remit the cause, because there may be abundant proof of negligence or *culpa* in the evidence that was actually taken.

LORD CHANCELLOR.—I have looked through the evidence, although I have not adverted to it, and I do not think there was proof of negligence; but, in mercy to the parties, I should recommend your Lordships not to give any countenance to further litigation by remitting the cause. I need hardly say that we shall not give expenses.

Mr. Anderson.—The reversal will include that.

Mr. Connell.—Is it not intended, my Lords, to give the appellants their own costs in the Court below?

LORD CHANCELLOR.—No, certainly not. The appellants misled the respondent by pleading wrongly below. I do not wish to give any costs at all.

Interlocutors reversed.

Appellants' Agents.—G. and G. Dunlop, W.S.—*Respondent's Agents.*—Morton, Whitehead, and Greig, W.S.

APRIL 23, 1855.

WILLIAM R. BAILLIE, W.S., Tutor *ad Litem* to Sir Norman Macdonald Lockhart, *Appellant*, *v.* Dame MARGARET MACDONALD LOCKHART, Relict of the late Sir Norman Macdonald Lockhart, and his Trustees and Executors, *Respondents*.

Apportionment Act, 4 and 5 Will. IV., c. 22—Heir and Executor—Entail—Construction.

HELD (affirming judgment), *That the Apportionment Act applies to Scotland, and to rents derived from an estate held under the fetters of an entail, though payable at terms postponed to the death of the heir in possession.*[1]

The late Sir N. Macdonald Lockhart, who was heir of entail in possession of the estate of Lee and others, died on 9th May 1849. Thereafter the respondents brought an action, founding on the Statute 4 and 5 Will. IV. c. 22, for payment, up to the day of his death, of £6786 6*s.* 6*d.*, as the sum due to them, under the provisions of the act.

The claim was resisted. In defence it was explained, that the farms were not held under written leases, there being simply an entry of the occupiers in the rental book of the landlord; that the entry to all the farms, or most of them, was at a Martinmas term, (11th Nov.,) and that the payment of the first half year's rent was postponed till the following Martinmas, and the second till the following Whitsunday. In these circumstances, it was contended—(1) That the statute did not apply to the case of an entailed proprietor. (2) That there being no written instruments under which the leases were held, it was further inapplicable; and, (3) That at all events it was inapplicable to cases of rents due, not at the time of the death, but at a postponed term.

The Lord Ordinary pronounced the following interlocutor:—"The Lord Ordinary having heard counsel for the parties, allows the proposed second plea for the defenders to be added to the record; and, in respect of the judgment in the case of *Blaikie* v. *Farquharson*, 18th July 1849, and the authorities referred to in the opinions of the consulted Judges—Repels the first plea and defence accordingly: Finds that the rents, feu duties, and other proceeds of the estate, fall under the operation of the Act 4 and 5 Will. IV. cap. 22, and decerns; and appoints the cause to be enrolled, with the view of ascertaining the amount for which the pursuers are entitled to decree." The Second Division of the Court adhered, 27th Nov. 1852.

On appeal to the House of Lords it was maintained—That the Apportionment Act, 4 and 5 Will. IV. cap. 22, was not applicable to the rents claimed by the respondent. *Browne* v. *Amyot*, 3 Hare, 173; *Countess of Glencairn* v. *Graham*, M. Heir-apparent, Appendix No. 1; Ersk., iii. 8, 29; *Lang* v. *Lang*, M'L. & Rob. 893; *Markby*, 4 My. & Cr. 484.

The respondents maintained—1. The Act of the 4 and 5 Will. IV. cap. 22, is operative within Scotland. *Brydges* v. *Dingwall Fordyce*, 6 Bell Ap. 1. 2. Because the statute is applicable to the rents of lands in Scotland, held under settlements of strict entail. *Blaikie* v. *Farquharson*, 11 D. 1456; *Browne* v. *Amyot*, 3 Hare, 173; Bell's Principles, § 1720.

R. Palmer Q.C., and *Anderson* Q.C., for the appellant.—The interlocutor of the Court below

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[1] See previous report 15 D. 914. S. C. 2 Macq. Ap. 258: 27 Sc. Jur. 367.

is wrong. 1. The Apportionment Act, 4 and 5 Will. IV. c. 22, does not apply to anything except leases and instruments in writing, executed after the date of that Act. This is the proper construction of the 2d section. *Re Markby*, 4 My. & Cr. 484; 1 Williams' Exec. 709. As, therefore, the rents claimed in this action are mostly not payable under any lease or instrument whatever, but the tenants merely hold their farms by having their names entered in the rental book of the landlord, the statute is inapplicable. The case of *Blaikie* v. *Farquharson*, 11 D. 1456, is wrong, and cannot be supported. 2. The statute does not apply as between heirs of entail and executors. It has been decided in England that the statute does not apply to the case of leases granted by a tenant in fee, or proprietor. *Browne* v. *Amyot*, 3 Hare, 173; *Per* Maule, J., in *Beer* v. *Beer*, 12 C. B. 60; 1 Williams' Exec. 694. An English tenant in tail in England is assimilated in this respect to a tenant in fee. Coote's Landlord and Tenant, 701; Hayes' Introd. to Conveyancing. The question is—whether a Scotch heir of entail comes within the class of proprietors or of liferenters? It is well known that the theory of the Scotch law is, that the whole fee is in the heirs of entail. The heir has full power as fiar, except only where he is fettered. Ersk., iii. 8, 29. *Per* Lord Brougham in *Lang* v. *Lang*, M'L. & Rob. 893. The interest of the heir of entail is not an interest terminable by his death, but transmits to the next heir. Thus the widow has her terce, and the husband has his courtesy. So an analogy may be drawn from the decisions on the Forfeiture Act for treason, especially from the case of *Gordon of Park*, decided by Lord Hardwick, as to which see Kames' Elucidations, p. 381, *et seq.*, where all the English Judges who were consulted held that a Scotch estate tail was an estate of inheritance. See also *Earldom of Perth Peerage*, 2 H. L. Cas. 865. 3. The statute does not apply to cases where the rent is payable by convention—that is, not at the day when it is due, but at a postponed period.

Solicitor-General (Bethell) and *Rolt* Q.C., for the respondents, were not called upon.

The LORD CHANCELLOR CRANWORTH said he had no doubt that the interlocutor of the Court below was right, and that this was not so much a question of construction of the statute, as whether it was one of the evils which the statute was intended to remedy, and he thought it was. Without giving any formal reasons, his Lordship then immediately moved that the interlocutor be affirmed, with costs.

Interlocutor affirmed, with costs.

Appellant's Agents, Mackenzie and Baillie, W.S.—*Respondents' Agents*, Bell and M'Lean, W.S.

MAY 8, 1855.

THOMAS LANG and JAMES INNES LANG, *Appellants*, *v.* JOHN BROWN and ARCHIBALD FERGUSON, *Respondents.*

Arbitration—Submission—Prorogation—Oversman—*A submission was made to two arbiters with power to appoint an oversman, and the award by the arbiters or oversman to be made within a time limited. The arbiters decided some points after the time limited, and had devolved the other points on the oversman.*

HELD (reversing judgment), *That there was no power to separate the award into parts, and that the oversman had no power to prorogate the submission, so as to extend the time for the arbiters to decide their part.*

OPINION, *It requires an express contract to leave one part of the matter to be decided by arbiters and the other part by an oversman.*[1]

This was a reduction of a decree arbitral dated 28th May 1847, pronounced in a submission which was dated 19th January 1843. By it, the parties—viz. John Brown for himself and his absent son, Thomas Lang, Archibald Ferguson, and James Innes Lang—"do hereby submit and refer all demands, claims, disputes, questions and differences, depending and subsisting between them, on any account, occasion or transaction whatever, in connection with said vessel or otherwise, including their respective claims to the expenses of said proceedings, to the amicable decision, final sentence and decree arbitral to be pronounced by Robert Dow Ker and John Denniston, merchants, both of Greenock, arbiters mutually chosen by the parties, and, in case of their differing in opinion, to any oversman to be appointed by them, which they are hereby authorized to do."

The submission was kept alive by regular prorogations executed by the arbiters from time to time, the last of which was dated 18th and 20th December 1845, and was in the following terms:—"We, the within designed Robert Dow Ker and John Denniston, the arbiters within

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[1] See previous report 15 D. 38; 25 Sc. Jur. 37. S. C. 2 Macq. Ap. 93: 27 Sc. Jur. 369.