

Friday, January 27.

FIRST DIVISION.

[Lord Blackburn, Ordinary.]

M'EWEN v. WATT.

Teinds—Valuation—Pasture Lands not under Lease—Grass Parks and Policy Grounds Let Seasonally for Grazing—Hypothetical Rent—Deductions—Act of Sederunt, 12th November 1825 (C.A.S., 1913, H, vii, 1).

Certain grass parks and policy grounds let for seasonal grazings fell to be valued for the purposes of a valuation of teind. Held (1) that the actual rents obtained must be taken as the basis of the hypothetical rent with reference to which the teindable value of the lands was to be determined, even though the rent derived from the policy grounds might suffer diminution by trees, avenues, and other restrictions incident to the neighbourhood of the mansion-house, but not out of proportion to its character; (2) that for the purpose of estimating the fair rent of the subjects the heritor was entitled to deduct (1) the annual cost of keeping up the fences, (2) the annual cost of shepherding the stock and weeding the lands, (3) occupier's rates, and (4) a sum, in the present case fixed at 2s. in the pound of rent, in name of income tax payable under Schedule B in respect of the occupation of the lands; but was not entitled to any allowance for auctioneer's commission for letting the grazings by public roup.

Teinds—Valuation—Lands under Lease—Estimation of Teindable Rental—Consideration other than Rent—Fire Insurance Premiums Payable by Tenants.

Where fire insurance premiums were payable by tenants under their leases to their landlord, who was not bound to apply the proceeds of the policies in restoring buildings destroyed by fire, held that the premiums formed part of the rent payable for the lands, and must be taken into account in estimating the teindable rental of the subjects let.

The Act of Sederunt of 12th November 1825, reproduced in the codifying Act of Sederunt 1913, H, iii, 1, enacts—“*Valuation of Teinds—Particulars to be Condescended on.*—In processes of valuation of teinds the summons shall distinctly set forth the rent of the lands according to the current leases when they are under lease; and when they are not under lease the rent shall be stated which it is averred they would bring if let on a lease for nineteen years if arable, eleven years if pasture lands, or nineteen years if partly both, with the usual and customary clauses. . . .”

Robert Finnie M'Ewen, Esquire of Marchmont, Berwickshire, pursuer, brought an action against the Rev. Charles James Watt, minister of the parish of Polwarth, and Sir John Hume Campbell, Bart. of Marchmont, defenders, for any interest he might have as titular or pretended titular, concluding for a valuation of the teinds, both parsonage

and vicarage, of the estate of Marchmont.

No appearance was entered for the defender Sir John Hume Campbell.

The parties averred, *inter alia*—“(Cond. 3) The pursuer is heritable proprietor of the lands of Marchmont, together with the teinds, parsonage and vicarage, and the whole parts, pendicles, and pertinents thereof whatsoever lying within the parish of Polwarth and county of Berwick, . . . conform to disposition granted by the said Sir John Hume Campbell, Bart., in favour of the pursuer, dated 11th May and recorded 16th May 1914. (Cond. 5) . . . The grass parks extend to 424 acres. If said grass parks and the policies, which are 134 acres in extent, were let on lease for eleven years with the usual and customary clauses it is averred that a fair rent for the said subjects would not exceed the sum of £350. There are also woodlands which extend to 346 acres, which are for the most part moorland, and have an agricultural value not exceeding £60 per annum. The sums above specified are inclusive of rents derived from houses, smithies, shops, and stores, which amount to £30, 18s. or thereby, and if this sum of £30, 18s. be deducted from the estimated value above given the sum of £1516, 15s. or thereby will be left as the true annual agricultural value in stock and teind of said subjects. (Ans. 5) . . . Denied that a fair rent for the pasture lands referred to in condescendence 5 would not exceed the sum of £350. Explained that the said pasture lands extend to 422 acres or thereby, and it is believed and averred that a fair average rent for these subjects is £801, 0s. 9d. instead of £350. Denied that the woodlands have only an agricultural value not exceeding £60 per annum. Explained that the woodlands in the parish extend to 369,953 acres, a fair average rental of which it is believed would be £457, 10s. There therefore falls to be added to the total estimated value of £1516, 15s. condescended on by the pursuer (first) the sum of £451, 0s. 9d., being the difference between the sum of £350 estimated by the pursuer for the pasture lands and the sum of £801, 0s. 9d. mentioned above, and (second) the sum of £397, 10s., being the difference between the above sum of £457, 10s. for woodlands and the sum of £60 per annum which pursuer avers the agricultural value does not exceed. Said two sums of £451, 0s. 9d. and £397, 10s. amount together to £848, 10s. 9d., making in all £2365, 5s. 9d. as the true annual agricultural value in stock and teind of the pursuer's lands of Marchmont and others, apart from any adjustment that may be made on a strict accounting for deduction for rents from houses, smithies, shops, and stores above referred to.”

The comparing defender pleaded, *inter alia*—“1. The rental of the pursuer's lands being inaccurate and incomplete the action should be dismissed. 2. The rental of the pasture lands and woodlands condescended on by the pursuer not being a fair estimate of the average rental which could be obtained therefor during the next eleven years, cannot be used as the basis of the valuation concluded for.”

On 6th January 1921 the Lord Ordinary on Teinds (BLACKBURN) after a proof pronounced this interlocutor—"Finds and declares that the teinds, both parsonage and vicarage, of the following lands belonging to the pursuer, *videlicet*, all and whole the following parts and portions of the lands and estate of Marchmont, *videlicet*, the mansion-house of Marchmont with the offices and policies thereof, the lands and farm of Cothill, the lands and farm of Polwarth Rhodes and Mount Robert, the lands and farm of Polwarth South Crofts, the lands and farm of Polwarth Mill, the houses and acre lands in and near Polwarth village, part of Polwarth Moor, adjoining Kyles Hill Quarry, and all other lands and others being the whole lands and others belonging to the pursuer, and forming part of his estate of Marchmont, lying in the parish of Polwarth and county of Berwick, are of the constant yearly value of £303, 7s. sterling, being one-fifth part of the constant rent and value of £1516, 15s. sterling, which is the constant yearly value of the said lands and pertinents both in stock and teind jointly: And finds and declares that the said sum of £303, 7s. sterling per annum is the constant and fixed yearly duty and the just, constant, and true value of the teinds, parsonage and vicarage, of the said lands and pertinents to be paid in place thereof in all time coming."

Opinion.—"The pursuer, who is the proprietor of the estate of Marchmont, in the parish of Polwarth and county of Berwick, brings this action for the purpose of having the teinds of the said lands valued. The estimated yearly value of the subjects, so far as teindable, as set out in condescendence 5, amounts to £1516, 15s.

"Defences have been lodged by the minister of the parish, and numerous objections taken to the estimated rental. In his answer to condescendence 5 the defender puts the teindable rental at £2365, but after the proof he claimed that certain facts disclosed therein required that this amount should be increased by a sum of £52, 9s. 3d., making in all £2417, 9s. 3d.

"The subjects include the policies of the mansion-house, grass parks, woodlands, farms let on leases, and other lands let yearly. It is with regard to the rental of these last two mentioned subjects that the defender claimed that the addition of £52, 9s. 3d. should be made to his estimate of the teindable rental as stated on record.

"The rental of the lands under lease is stated by the pursuer at £1021, 4s., and leases were produced in process verifying this figure. Objection was taken to the rental of £75 in the lease produced of the farm of Polwarth Mill as not disclosing the true value of the lands. This is a lease of the farm for nineteen years from Whitsunday 1898 in favour of John Kinghorn. On the expiry of the term the tenancy was renewed by tacit relocation. In October 1920 a new lease was adjusted as from Whitsunday 1920 at a rent of £90 in favour of James Kinghorn as tenant, and of the said John Kinghorn, his father, as cautioner for his son. The defender claimed that the

rental disclosed in the new lease must be taken as the true value of the lands. The summons in this action is dated 13th April 1920, when the old lease was still current, and it is well established that where lands are let on lease the rent under the lease current at the date of raising the action is to be taken as establishing the teindable rental (Connell, vol. i, p. 188). The argument for the defender proceeded on what appears to me to be a misapprehension of the meaning of Ersk. ii, 10, 32, note 263. The case of *Dalrymple* (M. 15,759) there quoted makes it clear that the note refers to a lease with a periodically increasing rent, in which case the rent payable at the date of the summons is to be taken as the teindable value, and not the smaller rent payable at the commencement of the lease or the larger rent which might become payable during the course of the process.

"Next, it appeared from some of the leases produced that the tenants are taken bound to insure the farm buildings, and that premiums amounting to £21, 6s. 9d. are at present payable by some of the tenants. This sum it was claimed should be added to the rental of the subjects let on lease because insurance was 'a landlord's obligation.' No authority was quoted for this proposition, and I know of none to support it. Apart from express stipulation, neither a landlord nor a tenant is bound to insure the farm buildings any more than to restore what may be destroyed by fire (Rankine on Leases, 221), and the insurance is as much in the interest of the one as of the other. The Marchmont leases contain an express agreement that the tenant shall be liable for any damage or loss occasioned by fire to the buildings, and I cannot see that premiums payable under a stipulation of this sort have any relation whatever to the teindable rent of the farm. I accordingly find that the teindable rental of the subjects let on lease is £1021, 4s. as stated by the pursuer.

"The subjects which are let yearly are stated in condescendence 5 to return a total rental of £116, 9s. They consist of some thirty-five properties let at small rents, and the total rental is verified by a statement. From this total rental there falls to be deducted a sum of £30, 18s., which it is not disputed is rent paid for non-teindable subjects, and which is verified by No. 40 of process. The net result of these two productions is embodied in No. 41 of process, which identifies the subjects by their numbers on the Ordnance Survey sheet, and gives the rental so far as teindable. The defender's only objections to this statement are that the rental of £10, 2s. 6d. paid by J. Hastie for No. 106, which extends to 6·8 acres, and the rental of £12 paid by P. Jaffrie for No. 248, which extends to 23·3 acres, do not represent the true value of the subjects let.

"Hastie's field, No. 106, is valued by the pursuer's witness Forrest at from 25s. to 30s. an acre, while the defender's witnesses, Maitland Stewart and Crichton, value it at 45s. an acre. I prefer the evidence of Forrest, who is very familiar with the

district, supported as it is by the evidence of the rent at which the field has been let for some time.

“Jeffrie’s field, No. 248, which is also referred to in the evidence as Crumpton’s Park, was in grass before the year 1918, when it had to be broken up. It was leased to Jeffrie from the term of Martinmas 1918 for three years at a rent of £12, on condition that it should be cropped in a certain rotation, and that in the year 1921 a crop of oats or barley should be sown along with grass and clover seeds to be supplied by the pursuer. There are also conditions as to the manuring of the ground, some of the manures being supplied by the pursuer. The defender maintains that the true value of this field is the rent it might fetch if the result of this treatment is to improve the ground to the same condition as a neighbouring field, Burn Park, which is valued at £1 an acre. Forrest says that in its present condition 10s. an acre, which is the rate at which the field is now leased, is a fair rent. With regard to the rent which might be obtained if the field improves under its present treatment, he says—‘I think it would be difficult to make as big a rent as Burn Park; I think £22.’ Of the defender’s witnesses who value the field in its prospective condition alone, one (Maitland Stewart), after saying in chief that he agrees with Forrest’s figure of £22, says in cross that ‘the value I have put upon it is £18, 13s.’ while the other (Crichton) puts on it the same value as on Burn Park, and reaches a rent of £23, 7s. In my opinion the teindable rent of the field must be ascertained on the basis of what it would yield if let on a lease for eleven years in its present condition, and on that basis the present rent appears to be a fair one.

“The grass parks are stated in condescendence 5 to extend to about 424 acres and the policies to 134 acres, and the pursuer estimates that if let on lease for eleven years a fair rent for these subjects would not exceed £350. The defender in answer 5 contends that a fair average rent for the pasture lands, which he describes as extending to 422 acres or thereby, would be £801, 0s. 9d., but makes no mention of the policies. In the course of the proof, however, it appeared that he included the rental of the policies in the above figure.

“What are described by the pursuer as the grass parks are shown by a statement to extend to 429 acres, and to yield a total rental of £613 as at present let for grazing purposes. The grazing of 113 acres of the policies is let as a separate subject for £60, the remainder of the policy acreage being occupied by the mansion-house, stables, gardens, tennis courts, &c. All these grazings were let by public roup in 1917, and were again let to the same tenants in 1918 at an increase of 30 per cent. on the rents. This increased rent they have continued to pay each year down to the raising of the present action.

“The rent obtainable for policy grounds is admittedly affected by the drawbacks which necessarily attach to the use of such ground for pasturage. Not only is the

feeding of beasts which might do damage to the policies prohibited, but any stock fed therein is subject to disturbance by the use made of the policies by the landlord and others. The defender maintains that to ascertain the teindable rent of the policies they should be valued as if no such drawbacks existed, and further, that the whole acreage should be valued as if it were under grass, without making any allowance for the part occupied by the avenues, or even, as I understood, by the mansion-house, gardens, &c. This somewhat startling proposition is said to be justified by the decision in the Calton case *Burt v. Home*, 5 R. 445. Valuing on this basis one of the defender’s witnesses, Maitland Stewart, arrives at a figure of £182, 2s. 8d., and the other, Crichton, at a figure of £168, as the fair rent which the policies should produce if let on lease for eleven years. I do not think it is necessary to examine the methods by which they reach their totals, as in my judgment a valuation on this basis is entirely wrong and was expressly disapproved of in *Baird v. Wemyss*, 8 F. 669, where it was laid down that the teindable rental of rural subjects is the rent which can be obtained for the subjects in their actual condition. The pursuer’s witnesses gave evidence that the present rent of £60 paid for the grazing of the policies is a fair rent for the subjects as they at present exist, and I do not think the defender’s witnesses suggested any alternative figure as the fair rent on this basis although they criticised the figure of £60 as being too low. Counsel for the defender referred to a book which contains the particulars of the Marchmont estate when it was offered for sale in 1913, wherein it is stated (page 19) that the rental of ‘policy parks (let season 1912) apportioned’ was £119. This entry is apparently taken from the valuation roll, and it was said to apply to a smaller acreage than that now included in the policies. I do not think there is any evidence as to what is meant by ‘policy parks’ or by the word ‘apportioned’ in this entry. But even if it be assumed that the entry applied only to the actual policies as they existed in 1912, they have since that date been so altered that I do not think the rental then obtained would be of much assistance in fixing the rent which the grazings might now be expected to yield. I think the evidence of the pursuer’s witnesses, corroborated as it is by the rent actually paid for several consecutive seasons, establishes that £60 is a fair rent for the season’s grazing of the policies.

“The rental of £613 at present paid for the seasonal grazing of the other grass parks is again supported by the pursuer’s witnesses as a fair annual rent for such subjects as at present let, though they agree that the annual rental of grass parks is liable to fluctuate from year to year. They take the total rental of £673 now paid for the whole grazings, including the policies, as the starting point from which they proceed to estimate what would be a fair rental for the whole subjects under an eleven-year lease. From this figure they make certain deductions in respect of the obligations

which under the existing method of letting the subjects have to be met by the pursuer, but which under a lease would be transferred to the tenant. This is on the intelligible principle that you will arrive at a rental which the tenant could pay without increase of expenditure and the landlord accept without loss of profit. In connection with the grass parks there are 25,000 yards (15 miles) of fencing to be maintained, excluding one-half of the march fences and fences maintained by the railway company. The burden of keeping these fences in repair at present falls on the landlord while under a lease it would be transferred to the tenants. The fences were in very bad condition when the pursuer acquired the property and have not yet been put in good order. The witness Spence estimates that the sum of £175 spent upon them last year will require to be spent for the next six years before they are in order, while after that it will cost £75 a-year to maintain them. Accordingly the first deduction which it is claimed must be made from the seasonal rents is £75 in respect of the fences. Next, the lessor of grass parks has to provide a parkkeeper or shepherd to look after the stock, and as these parks are extensive the cost of this is put by the pursuer's witnesses at £100 per annum. The labour required for the cutting of thistles, weeds, &c., is estimated at £50, and the commission of an auctioneer, which is also paid by the lessor, is put at £14. In addition to these charges, of which the pursuer would be relieved if the grazings were let on lease, he has at present to pay occupier's rates which amount to £35 and income tax under Schedule D as the occupier of the ground. The grazing subjects are entered in the valuation roll at £475, a sum which was apparently arrived at on the average of the gross rentals for the three years prior to 1914, and on this value the pursuer last year was assessed for and paid £285 income tax as occupier under Schedule B. He has appealed against this assessment, but the grounds of his appeal would not be available to tenants under leases and they would have to pay the whole of the occupiers' taxes as at present assessed. I think that in estimating that the rent which tenants could afford to pay under leases would be at least £100 less in respect of the income tax alone than the seasonal rents which they at present pay, the pursuer's witnesses take a very sanguine view of the future. The pursuer accordingly maintains that the above deductions, viz., £75 for fences, £150 for labour, shepherding, and weed cutting, £14 for auctioneer's commission, £35 rates, and £100 for income tax, would require to be made from the present rental to ascertain what a tenant could afford to pay under an eleven years' lease. This would reduce the rent to £300, but in condescendence 5 the pursuer suggests that £350 should be fixed as the fair rental. This seems to me to be the best available method of arriving at the probable rental of the subjects as they at present exist if let on lease, but the resulting figure necessarily depends upon the proper amount of the deductions. The defender's witnesses admit

that applying this method of arriving at the rental under a lease deductions would fall to be made from the present rental under all the above heads. But as they themselves proceed on an entirely different method of arriving at the rental under a lease they content themselves with criticising the amount claimed for deductions as excessive without offering any alternative figures. The method they adopted is to ignore any seasonal rents which have been received for the grass parks at any time and to value each field separately as the subject of an eleven years' lease. I am not at all sure whether this was on the assumption that the fields were to remain in grass or not. My impression is that they valued each field on the footing that the whole of the grass parks might be let as one agricultural farm. I cannot find that any of the witnesses states the total amount of the rental thus arrived at, but counsel for the defender stated that it came to £658 for the grass parks, which together with the £169 for the policies made a rental of £827 for the whole pasturage subjects. This it was maintained was the rent tenants might be expected to pay under a lease, although they would have in addition to bear the burden of rates and taxes and upkeep of fences and also have to provide a shepherd to look after their stock. I was not at all impressed with this evidence, and cannot reconcile the figures the witnesses arrived at with their admission that seasonal grazings give higher rents and a better net return to the landlords than do lands let on lease. I am accordingly left with little to guide me as to the rental which the grass parks could return if let on lease except the evidence of the pursuer's witnesses. Some of their deductions appear to me to be rather on the liberal side, but that for income tax under Schedule B is probably understated, and I do not think it is doubtful that a rent of £350 under a lease would give a higher net return to the pursuer than do the present seasonal rents. As it is admitted that seasonal rents as a rule give a higher net return than rents under leases, I see no reason for interfering with the pursuer's figure of £350 as a fair rent for the grass parks on the assumption of an eleven years' lease.

"The woodlands extend to 346 acres, and the pasturage of them is not and has never been let. The pursuer offers to include them in the teindable subjects at a rent of £60. The witnesses on both sides are agreed that if let in their present condition this is a fair rent. But the defender maintains—again on the authority of the *Calton* case—that the rental of the woods should be ascertained by estimating the value of the land as if it were free of trees. This value his witnesses arrive at by ascertaining the value of the land on each side of a wood and taking the average as the value of the woodland. This is, I believe, the practice adopted in fixing values for the valuation roll. By this process they arrive at a teindable rental of £250 for the woodlands. I think this branch of the defender's case illustrates more clearly than any other the confusion

of thought which runs through his whole case between taxation on the value of land and a right to a portion of the fruits which the land may be expected to yield in its actual condition. I have no hesitation in fixing the teindable rental of the woodlands at £60, but in doing so I do not wish it to be understood that I commit myself to the view that woodlands are teindable subjects. The pursuer has tendered that sum on record and the question has not been argued before me. My impression is, however, that woodlands are not teindable, and if I had thought that the pursuer had to any small extent understated the teindable rental of some of the other subjects included in the valuation I should have been inclined to give him credit for allowing a teindable rent for these woodlands. On the whole matter, I see no reason to make any alteration on the figure of £1516, 15s. suggested by the pursuer as the teindable rental of the whole subjects referred to in the condescendence."

The comparing defender (the minister) reclaimed, and argued—There were three points to be considered—(1) The rental of the grass parks; (2) the rental of the policy grounds; and (3) the question whether fire insurance premiums, payable by the tenants, should be added to the rental from the subjects let on lease. (1) The Lord Ordinary's figure of £350 as the rental of the grass parks was arrived at by taking the actual rents received and then deducting the oncost charges. In adopting this method the Lord Ordinary was in error. The correct method of ascertaining the value of the parks was to consider what rent they would bring if let on an eleven years' lease on ordinary terms, in accordance with the Act of Sederunt 1825. The figure would then be £810. The let of the grass and grazing fell to be distinguished from a let of pasture land itself. If the claimer's figures, calculated upon this basis, could not be accepted, then the respondent was bound to give his own figure for a lease of these parks. The evidence showed that the value of the parks if let, on an eleven years' lease would be much higher than their value when let as seasonal grazings. The respondent had arrived at his figure by taking the rent received for the letting of parks and deducting therefrom the charges actually borne by the proprietor. This method was wrong because it did not include the profit derived from the occupation of the land itself. (2) As regards the policy grounds, no doubt it was their actual condition that, on the whole, determined their value, but in calculating that value restrictions imposed by the landlord to preserve the amenity of the mansion-house and its approaches ought not to be taken into account. Nor should the hypothetical rental be reduced because these grounds were interspersed with trees, even though the trees deteriorated the grass under and around them—Act 1633, cap. 17, C.A.S., 1913, H. 3, 1; Connell on Tithes, vol. i, p. 181, vol. ii, p. 95; *Lord Glenlyon v. Clark*, 1842, 5 D. 69, per Lord Mackenzie at pp. 71, 72; *Burt v.*

Home, 1878, 5 R. 445, 15 S.L.R. 472, approved in *Galloway v. Earl of Minto*, 1922, reported *supra* p. 46, per Lord Dunedin at p. 47; *Baird v. Wemyss*, 1906, 8 F. 669, 43 S.L.R. 614. (3) The fire insurance premiums ought to be considered part of the teindable rental, as they were an element in the consideration for the use of the lands. Tenants were not bound at common law to insure against fire, and the practice of the Valuation Court had been to treat these premiums as rent—*Marquis of Breadalbane v. Robertson*, 1914 S.C. 215, per Lord Skerrington at p. 222, 51 S.L.R. 156.

Argued for the respondent—The Lord Ordinary arrived at the figure £1516, 15s. as the constant rent and value of the subjects, and one fifth thereof, viz., £303, 7s., represented the yearly value of the lands. It was a principle of teind valuation that the subjects must be taken in their actual state unless the land were being put to an unnatural use to defeat the minister's right to teind. The landlord was entitled to use his land for all natural purposes whether the result was to raise or to lower the teindable value. The Act of Sederunt of 1825 provided that in the case of subjects not let under lease the "constant rent" should be fixed at such a figure as the subjects might fairly be expected to bring in if let in their actual condition. The grass parks must be taken as they stood. They ought not to be assimilated to ordinary pasture land for the purpose of calculating the rental. With regard to the policy grounds the valuation properly took into account (a) the existence of trees and (b) the restrictions imposed by the landlord with a view to preserving the amenity of the mansion-house and its approaches. It was doubtful whether policy parks were teindable—*Erskine*, ii, x, 43; *Buchanan on Teinds*, p. 197; *Connell on Tithes*, vol. i, page 195; *Juridical Styles*, 6th ed., vol. i, pp. 443 and 447; *Bell on Leases*, vol. ii, p. 280; *Baird v. Wemyss*, 1906, 8 F. 669, per Lord McLaren at p. 683, 43 S.L.R. 614. Assuming, however, that they were, the respondent was entitled to deduct "oncost" charges, and it was only the surplus rent after deduction of these charges that was teindable—*Erskine* ii, x, 32; *Buchanan on Teinds*, p. 199 *et seq.*; *Watson v. Heritors of Northmavine*, 7th March 1821, F.C. Insurance premiums could not be considered part of the fruits of the lands in respect of which they were paid, and it was from the fruits of the lands that the teinds fell to be paid. They were *debita fructuum* not *debita fundi*—*Marquis of Breadalbane v. Robertson*, 1914 S.C. 215, 51 S.L.R. 156; *Bennie v. Mack*, 1832, 10 S. 255; *Earl of Morton v. Murray's Representatives*, 1793 M. 13,872; *Baillie v. Earl of Douglas*, 1730 M. 15,738; *Clark v. Duke of Queensberry*, 1747 M. 15,747.

At advising—

LORD PRESIDENT—Only one question involving any substantial sum is raised on this reclaiming note. The Lord Ordinary fixed the constant rent of the lands let seasonally for grazing purposes at £350. The minister maintains that it should be

fixed at £800. The grazings consist of 424 acres of grass land, laid out as regular grass parks, and 113 acres of policy land attached to the mansion-house, the grazings on which are, like those on the regular grass parks, disposed of seasonally to graziers and others by public roup or by arrangement.

It was common ground between the parties that the mode of valuation of these lands is regulated by the Act of Sederunt of 12th November 1825, reproduced in the Codifying Act of Sederunt H. iii. They are "pasture lands," and as "they are not under lease" the constant rent is the hypothetical rent which "they would bring if let on a lease for . . . eleven years . . . with the usual and customary clauses." There is some awkwardness in applying this test to the case of individual parks the grazing on which is seasonally let. Such grazings are not in practice disposed of by granting leases of the land at all, still less by granting leases for a fixed period such as eleven years. And there is a great difference both in law and in practical economics between the right given to a grazier to feed his cattle and sheep on the grass which a park produces under the proprietor's management of it, and that of a tenant to manage and use for his own profit a piece of pasture land of which he holds a lease as such. The difference depends not so much on the circumstance that the grazing is practically limited by the operations of nature to a part only of the year, as on the distinction between a let of mere grazing and a lease of the pasture land itself. Thus, in the case of *Hamilton v. Cuninghame* ((1830) 8 S. 955), which was one of the let of a grazing only, from Whitsunday to Whitsunday, the proprietor was held entitled to entry from Candlemas onwards for the purpose of top-dressing the park with a view to the next season. On the other hand, in *Addie v. Young* ((1862) 24 D. 799)—a case which seems to present the solitary example in the books of a lease of land consisting of regular grass parks for a term of years—the tenant was held entitled (because he was truly a tenant of the land itself) to refuse entry to the proprietor for a similar purpose prior to the expiry of the full term of his tenancy.

The method adopted by the Lord Ordinary, in which he followed the witnesses adduced by the heritor, is to begin with the prices, or rents as they are commonly called, actually obtained at present for the seasonal grazings. These amount to £613 in respect of the regular grass parks and to £60 in respect of the policy parks—£673 in all. The whole of the grazings were put up to roup in 1917; and while many of them have by arrangement continued to be enjoyed by the successful bidders of that year, the prices or rents have been raised by 30 per cent. since then. The adequacy of the present prices as a permanent measure of price is confirmed by the evidence of witnesses familiar with agricultural values; and the probability that the rise in such values which recent exceptional conditions have produced will not be maintained is all in favour of the minister. Having established this basis, the Lord Ordinary arrives

at a measure of the hypothetical rent which the parks themselves would bring if leased on ordinary pastoral terms for eleven years, by deducting from the price of the seasonal grazings the amount of those charges which, under the system of letting the grazings only, are borne by the proprietor, but which, if the parks themselves were leased under ordinary pastoral leases for a term of years, would fall on the tenants.

This method was persistently attacked on behalf of the minister, but I see nothing to find fault with about it. If it had been common to let grass parks under pastoral leases for a term of eleven years, or any similar term, the actual rents payable under them would no doubt have afforded a measure, probably the best measure, of the hypothetical rents which the pasture lands forming the grass parks in this case would bring. But neither of these conditions is fulfilled; and the assumptions on which the only two witnesses adduced for the minister based their estimates of hypothetical rents under leases for eleven years are left in much obscurity on the evidence. They admit that under such leases the tenants would have to bear charges now borne by the proprietor, and they admit that the gross return obtained by the latter under the system of letting the grazings only is higher than would be the rent obtainable for the grass parks themselves under pastoral leases; further, the *bona fides* of the prices which the proprietor obtains for the grazings in the present case is not impugned. Yet they assess the hypothetical rents greatly in excess of those prices without offering any explanation of how they arrive at so remarkable a result. The Lord Ordinary, who heard the evidence of these two witnesses, records that he was not impressed with it. I find it too indistinct and confused on the vital matter of the assumptions on which it is based to be set against the more intelligible evidence led for the heritor.

Before passing to the deductions there is one other point which must be noticed. It concerns the policy parks. The prices got for the grazing of these parks are much lower per acre than those got for the grazing of the regular grass parks. This is said to be due not merely to the presence of trees which deteriorate the grass under and around them, but also to the fact that the intersecting approaches to the mansion-house and the use by its occupants of the policies as such, expose these policy parks to appreciable interference and disturbance, and to the further fact that restrictions on the kinds of bestial allowed to be grazed on them are imposed in the interests of residential convenience and of the amenity of the mansion and its approaches and of the policies themselves. On the analogy of the very wide theory of the universal teindability of land which commended itself to the majority in *Burt v. Home* (5 R. 445) counsel for the minister argued that just as it was there held that land devoted to urban uses should be valued as if it were put to the purpose of growing corn (the buildings erected on it being ignored) so the grazings

on the policy parks should be valued as if they were wholly devoted to grazing purposes (the mansion-house and its approaches being ignored and the policy restrictions being thrown out of account). It was indeed admitted, in view of the later decision with regard to the valuation of park and policy ground in *Baird v. Wemyss* (8 F. 669), that the injury to the grazing value of the policy parks resulting from their being interspersed with trees must be accepted as a condition of the valuation. The decision was that park and policy ground must be valued as grazings if let in their actual condition, and not as if they were used for corn growing. But if the disadvantages to a grazing which result from the growth on it of spreading trees is part of its actual condition why is not the same to be said of approach roads which cross it?—or of the use made of it as policy ground by the occupants of the mansion-house to which it is attached? Neighbourhood is one of the inevitable conditions attaching to land anywhere and every where; and neighbourhood to the mansion-house of a considerable estate naturally carries with it a certain amount of restriction on the industrial uses to which the land surrounding and appropriated to it can be put. The policies have not been increased in extent as compared with former days; and it was proved and not disputed that they are not out of proportion either in character or extent to the size of the estate as a whole and the importance of the mansion-house, though it was suggested, and it is probably the case, that recent alterations and improvements by the present proprietor have somewhat increased the subordination of the profitable uses of the policy lands to those connected with permanent residence. I think the Lord Ordinary was right in approaching the valuation of the policy parks from the point of view of their actual condition in relation to the mansion-house and its approaches. I think this point is completely covered by the decision in *Baird v. Wemyss*. But even if it should be thought otherwise my judgment would be the same.

This brings me to the deductions. If pastoral leases for eleven years were substituted for seasonal lets of the grazing rights the following charges which the proprietor at present bears would be transferred to the tenants:—(1) The repair of the stock fences, which are 15 miles in length, and cost the present proprietor about £75 a-year to keep in order. (2) The shepherding and stockkeeping of all the stock which the whole 573 acres accommodate and the keeping down of the weeds. The shepherding and stockkeeping require careful and experienced men. The cost of these services is put by the pursuer's witnesses at £150. (3) The occupier's rates, the only figure for which is given by the pursuer's witnesses, viz., £35. And (4) The liability for assessment to income tax in respect of the occupation of lands under Schedule B—a serious liability in these days even though tempered by the tenant's statutory option as between Schedules B and D. The proprietor claimed a further deduction of a

few pounds in respect of the auctioneer's commission for the seasonal rousps. But I do not see how this charge or any counterpart of it could fall on the hypothetical tenants. That the four charges above enumerated would be transferred to those tenants cannot be disputed, and they are all, except the fourth, easy to assess. The Lord Ordinary does not state in detail which of the heads of deduction claimed on behalf of the heritor he allowed, nor how much he allowed under each head. The total deductions allowed in effect by the Lord Ordinary come to £323, being the difference between £673, the amount of the gross returns from letting the grazings, and £350 the amount of the constant rent arrived at. It is accordingly clear that the Lord Ordinary did not allow in full the deductions claimed by the heritor, for these included £14 for the auctioneer's commission and £100 in respect of the income tax, and if these be added to the amounts claimed in respect of the first three heads above enumerated it will be seen that the total claims for the heritor amount to £374, while the Lord Ordinary allowed only £323, or £51 less. The minister's criticisms on the heritor's deductions under the first three heads are not strongly supported by the evidence, and do not appear to me to displace the figures spoken to by the heritor's witnesses. These amount to £260. As I have indicated, I think nothing can be allowed for auctioneer's commission. There remains the deduction claimed under head 4. The proprietor's assessment under Schedule B last year in respect of the parks was actually £285. This was an old valuation stating the annual value of the parks at £475 which reached the valuation roll in 1914 before recent changes in the administration of the estate, and both the valuation and the assessment are under appeal or subject to adjustment at the present time. There is also the uncertain effect of the hypothetical tenant's option to come under Schedule D to be kept in view. The problem is to strike a figure which may fairly represent the disadvantage of incurring liability to Schedule B income tax, as that disadvantage would affect offerers for the grass parks on the system of tenancies under lease for eleven years as against the ordinary system of seasonal grazings. The deductions of £260 in all dealt with above amount to between seven and eight shillings in the pound of the prices actually paid for the seasonal grazings. I cannot think that a further deduction of two shillings in the pound from these prices would be excessive as representing this disadvantage. That amounts to £67, and brings the total deductions to £327—only £4 more than the figure allowed by the Lord Ordinary. It will be observed that the Schedule B assessment on the rent of £350 as fixed by the Lord Ordinary would at present rates be as much as £210. Whether I have exactly or only approximately followed the same method as that which was adopted by the Lord Ordinary the result is substantially to confirm his valuation figure, and in a matter so entirely dependent on valuation as this

it would not be justifiable to allow so trifling a difference to form ground for differing from him. I think therefore that no sufficient reason has been made out for disturbing the Lord Ordinary's assessment of the constant rent of the grass and policy parks at £350.

There remains a small matter with regard to the constant rent of the lands under lease which the Lord Ordinary has fixed at £1021, 4s. It appears that by some of the leases the tenants are bound to pay to the proprietor sums amounting in all to £21, 6s. 9d. over and above the rents. These sums represent the cost of the premiums on policies of fire insurance on the farm buildings taken out by the proprietor, who, however, is not taken bound to employ any sums which might become payable under the policies in rebuilding or repairing the buildings damaged by fire. The heritor's contention before us was that these sums are not stipulated for as rent and do not form part of the consideration for the lands. They are, however, payments wholly for the benefit of the proprietor, and if they are not just so much additional rent for the lands leased it is difficult to imagine under what category they can be brought. They constitute consideration other than rent in the sense of the Valuation Acts—*Walker*, (1862) 24 D. 1453. They are unaffected in their character by any counter-obligations by the proprietor other than such as are incumbent on him as landlord—see *Clark v. Hume*, (1902) 5 F. 252. It is impossible to refer them to any collateral contract as was done by the majority in the highly special case of *Breadalbane v. Robertson*, 1914 S.C. 215. It seems to me therefore that they fall directly within the dicta of the Judges of this Division in *Hamilton's Trustees v. Fleming*, (1870) 9 Macph. 329. In short, they form part of the rent payable for the lands. The teindable rental of the lands under lease must therefore be taken at £1042, 10s. 9d. and not £1021, 4s.

The result is to fix the constant yearly value of the lands at the sum of £307, 12s. 4d. instead of the Lord Ordinary's figure of £303, 7s.

LORDS MACKENZIE and SKERRINGTON concurred.

LORD CULLEN did not hear the case.

The Court recalled the interlocutor of the Lord Ordinary, and found and declared the teinds, both parsonage and vicarage, of the lands in question were of the constant yearly value of £307, 12s. 4d., being one-fifth of the constant rent and value of £1538, 1s. 9d., the constant yearly value of the said lands and pertinents in stock and teind jointly.

Counsel for the Reclaimer—Mackay, K.C.—Stevenson. Agents—P. Gardiner Gillespie & Gillespie, S.S.C.

Counsel for the Respondent—Chree, K.C.—Aitchison. Agents—Carment, Wedderburn, & Watson, W.S.

Thursday, December 22.

FIRST DIVISION.

[Lord Blackburn and a Jury.]

MILLER v. MAC FISHERIES,
LIMITED.

Process—Jury Trial—*Res noviter*—New Parole Evidence—New Trial—Jury Trials (Scotland) Act 1815 (55 Geo. III, cap. 42), sec. 6.

The unsuccessful pursuer in an action before a jury for damages in respect of personal injuries having discovered new additional parole evidence since the date of the trial, applied for a new trial on the ground of *res noviter veniens ad notitiam*. The Court refused the application in respect that the testimony of the proposed additional witnesses was merely in further corroboration of evidence already led.

The Jury Trials (Scotland) Act 1815 (55 Geo. III, cap. 42) enacts—Section 6—“And be it further enacted . . . that in all cases where an issue or issues shall have been directed to be tried by a jury, it shall be lawful and competent for the party who is dissatisfied with the verdict to apply . . . for a new trial on the ground . . . of *res noviter veniens ad notitiam*. . . .”

Mrs Christina Miller, 4 Clerk Street, Edinburgh, pursuer, brought an action for damages against the Mac Fisheries, Limited, defenders, in respect of injuries sustained by her through falling over a fish box, which she averred had been left by them or their servants recklessly and negligently on the roadway opposite their shop.

At the trial of the case before a jury the defenders led evidence to show that no fish box was on the roadway at the time of the accident. The only evidence that a fish box was in the position averred by the pursuer was that of the pursuer herself, corroborated by a small boy who was with her. The jury returned a verdict for the defenders. As a result of the reports of the trial in the public press two men gave affidavits that they had seen a fish box standing on the roadway, and that the pursuer fell over it.

The pursuer obtained a rule on the ground of *res noviter veniens ad notitiam* for the defenders to show cause why a new trial should not be granted.

At the hearing of the case on 17th December 1921, argued for defenders—New trials on the ground of the discovery of additional evidence had only been granted when the evidence was documentary, as in *Bannerman v. Scott*, 1846, 9 D. 163, and *Coulv. Ayr County Council*, 1909 S.C. 422, 46 S.L.R. 338. When new evidence was purely oral applications had been consistently refused—*Paterson v. Stow*, 1st February 1817, F.C.; *Patterson's Trustees v. Johnston*, 1816, 1 Mur. 71; *Baillie v. Bryson*, 1818, 1 Mur. 317; *Bell v. Bell*, 1819, 2 Mur. 130; *Longworth v. Yelverton*, 1865, 3 Macph. 645; *Ersk. Inst. iv, 3, 3*; *Macfarlane, Practice of Jury Trials, 1837, p. 267*.

Argued for pursuer—An application for