DIVISION.

FARQUHARSON, PETITIONER.

Lease—Lease of Entailed Lands for Shooting Purposes—Rutherfurd Act, 11 and 12 Vict. c. 36, § 24. What constitutes a long lease under this section.

Held (1) that a lease of land for a period of years for the purposes of sport may be granted by an heir of entail, under the authority of the Rutherfurd Act; the lease being really one of the land, and not of a mere privilege of sport over the land; and the Court being satisfied of the expediency, and that the provisions of the statute are complied with. *Held* (2) (dissenting, Lord Deas) that the term long lease in the 24th section of the Rutherfurd Act must be taken to mean, not only building leases, and leases of such duration as to be virtual alienations, but leases also of a length exceeding that which the heir of entail in possession is entitled to grant in the ordinary administration of the estate, and under the fetters of the particular entail.

This was a petition under the Rutherfurd Act, 11 and 12 Vict., c. 36, § 24, and the Amendment Act, 16 and 17 Vict., c. 94, § 5, for authority to grant a lease of part of the entailed estate of Invercauld. The petitioner, James Ross Farquharson, set forth that he was heir of entail in possession of the entailed lands and estate of Invercauld, &c., under certain deeds of entail; and that he was infeft in the said lands and estate according to special service as the nearest and lawful heir of tailzie and provision in special of his father James Farquharson, last of Invercauld, under the said deed of entail. "That by the said deeds of entail the petitioner and the other heirs of entail thereby called to the succession of the foresaid lands and estate are especially prohibited, *inter alia*, from granting any tack or lease for a longer period than one year of a certain portion of the said entailed lands and estate, comprehending the lands to be contained in the lease after mentioned."

He then narrated the 24th section of the Rutherfurd Act, and the 5th of 16 and 17 Vict., c. 94,

under which the present application was made, and proceeded to state that he, the petitioner, "has not yet availed himself to any extent of the said power of granting feus or long leases of the estate contained in the said deeds of entail conferred upon proprietors of entailed estates in Scotland by the above-recited section of the Statute 11 and 12 Victoria, cap. 36, but he is now desirous to exercise that power, and with that view he has granted or intends to grant a lease in favour of His Serene Highness Ernest Leopold Victor Charles Augustus Joseph Emich, Prince of Leiningen, the Right Honourable George Granville, Earl Granville, and Sir Thomas Myddelton Biddulph, Knight Commander of the Bath, as trustees for behoof of Her Majesty Queen Victoria, of the portion of the said entailed estate commonly called 'The Ballochbuie,' which lands extend from the march with the estate of Balmoral at Aberdeen Haugh on the south side of the river Dee, up to Lochnagar, thence by water shear by Cairn Taggart, Little Cairn Taggart, Craig-in-Loch, Waul-Luggan, Craig-na-derkaig, and Craig Segach to Lochan-na-gaur, thence from Lochan-na-gaur, by water shear to Stronabrack Rock, thence by the ridge of hillocks immediately east of a straight line between that rock and the end wall of the old Bridge of Dee, and the River Dee to Aberdeen Haugh, above named, as the same is bounded by march-stones set up, and marked and will be delineated and coloured red on a map of the district to be produced in the course of the proceedings to follow hereon, together with the whole growing timber, woods, and plantations thereon, and with full and exclusive right to the said trustees and the beneficiary and beneficiaries under the said trust, by themselves or others, to occupy and possess the said lands and others, and to shoot and hunt and sport, and to kill deer and game thereon, and that for the space of nineteen years from and after the 11th day of December 1868, at the yearly rent of £1500 sterling. That the lands to be contained in the said lease are under one-eighth part in extent and value of the said entailed estate possessed by the petitioner under the before-mentioned deeds of entail, and do not include the mansion-house, offices, or policies of the said estate. The said rent of £1500 is the highest which could, in the circumstances, be obtained for a nineteen years' lease of the said lands above described, and would materially increase the value of the said entailed estate, and be beneficial thereto, and likewise to the petitioner and a succeeding heir or succeeding heirs of entail. That the petitioner is of full age, and James Murray Ross Farquharson, the petitioner's eldest son, and residing with him at Apethorpe Hall, in the county of Northampton, England, is at present the heir of entail next entitled to succeed to the said entailed estate immediately after the petitioner, and the only heir of entail to whom notice of the present application is required to be made in terms of the said 24th section of the said Act 11 and 12 Vict. cap. 36. That the said James Murray Ross Farquharson is in pupillarity; and as he has no guardian other than his father, the petitioner, his administrator-in-law, it may be necessary for your Lordships, in terms of the 31st section of the said last-mentioned Act, to appoint a tutor *ad litem* to him in the course of the present application. That the petitioner will duly lodge in process the draft of the said lease for the approval of the Court as before mentioned, subject to such modification as to your Lordships shall seem proper; and he will also make and produce an affidavit, in terms of the 6th section of the said Act 11 and 12 Vict. cap. 36, and of the 17th section of the said Act 16 and 17 Vict. cap. 94, setting forth to the best of his knowledge and belief the particulars of the debts and provisions, if any, affecting, or that may be made to affect the said entailed lands and estate, or the heirs of entail succeeding thereto. That the petitioner is desirous to obtain the approval of the Court to the said lease granted or to be granted by him, to be produced as aforesaid; and for this purpose makes the present application to your Lordships in terms of the foresaid Statutes, and the Statute 31 and 32 Vict. cap. 84, and relative Acts of Sederunt."

The Lord Ordinary, on the motion of the petitioner, appointed Mr Robert Burt Ranken, W.S., to be curator *ad litem* to James Murray Ross Farquharson, mentioned in the petition, and on full consideration of the case Mr Ranken raised no objections on the part of his ward.

The Lord Ordinary likewise remitted to Mr Alexander Hamilton, W.S., to enquire into the facts and circumstances set forth in the petition, "and whether the provisions in the Statutes and Acts of Sederunt have been complied with, and to report:" and further, remitted "to Mr James Forbes Beattie, land-surveyor, Aberdeen, to visit and examine the entailed lands and estate mentioned in the petition, and to inquire whether the proposed lease mentioned in the petition is expedient, and would be advantageous to the estate and heirs of entail, and whether the lands proposed to be let are less than one-eighth part in value of the said estate, and do not form any part of the mansion-house, offices, or polices thereof, and to report." The reports of Messrs Hamilton and Beattie were both favourable to the granting of the application — Mr Hamilton reporting that the proceedings were regular, and Mr Beattie writing, "I reckon the extent of the ground proposed to be let at about 7500 acres, or at most 8000. . . . The ground is mountainous, very broken and rugged, with rock. The lower ranges wooded. It has no agricultural value, nor is it of value for grazings, excepting a small piece of flat land by the river side, which might be turned to account as a grazing, were it fenced against the deer, but the expence of fencing it would be more than it is worth. Its value as a separate shooting is difficult to determine. There is no lodge or accommodation for sportsmen attached to it. In my opinion it is merely deer-stalking ground, and might bring a rent, one year with another, of £600 to £700, including the fishings on that side of the river. But shooting rents are not fixed on any intrinsic value. Where good lodges, &c., are provided, very high sums are given for the pleasures of mountain exercise and sport, particularly when a family are well accommodated." Besides the provisions of the proposed lease already quoted, it only remains to notice that there were a few peculiar clauses inserted, particularly with regard to the right to the wood upon the part of the estate proposed to be let, and to the right of riding and driving through the lands, reserved by the proprietor, the use granted being otherwise peculiarly exclusive.

There having arisen certain difficult points of law as to the power of the Court to authorise the proposed lease, The Lord Ordinary (MACKENZIE) reported the case to the First Division of the Court in the following interlocutor:—

Edinburgh, 16th July 1870.—"The Lord Ordin-

ary having heard the counsel for the petitioner, and for Mr Robert Burt Ranken, W.S., the tutor *ad litem* to James Murray Ross Farquharson, the eldest son of the petitioner, and considered the petition and the reports by Mr Alexander Hamilton, W.S., and Mr James Forbes Beattie, land-surveyor, Aberdeen, Nos. 18 and 15 of process, with the minutes for the said tutor *ad litem*, Nos. 19 and 20 of process, and whole proceedings—reports the said petition, with reference to the question stated in the annexed note, to the Lords of the First Division of the Court, and grants warrant to enrol in the Inner House Rolls.

"*Note.*—The petitioner, who is heir of entail in possession of the entailed estate of Invercauld, makes the present application under the statutes 11 and 12 Vict., chap. 36, sec. 24, and 16 and 17 Vic., chap. 94, sec. 5, for the sanction of the Court to a lease by him for nineteen years, from and after 11th December 1868, of that part of the forest on the said estate called 'The Ballochbuie,' in favour of His Serene Highness Ernest Leopold Victor Charles Augustus Joseph Emich, Prince of Leiningen, and others, as trustees for behoof of Her Most Gracious Majesty Queen Victoria. The subjects proposed to be so let adjoin the estate of Balmoral, being on the same side of the River Dee. They are 'All and Whole the lands and others, being that portion of the estate of Invercauld commonly called "The Ballochbuie,"' as particularly described in the draft lease, 'together with the whole growing timber, woods and plantations therein, and with full and exclusive right' to the said trustees, for behoof foresaid, 'to occupy and possess the said lands and others, and to shoot and hunt and sport, and to kill deer and game thereon.' The yearly rent agreed to be paid is £1,500.

"Mr James Forbes Beattie, land surveyor, Aberdeen, to whom a remit was made in the course of the proceedings under the petition, states in his report that in his opinion 'the proposed lease is expedient, and will be advantageous to the estate and the heirs of entail. The lands proposed to be let are much less than one-eighth part in value of the said estate, and do not form any part of the mansion-house, offices, or policies thereof.' On the application of Mr Ranken, the tutor *ad litem* for the petitioner's eldest son, Mr Beattie has, in a letter which he addressed to the petitioner's agents, stated his opinion as to the extent of the ground to be included in the lease, and as to what it would let for separately as a shooting, and as an agricultural or pastoral subject. He reckons the extent to be from 7500 to 8000 acres. He states that the ground is mountainous, rugged, and rocky, the lower ranges being wooded. He says—'It has no agricultural value, nor is it of value for grazing, excepting a small piece of flat land by the river side, which might be turned to account as a grazing, were it fenced against the deer, but the expense of fencing it would be more than it is worth. Its value as a separate shooting is difficult to determine. There is no lodge or accommodation for sportsmen attached to it. In my opinion it is merely deerstalking ground, and might bring a rent, one year with another, of £600 or £700, including the fishings on that side of the river. But shooting rents are not fixed on any intrinsic value. Where good lodges, &c., are provided, very high sums are given for the pleasures of mountain exercise and sport.'

"The tutor *ad litem* is, in the interest of his ward, satisfied as to the expediency of the proposed lease, subject to the adjustment of its details.

"The Lord Ordinary is of opinion that the proposed lease would be very beneficial to the heirs of entail. But the question, whether an heir of entail can grant a lease of the shootings over the entailed estate for nineteen years, which shall be binding after his death upon the future heirs of entail, has never been decided by the Court. In the case of the *Earl of Fife* v. *Wilson*, 14th December 1859, 22 D. 191, the Lord Ordinary (Lord Ardmillan) held that such a lease was binding on the future heirs of entail. But the Court, holding that the lease of the shootings founded on had not been proved, did not decide the general question. It has been decided in the case of *Pollock, Gilmour, & Company* v. *Harvey*, 5th June 1828, 6 S. 913, and by Lord Barcaple, in the case of *Birkbeck* v. *Ross*, 22d December 1865, 4 Macph. 272, that a lease of shootings is not effectual against a singular successor. In the first of these cases the Lord Ordinary (Lord Corehouse) in his note said, 'By the law of Scotland the right of killing game, considered as a real right, is an incident of landed property.' The report of the case bears that the other Judges, with the exception of Lord Craigie, concurred in Lord Corehouse's opinion. Mr Bell, in his Principles (sect. 952), states that 'the right to kill game does not exist as a real right separate from the land by sasine or lease; this is only a personal privilege in respect of the right of property.' Lord Barcaple states in the note to his interlocutor in the case of *Birkbeck*, 'The tenant contends that there is a distinction between an ordinary lease of shooting and a lease of a deer forest, where all use of the land for agricultural or grazing purposes is excluded, and the game tenant is the sole occupant. The Lord Ordinary has formed no opinion adverse to this view, though the precise nature and terms of the lease would be required to be looked at in each case.' Mr Beattie states that the ground intended to be leased is merely deerstalking ground. The retention by the proprietor of the right to kill game is incompatible with the exclusive possession and beneficial occupation of the ground as a deer forest, and would, it is thought, prevent the ground being let for a deer forest, except at a very reduced rent.

"The deed of entail under which the petitioner possesses the estate of Invercauld prohibits him from granting any leases, 'except only from year to year, upon the manour-place and offices of Invercauld, or upon the gardens, parks, enclosures, forests, glens, grassings, and others surrounding the same, or any part thereof lying within the limits' therein specified. These limits comprehend that part of the forest called 'The Ballochbuie.' But it was maintained by the petitioner that, notwithstanding this prohibition, he was entitled to grant the proposed lease, because, by the 24th section of the Rutherfurd Act he is empowered to grant, with the approbation of the Court, 'long leases of any part of the said entailed estate,' for the highest rent that can be got for the same, not exceeding one-eighth part of value thereof for the time.

"Considering the novelty and importance of the question raised by the petition, the Lord Ordinary deems it right not to decide the question, but to report it for the determination of the Court."

DUNCAN appeared in support of the petition.

ASHER, for the tutor *ad litem* to James Murray Ross Farquharson, assented.

LORD ADVOCATE (YOUNG) and SHAND for Her Majesty's trustees.

At advising—

LORD PRESIDENT—This is a petition for authority to grant a lease of entailed lands presented to us by Mr Farquharson of Invercauld. It is founded upon § 24 of the Rutherfurd Act, and also upon § 5 of the Amendment Act of 1853. The only difference between these two sections is, that under the latter the heir of entail in possession may come to us with his deed ready instead of having to come to us first for power to make it. The question before us is, whether this lease is such a one as we ought to sanction. It is in many respects peculiar; but the leading peculiarity is this, that it is what is called a shooting or sporting lease. It sets forth "full and exclusive right" to the granter, "and to the beneficiary and beneficiaries under the said trust, by themselves or others, to occupy and possess the said lands and others, and to shoot and hunt and sport and to kill deer and game thereon." Now, it is necessary to notice what the nature is of the land which it is thus proposed to let. This is well set forth in a letter of 4th July last from Mr Beattie, land surveyor, Aberdeen, to whom the Lord Ordinary remitted to report. It is made clear by him that this is a subject which can be made available as a rent producing subject, only under a sporting lease. Consequently, it is manifest that it is for the benefit of the estate and for the heirs of entail that it should be thus let if the rent offered is adequate, and if there are no further objections. We have Mr Beattie's opinion that the rent offered is ample, and rather more than ample; and we have only now to consider whether there are any further objections. Now, this being a sporting lease, we must ascertain that the lands proposed to be let are not a part of the home district of the estate. It clearly appears that they are not so; that they are on the opposite side of the river, and are an out-lying portion of the estate contiguous to the neighbouring lands of Balmoral, and farther, that the value of the lands proposed to be let is much less than the eighth part of the value of the whole estate.

But the Lord Ordinary has suggested some difficulties to us. He says that it has never yet been determined authoritatively that a lease of shootings for a term of years is a lease which would be held binding upon singular successors or future heirs of entail. Now, I confess I do not see much difficulty in this objection. This is not a lease of shootings in such a sense that the granter of the lease receives nothing but a personal privilege of sporting over certain lands. On the contrary, it appears to me that this is in substance a lease of the land itself. The granter gives the grantee exclusive right of occupation of the land. The only peculiarity therefore arises from the nature of the land itself. Now, it is shown that it is impossible to turn the land in question to any other purpose, and the lease gives the tenant the land for the purpose of turning it to the only account which will produce a rent to the granter. Under these circumstances, I look upon the proposed lease as substantially a lease of land. In addition to the cases cited by the Lord Ordinary, I think the case of *Stirling Crawfurd* v. *Stewart*, 23 D. 965, most important. The effect of that judgment is, I think, to fix a principle perfectly conclusive on the subject—viz., that a game lease is a lease of land for a particular use (and here it is an exclusive use); and that the yearly return is a rent of land, in the proper sense of the term—a rent received for the use and occupation of the land.

But the Lord Ordinary raises a farther difficulty on the question whether this lease is a long lease under the 24th section of the Rutherfurd Act. The object of that clause is to enable the heir of entail in possession "to grant feus or long leases of any part of the entailed estate for the highest feu-duty or rent that can be got for the same; such feus or long leases so granted by him not exceeding in all one-eighth part in value for the time of such estate," provided that it shall not be lawful for such heir to grant any such feu or lease "of the mansion house, offices, or policies of the estate." I think it extremely probable that the object immediately in view of the Legislature was the granting of feus or long leases of small portions of the estate, and that for building or other similar purposes. But the terms of the clause do not so restrict it. On the contrary, the clause says it shall be lawful so to feu or let provided that the feus or leases granted do not exceed one-eighth part in value of the estate at the time. I think, therefore, that it is the fair interpretation of the clause to hold that the heir of entail in possession may grant a feu or long lease of one-eighth part in value of the estate at the time. But then the next question is—Is this a long lease? The term long lease is one which has various meanings in different acts. In some it means a lease of fifty-seven years and over; in others more; in others less. But I think that in construing the terms of this clause, and looking to the scope of the statute, it would be a very contradictory thing to hold that a lease for fifty-seven years or ninety-nine years, or any longer period, would be valid, while one for a shorter period would not. In fact, I am of opinion that we must construe the term long lease here as meaning such as the heir of entail could not himself grant in the ordinary administration of the estate, under the fetters of the entail or otherwise, without authority from this Court under the Act. I think that, giving fair effect to the clause, it authorises the heir to grant a lease exceeding in duration that which he would have been entitled to grant in the ordinary exercise of his powers as heir of entail.

But, farther, I think the lease is, in another view, a long lease. The usual sporting lease is for five or seven years. If so, then this a lease of unusual endurance. But we must also keep in view the peculiar law of this entail. Under it the lease proposed is a very long one. The law of the tailzie is that certain parts of the estate, among which this is included, are not to be let for more than one year. The statute therefore relaxes this particular entail to a very considerable extent.

For these reasons, I am of opinion that the Act of Parliament does apply to the present case. There are some clauses in the proposed lease which struck me at first sight as peculiar; for instance, the clauses about cutting timber, providing for the absolute privacy of the lessee, and excluding the lessor except to a certain limited extent. But supposing this had been a lease for a term of ninety-nine years, would those clauses have been incompetent? I think not; and viewing the lease as a long lease, I do not think we can hold these clauses incompetent here. I think the difficulties disappear entirely when we consider the peculiar purposes for which the land is let, and for which alone it could have been let.

LORD DEAS—There are, as it seems to me, two

reasons for particular anxiety in the decision of this case. In the first place, we have had the question fully argued upon the one side while the other is merely consenting. And, in the second place, the advantage of the proceeding to the present heir of entail in possession is so obvious that we may be carried away by the expediency of the thing to sanction more than we are entitled to do. And farther, there is a considerable doubt in my mind as to how far our judgment will be binding upon future parties.

Now, looking to the merits of the petition, there are only two points upon which there is room for much doubt. First, whether, apart altogether from the peculiar provisions of this particular entail, a lease for sporting purposes is in law a valid lease if granted for a term of years, as is proposed here. On this point I am disposed to agree with your Lordship in the chair, and hold that if the land is let it is not competent to interfere with the object for which it is let.

But the second point is a much more formidable one, viz., whether a lease of this kind falls within sec. 24 of the Rutherfurd Act, without which the lease could not be granted under the entail. The terms of the entail are very express, they prohibit any lease of the lands within a certain limit, in which I understand the Balloch-buie is contained, except from year to year. Not only do the words of the prohibition cover this case, but it is perfectly obvious that the object was to do so. Now the question arises, whether the statute enables an heir to grant a lease which he could not otherwise do. In some cases it does, but I am of opinion that it was not intended to apply, and does not apply, to such cases as the present. The things to be got over are very accurately stated in the statute itself. It enacts "that, notwithstanding any prohibitory, irritant, and resolutive clauses, or any limitation, by way of maximum or minimum, of the extent of ground to be feued . . . . it shall be lawful for an heir of entail in possession . . . . to grant feus or long leases," &c. It is quite plain, I think, that we are not dealing with any such prohibitions here. The whole plausibility of the argument for the present heir of entail depends upon this, that although the whole clause relates to feuing and to that only, it goes on to insert the word lease in conjunction with the word feu. But the observation which naturally occurs is, that the long lease which the statute authorises, if not a feu, must at least be a lease of the nature of a feu, and not an agricultural lease. We are all familiar with the doctrine that building leases for a long period are of the nature of property, and my humble opinion is that this is the interpretation intended by the statute. The long lease of the statute means a long lease for proprietary purposes. The proposed lease is not a lease of that kind. It is not a lease, which can be said to confer the property in any sense. It contains things in the body of it which are quite inconsistent with that,—for instance the growing timber is reserved, and yet the heir is not entitled to cut except under certain limitations. Then there is a prohibition of all building. In fact the whole deed does not resemble in any way a feu-right. I am not required to say whether it would be advantageous or not for the estate that we should sanction this lease—very likely it would—but I am clear that the fetters of the entail prohibit it, and I am equally clear that the statute does not empower us to override them.

LORD ARDMILLAN—The question before us is, whether § 24 of the statute applies. On the whole, I think it does. The application certainly comes under it, and the view I take of it is this, that whenever a lease extends beyond what the heir of entail is entitled to grant under the deed of tailzie, in the ordinary administration of the estate, that in the contemplation of the statute is a long lease. The Rutherfurd Act is intended to to give more power to heirs of entail in possession than they naturally possess under the prohibitions of their entails. Where these powers are fettered by a clause adverse to the good and profitable administration of the estate, it is the more necessary to afford them some remedial measure. Now, the clause in the present entail concerning leases is one most distinctly adverse to good management, and I have no doubt that this remedial measure applies. Had the petition here craved power to feu, or to grant a building lease, it might have been granted. Wherein is the lease asked different? In every particular where it differs it does so in favour of the petition. In point of duration, as regards reserved rights of property, &c., all is in favour of the application. And surely in a case like this the major includes the minor. It cannot but be in the power of the Court to grant authority for a lease of nineteen years, as well as for one of ninety-nine —to give their sanction to a lease more favourable to as well as to one more stringent upon the succeeding heirs of entail. There remains the question—Can the Court, in the exercise of its discretion, sanction a lease for purposes of sport? I will not enter upon the point as to how far the heir of entail could grant such a lease without the sanction of the Court; I will only say that a right to land and the shooting over it is one thing, and a right to the shooting merely over certain land is quite another thing. This being distinctly a lease of land with the right of employing it for purposes of sport, which happens to be its only available use, I see no reason at all why the Court should not authorise it. The lands proposed to be let are not contiguous to the mansion house. It is not the shooting over the forest in the immediate neighbourhood of Invercauld itself, and therefore the question of the Court sanctioning a lease of the home shootings is not here at present—that would be quite another matter, but does not affect the one before us.

LORD KINLOCH—The present application has been made to us under the 24th section of the 11th and 12th Vict. cap. 36, by which power is given to the Court, in certain circumstances, to allow an heir of entail "to grant feus or long leases of any part of the entailed estate."

On a sound construction of this statute, I do not think the Court is limited to a sanction of "long leases," in the sense of leases of such extreme endurance as to be substantially acts of alienation. I conceive the phrase, soundly construed, to mean leases of such a length as could not be granted under the powers of the particular entail, and which may be fairly denominated long leases with reference to that entail. There is no particular purpose, such as building, to which the leases to be allowed by the Court are to be confined. It is endurance which is alone regarded, and this, I think, is simply endurance beyond the period for which leasing is permitted by the entail. If, for instance, an entail prohibited all leases, agricultural

or pastoral, beyond a period of nine years, I think the Court could under this statute give permission to let a lease for nineteen years; though not inferring an act of alienation in the ordinary sense. To hold anything else would at once involve the absurdity, that the Court could give authority for a lease of ninety-nine years, but could not authorise a lease for nineteen. The absurdity could be avoided by the very simple evasion of taking authority for ninety-nine years and then limiting the lease to nineteen. What the parties could thus accomplish indirectly, I think the statute allows the Court to do directly and openly.

The application now before us is for permission to grant a lease of Ballochbuie Forest for nineteen years, under such terms and conditions as are set forth in a draft lease laid before us. By the terms of the entail such a lease could only be granted "from year to year," so that, relatively to the entail, the lease sought to be granted is substantially a "long lease."

There cannot be any doubt, that at the large rent proposed to be paid, this transaction will be of the highest benefit to the heirs of entail. And I think that no reason can be stated or conceived sufficient to warrant us to refuse the application.

The main difficulty suggested is, that this is in substance a game lease or lease of shootings, which it is suggested cannot be granted by an heir of entail, or authorised by the Court, because, however named in common parlance, it is not legally a lease at all, but a mere assignation or devolution of a personal privilege, falling at the death of the granter. I am of opinion that this objection is ill founded. The proposed lease is not in words a lease of shootings. It is a lease of a large tract of land, comprising a power to shoot and hunt, but not in form limiting the use or occupation. At the same time, as admittedly the only real use of the ground is that of a deer forest, it is right that the question should be faced. And I have no hesitation in giving it as my opinion that, supposing the lease had been one of shootings merely, I should think it competent for an heir of entail to grant it. Whatever was at first held theoretically, I think the progress of society and the practice of the country have now placed shootings in the common category of property, and given to a lease of shootings the proper character and legal effect of leases generally.

It may be still an open question for what length of endurance an heir of entail may grant a lease of shootings, and therein not go beyond an act of ordinary administration. What I have said merely goes to this, that a lease of shootings is not *eo ipso* void because granted by an heir of entail; and does not necessarily fall at the death of the granter of the lease. Having regard to the nature of the case, I am not prepared to say that a lease of shootings for nineteen years would be an act of ordinary administration like the lease of an arable farm for that period. A lease for three or five years would probably be clearly such. In the present case the entailer has indicated that in his view the lease should not be in duration beyond a year.

The doubtfulness of this point is exactly that which gives edge and propriety to the present application. The statute under which it is presented is intended for the very case in which, under the entail, the lease could not be granted, but in which the Court can give permission for its execution if satisfied that the transaction will be for the advantage of the heirs of entail. What is asked I conceive substantially to be authority for a long lease of shootings not permitted by the entail, but proper to be authorised for the advantage of the entailed estate. I think it fairly made out that the ground will not exceed one-eighth of the value of the estate; and I am clearly of opinion that the prayer of the petition should be granted. I do not perceive any grounds for thinking that either the absence of a contradictor, or any other conceivable objection, can lay our judgment open to an effectual challenge.

Agents for Petitioner—Tods, Murray, & Jamieson, W.S.

Wednesday, November 2.

THE DUKE OF ATHOLE *v.* THE POST MASTER GENERAL AND ANOTHER.

Toll—Turnpike—Exemption from Toll of Her Majesty's Mails—General Post-Office Act, 1 *Vict. c.* 33, § 19. The said section provides "that no turnpike tolls shall in Scotland be charged on carriages with two wheels, conveying only the mail or packet with their driver, and any horse or horses drawing the same." A two wheeled carriage conveying the mails between Dunkeld and Kenmore, carried also passengers and parcels between Inver (a place about one mile on the other side of the Dunkeld Bridge) and Kenmore. When crossing the bridge it carried nothing but the mails and driver, and claimed exemption under the above mentioned statute. *Held* unanimously that the pontage levied at Dunkeld Bridge, under the Private Act 43 Geo. III. c. 33, is a turnpike toll within the meaning of the General Post Office Act, 1 Vict. c. 33. *Held* by Lords Deas and Kinloch, altering the Lord Ordinary's interlocutor (dissenting the Lord President, Lord Ardmillan absent), that the said mail carriage was not entitled to exemption from toll under the Act, even though at the time of passing through the toll it carried nothing but the mails and their driver.

Opinion by Lord Kinloch—That in order to bring it within the exemption the carriage must be *constructed* so as only to contain the mails and driver.

Contra opinion by Lord President—That if the mail carriage, having two wheels only, passes the toll bar carrying the mails and driver only, it is entitled to exemption.

This action was raised in January 1852 by the trustees of the late Duke of Athole against the Postmaster-General, and also against James Taylor, contractor for conveying the mails between Dunkeld and Kenmore. The summons, *inter alia*, concluded for declarator that the pursuers were entitled to levy tolls or pontage, in terms of the Act 43 Geo. III. c. 33, at Dunkeld Bridge on all carriages used for the conveyance of the mails. There were also conclusions for certain sums due as pontage in respect of the passage over the bridge of the mail-cart between Dunkeld and Kenmore.

In 1803 a Private Act (43 Geo. III. c. 33) was obtained by the then Duke of Athole to enable him to build a bridge across the Tay at Dunkeld. This Act, proceeding on a recital of the expenses to be incurred in erecting and maintaining the bridge, empowers the Duke and his heirs to levy