Tuesday, November 21.

SECOND DIVISION.

[Lord Kincairney, Ordinary.

GOULD *v.* WISEMAN AND OTHERS (GOULD'S TRUSTEES).

Entail—Contravention—Lease of Minerals—Sum Paid by Lessees in lieu of Restoring Surface—Grassum.

An heiress of entail in possession conveyed by antenuptial marriage-contract the entailed estate to trustees for certain purposes—*inter alia*, to pay to her the free rents, fruits, and produce, exclusive of her husband's *jus mariti* and right of administration. By a lease, of date prior to the marriage-contract, she had let certain mineral workings on the estate, and it was provided that at the termination of the lease the lessees should restore the ground or pay compensation at a specified rate. At the termination of the lease the lessees elected to pay compensation, and in terms of the marriage-contract the amount, along with a sum in lieu of lordship on coal which was left unworked, was paid to the trustees. In an action by the heiress of entail against the marriage-contract trustees and next heirs of entail, *held* (1) that the lease was not a contravention of the entail, and (2) that as she was not bound, in a question with succeeding heirs of entail, to restore the surface if the minerals had been worked by herself, she was not bound to apply the sum received as compensation for the lessee's failure to do so, for the benefit of the estate, but was entitled to have it paid to herself as part of the rents or produce of the estate.

In 1883 Miss Emily Muirhead, who was at that time heiress of entail in possession of the estate of Bredisholm, entered into a contract of lease with the Provanhall Coal Company, whereby she let to the company certain mineral workings on the estate of Bredisholm. By a subsequent minute of agreement the Glasgow Iron and Steel Company became lessees under the said lease, and "(Cond. 3) bound themselves to pay all the damages of what kind soever which they might 'in any way cause to any lands, crops thereon, houses or wood, or fences or drains.' They also bound themselves to 'make good all loss or damage which the first party may sustain in consequence of irregular workings or neglect of the underground operations,' and also 'to restore all grounds that may have been damaged by them to an arable state, and capable of bearing crops, or pay a sum equal to a twenty-five years' purchase of the land immediately adjoining.'"

In 1886 Miss Muirhead entered into an antenuptial contract of marriage with Major A. L. G. Gould in contemplation of their intended marriage. By that deed Mrs Gould, without infringing the entail, disponed the estate of Bredisholm to certain trustees—"But declaring that the before-written conveyance by the second party (*i.e.*, Mrs Gould) is granted in trust always for the ends, uses, and purposes after specified, viz.: *In the first place*, that the trustees acting for the time under these presents, hereinafter called 'the trustees,' shall make payment of the whole expenses and charges of every kind in connection with the trust hereby created, including the expenses of these presents, in so far as not otherwise provided for, and all public and parochial burdens, ministers' stipend, teinds, and all other burdens, taxes, and exactions of every kind, including such repairs on houses and ameliorations of the estate as may be requisite, and shall not be capable of being made charges upon the said entailed estate and the heirs of entail succeeding thereto, and the interest of all sums, if any, charged upon the said estate; *in the second place*, that the trustees shall allow to the second party the use and enjoyment of the mansion-house of Bredisholm, and garden and offices, and so much of the adjoining ground as has hitherto been in use to be occupied in connection with the said mansion-house, and the trustees shall, out of the first and readiest of the rents, fruits, and profits of the said tailzied lands and estate of Bredisholm and others, pay all burdens, taxes, assessments, and exactions, and all outgoings of every kind and description affecting the said lands and estate, and fulfil all obligations affecting the said rents, fruits, and profits incumbent on the second party as heiress of entail foresaid, and affecting the said lands and estate; *in the third place*, the trustees shall, as and when the same shall arise, pay over to the second party the remainder of the free rents, fruits, and produce of the said lands and estate; *in the fourth place*, it is hereby expressly provided and declared that the whole foresaid rents, fruits, and produce payable to the second party shall be so payable to her for her own sole and separate use and benefit, and exclusive of the *jus mariti* and right of administration of her said intended and any future husband she may marry, and the same shall be purely alimentary to her, and shall not be alienable or assignable by her or affectable by her debts or deeds, or attachable by the diligence of her creditors in any manner of way; *in the fifth place*, upon the decease of the second party the trustees shall hold, retain, and apply any balance of trust-funds in their hands as part of the second party's own separate estate, in terms of the provisions hereinbefore provided in regard thereto."

On the termination of the lease it was found that a considerable portion of the surface of the ground adjoining certain coal-pits on the estate was covered with debris and otherwise injured. The ground could not have been restored to an arable state unless at great expense, and in terms of the above conditions in the lease the company, in lieu of restoring the ground, paid a sum amounting to £905, 2s., being £2 per acre at the stipulated rate of

twenty-five years' purchase. On the termination of the lease it was also found that a section of coal in No. 2 Pit Ellismuir on the estate of Bredisholm had been left unworked, and the company agreed to pay the sum of £78 in lieu of the lordship or royalty which the pursuer would have received if the said coal had been worked.

These sums of £905, 2s. and £78 were paid by the lessees under the lease to the trustees acting under Major and Mrs Gould's marriage-contract. Mrs Gould then raised an action against these trustees, and also against her two pupil children, in which she sought a declarator that the above-mentioned sums were "part of the rents, fruits, produce, or profits" of the estate of Bredisholm, and fell to be paid to her under the provisions of the marriage-contract and deed of entail; or alternatively, that she as heiress of entail was entitled to receive and enjoy them, and decree for payment thereof was asked against the trustees. The marriage-contract trustees declined to pay over the sums of money without the sanction of the Court. They stated—"The said sums are not part of the rents, fruits, profits, or produce of the trust-estate, but have been placed in the hands of the trustees in substitution of portions of the estate of Bredisholm which are no longer available to the trustees as subjects yielding rents, fruits, profits, or produce. The pursuer is only therefore entitled to the income derived from said sums, and the trustees are bound to retain the capital as part of, or as the equivalent of part of, the said estate of Bredisholm. In any event, the said sum of £905, 2s. falls to be so retained by them."

The pursuer pleaded—"(1) The sums in question being part of the rents, fruits, produce, or profits of the said estate, fall to be paid to the pursuer in terms of the said antenuptial contract and of the said disposition of taillie. (2) The said sums being payments derived from the said estate, and not being against the prohibitions of the said disposition of taillie, the pursuer is entitled to receive and enjoy them."

The trustees, defenders, pleaded—"(2) The sums in question not being part of the rents, fruits, profits, or produce of the trust-estate, the marriage-contract trustees are not bound to pay the same to the pursuer. (4) The sums in question having been paid into the hands of the trustees in substitution of portions of the entailed estate of Bredisholm, the pursuer is not entitled to the capital thereof. (5) The pursuer not being entitled as heiress of entail in possession of the estate of Bredisholm to the capital of the sums in question, the action should be dismissed."

A curator *ad litem* was appointed to the pupil children, and he adopted the defences of the trustees.

After hearing parties on the procedure roll, the Lord Ordinary (KINCAIRNEY) pronounced the following interlocutor:—"Assoilzies the defenders from the conclusions of the summons *quoad* the sum of £905, 2s., and decerns; appoints the cause to be put to the roll for further hearing as regards the sum of £78 second mentioned in the summons."

Opinion.—"In this action the heiress of entail of the estate of Bredisholm, with her husband's consent, concludes against the trustees under their antenuptial marriage-contract, and also against the next heirs of entail, who are children of the marriage, for declarator that two sums in the hands of the trustees are part of the rents, fruits, produce, or profits of the estate, and fall to be paid to the pursuer, or alternatively that the pursuer as heiress of entail is entitled to receive these sums and enjoy them; and the action concludes for payment. The first of these sums was paid to the marriage-contract trustees by tenants of the minerals in Bredisholm at the close of their lease in implement of obligations in reference to land occupied or injured in the course of the mineral workings.

"The trustees under the marriage-contract hold the entailed estate of Bredisholm under the obligation, *inter alia*, to pay to 'the pursuer the remainder of the free rents, fruits, and produce of the said lands and estate.' There are no directions to the trustees about the fee of the estate, except that on the pursuer's death they 'shall hold, retain, and apply any balance of trust-funds in their hands as part of "her" separate estate.'

"The trustees have lodged defences, and the curator *ad litem* for the next heirs (who are pupils) has concurred in them. Their interests, however, are not the same. The trustees are not trustees for the next heirs, and owe them no duty as such; and the questions which are raised by the deed of entail and the marriage-contract are quite distinct. There has been only one appearance for both defenders. I do not suggest or think that more was necessary, and I believe that the questions raised—which are difficult in law—may be decided on the present pleadings.

"The sums in question are: (1) £905, 2s., which is said to be a capital payment by the tenants on account of a considerable part of the surface being at the close of the mineral lease covered with debris and otherwise injured; (2) £78 which was paid by the tenants because a certain amount of coal had been left unworked, and the tenants had agreed to pay that sum in lieu of lordship, an explanation not in itself complete.

"The lease contains several clauses in relation to the restoration of ground occupied or injured by the mineral workings. The quotation in condescendence 3 is not complete. The first clause there quoted relates to injury during the currency of the lease, and is not at present directly in question. In all the other clauses except the last (which is quoted on record) the only obligation on the tenants is to restore. The last provision in the lease on the subject—that which is quoted—is to 'restore all grounds that may have been damaged by them to an arable state, and capable of bearing crops, or pay a sum equal to

twenty-five years' purchase of the land immediately adjoining.' Here the tenants have an alternative to restore or to pay. The option is with them, not with the landlord. The tenants finding the expense of restoration very great, as often happens in such cases, preferred to pay £905, 2s. as a slump amount of damages.

"It was not clearly explained in what manner the obligation to pay the £78 arose, and I do not think I can decide that part of the case without more information.

"The record does not explain of what sort the injury to the surface was which is covered by the payment of £905, 2s.; and I have felt some hesitation in disposing of the question raised without fuller information on that point. But in the view which I have taken, I think that question may be decided on the pleadings as they stand.

"The first and principal question as to the £905, 2s. is primarily with the next heirs of entail. They resist the conclusions of the summons. The trustees also plead that they hold the sum as part of the entailed estate of Bredisholm. It was a payment on account of the permanent depreciation of the entailed estate, reducing its value to that amount, both while in the possession of the pursuer and also when in the possession of the succeeding heirs. It is to be observed that the case is not a competition for payment from the tenants. The money has already been paid, not indeed to the pursuer, but to her trustees, and the primary conclusion is substantially for declarator that it belongs to her free from the fetters of entail.

"The pursuer maintained in the first place that the lease was not, and is not, a contravention of the entail. This may be taken as a conceded point, and it was not disputed. It so happens that it has been decided that a lease of the minerals in the Bredisholm estate, apparently more open to objection than this lease, was not a contravention of this entail—*Muirhead* v. *Young*, June 1855, 17 D. 875, and February 13, 1858, 20 D. 592. In these cases the established principle was recognised and enforced, that an heir of entail in possession is an absolute proprietor, unless so far as his rights are expressly limited by the conditions of the entail; that a lease of minerals sanctioned by the Rosebery Act (6 and 7 Will. IV. c. 42), sec. 1, is not an unlawful alienation of the estate, although it necessarily deprives the next heirs of a part of it; and therefore that a lease of minerals, however adverse to the next heirs of entail, must be sustained as an exercise of the right of a proprietor, unless it can be characterised as fraudulent. It was argued that, if the lease was a contravention, the necessary or ordinary results of a lease, such as injury to the surface, could not be so either. The payment of £905, 2s. arose out of the ordinary operations in carrying out the lease, and was in implement of its provisions; hence it could not be held that the payment to the trustees was a contravention or an alienation of any part of the estate in breach of the fetters. It was therefore no part of the entailed estate, but was only a sum of money derived from the lawful use of it, which fell to the pursuer as heir in possession. It had been paid to the trustees. That was the same, so far as the next heirs of entail were concerned, as payment to the heir herself; and if it had been paid to the pursuer herself it could not have been recovered from her. It was either a contravention or it was not. If it was not, then there was no ground of action against the pursuer. Even if it was a contravention, the sole remedy of the next heirs was an action of declarator of contravention and irritancy—*Breadalbane* v. *Jamieson*, March 16, 1877, 4 R. 667. If the money was paid to the pursuer there were no means of entailing it, and no obligation to invest it.

"If, then, it was not part of the entailed estate, the marriage-contract trustees, it was argued, had no right to hold it, there having been nothing conveyed to them except the entailed estate. The sums in question were, substantially, and must be held to be rents and produce of the estate.

"For the defenders it was not contended that there had been any contravention of the entail, although it was said that there would be a contravention if the pursuer were allowed to appropriate the money. That would be an appropriation of what was truly a part of the entailed estate. The primary obligation of the tenants was not to pay damages, but to restore. In several of the clauses their only obligation was to restore; and if their obligation had been fulfilled in that manner, of course the benefit would have accrued to the entailed estate. If the pursuer appropriated it, it would be analogous to a grassum. The argument as to an action of irritancy being the sole remedy of an heir of entail, when the heir in possession had acted in breach of the fetters, was not applicable; because the heirs were not *in petitorio*. They were resisting an attempted breach of the entail, just as if they had been interdicting it.

"The case has novelty, although the general principles applicable are well fixed. I have formed an opinion in accordance with the argument of the defender. I think that the lease was not a contravention. That is settled by *Muirhead* v. *Young;* and further, that nothing done in the fair execution of the lease was in contravention. There has been no alienation of the estate except by the removal of the minerals, which is not in breach of the entail. Otherwise it still remains the same entailed estate, reduced in parts in value, but still existing. A sum has been paid for the injury done to it. That sum is not payment for the injury for a single year, but for the permanent capital injury. It affects the interests of each heir. If the pursuer receives the interest of it, she is fully recouped for the injury done to her. I think that the true obligation on the tenants was to restore. The money was paid to the pursuer to enable her to restore. I see no reason why there should not be an obligation on her to hold this sum as part of the

entailed estate. The receipt of it by her would not be a contravention. It would be a payment for the benefit of the entailed estate. That seems to me to be the just result from what has occurred. If so, then this sum forms part of the entailed estate now in the hands of the trustees. There has been no suggestion that the Bredisholm entailed estate should be withdrawn from the trust. I do not say what use the trustees should make of this sum. That is not before me. Of course the pursuer will have such benefit from it as she has from the rest of her estate; but so long as the trust endures, it must, according to my view, remain in the hands of the trustees, which involves the rejection of both the declaratory conclusions in regard to the sum of £905, 2s.

"With regard to the sum of £78, I am in some difficulty, and regret that I do not feel in a position to decide it. I do not know why the tenants paid that sum. Nothing more than conjecture on that point was offered from the bar. If the tenants were not obliged under the lease to pay, there may be room for argument. I propose to hear parties on the point again."

The pursuer, on obtaining leave, reclaimed.

Argued for pursuer—(1) As to the £905. The lease was within the powers of the heiress in possession—*Muirhead* v. *Young*, 17 D. 875, 20 D. 592. She might have omitted to impose any obligation on the lessees to restore or pay compensation in lieu thereof, and she would have got a higher rent. She is not bound to restore the ground—*Breadalbane's Trustees* v. *Jamieson* (1877), 4 R. 667. She is entitled to the benefit of her own act. There is no obligation on the trustees to hold this money, nor any one apart from the pursuer *in titulo* to uplift it. There is no direction to the trustees to purchase other lands or invest the capital of it in any way—*Stewart* v. *Fullarton*, 4 W. & S. 196; *Montgomerie* v. *Eglinton*, 2 Bell 149. The defenders are really *in petitorio*, and must show that they could interdict the pursuer, if she had got the money from the lessees, from applying it to her own uses. (2) The £78 is a surrogatum for lordship, and so falls to the pursuer.

Argued for the pupil children—It is not disputed that the lease was within the powers of the pursuer to grant. But if she gets this money and spends it she will contravene the provisions of the entail. The lease makes a distinction between this sum and what is due year by year for surface damages. The pursuer by this action seeks to get 18 acres of land at £50 an acre. This sum is analogous to the taking of a grassum by the lessor, and that is forbidden. The pursuer's obligation in regard to restoring the ground is not like *Breadalbane's Trustees* v. *Jamieson*, *supra*; it is rather a case similar to pulling down a house to sell the materials, in which case the heir is liable to restore.

Argued for the trustees—The trustees have no interest in the sums of money. The pursuer's right is merely that of an alimentary liferent, and she has no claim on this capital. This is provided by the fourth purpose of the trust. She is therefore unable to claim the position of an heir of entail. This sum of £905 is capital, and must be retained by the trustees till the beneficiaries under the fourth provision of the trust are in a position to take it—*Menzies* v. *Murray* (1875), 2 R. 507.

At advising—

LORD JUSTICE-CLERK—The pursuer, being an heiress of entail, granted a lease of certain minerals in the estate, and took the lessees bound at the conclusion of the lease either to restore the ground which was covered up by the working of the pits, or to pay a sum of money as compensation for their leaving it covered. The lease having terminated, the lessees exercised their option to pay instead of restoring the ground, and the question now is whether the heiress of entail who granted the lease is entitled to the money, or whether, according to the contention of the defenders, it forms part of the entailed estates as being in substitution of the part of the lands covered by the workings. The Lord Ordinary has decided in favour of the defenders, holding that the sum in question forms part of the entailed estate. I have found myself unable to agree with this view. The pursuer was entitled to win the minerals in the estate as part of its fruit or produce. She could have worked the minerals herself, and it is not now disputed that she could lease them out. She could do so under such conditions as she thought proper. She was under no obligation to restore the ground injured in winning them, nor to stipulate for the ground being restored. She was not called upon to act as regards the minerals in any other interest than her own. She had a claim under her own bargain and in her own interest to have the ground restored or to receive a sum of money. I am unable to see that what she thus bargained for is not her own when it is paid. It is compensation due to her and to no one else. The entailed estate which she holds as heiress of entail is now in no different position from that in which she is entitled to leave it, for all that has been done is only what was inevitable if the work of winning the minerals was to be carried out. She made a stipulation in her own favour that if the lessees did not restore to her the land covered up by the operations, they were to give her a sum in compensation. She was not bound to make any such stipulation. It was an arrangement made by her in her own interest in obtaining for herself the produce to which she was entitled as heir of entail. The sum in question, in my opinion, belongs to her, and is not part of the entailed estate.

I am therefore in favour of recalling the Lord Ordinary's interlocutor and granting decree.

As regards the £78, I understood that it is not now disputed that the pursuer is entitled to decree for that sum.

LORD TRAYNER—I am unable to concur in the view taken of this case by the Lord Ordinary.

The lease which was granted by the pursuer to the Glasgow Iron and Steel Company was not in contravention of the entail, nor outwith the competency of an heir of entail in possession. The pursuer is the proprietor of the entailed estate, with all the rights and powers of a proprietor, except in so far as these may be prohibited or restricted by the conditions of the entail. Accordingly, the pursuer could and did competently grant the lease in question, and none of its clauses are in the least unusual in a mineral lease. By one of the clauses the lessees are taken bound to restore the ground that may have been damaged by them to an arable state, or pay a certain sum in place of doing so. The lessees adopted the latter alternative, and paid the £905 now in question on account of a part of the land "covered with debris, and otherwise injured" in the course of their working. This sum the pursuer claims as her own, as part of the fruits or produce of the entailed estates, and her claim is opposed by the next heir of entail, and also by her own marriage-contract trustees.

The defenders maintain that the £905 above referred to is a surrogatum for a part of the estate which has been practically destroyed by the pursuer. I cannot see how this money can be regarded as a surrogatum for a part of the estate so long as the whole estate is there. So far as its extent is concerned it is just as the pursuer got it. But granting that it is not in the same condition, what then? The pursuer is not bound to preserve the estate for the succeeding heirs of entail, nor to repair any injury it may have sustained while in her possession, such injury not having been caused fraudulently or in *mala fide* by her. Any injury or deterioration which befel the estate as the consequence of something lawfully done by the heir in possession must be borne by the estate and be submitted to by the succeeding heirs. Then it is said that the £905 is not part of the "rent, fruits, profits, or produce" of the estate, Well, it is certainly not price, for no part of the estate has been sold, and it is not made "price" by the fact that the amount of the damage done was ascertained by a reference to the price or value of adjoining land. If not price, it does not occur to me that it can be anything else than rent, fruit, profit, or produce, for these things, along with price, seem to me to exhaust everything that could be got out of the estate in any way.

Again, it appears to me that the pursuer was in no way bound to insert in her lease the clause under which the money in question became exigible. If there had been no such clause the succeeding heirs would have been in the same position—no better and no worse—as they now are. But if the pursuer could have abstained from taking her lessees bound as she did by the clause in question, she could also—having taken them bound—have gratuitously discharged the obligation imposed by the clause or declined to enforce it. This shows how personal a matter the obligation was, and how personal the right to which it gave rise.

If this money is not to be paid to the pursuer as her own, who is to get it? The money cannot be entailed, and there is no duty on anyone to purchase other lands with the money, and entail them under the same conditions on the same series of heirs as are to be found in the Bredisholm entail. The Lord Ordinary suggests that the pursuer may get the interest of the money. But who is to get the capital? It can only be handed over by the trustees on the failure of the pursuer to the succeeding heir, who would use it as his own. But the pursuer has as much right to the money as the succeeding heir. She has more, because it has been derived from a use of the estate while in her possession.

If the succeeding heir of entail has no right to this money, no more have the marriage-contract trustees. They are bound by the terms of the marriage-contract to pay over to the pursuer the whole fruits or produce of the entailed estates, after paying all burdens and exactions affecting the land. It is not suggested that any such are due or unpaid. I am therefore of opinion that the pursuer is entitled to decree in terms of the conclusions of her summons. With regard to the smaller sum of £78, also concluded for, but with which the Lord Ordinary has not dealt, it was explained to us that the lessees had paid that sum as royalty on coal they had not worked but were bound to work. That therefore was really a sum of rent which plainly belongs to the pursuer.

LORD MONCREIFF — This case raises a somewhat novel question, and in my opinion depends to a certain extent on the peculiar circumstances of the case. The pursuer of the action, Mrs Grosset Muirhead or Gould, is heiress of entail in possession of Bredisholm, in the county of Lanark. Before her marriage she in 1883 granted a lease of minerals in favour of the Provan Hall Coal Company. It is material to note that the lease expired in 1896, and the present question arises in regard to a sum of £905, 2s., which on the termination of the lease the lessees paid, as they were entitled to do, in lieu of restoring the ground. The pursuer maintains that she is entitled to receive and apply that sum to her own purposes. On behalf of the substitute heirs of entail it is maintained that she is not entitled to do so, because that sum represents deterioration of the substance of the entailed estate, and ought to be applied for the purpose of restoring the ground.

The position and powers of an heir of entail in possession are well settled. He is not a mere liferenter; he is a fiar except so far as limited by the fetters of the entail. He is not a trustee for the substitute heirs of entail; and he is under no implied obligation as regards such heirs. A deed of entail is *strictissimi juris*, and no obligation that is not to be found on the

face of it is binding on the heir of entail in possession. Accordingly, a substitute heir of entail cannot restrain the heir of entail in possession or oblige him to do anything in connection with the entailed estate unless what he desires to prevent would constitute a contravention of the deed of entail.

I now come to consider whether what the pursuer proposes to do, viz., to appropriate the sum paid by the mineral tenants in lieu of restoring the ground, does or does not constitute a contravention of the entail, or put otherwise, whether the substitute heirs of entail could by any known process compel the pursuer to apply that money in restoring the ground? In my opinion they could not do so.

If the pursuer, instead of leasing the minerals, had preferred to work them herself, I do not know of any process by which the substitute heirs of entail could have compelled her to restore the ground. Again, if the minerals being leased, she had for what seemed to be a good reason freed the tenants from their obligation at the end of their lease, I have equal difficulty in seeing what legal claim the substitute heirs could have maintained against her. She need not have taken the mineral tenants bound to restore. In the earlier case—*Muirhead* v. *Young*, 17 D. 875—it was held not to be a good objection to a lease of minerals that the tenants were not taken bound to restore the surface. In that case the lease was current when the question arose, and it may be that the stipulated return was held to have been greater, because the tenant was not taken bound to restore the ground. If in the present case the lease had been still current, it might have been contended that in respect of the obligation to restore the surface the tenant paid a smaller rent or royalty, and that by appropriating the sum paid in lieu of restoration (supposing that payment to be exigible during the lease) the pursuer would really be receiving a grassum, while the substitute heirs would (if the succession opened during the lease) be left saddled with an inadequate return. But as I have already said, the lease is at an end, and therefore the only prejudice which the substitute heirs (who are not concerned with the adequacy or inadequacy of the return received by the pursuer) can allege, is that the pursuer has allowed the mineral tenants to make a use of the surface of the ground, which in the meantime has rendered it unfit for agricultural purposes, and has not applied the compensation paid for the good of the estate. For the reasons stated I cannot hold that this amounts to a contravention of the conditions of the entail, and therefore, although I think the question is one of difficulty, I am prepared to give decree in favour of the pursuer.

In what I have said I have assumed that the money is in the hands of the pursuer, because in my opinion while the marriage-contract trustees were quite justified in taking the opinion of the Court on the question, they were not entitled to withhold payment of this sum, which is really part of the produce of the entailed estate, from the pursuer.

As regards the rents, produce, and profits of the estate of Bredisholm, the marriage-contract trust is simply a trust for management for the benefit of the pursuer alone.

The sum of £78 is, I understand, now admitted to be produce of the estate, and therefore payable to the pursuer.

LORD YOUNG was absent.

The Court recalled the interlocutor of the Lord Ordinary, and found and declared in terms of the first declaratory conclusion of the summons, and ordained the defender to pay the sums of £905, 2s. and £78 to the pursuer, with all interest received thereon.

Counsel for the Pursuer—Campbell, Q.C. —Graham. Agents—Webster, Will, & Co., S.S.C.

Counsel for the Pupil Children (Defenders)—Macfarlane. Counsel for the Trustees (Defenders)—Moncrieff. Agents for Defenders—Fraser, Stodart, & Ballingall, W.S.

Tuesday, November 21.

SECOND DIVISION.

[Lord Kyllachy, Ordinary.

FARQUHARSON *v.* CALEDONIAN RAILWAY COMPANY.

Superior and Vassal—Casualty—Composition—Clause of Relief—Implied Entry—Conveyancing Act 1874 (37 *and* 38 *Vict. cap.* 94), *sec.* 4.

A vassal duly entered with the superior conveyed the subjects to A and died in 1839. In 1871 A, who had taken infeftment, but had not entered with the superior, disponed the subjects to B, who recorded his disposition. In the beginning of 1874 B disponed the subjects to C, who recorded his disposition, and thus at the passing of the Conveyancing Act 1874 was impliedly entered with the superior. In 1876 C disponed the subjects to D, who also recorded his disposition. Each of the above dispositions contained a clause of relief of all casualties. C died in 1892.

Thereafter, the superior having demanded a composition of a year's rent from D, D paid it and got relief from C's trustees. C's trustees in turn got relief from B, but upon B asking relief from A, the latter refused to pay, on the ground (1) that prior to the passing of the Act of 1874 composition was not a casualty payable or prestable to the superior, and was not therefore included in the clause of relief in his disposition to B in 1871; and (2) that the composition demanded by the superior from D was in respect of D's entry, and had become due at C's death in 1872, and was not therefore the composition due and payable at the date of the disposition to B, to which alone the clause of relief applied.