Thursday, January 17.*

SECOND DIVISION.

[Lord Adam, Ordinary.

ALLAN'S TRUSTEES *v.* THE DUKE OF HAMILTON.

Superior and Vassal—Redemption of Casualties under Conveyancing (Scotland) Act 1874, *sec.* 15—*Are Mineral Rents to be included in "Year's Rent"?*

Held that in fixing the amount of the composition of year's rent due to a superior upon the entry of a singular successor, and by consequence in fixing the sum on payment of which, under sec. 15 of the Conveyancing (Scotland) Act 1874, that casualty may now be redeemed, the proceeds derived from mines and minerals wrongh on the lands fall to be taken into account.

Observed that as in many cases it would be inequitable to give the superior the full mineral rent in any particular year, an estimate may be obtained by capitalising the mineral rent, and a fair percentage upon that may be held to be the sum exigible by the superior from the singular successor as composition for an entry.

This was an action of declarator by the trustees of John Allan of Eddlewood, Lanarkshire, against the Duke of Hamilton and Brandon, superior of the lands of Eddlewood, concluding for declarator that, under section 15 of the Conveyancing (Scotland) Act 1874, the pursuers were on 1st July 1876 entitled to redeem the casualties incident to the lands held in feu by them on payment of a year's rent, being the highest casualty, with an addition of 50 per cent., without embracing the royalties or other pecuniary payments for coal and minerals removed from the lands. The amount of the redemption money, as stated by the pursuers, was £843.

The superior claimed to be entitled—beyond what the vassals offered—to the estimated value of the royalties or other pecuniary considerations payable to the vassals by the tenants of the coal and other minerals on the property, with an addition of 50 per cent. So that the point at issue was solely the question—Whether in calculating the redemption value of casualties royalties on coal and minerals fell to be included?

The pursuers pleaded, *inter alia*—"(1) On a sound construction of the clauses of the Conveyancing (Scotland) Act 1874 applicable to the redemption of casualties, the pursuers were entitled to a discharge of their liability thereto on 1st July 1876, upon payment of a year's rent of the lands, with the statutory addition of 50 per cent. (3) In estimating the redemption money payable by the pursuers, the value of the land as actually let is alone to be taken into account, and the pursuers are not liable in casualties or redemption money in respect of minerals."

The defender pleaded, *inter alia*—"2. On a sound construction of the statute founded on, the defender is entitled to be assoilzied with expenses, in respect (1) that the mineral rents or returns fall to be taken into account in estimating the redemption money; and (2) that a casualty has become due, and is not yet paid."

On 30th November 1876 the Lord Ordinary (SHAND) remitted to Mr Edmund Baxter, W.S., to inquire and report "(1) What has been the practice, if any, in regard to properties containing minerals, in fixing the casualties becoming due to superiors, and if in practice mineral rents or royalties have been taken into view; (2) the rule or principle which has been adopted in such cases in fixing the value, or rent, or return as the basis of payment of casualties."

Mr Baxter reported on 12th May 1877 that he had by circular invited a statement from conveyancers throughout Scotland as to the result of their professional experience, and concluded his report in the following terms:—"Having regard to what is stated in those letters, I have to report in answer to the remit—*First*, That while there have been cases where, in fixing casualties due to superiors from properties containing minerals, the rents or royalties payable in respect of such minerals have been taken into view, there have, on the other hand, been cases where casualties in respect of such rents or royalties were not paid, in consequence either of no demand or of refusal to pay, acquiesced in by the superiors; and that in fixing the casualties payable from such properties there has not been, so far as the reporter can learn, any 'practice;' and *second*, That where casualties in respect of minerals have been paid, there has been no uniform rule or principle in fixing the value, or rent, or return adopted as the basis of payment."

The Lord Ordinary (ADAM) pronounced an interlocutor decerning and declaring in terms of the conclusions of the summons. He added this note:—

"*Note.*— . . . The question in this case therefore is—Whether a superior is entitled to have the amount of the mineral rents of an estate included in the composition payable to him by a singular successor on granting an entry?

"It was admitted that if this question be answered in the negative, that the pursuers are entitled to the decree as craved. If answered in the affirmative, that the defender is entitled to be assoilzied.

"It is probable that vassals will largely avail themselves of the provisions of the recent Conveyancing Act in order to redeem the casualties due by them, in which case the same question will frequently arise and will be regulated by this case, which is therefore of importance.

"If the claim of a superior to have the mineral rents included in the composition payable to him be well founded, it is somewhat singular that the claim should not be perfectly well known and recognised as a legal claim. Mineral leases and rents, if not to the same extent as at present, have existed from very early times, and the superior's right to have them included in the amount of composition payable to him must have then emerged. That such rents are not now universally recognised as payable would appear to have arisen from the fact that they have not been claimed by superiors, and it is not unreasonable to conclude that they have

* Decided 12th January 1878.

not been claimed because it had been understood that the claim was not a well-founded one.

"By the Act 1469, cap. 36, superiors were ordained to receive appraisers upon payment of 'a year's maills as the land is set for the time.'

"By the Act 1672, cap. 19, superiors were ordained to receive adjudgers on the same terms.

"By the Act 20 Geo. II. cap. 50, sect. 13, superiors were ordained to enter disponees by resignation upon their paying or tendering 'such fees and casualties as he is entitled to receive upon the entry of such heir or purchaser.'

"By the Act 10 and 11 Vict. cap. 48, sect. 6, superiors are ordained to enter vassals by confirmation on payment or tender of 'such duties and casualties as he is by law entitled to receive.'

"It would appear therefore that there has been no change in the law as to what a superior is entitled to receive since the Act of 1469, and that it is still a year's maills as the land is set for the time.

"When minerals are let for an annual return (whether fixed rent or royalty), the rent or royalty has now come to be considered, for many purposes, as part of the ordinary rent of the estate, and treated accordingly. This does not appear formerly to have been the case to the same extent. Thus, a legal liferenter was not considered to be entitled to the produce of the minerals in the estate over which his liferent right extended, although these minerals were let on the ground that being *partes soli* he had no right to them—*Lamington*, M. 8240; *Lady Preston*, M. 8242; *Belschier* v. *Moffat*, M. 15,863; Bell's Prin. 1042; Bell's Lectures, ii. 1137. It may well be that a superior was considered on the same ground to have no right to mineral rents.

"As regards modern practice, it appears from Mr Baxter's report that there is no general practice in support of the superior's claim. It appears that the claim has been in some cases asserted by superiors and acquiesced in by vassals. In other cases the vassal has refused to recognise it, and the refusal has been acquiesced in by the superior. In no case has the claim of the superior been insisted in to the effect of obtaining a judgment of the Court. No case was quoted to the Lord Ordinary, and he is not aware of any, in which the superior's claim has been recognised.

"The Lord Ordinary does not think that such cases as *Waddell* v. *Waddell*, June 21, 1812, F.C.; *Guild's Trustees* v. *Learmonth and Others*, June 29, 1872, 19 Macph. 911; and *Wardlaw* v. *Wardlaw's Trustees*, January 23, 1875, 2 Ret. 368, afford much aid in the decision of this case. These were all cases arising on the construction of settlements in which it was held that it was the intention of the testator that the liferenter should enjoy the mineral rents.

"In the case of *Wellwood* v. *Wellwood or Clarke*, July 12, 1848, 10 D. 1480, it was held that the rent of a coal mine was to be taken into computation in determining the amount of free rent of an entailed estate, in order to ascertain the amount of the provisions payable to the widow and children under the Aberdeen Act, but that case proceeded on the construction of the Act, which received, as it ought, a liberal interpretation as regards the rights of the widow and children. *Douglas* v. *Douglas*, May 15, 1822, 1 S. 408, and *Macpherson* v. *Macpherson*, May 24, 1839, 1 D. 794, in the latter of which a game rent was taken *in computo* in estimating the amount of a widow's annuity under a deed of entail, were cases of the same class.

"It is stated in the report of the case of *Aitchison* v. *Hopkirk*, February 14, 1775, in which the Court decided that the superior was entitled to a casualty on the rents of houses erected on the feu, that the point was determined after a hearing in presence, and after considering reports relative to the practice, which last chiefly weighed with the Court—Ross' Leading Cases, ii. 188.

"The Lord Ordinary thinks that in this case practice ought also chiefly to weigh with the Court; and that the absence of any practice in favour of the claim ought to lead to its rejection.

"Had the Lord Ordinary considered the case open for decision purely on principle, he would have been inclined to come to a different conclusion, as he thinks that the superior's rights ought to be measured by what he would have been entitled to draw as rent had he entered into possession of the feu under a decree of declarator of non-entry, and in that case it is difficult to come to the conclusion that he would not have been entitled to the rents of minerals actually let."

The defender reclaimed, and argued—The composition or casualty was an outcome of the original feudal system. Statutes were enacted one after another to compel the superior to enter his vassal, and giving to him these casualties as an equivalent for his deprivation of the older feudal right of resuming possession of the land—Menzies' Conveyancing. Where an artificial increase had been created in the value of the land, as, for example, by building houses upon it, that increase went to swell the amount of the composition—*Aitchison's* case (*infra*). Similarly with salmon fishings—*Duff's* case (*infra*). Legal liferenters had certainly not been held entitled to work minerals, but they were different. This was a case of universal liferent, a position nearer that of the superior than a tercer was. The superior should have access to the whole profits of the estate. He here claimed the rent, the coal being let; and the argument was limited to a going coal mine. The view of all recent cases amounted to this, that the minerals were a rent-bearing subject, and that their produce was rent. Rent was the word in the statute, but it was a common law word, and as such more expressive, and even if at the date of the Act it did not include minerals it did so now. Questions under entails might be referred to, as in the cases of *Douglas* and *Macpherson* (*infra*).

Argued for the pursuers—The Act of 1874, sec. 23, abolished all casualties for the future. It was, to say the least of it, remarkable that now for the first time in 400 years this question should have been raised. The superior was really regarded as a usufructuary or legal liferenter—*Aitchison's* case (*infra*). There the Court merely followed the existing practice, although the circumstances were far more favourable to the superior than the present. No institutional writer even hinted at such a claim as was now made—Bell's Prin., Menzies, Bell's Lect. Minerals were deemed *partes soli*, and in a question with liferenters, tercers, &c., they had been held entitled only to enjoy *salva rei substantia*. Craig had been followed as the

authority on this point, though no doubt Stair somewhat differed. Violent profits were not applicable to minerals—*Houldsworth's* case (*infra*). Then, as to the entail cases, it was to be remembered that they proceeded upon totally different considerations. The heir-institute of entail is a limited fiar, with power himself to work the minerals. [Lord Justice-Clerk—How do you reconcile that with the theory that the rent of minerals is not the use of the estate?] The heir of entail could work minerals himself. The case of *Douglas* was special on the terms of the deed. In *Wellwood* the heir had the "rents and proceeds," and there Lord Mackenzie alluded to the case of a tercer. There was the case of *Macpherson*, where game was in question. [Lord Justice-Clerk—There was not much analogy there, as there was no diminution of the subject as with minerals.] If this was truly a reserved right once in possession, what was to prevent the superior working out the minerals. [Lord Ormidale—I would refer to what Hunter on Landlord and Tenant says on the subject of liferenters.]

Authorities—Act 1469 c. 36; Act 1672 c. 19; Act 20 Geo. II. c. 50, sec. 13; Conveyancing (Scotland) Act 1874; Menzies on Conveyancing, 525, 815; *Aitchison* v. *Hopkirk*, M. 15,060, 2 Ross' Leading Cases 188; *Duff* v. *Magistrates of Inverness*, M. 9300; Bell's Lectures on Conveyancing, ii. 1057; *Wardlaw* v. *Wardlaw's Trustees*, January 23, 1865, 2 R. 368; *Campbell* v. *Hamilton*, June 28, 1832, 10 S. 734, 2 Ross' Leading Cases 207; *Lamington*, 1682, M. 8240; *Lady Preston*, 1677, M. 8242; *Belschier* v. *Moffat*, 1779, M. 15,863; Stair, ii. 3, 74; *Wellwood* v. *Wellwood or Clarke*, July 12, 1848, 10 D. 1480; *Waddell* v. *Waddell*, June 12, 1812, F.C.; *Guild's Trustees* v. *Learmonth*, June 29, 1872, 10 Macph. 911; *Douglas* v. *Douglas*, May 15, 1822, 1 S. 408; *Macpherson* v. *Macpherson*, May 24, 1839, 1 D. 794; Bell's Principles, sec. 1598, sec. 1042 *et seq.*; *Houldsworth* v. *Brand's Trustees*, January 8, 1876, 3 R. 304 (Lord Gifford there); *Fleeming* v. *Baird & Company*, March 18, 1871, 9 Macph. 730; *Guild's Trustees* v. *Learmonth*, June 29, 1872, 10 Macph. 911; Hunter on Landlord and Tenant, 113, 122; Erskine, ii. 9, 49; Craig, ii. 8, 18; *Duncan* v. *Scottish North-Eastern Railway*, May 9, 1870, 8 Macph. (H. of L.) 53.

At advising—

Lord Justice-Clerk—I am unable to concur with the Lord Ordinary in the grounds of his judgment or in the result at which he has arrived. I have the less hesitation in giving effect to that opinion that the Lord Ordinary would have been inclined to come to the same conclusion had he thought himself free to consider the question of law on its proper merits. My only difference therefore with his Lordship's views is that I am not inclined to attribute as much weight as he does to the evidence of practice or the absence of it.

The origin and foundation of the dispute between the parties is so clearly and accurately stated in the note of the Lord Ordinary that I shall not resume these. It is admitted that the superior is entitled to one year's rent of the lands; and the only question between the parties is, whether that right includes the rents stipulated in a lease of minerals? The record is exceedingly imperfect in its statement in regard to the actual lease in question; but I assume that the amount claimed by the superior represents either fixed rent or sums calculated on output by way of royalty payable under a current lease of minerals in process of being worked. It is not said that there is any danger of the minerals being exhausted, and I shall assume that there is none.

In these circumstances the question for our decision is, Whether these mineral rents represent income or capital, whether they are paid for *partes soli*, or constitute annual fruits?

I am of opinion that this question has been long settled by authority, and that even had it not been so, very familiar legal principles must have led in this case to the same result. The rent of a going colliery is not part of the *corpus* or capital of the estate, but constitutes fruits or beneficial enjoyment.

This was deliberately decided in the case of *Wellwood* v. *Clarke*, 10 D. 1480, and the decision has been uniformly followed ever since. It did not turn on any specialty in the Aberdeen Act, the construction of which was in question, but related to the ordinary meaning of the words "free rent of lands and estates;" and it was held that the notion of minerals being *partes soli* was far too metaphysical to be applied to the transactions of ordinary life, and that the term meant the whole annual produce of the estate as it would in ordinary colloquial phraseology. It is so important to keep this clearly in view that I shall refer to one or two expressions in the opinions of the very eminent Judges who decided the case.

Lord Mackenzie said—"It is quite impossible to regard the sale of coal as an alienation of a part of the *solum* of the estate, for in that case an heir of entail could not work it at all without being guilty of a contravention. No doubt in strict fact every lump of coal excavated is a piece of the entailed estate which is sold. But that is a mere theoretical view, and must give place to common sense and utility." Lord Fullerton said—"We are not to take a nice and metaphysical view of what is meant by rent. . . . It is in vain to go into any question upon the words of the statute; in their ordinary reading they just import that a party in this situation is entitled to give his widow a liferent of the third part of the annual income of his estate at his death." Lord Jeffrey said—"I am not at all startled by the critical objection that the income derived from coals is not properly 'rent.' In construing this statute we must bear in mind that 'rent' and 'produce,' of coals, are familiarly used as convertible terms, as well in the courts of law and in conveyancing as in common parlance." The views thus expressed, which are manifestly founded in reason and good sense, have received effect ever since. In the case of *Douglas* v. *Scott and Yorke*, Dec. 17, 1869, 8 Macph. 360, in which precisely the same question occurred, we took occasion to affirm the principle that mineral rents were income or fruits, and not part of the *corpus* of the estate, and to express the opinion that this had been conclusively set at rest by the case of *Wellwood*. In the recent case of *Wardlaw*, 2 R. 368, and others of that class, it is true that the element of intention had its necessary operation in the construction of settlements; but Lord Neaves' opinion in the case of *Wardlaw* places the principle on its true footing, and repudiates entirely the *nostrum* that

in the case of a current lease the minerals can be regarded as *partes soli*. But if they are not to be so regarded, the minerals raised are fruits, and the money paid to the landlord for them is rent.

For myself, I should desire to go no further, for the case of *Wellwood* decided, and was intended to decide, not a special but a general question, and one quite sufficient to rule this case. It was pleaded, and the Lord Ordinary seems to give some countenance to the view, that the humane and reasonable object of the Aberdeen Act gave a wider signification to the words "free rent" than they would bear in ordinary legal phraseology. But the rights of a superior, if looked at, as we must look at them, in their true nature, are much more comprehensive than those of an heir of entail under the Aberdeen Act. An heir of entail in possession is a limited fiar under restrictions in favour of the other heirs of entail. The Aberdeen Act conferred a privilege for a laudable object no doubt, but one which interfered with existing rights, and not to be extended beyond the legal signification of the terms in which it is conferred. But the superior stands in a different position. He takes nothing by the Act 1469 cap. 36, or the succeeding statutes. They are restrictive of his right, not extensions of it. He is fiar of the lands under burden of the feu-right, not a life-renter in any sense. The lands are in non-entry, and before the statutes in question he was not bound to enter a singular successor at all. These statutes compelled him to receive, first, apprisers, then adjudgers, and ultimately all singular successors, on payment of a year's mail of the lands; but the privilege is conferred on the singular successor, and must be so construed. The lands being in non-entry, the superior is presumed to be in possession, and what the singular successor must render for his entry is the value of the beneficial enjoyment or income of the lands for which it is the equivalent. I can see no principle, and I know no authority, for holding that the superior's right of beneficial enjoyment or its equivalent can possibly be less than that of a limited fiar, who is only entitled to use the fruits *salva rei substantia*. A year's mail of the lands in the Act 1469 cap. 36, means precisely the same thing as a year's free rent of the lands and estate under the Aberdeen Act, as the minerals are part of the lands, and the superior must deduct from his claim all burdens attaching to the income or produce of the lands.

The case of terce which was so strongly founded on has no imaginable bearing on this question. I doubt indeed, if the question were open, whether the decisions founded on would now be repeated; and I have the high authority of Lord Fullerton, in the case of *Wellwood*, for saying so. But the right of terce is of so exceptional and technical a nature as to afford no analogy whatever to that of the superior. Terce is a right of liferent only; the superior's is one of fee. It is limited by the husband's infeftment. It does not extend to superiorities or feu-duties, and it was found in the case of *Nisbett* v. *Nisbett's Trustees*, February 24, 1835, 13 S. 519, that it did not even extend to large returns from building feus, although these comprehended nearly all the husband's estate. The superior's right is subject to no such limitations; and although it was found in the case of *Cockburn Ross* v. *Heriot's Hospital*, June 6, 1815, 18 F. C. 392, aff. 6 Pat. Apps. 640, that his casualty must be measured by the actual amount of sub-feu-duty paid to the vassal, that decision only proves the more clearly that his right is to be measured by the beneficial enjoyment of the vassal himself.

As to the practice, if it had been uniform, it might have afforded us some guide; but it is plainly not so, and I think we must determine the point on its merits.

As to the amount to which the superior is entitled, we have no materials to decide. If the parties cannot agree in this, it would be necessary for us to have some further information. We only hold that the annual value of the minerals is not to be excluded.

Lord Ormidale—I have arrived at the same conclusion as your Lordship. The only disputed question in the case is, Whether in estimating the composition for casualties due by the pursuers under the recent Conveyancing (Scotland) Act 1874, the ground-rent, as it is called, is alone to be taken into account, or whether the mineral rent or returns must not also be included? This is an important question, as the decision of it, as remarked by the Lord Ordinary, will probably constitute a precedent for many other cases involving a similar question.

Little or no assistance in the solution of this question can, I think, be derived from a consideration of the rights of superiors in relation to the casualties of ward, recognition, and marriage, to which they were entitled in early times, all that having been long since abolished and put an end to as no longer to be tolerated. It is, notwithstanding, essential to bear in mind the nature of the feudal connection between superior and vassal, in respect of which certain casualties are still exigible by and due to the former on every renewal of the investiture, and more especially the casualty of composition due to the superior on the entry of a singular successor. By the enactments referred to in the Lord Ordinary's note, a year's rent of the subjects is on such an occasion due to and exigible by the superior. But what is comprehended by the expression 'year's rent'? The defender, who is the superior in the present instance, maintains that he is entitled not only to the agricultural, but also to the mineral, rent or returns of the subjects in question; while the pursuers, who represent the vassal, contend that the agricultural rent is alone due, in respect that the rent obtained for the minerals is in reality not for annual fruits, but for the soil itself.

Both parties were agreed that this precise question has never been *in terminis* decided by the Court; but many considerations of more or less value were pressed in argument by the parties in support of their respective contentions.

It does not, at first at least, strike one that when lands fall into non-entry by the death of the vassal, and when the minerals forming part of the lands or estate are actually under lease for a specified rent, that there can be any good reason for not taking into account such rent in estimating the casualty or composition due to the superior for an entry on renewal of the investiture. There must no doubt be deducted from that rent all public burdens and other charges due by and from the subjects, for the obvious

reason that every one in right and possession of the subjects must bear such burdens and charges. Accordingly, in the case of *Aitchison* v. *Hopkirk and Others*, February 14, 1775, Mor. 15,060, it was held, in the express terms of the judgment, that the superior "is entitled for the entry of singular successors in all cases where such entries are not taxed to a year's rent of the subject, whether land or houses, as the same are let or may be let at the time, deducting the feu-duty and all public burdens imposed on the lands by consent of the superior, with all reasonable annual repairs to houses and other perishable subjects." It appears to me that this decision has an important bearing on the question to be determined in the present case, inasmuch as it shows that the actual nominal rent of the subjects is not to be taken as the criterion of the superior's composition, but that allowance or deduction must be made for all burdens and all reasonable repairs—not repairs actually made merely—to houses and other perishable subjects. In short, the principle given effect to in that case seems to have been that the superior is not to be put in a better or worse position than the vassal himself. And in conformity with this principle it was ruled in the cases of *Baird*, July 18, 1663, Mor. 15,054, and *Scott* v. *Elliott*, March 11, 1636, Mor. 15,055, that when lands belonging to a vassal were subject to the burden of a liferent in favour of another, payment of the composition as an entry should be superseded or suspended till the liferenter's decease. So in *Cowan* v. *The Master of Elphinstone*, March 29, 1636, Mor. 15,055, it was found that the vassal in lands which had been subfeued was not bound "to pay more to the superior than a year's feu-duty of that which he was to get himself when he was entered, which was only so much feu-duty paid to him by his subvassals, and not a year's duty of the lands which pertained not to him but to his subvassals." And in accordance with this principle it was conclusively decided, both in this Court and in the House of Lords, in the case of *Cockburn Ross* v. *The Governors of Heriot's Hospital*, June 1815, F.C., and 2 Bligh 707, that where a vassal had subfeued his lands at a rate reckoned their fair value at the time, and subvassals had erected houses which yielded a large amount of rent, the overlord or superior could exact as composition from a purchaser or adjudger of the intermediate estate only a year's sub-feu-duty, and not the actual rent of the subjects.

But although these decisions may be held to have settled it as a general principle that the superior is not, in reference to the composition due to him for an entry, in a better or worse position than the vassal, they do not directly touch the present question, Whether the rent derivable from minerals is or is not to be taken into computation? But why should it not? The minerals are as much the estate, held by the vassal of and from the superior, as the upper soil, and the one is in non-entry as much as the other. The two form integral portions of the same subjects; at least that must be so held in the present and every instance where they are held as one estate by one and the same title of and from the same superior. They might no doubt have been separate estates under different titles. And this suggests the inquiry, What, on the assumption that they were separate estates, would have been the rights and liabilities of superior and vassal as regards the composition for an entry? Would not the superior be entitled to a year's rent of the minerals, just as he would be entitled to a year's rent of the lands? And would not the vassal have been liable in a year's rent of both as the casualty or composition for an entry? I do not see upon what ground it could be otherwise; and if so, it is difficult to understand how any difference in this respect can arise between such a case and the present merely because the lands and minerals in place of being held as separate estates are held together as one estate, the principle being the same, applicable to either case alike, viz., that the superior must, in reference to his casualty or composition for an entry, be put into the same position—no better and no worse—as the vassal himself.

It is upon this principle that, where there is a refusal or unreasonable delay on the part of the vassal to enter, the superior is entitled to the remedy of obtaining possession himself. The conclusions of a summons of declarator of non-entry are accordingly to the effect that the tenants of the vassal are to pay their rents to the superior; and such would be the terms of the summons in the present instance were a declarator of non-entry resorted to. And it is of importance to keep in view that the principle upon which this takes place is, as explained by Mr Erskine (ii. 5, 42), that the right "of the superior to the full rents which become due after citation does not accrue to him in the character of creditor, but as *interim dominus* or proprietor of the rents; and consequently the action for making these effectual must be the same that a proprietor is entitled to for recovering the rent of his estate, which can be directed only against tenants and other possessors; it would be incongruous and inept in a proprietor to use real diligence by poinding the ground of his own lands for a debt due to himself."

I concur, however, with the Lord Ordinary in thinking that the rights of legal and conventional liferenters can scarcely be taken as precisely in point, as they are limited as a general rule strictly to annual fruits without wasting in any degree the substance; and, so far as I am aware, a liferenter can in no event acquire by virtue of his usufruct merely a right to the lands or subjects themselves. But a superior may, when his vassal refuses to enter and pay the composition for an entry, get himself, by means of the appropriate action, into the full right of the vassal, which shows that the right of a superior may be different and larger than that of either a legal or conventional liferenter. I also concur with the Lord Ordinary that such cases as *Waddell* v. *Waddell*, where a right somewhat larger than a mere usufruct has been held to be covered by a liferent in respect of its being shown, according to the construction of the settlement or deed upon which it depends, that such was the intention of the granter, have little or no application. But the cases of *Wellwood* v. *Wellwood or Clarke*, referred to by the Lord Ordinary, and the later case of *Campbell Douglas* v. *Scott's Trustees*, 8 Macph. 360, referred to by your Lordship, are of much importance—especially the latter case—in consequence of the remarks which appear to have fallen from some of the Judges on the subject of mineral rents.

Assuming that I am right in holding, with reference to the authorities bearing on the subject, that the right of a superior of subjects in non-entry is higher or larger than that of a mere life-renter, either conventional or legal—that, in short, he comes for the time into the place of the vassal—it necessarily follows, I think, that in estimating the year's rent or annual worth of the subjects to which he is entitled as composition for an entry the rents or profits derivable from minerals ought to be taken into account. But although this is so, I am not satisfied that the full rent or profit actually payable or derivable for or from the minerals for any particular year must be taken as the measure of his right or claim. That might be very inequitable. It might indeed, according to circumstances, be tantamount to giving the superior a great deal more than a year's rent or profit of the minerals. For example, if the minerals were about exhausted, to give the superior the full nominal rent would be to give him not merely a year's value or profit, but in reality what would be more of the nature of the price or value of part of the soil or estate itself. I am not surprised therefore to find that according to the report of Mr Baxter the practice or understanding, so far as it has been ascertained, is very much to the effect that the mineral rent for a given number of years is capitalised, and the interest thereon at a certain percentage fixed as the composition for an entry. This appears to me to be a fair and reasonable mode of proceeding; and if precedent for it in a decision of the Court were necessary, I think it is to be found in the case of *The Magistrates of Inverness* v. *Duff and Others*, February 27, 1771, Mor. 9300, where, besides the ground-rents, the rents of salmon fishings were taken into computation in fixing the amount of non-entry duties—not however the full current nominal rent, but an average rent calculated on the preceding seven years. This, I have no doubt, was thought right in consequence of the uncertainty and risk which necessarily attended such a subject as salmon fishing; and the same principle seems to have been recognised in the cases of *Campbell Douglas* v. *Scott's Trustees* and *Wellwood* v. *Wellwood or Clarke*, which have been already noticed.

So accordingly, considering the uncertainty and risk upon which mineral rents or returns are necessarily subject, and that they must in reality consist of and be derived from the substance rather than the fruits of the lands, it appears to me to be fair and reasonable that the mode of getting at their annual value should be that to which I have referred as the result of Mr Baxter's report. It may, however, be right, if the parties do not come to an agreement on the subject, that before the number of years is fixed for capitalising the rents, and so getting a fair average, a report should be obtained from a mining engineer as to how long the minerals in the colliery are likely to realise the same rent or return as at present, or when the minerals are likely to be exhausted or materially diminished.

Lord Gifford—In this case I have come, and ultimately without much difficulty, to the conclusion that the Lord Ordinary's interlocutor should be altered, and that in fixing the composition due to the superior the proceeds derived from the mines and minerals wrought in the lands must be taken into account in fixing the one year's rent due to the superior as on the entry of a singular successor, and by consequence in fixing the redemption money, on payment of which the casualties are now to be redeemed.

It is satisfactory to think that, while altering the Lord Ordinary's interlocutor, I am thus only carrying out the views of the Lord Ordinary himself, and pronouncing the decision which he himself would have done had he not been, as he thought, precluded by the weight of practice.

Now, giving every weight which in a case of this kind it can possibly have to the practice of superiors and vassals in striking the composition for the entry of singular successors, I cannot think it amounts either in quantity or in quality to that uniform, persistent, and notorious practice which would be necessary to fix a rule of law, especially in a case in which the rule so sought to be fixed is contrary to principle.

Indeed, on analysing the proof of practice, it appears to me that on the proof, carefully considered and tested, there is really no practice at all established by anything like the amount of evidence which in such cases the law requires.

In the first place, it is only in certain districts of the country—viz., mineral districts—where the practice as to computing mineral rent or proceeds can arise, and even in such districts it is only where feus have been given off, or lands, including minerals, to be held feu, and with entries untaxed, that the question could possibly arise, and even then it is only in isolated cases, emerging here and there with considerable intervals, that a case occurs. And when the case does occur, it is always between two private parties, who, after more or less negotiation, make their own bargain privately on what terms they please, the terms of the bargain never being announced or known to anybody excepting the contracting parties themselves. It is difficult to see how a general law binding the whole community and the whole country could ever arise out of a practice like this, even although the cases had been many times more numerous than they seem to have been. There does not appear to have been a single appeal to a court of law, so that there is no decided case; and in almost every instance there seems to have been demur to or denial of the superior's right, so that in every case the result come to was either of the nature of a compromise, in which each party gave up something, or at best, and even when the superior's rights were conceded, they were so rather because the vassal was unwilling to incur the expense of litigation with a powerful antagonist than from any admission of right in point of law. Without examining in detail the evidence which was taken by way of private inquiry by the Auditor, it is enough to say that I entirely concur in the result which he reached, viz., that there has been no fixed practice either one way or another either in reference to the right to include mineral rents or in reference to the mode of computing the amount of mineral rental—of course I mean no such practice as can in any view be held to fix a definite and universal rule of law.

The question then being open, as one of legal principle, whether the mineral rental or proceeds must be taken into view in fixing the composition of a year's rent exigible by a superior, the reason why a year's rent is to be taken is that it is held

to be, and is really, a substitute or equivalent for a year's actual possession of the feu. According to original feudal theory, when the subject fell into non-entry by the death of the last entered vassal, the superior immediately entered into possession, and he was entitled to retain actual possession till the new vassal's entry. At first he was not bound to receive a singular successor at all, but might keep the lands till the heir entered; and when singular successors obtained the right to compel an entry—a right first given to apprising or adjudging creditors—the condition was imposed that the superior should have a year's rent —that is, a year's possession or a year's non-entry. The superior's right is that of eminent proprietor, upon whose right the vassal's title is a mere burden, which is interrupted or ceases every time a vassal dies, and this is still in law the technical position of superior and vassal.

What the superior is to get then as composition is the equivalent of one year's enjoyment of the feu, just as if he had entered into possession, and I think this is the true principle to be followed out in fixing such composition.

Now, if the superior had actually entered into possession, I think he could not have been prevented from continuing the working of the going collieries or quarries or any other subsisting mineral workings in the lands, and if the mineral or quarry is held as practically inexhaustible, the superior would be entitled to the mineral rent applicable to the non-entry year. In short, he would just take the place of his vassal, and receive the mineral rents which the vassal would have received if the lands had not fallen into non-entry.

Mineral property, however, has a great many peculiarities. The minerals may be so limited in quantity that they may very soon be wrought out. The winning of them is attended with great risk and great expense. Their working may suddenly be rendered impossible, or impossible to profit, by faults, by flooding, or by other contingencies; and practically mineral properties are only worth a limited number of years' purchase, far inferior to the value of lands with a corresponding land rent. It would not be equitable, therefore, in many cases to give the superior the full mineral rent or proceeds which happens to be made good the year of the non-entry. That might possibly be to give him a large proportion of the whole value of the minerals, for minerals are sometimes wrought out in a very few years, and therefore some equitable rule must be adopted for ascertaining what is the true and permanent annual and constant value of the minerals as distinguished from the mere accidental output in any one year.

Now, I think from the analogy which we have of grassums payable by subvassals and other similar cases, a fair rule would be first to ascertain, by remit or otherwise, if the parties cannot themselves agree upon it, the number of years' purchase which the minerals are fairly worth, taking into view the character of the workings and the risks and expenses attending the same. Then having thus ascertained the capital value of the mineral workings, 4 per cent. per annum or other fair percentage on that capital value may, I think, be regarded as the constant annual value which must be taken into account in striking the year's rent due to the superior.

The Court recalled the Lord Ordinary's interlocutor, finding "that in estimating the year's rent due to the superior for an entry, the annual value of the minerals in the course of being worked must be included," and before further answer continued the cause.

Counsel for Pursuers (Respondents)—Lord Advocate (Watson)—Moncreiff. Agent—A. Morison, S.S.C.

Counsel for Defender (Pursuer)—Balfour—Pearson. Agents—Tods, Murray, & Jamieson, W.S.

Friday, January 18.

FIRST DIVISION.

MENZIES *v.* INLAND REVENUE.

Revenue—Assessment under the Income-tax and Lands Valuation (Scotland) Acts (5 *and* 6 *Vict. cap.* 35, *sec.* 60; 17 *and* 18 *Vict. cap.* 91, *sec.* 6).

A tenant of certain farms and shootings was assessed by the assessor for the county of Argyll (who in that county was not the officer of the Inland Revenue) under the Income-tax Acts. He was assessed upon a sum in excess of the valuation entered upon the valuation roll, and also of the real rent paid for the subjects. No independent valuation was taken or demanded by either party under section 47 of 16 and 17 Vict. cap. 34. On appeal to the Court of Session against the assessment, *held* that the provisions in the Act 5 and 6 Vict. cap. 35, as to the taxing of property for imperial purposes, were not superseded by the provisions for the taxing of land under the Act 17 and 18 Vict. cap. 91 (Lands Valuation (Scotland) Act 1854), those provisions being for the purposes of local taxation only; and finding of the Commissioners affirmed.

Observed that the Lands Valuation (Scotland) Act 1854 never was intended to apply to imperial taxation, but that its operation was entirely confined to the valuation of lands and heritages for the purposes of loca assessment.

Revenue—Assessor and Surveyor of Inland Revenue under the Valuation of Lands Act Amendment Act 1857.

Observed, that if, under the provisions of the 3d section of the Act 20 and 21 Vict. cap. 58, the surveyor of Inland Revenue be appointed in either county or burgh the assessor under the Lands Valuation Acts, the valuation roll may be made available for the purposes of imperial taxation, but not otherwise.

On 11th May 1877, at a meeting of the Commissioners under the Property and Income-tax Act held in Oban, William Menzies, farmer, Keilator, appealed against an assessment of £17, 10s. of duty under Schedule A of the Act 5 and 6 Vict. cap. 35, made on him for the year 1876-77, and also against the assessment of £7, 5s. 10d. of duty under Schedule B of the same Act, in respect of his being lessee of the farms