and the state of the facts of the case. The petitioner's father Colonel George Logan possessed both estates, although under the entail of Broomhouse it is impossible for the heir of entail in possession to hold both the estates of Broomhouse and Edrom. An exception was, however, made in favour of that heir by the entailer. Upon his death, in June 1870, his elder son William took Broomhouse, but he conveyed Edrom to his younger brother, the present petitioner, who has been in possession of the latter estate since 1873. William died in September 1875, and thereupon the succession to Broomhouse opened to the petitioner, who now proposes to make up a title to that estate, and then to disentail it under the second section of the Act 11 and 12 Vict. cap. 36. In this way he wishes to get rid of the fetters of the Broomhouse entail, and to relief himself of the obligation which lies upon him upon his succeeding to it, either to give up Edrom on the one hand, or to forfeit Broomhouse and remain in possession of Edrom.

The question here raised is whether he is entitled to do this. The obligation in the Broomhouse entail relating to this must be read by itself, and the clause which follows, providing for the event of the heir of Broomhouse succeeding to another estate of the annual value of £300, in which case the heir is allowed a year and a day before making his option, has nothing to do with the present matter. It is unquestionably true that the present petitioner has already succeeded to an estate other than Broomhouse, which obliges him to assume another name than that of "Home of Broomhouse," and there cannot be a doubt that he is in the predicament contemplated under the clause of the entail. He has succeeded to Edrom and entered into possession of it; the succession has now opened to Broomhouse, which compels him to take the name of "Home of Broomhouse," and deprives him of the name of "Logan of Edrom."

The obligation is to the effect that the heir must denude of Broomhouse when the succession opens, and if he does not denude, the only other alternative is that he must give up Edrom. It is plain that the option must be exercised immediately, equally in the one case as in the other. The election must take place the moment the succession to Broomhouse opens. That is the conclusion of the whole question. The petitioner is not entitled to make up a title to Broomhouse. The deed of entail excludes him from doing so unless upon a condition which he will not gratify. I confess that if the next heir had applied for an interdict to prevent the petitioner making up his title I should not have hesitated to grant it.

While denuding is a thing which does not require to be done in a few days, or in an unreasonably short time, it is plain that the petitioner is not entitled to do anything with the estate beyond what is necessary for purposes of administration. He cannot make up a title, and I am therefore clearly of opinion that the Lord Ordinary is right.

Lord Deas concurred.

Lord Ardmillan—This is a clear case. I cannot say that I entertain any doubt upon it. The latter clause which has been mentioned does not touch the point before us. It does not relate to succession to Edrom, or to an estate held on an entail requiring the adoption of a different name and arms. As your Lordship has explained, it has nothing to do with this question.

Before this petition was presented the petitioner had succeeded to Edrom, another estate of which it was a condition that the name of the heir in possession should be other than "Home of Broomhouse." In that case he must elect. He must either forfeit Broomhouse, or, taking it, must relinquish Edrom to the next heir of entail.

In that position the petitioner holding Edrom also claims Broomhouse, and being in the course of making up a title to Broomhouse he declines to elect, and occupies the period during which he may elect in proceedings intended and calculated to get rid of the obligation altogether. He is proceeding to make up a title to Broomhouse without surrendering either estate, and without electing to take Broomhouse—a proceeding to get rid of the entail and to defeat the rights of succeeding heirs which I do not think the petitioner is entitled to adopt.

The case of *Preston Bruce* was different from the present. In that case there was no heir in existence, and no present date of election; and the event contemplated in the entail had not arisen, as it has here.

Lord Mure concurred.

The Court adhered.

Counsel for Petitioner (Reclaimer)—Balfour—Keir. Agents—T. & R. B. Ranken, W.S.

Counsel for Respondent — Asher — Hunter. Agents—Dalgleish & Bell, W.S.

Thursday, March 16.

FIRST DIVISION.

SIR G. N. BROKE-MIDDLETON, BART.

v. THE INLAND REVENUE.

Assessment—Property and Income-Tax Act, 5 and 6 Vict. cap. 35—Lease—Deer Forest.

Held that a lessee of a deer forest is liable to be assessed under the Property and Income-Tax Act upon the amount of rent payable, as the annual value of the subject.

Observed, that so far as lands and heritages are concerned, the rule of assessment under the Property and Income-Tax Act is the same as under the Poor Law Act.

This was a case stated by the Commissioners for the county of Inverness for the opinion of the Court under the provisions of "The Customs and Inland Revenue Act 1874."

At a meeting of the Commissioners under the Property and Income-Tax Act, 5 and 6 Vict. cap. 35, and subsequent Acts, held at Inverness on 2d December 1875—Sir G. N. Broke-Hamilton, Bart., appealed against the assessment of £4, 15s. duty, under Schedule B, on £1520, made on him as occupier of the deer forest of Invermoriston, &c., for the year ending 5th April 1876. He paid a rent of £2000 for the furnished house of Invermoriston, with deer forest, including the privi-

lege of shooting deer thereon, and certain grouse shootings and fishings; and the assessor, in fixing the assessable amount at £1520, allowed a deduction of £480 in respect of the houses, with the furniture and the grouse shootings—without, however, admitting that grouse shootings were not assessable. On behalf of the appellant it was stated that the house, with furniture and grouse shootings, were under-estimated, and the assessor agreed to a further deduction of £320, thus making the estimated rent of the deer forest, with the privilege of killing deer thereon, and the schedule (B) assessment, £1200. The appellant objected to this assessment, in respect that it included the portion of the rent paid by him for the privilege of killing deer within the forest, which he maintained was not assessable under Schedule (B), and he therefore claimed to have it reduced to the annual grazing value of the forest. He stated—and this was admitted by the surveyor—that the rent paid for the forest, including the privilege of killing deer thereon, was much above the rent that would be paid for it as a sheep-farm. He referred to rule No. 7, under which the Schedule (B) duty is charged, and rule No. 1, Schedule (A), of 5 and 6 Vict. c. 35, where the properties to be charged are declared to be those "capable of actual occupation," and maintained that the forest was capable of actual occupation only in so far as the land was concerned (the mere privilege of shooting deer, for which so much was paid, not being capable of occupation), and that nothing beyond the ordinary value of the land could be charged for profits of occupation, the duty under Schedule (B) being really chargeable in respect of profits only.

In support of the assessment the surveyor referred to rule No. 7, which provided for the Schedule (B) duty being charged in addition to the duty to be charged under schedule (A), "according to the general rule in No. 1, Schedule (A), before mentioned, on the full amount of the annual value thereof." That rule extended to all lands, "for whatever purpose occupied or enjoyed;" and under the Property Tax Acts (and Valuation of Lands Acts, which ruled the Property Tax valuations), the rent, where a *bona fide* rent was paid, was held to be the annual value. The appellant had the exclusive use or occupation of the forest, and the rent paid by him was its agreed-on actual value. He maintained, therefore, that the appellant was chargeable on the rent actually paid under his lease, without reference to the rent the forest might bring if let as a sheep-farm or otherwise.

The Commissioners found that the assessment appealed against was made according to the amount of rent fixed in terms of the lease between the appellant and the trustees of the late James Murray Grant of Glenmoriston, dated 18th June and 2d July 1872. Therefore refused the appeal; but in respect that the assessor consented to allow the sum of £800 as a deduction from the actual rent payable by the appellant to the said trustees, restricted the amount of the assessment to £1200.

The appellant being dissatisfied with this decision, a case was required to be stated, which came before the Lord Ordinary (SHAND) in Exchequer Causes. His Lordship appointed it to be heard before the First Division of the Court.

Sir G. N. Broke-Middleton argued—A deer forest was not included in "lands, tenements, and hereditaments or heritages, capable of actual occupation," and, as matter of fact, was not occupied. There was an attempt here to assimilate the position of a tenant of a deer forest to that of an agricultural tenant. There was here, in addition to the elements present in the case of game tenants, that of exclusive use of the forest. The tenant made no profit out of his tenancy, and it was upon profit that assessment under the Act was made. That constituted the difference between assessment under the Property and Income-Tax Act, and that under the Poor Law Act, where a game tenant had been held to be in the occupation of land, and so assessable. The terms and objects of the two Acts were thus different.

Authorities—*Pollock, Gilmour, & Coy.*, v. *Harvey*, June 5, 1828, 6 S. 913; *Macpherson* v. *Macpherson*, May 24, 1839, 1 D. 794, 5 Bell's Appeals 280; *Sinclair* v. *Duffus*, November 24, 1842, 5 D. 174; *Menzies* v. *Menzies*, March 11, 1852, 14 D. 451; *Stirling Crawfurd* v. *Stewart*, June 6, 1861, 23 D. 965.

At advising—

LORD PRESIDENT—It is to be taken into consideration in this question that the rent of £1200 is paid for a deer forest, that is to say, it is a rent paid for the occupation of the ground of which that deer forest consists, and for the exclusive occupation of that ground for the purposes of sport; and the question is, whether the appellant is assessable under Schedule B of the Income Tax Act for that forest. Schedule B grants to Her Majesty a duty for "all lands, tenements, and heritages in Scotland, in respect of the occupation thereof for every 20s. of the annual value thereof, the sum of 2½d." In Schedule A there is a corresponding sum charged against the owner of the land, "in respect of the property thereof, for every 20s. of the annual value thereof the sum of 7d." So that every acre of land in Scotland is made the subject of assessment in this way to the amount of 7d. in the £1 for every owner, and to the amount of 2½d. in the £1 for every occupier of such subject. The two assessments plainly go together. They are intended to apply, and do apply, to the same subjects, and the tax is payable as assessment upon the annual value.

Now, the way in which these assessments are to be laid on is regulated by the 60th and 63d sections of the statute. The first rule under the 60th section is this—"The annual value of lands, tenements, hereditaments, or heritages charged under Schedule A shall be understood to be the rent by the year at which the same are let at rack-rent, if the amount of such rent shall have been fixed by agreement, commencing within the period of seven years preceding the 5th day of April next before the time of making the assessment; but if the same are not so let at rack-rent, then at the rack-rent at which the same are worth to be let by the year, which rule shall be construed to extend through all lands, tenements, hereditaments, and heritages capable of actual occupation, of whatever nature, and for whatever purpose occupied or enjoyed, and of whatever value,"—excepting certain sub-

jects which are specified in rules Nos. 2 and 3, which are not applicable to the present case.

The 63d section has this rule No. 7—"The duties last beforementioned shall be charged in addition to the duties to be charged under Schedule A on all properties in this Act directed to be charged with the said duties, according to the general rule in No. 1, Schedule A, beforementioned, on the full amount of the annual value thereof, estimated as by this Act is directed."

In laying on these duties under this statute the subject is to be considered—what is a heritage?—and there can be no doubt that according to the description of the statute the ground in question falls within that description. Then, in the second place, the annual value is to be ascertained by the actual rent, if it is the full rent of the subject. And we have in this case the rent ascertained in quite a satisfactory way. That, the Act says, is to be taken as the annual value; and the owner is to pay on that annual value 7d. in the £1, and the occupier is to pay 2½d. Now, surely all that is very clear and plain, and admits of no difficulty of construction at all. The only question raised here, as I understand it, is, whether Sir George Middleton is the occupier of a heritable subject within the meaning of the statute. Now, I should have thought that it was a great deal too late to question that unless some distinction could be shown between this statute and the Poor Law Act; because the question has been settled under that Act by the case of *Stirling Crawfurd* v. *Stewart*, and settled upon this precise ground, that the tenant of a shooting is a person in the occupation of land, and is assessable as such. He is assessable as a tenant or occupier under the Poor Law Act, and the occupier is a person to be assessed under this Act also. Therefore, unless some distinction can be pointed out between the one Act and the other, the present case is perfectly hopeless, for Mr Mackintosh, with all his ingenuity, has been unable to point out any distinction, unless it consists in this — that the present Act is intended as a tax upon profits, whether they arise from lands or from trades and professions. And that is quite true; but there is a material distinction between the provisions of the Act as regards profits arising from the one source and as regards profits arising from the other. In the case of profits arising from trades and professions, the Act says that there shall be an estimate made of what the profits are, and we know that it is a very rough and ready kind of estimate that can be made even in that case. But in the case of lands the statute requires no such estimate of profits. It fixes the mode in which the profits are to be estimated—a statutory mode of proving what the profits are—and that is by taking the actual annual value of the land, which it defines to be the rent payable, if it be the full rent, or the rack-rent, as the statute calls it, or what the rent would be if it be not let. That is precisely the rule which is to be applied. So that, as far as lands and heritages are concerned, the rule of assessment under this statute, and the rule of assessment under the Poor Law Act, are precisely identical; and therefore I think the determination of the Commissioners is sound.

Lord Deas—There is, I think, some distinction between the poor law cases and the present case. Poor-rates are required to be payable upon the annual value, taking one year with another, one-half by the landlord and the other half by the tenant. The first thing to be ascertained in such a case was, of course, what was the annual value of the lands and heritages? That could only be ascertained by taking the rent. When it was required that one-half should be paid by the landlord and the other half by the tenant, there was a division of liability between them upon the annual value—the annual value being what was paid by the tenant. But this, you observe, was not a tax upon the profit made by the tenant, it was a tax upon the whole annual value of the subject.

In the present case the one-half was not payable by either the landlord or the tenant. There is a larger tax upon the landlord and a smaller one upon the tenant. The question, however, I think, comes to be, notwithstanding the mode of division between the two, whether it is not really a division of the tax between the two of the whole annual value, just as under the Poor Law Act, with the difference simply that in the one case the assessment is equally divided, while in the other case it is unequally divided. Although there is that difference, the assessment is laid on as in the Poor Law Act itself, and if that be sound, it is no matter whether the tenant makes profit out of it or no. It is not on the footing of the amount of profit that the liability is laid on, but on the footing that the lands are of a certain annual value, and the assessment has to be divided in certain proportions between the landlord and the tenant. I have come to the same result as your Lordship in the chair.

Lord Ardmillan—In the case before us I do not think there is any difficulty at all. The tax is partly on the profit of the property and partly on the income. Schedule A is distinct as to its being a tax on "all lands, tenements, hereditaments and heritages, in respect of property, for every 20s. of the annual value thereof 7d." Schedule B is in the same terms in regard to the occupation of lands, tenements, hereditaments, and heritages, the amount in that case however being only 2½d. in the £1. Then, proceeding to the more detailed enactments on the subject, there is section 60, where the rules for estimating lands mentioned in Schedule A—that is, for the ascertainment of the tax on the property—are laid down. You have it there again put expressly on the ascertainment of the annual value; and under section 63, which gives the detailed enactment for assessing and charging properties under the Act (Schedule B) on the occupant, you have again the very same words—the annual value. Whatever the thing be, it is a tax both in regard to the proprietor and in regard to the occupant. Now if there is in this case a rent accruing to the proprietor of the deer forest, it is the annual value of the property so far as it is paid for the deer forest. The rent is, besides, the annual value of the deer forest to the occupant. Both landlord and tenant are therefore within the enacting words of the statute. The time was when a difficulty was raised which does not occur here at all, whether game was a fit subject of such enactment or of assessment at all, on the ground that game, or

the shooting of game, was a personal privilege or enjoyment. That question has long ago been settled. There is a whole string of cases, and I think the case in which the subject was perhaps most deliberately and satisfactorily dealt with was the case of *Menzies* v. *Menzies*. So that it cannot be doubted that game let is property let. The privilege of shooting game let to a tenant is part of a right of property; unlet game raises a different question, and unlet game must be estimated as of so much annual value. The case of *Crawfurd* v. *Stewart* was of much the same character. The fact that under the Poor Law the landlord pays one-half does not raise a different principle; for where the landlord pays on the annual value, and the tenant does the same, it may be called one-half, or the other half, which each pays, but it is the annual value still. It is the criterion of the landlord's and of the tenant's liability.

In regard to a deer forest, it is obvious that there is this other consideration, that there is no means of ascertaining, except by pure hypothetical conjecture, the rent of the land apart from the deer shooting. In the case of a grouse shooting there may not be a very great sheep stock upon it, but there is a sheep-stock often put upon it; and it is capable of being let for pasture for cattle and sheep, whether it is so or not. But in the case of a deer forest everything else is excluded. That is the very reason why it is impossible to reach the rent of the land if it is merely a deer forest, otherwise than by taking the rent as the annual value, and the annual value as the rent.

The only difficulty suggested in dealing with the case is an attempt to say that if there is no assessment in regard to grouse why should there be such in regard to deer? But we have not that before us. There have been distinctions drawn on such matters. I agree with your Lordships that the decision of the Commissioners was right.

Lord Mure—I agree with your Lordship in the chair that there is no substantial distinction between the circumstances of this case and the case of *Stirling Crawfurd* v. *Stewart*, which has been referred to, and which was tried under the regulations of the Poor Law Act. The only argument that Mr Mackintosh used was, that, strictly speaking, in the matter of deer there is no profit; and that this Act being made for the purpose of levying a tax upon profits, deer did not fall within its general principle. Then, he said that the appellant did not occupy in the ordinary sense of occupation. I do not think that is a sound distinction, because, in regard to property, the income-tax is laid on the annual value as well as upon occupancy, and it is levied whether the occupant makes a profit or not. He is supposed, taking one year with another, to make a profit out of his occupation, but if he makes no actual profit he still pays, because it is presumed that whatever the rent may be a profit is really made. So, in this case the tenant of a deer forest is presumed to get some benefit out of the forest when he pays a particular rent for it. He makes some profit out of it in the shape of the enjoyment of the privileges of the deer forest. A deer forest appears to me to fall under the very words of section 60 of the Act, because section 60, to which we refer in dealing with section 63, uses not merely the word "occupy," but for whatever purpose "occupied or enjoyed." I am thus of opinion that a man who enjoys the privileges of the tenancy and occupancy of a deer forest falls within the very words of section 60.

Lord Deas—I should explain that in what I said about the application of the decision in the Poor Law case I am quite aware that the division there between the landlord and the tenant is not between individual landlords and individual tenants, but landlords as a class and tenants as a class. But that makes no difference in the principle, or in the result at which I arrived, as the principle I go upon is this—that it is a tax upon the whole of the annual value, and divided between the two in certain proportions. It does not, therefore, matter what the proportions are, whether one-half or some other proportion. So that, although I did not use the words "classes," it comes to precisely the same thing.

The Court affirmed the determination of the Commissioners, and found the assessor entitled to expenses.

Counsel for Sir G. N. Broke-Middleton—Asher—Mackintosh. Agents—Adam & Sang, W. S.

Counsel for The Inland Revenue—Dean of Faculty (Watson)—Rutherford. Agent—David Crole, Solicitor of Inland Revenue.

Thursday, March 16.

SECOND DIVISION.

SPECIAL CASE—BISHOP OF SYDNEY AND OTHERS (HARDEN'S TRUSTEES.)

Succession—Testament—Implied Revocation—Donatio inter virum et uxorem stante matrimonio.

A conveyed a house to his wife, who was infeft therein, the disposition proceeding upon the narrative that he had through her succeeded to money. His wife predeceased him, and after a second marriage he died, leaving a trust-disposition and settlement conveying to trustees his whole means, heritable and moveable, and directing them to dispose of, *inter alia*, his "house, furniture, plate, &c.," and also generally to realise the residue, "whether heritable or moveable."—*Held*, without deciding the question whether or not the disposition to the wife was revocable, that it had not been revoked.

This was a Special Case, in which the Bishop of Sydney, the Rev. J. Harden Clay, and G. T. Kinnear, W.S., trustees and executors appointed by Mr Harden's will, were the first parties, and Lieut.-Col. Learmonth, M.P., and James Cleghorn Moore, heirs-portioners of the deceased Mrs Cleghorn or Harden (Mr Harden's first wife) were the second parties. Mr Harden died on 9th January 1875, leaving a trust-disposition and settlement dated 5th December 1873. He was twice married, first, in 1829, to Miss Mary Cleghorn, who