Friday, July 4.

OUTER HOUSE.

[Lord Rutherfurd Clark.

TODD & HIGGINBOTHAM *v.* CORPORATION OF GLASGOW.

Process—Minute of Abandonment—Terms upon which allowed to be withdrawn.

One of three pursuers, after the record in an action had been closed and a remit had been made to a man of skill, gave in a minute of abandonment, and the usual interlocutor remitting the defenders' account of expenses to the Auditor for taxation was thereupon pronounced. Thereafter, on the report of the man of skill being lodged, and before the Auditor's report which had been lodged, was approved of, leave was craved to withdraw the minute of abandonment, which was allowed to be done on payment of all expenses connected with the proposed abandonment.

Counsel for Pursuer—Rhind. Agents—J. L. Hill & Co., W.S.

Counsel for Defenders—J. P. B. Robertson. Agent—T. J. Gordon, W.S.

Tuesday, July 8.

SECOND DIVISION.

[Lord Adam, Ordinary.

SIVRIGHT *v.* STRAITON ESTATE COMPANY (LIMITED).

Superior and Vassal—Casualty—Conveyancing Act 1874 (37 *and* 38 *Vict. c.* 94), *sec.* 4, *subsec.* 4—*Valuation of Minerals—Period at which Valuation to be made for Payment of Casualty.*

Lands fell into non-entry in November 1872. The superior in 1873 granted a precept of *clare constat* in favour of the heir of the last entered vassal, which was not recorded, and on 9th July of that year the trust-disponee of the same last entered vassal was infeft by recording a notarial instrument in his favour, but no casualty was paid.

In November 1876 the trust-disponee executed and recorded a disposition of the subjects, the profits of which were chiefly mineral, in favour of A, a singular successor. The superior having raised an action in May 1877 against A for payment of a casualty of a year's rent, in which the former was successful (*ante*, June 12, 1878, vol. xv. p. 622), the question arose which year was to be taken as the criterion of the composition due.

Held that the basis should be a sum equal to ten years' purchase of the average mineral rents payable for three years, and interest at 4 per cent. thereon.

Observed per Lord Justice-Clerk that the infeftment of the defenders in 1876 did not operate in any view, the fee being already full in virtue of the implied entry operated by the Act of 1874, and further, that in his view the date of demand had nothing to do with the question.

Mines and Minerals—Casualty.

Procedure followed by the Court and by the reporter to whom they remitted in a valuation of minerals for the purposes of payment of a casualty.

This action was raised by Mr W. H. R. B. Sivright of Southhouse against the Straiton Estate Company (Limited), incorporated under the Companies Acts 1862 and 1867, to have it found and declared "that in consequence of the death of Peter Brash, merchant in Leith, who was the vassal last vest and seised in all and whole the town and lands of Straiton, and both halves thereof, &c. . . . . and in all and whole these five rigs of land, with houses, biggings, and yards thereof, commonly called Soutterland, together with, &c. . . . . all lying within the barony of Southhouse and sheriffdom of Edinburgh, a casualty being one year's rent of the said lands (with the exception of a part conveyed away) became due to the said W. H. R. B. Sivright, as superior of the said lands, upon the 15th day of November 1876, being the date of the infeftment of the said The Straiton Estate Company (Limited) in the said lands of Straiton and others," &c., and claiming payment of £1930, 19s. 2d. as the amount of the year's rent.

Peter Brash, who had been infeft in the lands in question, had died on 8th November 1872.

It was averred on behalf of the defenders that Brash's son, Peter Brash junior, was entered with the superior by a writ of *clare constat* granted in his favour and duly recorded in the register of sasines, and that therefore the fee being full, the pursuer was not entitled to demand a casualty till Brash junior's death.

In answer to this the pursuer alleged that the writ of *clare constat* was granted at the request of the accepting trustee under the trust-disposition and settlement of Peter Brash senior, and that the writ was not intended to confer, and did not confer, any permanent right, and that no infeftment had ever passed thereon. Further, that the estate of Peter Brash senior was insolvent, and that the requisite consent of his heir was not asked, or at least not obtained, to the completion of an entry under the said writ; also that the writ was granted without any evidence of propinquity, and without the heir having served to his father or consented to the writ being applied for.

These statements were denied by the defenders, who explained that the agents who acted for Mr Brash's trust-estate, on being called on for an entry, offered to the then agents for the pursuer Mr Brash junior as vassal, and obtained delivery from them of the writ of *clare constat* above mentioned. The defenders had become proprietors of the lands in question by purchase in November 1876 from Mr W. W. Stephens, merchant, Leith, Mr Brash senior's sole accepting trustee appointed by his trust-disposition and codicil thereto dated February 1869 and November 1872, and recorded Jan. 18, 1873, and a disposition in their favour was granted by him.

The pursuer contended that Mr Stephens had made up his title by notarial instrument (recorded 9th July 1873), proceeding on the disposition in favour of Brash senior and his trust-disposition; that the effect of these deeds, assuming the writ of *clare constat* to be valid, was to leave an estate of mid-

superiority in the *hæreditas jacens* of Brash senior, the estate of property remaining in non-entry until the passing of the Conveyancing Act 1874; and that no casualty had been paid since the death of Brash senior.

The defenders explained that they had also obtained a disposition from Brash junior. They further averred that the pursuer's agents and Mr Stephens had represented that no casualty was due. They denied that the yearly rental after deduction of public burdens amounted to £1930, 19s. 2d., and they further maintained that Brash junior being entered by the writ of *clare constat* the fee was full. They admitted that they were entered by the operation of the Conveyancing Act 1876, but maintained that no casualty was due till the death of Brash junior, and that on the other hand, if the writ of *clare constat* did not constitute a valid entry, Mr Brash's trustee was entered on the passing of the Act of 1874 as if a writ of confirmation had been granted in his favour and a composition was then due—the value of the minerals on the estate being then much less than at the date of the action.

The first stage of the case in which it was held that a year's rent was due has already been reported (June 12, 1878, *ante*, vol. xv. 622, 5 R. 922). The question then arose as to the amount to be paid and which year was to be taken as the one whose rent was due.

The case was remitted back to the Lord Ordinary (Adam), who on July 11th 1878 remitted to Mr Charles Pearson, C.A., "to make up a statement of the annual rents and whole mineral and other profits and returns derivable by the defenders from the subjects referred to in the summons."

The defenders contended before the accountant that in making up the rental the accountant should have gone back upon the rents received prior to the date when they obtained possession of the estate, which would have shown a considerably smaller average than that now brought out, but the accountant did not see his way to agree to this, and confined himself to the rents 'derivable by the defenders' according to the interlocutor.

The following are various passages from the accountant's report:—"In the case of mineral rents the legal authorities, and the few cases which have been argued before the Court, seem to point to an average of several years' rents being taken in stating the sum payable for an entry, and not the actual rent of the particular year when the new proprietor obtained possession. The difficulty here is that the Straiton Company only acquired the estate in November 1876, so that the accountant has not quite two years' rents to go upon in stating the average. The output of shale and limestone for the two years to Martinmas 1878 shows a small increase for the second year; on the fireclay the increase the second year is more considerable; but in the case of the North Quarry freestone rock there has, on the other hand, been a decrease during the same period. As it is impossible for the accountant to say whether these outputs will increase or diminish in future years, he only feels entitled to make up the rental from information actually before him, and has accordingly taken the average of the output of the various minerals for the two years from Martinmas 1876 to Martinmas 1878—or rather to 30th October 1878—the last date to which returns of output have been made up, and a proportion at the same rates to Martinmas 1878.

The minerals might have been valued by a mining engineer, and a fair average rent ascertained in this way, but the Lord Ordinary's interlocutor does not apparently contemplate this being done. In these circumstances the accountant has adopted as the basis of his estimate of the fair annual rent of the minerals wrought by the Estate Company the rates which he has been informed by the assessor under the Valuation of Lands Act were taken by him in making up his valuation rolls. These are one-tenth of the sales in the case of the quarry, 9d. per ton on the shale, 5d. per ton for the lime, and 1s. per thousand bricks manufactured for the fireclay. In fixing the rent of the paraffin oil-works, the limekilns, and the brickwork, the accountant has also taken the average of the assessor's valuations for the two years from Whitsunday 1877 to Whitsunday 1879; and as these works are dependent on the continuance of the minerals, he has applied the same principle of valuation to each, as mentioned below, under deduction of 10 per cent. for repairs to the works. Having obtained an average rent of the various minerals wrought by the Estate Company in this way, the accountant then capitalised the same at ten years' purchase, and took interest on this capital sum at 4 per cent. as the year's rent payable for the composition on entry."

The accountant brought out a sum of £1514, 16s. 4d. as the free land rents and mineral rents calculated on the above basis. The pursuer contended that the minerals were worth more, and on the accountant's report being discussed before the Lord Ordinary, he, on 24th December 1878, remitted to Mr G. H. Geddes, mining engineer, "to examine and report the number of years' purchase which the freestone, shale, limestone, fireclay, and other minerals in the estate are fairly worth, keeping in view the character of the workings, and the risks and expenses attending the same."

Mr Geddes, after entering into details of the minerals, reported as follows:—"In all the circumstances of the case, and keeping in view the character of the workings, and the risks and expenses attending to same, the reporter is of opinion that the value of the shale and limestone should be founded on the rent quoted in Mr Pearson's report, capitalised at fifteen years' purchase, of fireclay at ten years' purchase, and of freestone at five years' purchase."

The Lord Ordinary (Adam) on 24th March 1879 pronounced the following interlocutor:—"The Lord Ordinary, on the motion of the pursuer, and there being no appearance for the defenders, Finds that the casualty of one year's rent of the lands specified in the conclusion of the action due to the pursuer amounts to the sum of £2641, 0s. 2d. sterling, and decerns and ordains the defenders to make payment of the said sum to the pursuer accordingly: Finds the pursuer entitled to expenses, allows an account to be lodged, and remits the same to the auditor to tax and report." This sum of £2641, 0s. 2d. was the amount of the actual and approximate rents received by the defenders during the year in which the claim against them for an entry was

judicially made—say from Martinmas 1876, the date of their infeftment, to Martinmas 1877.

The defenders reclaimed, and on 10th June 1879 lodged a minute which, *inter alia*, was as follows:—"M'Laren for the defenders stated that in respect of the Lord Ordinary's interlocutor of 2d January 1878, which was adhered to by the Court, they claimed that the value of the casualty sued for should be estimated upon the basis of the rental of the year 1872, being the year of the death of Peter Brash, the last entered vassal. That alternatively they claimed to have the casualty estimated upon the basis of the rental of the year 1873, in respect that William Walker Stephens, the trust-disponee of the said Peter Brash, was infeft by recording the notarial instrument in his favour on 9th July of that year, and was entered retrospectively by the Conveyancing Act which came into operation on 1st October 1874." They further asked leave to lodge the following plea-in-law:—"A casualty having become due on the death of Peter Brash in 1872, or at all events by the infeftment of Stephens, his trust-disponee, on 9th July 1873, in virtue of the implied entry operated by the Conveyancing Act 1874, the defenders are not liable for more than a year's rent on the estimated annual value of lands and minerals for the years 1872 or 1873, as may be determined by the Court."

To this minute the pursuer lodged answers, dated 18th June following, which stated among other contentions the following—"The pursuer further maintains that the insertion of the date 8th November 1872 in the Lord Ordinary's interlocutor of 2d January 1878 was not intended to fix, and does not fix, the date with reference to which the amount of the casualty falls to be calculated; and that the defenders are barred from putting that construction upon that interlocutor by having allowed the cause to proceed both before the Court and before the accountant without objection, on a footing entirely inconsistent with their present contention.

"As regards the amount of the casualty, the pursuer claims that it should be calculated on the basis of the rental of the year from Martinmas 1876 to Martinmas 1877, being the year in which the defenders' infeftment took place, and in which also the pursuer's judicial demand was made; and that in any view no earlier year can be taken than the year current at the commencement of The Conveyancing (Scotland) Act 1874, viz., 1st October 1874.

"As regards the principle of calculation, the pursuer claims to be entitled (1) to the actual yearly value and the free rents and returns of the subjects for the year which is fixed upon as the basis of calculation; or (2) to such free rent and value, exclusive of the returns from minerals, together with a sum equal to the average annual value of such returns, calculated on the returns for the year so fixed upon and subsequent years. The pursuer further claims that in any view the defenders' contention that he is only entitled as regards the mineral returns to interest at the rate of four per cent. on a capital sum representing ten years' purchase of the average annual returns should not be given effect to, except upon condition of the right of the pursuer and his successors in the superiority to obtain payment of a sum representing such interest at all future entries being made a real burden upon the *dominium utile* of the estate."

At advising—

LORD JUSTICE-CLERK—My opinion is that the second infeftment of the defenders did not operate in any view, the fee being already full in virtue of the implied entry operated by the Act of 1874 in the person of the party infeft at the date of the Act. Nor has, in my opinion, the date of demand anything to do with the question involved. I think what I have already suggested is a reasonable course to adopt, viz., that we should take the average of the three years in question, without absolutely fixing what year it is to be.

LORD ORMIDALE—I concur, and I think it right to add that neither party founded on the date mentioned in the interlocutor of the Lord Ordinary of January 2, 1878, affirmed by this Division, viz., 8th November 1872, as conclusive of the date at which the casualty became due.

It was admitted on both sides of the bar that that date was erroneous, or at all events meant no more than that the lands then fell into non-entry.

LORD GIFFORD concurred.

The Court pronounced the following interlocutor:—

"Recal the interlocutor of the Lord Ordinary: Find that the mineral rent of the subjects in question is to be taken into calculation in fixing the amount of casualty due to the superior: Find that neither the amount of the rent in the year of the infeftment of the defenders, nor the amount of rent when the demand was made, is the criterion of the composition due: Find that the lands fell into non-entry in November 1872; that they ceased to be in non-entry by reason of the infeftment of the trustee on the estate of the last entered vassal on 9th July 1873 and by the Conveyancing statute passed in the year 1874: Find that in the present case it is equitable to adopt as the basis for calculating the casualty a sum equal to ten years' purchase of the average mineral rents payable for three years, and to calculate interest at 4 per cent on the sum so obtained: Find that the sum thus due to the superior is £824, 6s. 1d., with interest thereon at the rate of 5 per cent from the date hereof till payment: Find the pursuer entitled to expenses in the Outer House down to the date of the Lord Ordinary's interlocutor: Find both parties liable in the expenses incurred before the accountant and engineer: *Quoad ultra* find the defenders entitled to expenses, and decern; remit to the Auditor to tax the expenses now found due and to report."

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

Counsel for Defenders (Reclaimers)—Dean of Faculty (Fraser)—M'Laren. Agents—Welsh & Forbes, S.S.C.