Monday, July 4.

TEIND COURT.

MINISTER OF BLAIR-ATHOLE.

Glebe—29 *and* 30 *Vict., c.* 71, §§ 11 *and* 17—*Feu-Charter.* Authority *granted* to feu glebe lands for other than building purposes; and *observed*, per Lord Justice-Clerk, that the Statute allowed feuing for any purpose. *Observed*, that if the feuar wished to build, under his feu-charter, he would require to return to obtain the Court's authority.

On 19th May 1869, the Reverend Norman Macleod, minister of the parish of Blair-Athole, presented a petition to the Court of Teinds for authority to feu part of the glebe lands. There are three glebes attached to the parish of Blair-Athole, and the proposed feuing only applied to the Blair-Athole glebe and the Kilmaveonaig glebe. The Lord Ordinary (MURE), remitted to Mr Ritchie, land-surveyor and engineer in Perth, to report on the facts mentioned in the petition. His report was in the following terms:—

"*Perth*, 19*th October* 1869.

"MY LORD,—In obedience to the remit contained in the prefixed interlocutor, the reporter has examined the lands, and inquired into the facts thereto stated in the petition, and he now begs to report that, in his opinion, they are correctly set forth.

"1. Blair-Athole glebe is equidistant about two miles from the parish churches and railway stations of Blair-Athole and Struan, and it extends to 455 imperial acres or thereby, about 70 acres being arable ground, and the remaining 385 acres hill or heathy pasture, partly overgrown with natural birch wood.

"The present estimated annual value of this glebe, including the manse, is £90.

"The hill pasture is bounded on the north by similar heathy ground, on the east by plantations, on the west by heathy pasture recently planted, and on the south by the arable lands of the glebe. This hill ground, extending as above stated to 385 imperial acres or thereby, is not, in the reporter's opinion, suitable for building purposes. In his opinion the minimum feuing rate thereof should be *four shillings* (4s.) *per imperial acre*, and as there are not many purposes for which this ground could be feued, the reporter would consider any offer to feu at this minimum rate as an advantageous one for the benefice.

"The 70 acres of arable land of this glebe are situated between the said hill pasture and the river Garry, and are more or less suitable for feuing for building purposes. The minimum feuing-rate of this arable area should, in the opinion of the reporter, be *four pounds* (£4) *per imperial acre*. But the manse is situated upon this arable portion of the glebe, and, in the opinion of the reporter, the feuing powers now desired should not extend to the manse, pleasure-grounds, and offices, nor to the three small fields in front and to the east thereof, bounded on the south by the Great North Road from Perth to Inverness, on the north by the Inverness and Perth Railway, and on the east and west by other lands of the glebe, extending in area to 10 imperial acres or thereby, and all as shown coloured blue on the accompanying plan of the lands.

"2. Kilmaveonaig glebe is situated to the south-west of the old church and burying-ground of Kilmaveonaig, within about half-a-mile of the parish church of Blair-Athole.

"The present estimated annual value of this glebe is eleven pounds (£11); it is wholly arable ground, and by recent measurement it is found to extend to 4 acres and 35 poles imperial.

"The access to this ground from the public road is somewhat circuitous, and the available water supply is doubtful, but upon the whole it is suitable feuing-ground for building purposes, and in the opinion of the reporter the minimum feuing-rate of this glebe should be *five pounds* (£5) *per imperial acre.*"

The Court appointed this report to be intimated to the Presbytery and Heritors of Blair-Athole parish. The Presbytery reported that they had considered the intimation and report, "and being of opinion that it would be for the interest of the benefice that the glebe should be feued as recommended in Mr Ritchie's report, they hereby signify their consent to the glebe being feued as proposed by Mr Ritchie in his said report;" and at the meeting of heritors, "the report of Mr Ritchie was approved of by the meeting." Eventually, the Lord Ordinary of new remitted to Mr Ritchie to report—"*First*, With reference to the Blair-Athole glebe; (1) what is the present annual value to the minister of Blair-Athole of the hill ground, extending to 385 imperial acres, mentioned in the report, either as occupied by himself, together with the rest of the glebe, or as let for his pasture? (2) upon the supposition that only 328 of the above-mentioned 385 acres are feued or sold, what would be the value to the minister of Blair-Athole of the remaining 57 acres lying immediately to the north of the railway, either as occupied by himself with the remainder of the glebe, or as let to the tenant? (3) what is the present annual value to the minister of Blair-Athole of the 70 acres of arable land of the glebe mentioned in the report as occupied by himself, or as let to a tenant? and (4) upon the supposition that the whole of the above 385 or 328 acres of hill pasture were to be feued or purchased by the conterminous proprietor under the 17th section of the Statute 29 and 30 Vict., c. 71, what, in his opinion, should be the rate or price at which the said portion should respectively be authorized to be now feued or purchased? *Second*, With reference to the glebe of Kilmaveonaig, what, in his opinion, should be the rate or price at which this glebe should be authorized to be now feued or purchased by the conterminous proprietor under the 17th section of the Statute?

"*Note.*—In reporting his opinion upon the present selling value of the glebes of Blair-Athole and Kilmaveonaig, the reporter will require to keep carefully in view any probable prospective increase of feuing value which may arise from the opening up of the district by means of railway communication, and that, if the whole of the respective portions of ground are at once feued or sold, the future incumbent of the benefice may lose the benefit of that increased value."

Mr Ritchie's report was in the following terms:—

"*Perth*, 23*d May* 1870.

"MY LORD,—In terms of your Lordship's remit to me of date the 19th February last, I now beg to report as follows:—

"*First*, With reference to the Blair-Athole glebe—(1) the present annual value to the minister of Blair-Athole, of the hill ground, extending to 385 imperial acres, mentioned in the report

either as occupied by himself, together with the rest of the glebe, or as let for pasture, is *Forty-six* (£46) *pounds*, including the shootings; (2) upon the supposition that only 328 of the above-mentioned 385 acres are feued or sold, the annual value to the minister of Blair-Athole of the remaining 57 acres, lying immediately to the north of the railway, either as occupied by himself with the remainder of the glebe, or as let to a tenant, would in the reporter's opinion be *Six* (£6) *pounds;* (3) the present annual value to the minister of Blair-Athole of the 70 acres of arable land of the glebe mentioned in the report, either as occupied by himself or as let to a tenant, is *Fifty-six* (£56) *pounds;* (4) the hill ground of this glebe is totally unsuitable to feu for building purposes; it is steep and rocky, incapable of reclamation for tillage, and scarcely improveable for pasturage; its present grazing value is about 2s. per acre; and upon the supposition that the whole of the above 385 or 328 acres of hill pasture were to be feued or purchased by the conterminous proprietor under the 17th section of the Statute 29 and 30 Vict., c. 71, in the opinion of the reporter the minimum feuing-rate of 4*s.* per acre, formerly reported by him, which is about double the present agricultural value of this ground, should be the annual feuing-rate at which the said portions should be authorized to be now feued, and twenty-four years' purchase of said feuing-rate the price at which it should be authorized to be purchased. In the opinion of the reporter such a disposal of this poor rocky hill ground would be a most advantageous one for the benefice.

"*Second*, With reference to the glebe of Kilmaveonaig.—This glebe lies wholly within the policies of Lude. In the opinion of the reporter, the minimum feuing-rate of *Five* (£5) pounds per acre, formerly reported by him, would be a fair annual feuing-rate for the lands of this glebe if wholly feued for agricultural purposes only, but if feued for building purposes, for which it is also suitable, in the opinion of the reporter *Eight pounds ten shillings* (£8, 10s.) per acre is the rate at which this glebe should be authorized to be wholly feued by the conterminous proprietor under the 17th section of the Statute, and twenty-four years' purchase of that annual rate the price at which it should be authorized to be purchased. Situated as this glebe is, wholly within the policies of Lude, the amenity of the conterminous heritor's lands would no doubt be, to some extent, impaired by the feuing of the glebe for building purposes.

"In reporting the above opinions upon the feuing and selling values of the glebes of Blair-Athole and Kilmaveonaig, the reporter has kept carefully in view the present demand for feuing ground in this locality, and the probable prospective increase of feuing value likely to arise from the further opening up of the district by means of its railway communication, and in the opinions now reported he has also kept carefully in view the interests of future incumbents of the benefice in the subjects for which feuing or selling powers are now desired."

Mr Ritchie further stated, "that in fixing the minimum feuing-rate of Kilmaveonaig glebe for building purposes at £8, 10s. per acre, I had in view the feuing of the whole four and a-half acres at that rate, but in consideration of the peculiar situation of these four and a-half acres—completely surrounded by the policy-grounds of Lude house, the amenity of which would, to some extent, be deteriorated by this glebe being built upon—lest the Court should be indisposed to view the lands so situated as fair building subjects in any negotiation with the conterminous proprietor, I likewise reported my opinion of the value of the lands if feued for agricultural purposes at £5 per acre,—meaning that if so feued for agricultural purposes, and if any buildings should afterwards be erected thereon, that the feuing value of the whole four and a-half acres should at once rise to and continue thereafter at the minimum building rate of £8, 10s. per acre.

The Lord Ordinary (GIFFORD) reported the case to the Court by the following interlocutor:—"*Edinburgh*, 21*st June* 1870.—The Lord Ordinary having heard counsel for the petitioner and for Mr M'Inroy of Lude, and having considered the petition and whole proceedings—reports the case to the Teind Court, and appoints the petitioner to print and box Mr Ritchie's second report, with this interlocutor and note.

"*Note.*—This application relates to two of the three glebes which are attached to the cure or living of Blair-Athole. The present parish of Blair-Athole includes the old parishes of Kilmaveonaig and Little Lude, and there are three glebes—(1) The glebe of Blair-Athole, extending to 455 acres imperial, whereof about 70 are arable; (2) the glebe of Kilmaveonaig, extending to about 4¼ acres; and (3) the glebe of Little Lude, extending to about 37 acres. The present petition applies only to the two former.

"*First*, as to the glebe of Blair-Athole.—The main questions as to this glebe relate to the non-arable portion thereof, consisting of about 385 acres of hill or heathy pasture, being for the most part steep rocky ground 'incapable of reclamation for tillage, and scarcely improveable for pasturage.' The present grazing value of this land is about 2s. per acre per annum, and power is asked to feu 328 acres of it at 4s. per acre per annum, being double its agricultural value as reported on by Mr Ritchie. None of the land is suitable for building purposes.

"The first question is, whether the Statute contemplates or authorizes feuing for other than building purposes—that is, feuing an agricultural or pastoral glebe where there is no prospect of its being required or being taken for building?

"This point has occurred in several recent cases, and the Lord Ordinary has occasion to advert to it in reporting, of even date herewith, the case of Croy and Dalcross.

"The inducement to feu in the present case is, that the conterminous proprietor, the Duke of Athole, is willing to feu the ground, and to give a permanent feu-duty of 4s. or thereby per acre, being about double the present grazing value.

"Although many of the provisions of the Statute refer to feus or long leases for the purposes of building, the empowering clauses of the Statute are expressed in terms so general as apparently to warrant a feu for other than building purposes, and the 17th section of the Statute giving conterminous proprietors a right of pre-emption seems to contemplate that such proprietors may acquire the glebe without any view to build thereon, as provision is made for their giving security for the feu-duty over the adjoining lands.

"The Lord Ordinary has been informed that in several recent cases (unreported) authority has been given to feu glebe land, although it was not to be built upon. Thus:

"In the case of the *Minister of Wilton*, 1870,

authority was given to feu ten acres for plantation;

"In the case of the *Minister of Kirkden*, 1868, five acres were feued, with a prohibition against building; and

"In the case of *Kilrenny*, a portion of the glebe was feued to enlarge the burying-ground.

"On the whole, the Lord Ordinary is of opinion that where feuing is otherwise advantageous, power to feu may be given, although there is no prospect of the ground being required or taken for building purposes.

"The next question is, whether the immediate advance of double the present agricultural or grazing value is a sufficient advantage to the benefice to warrant the permanent alienation of the glebe? On this question the Lord Ordinary cannot help feeling some difficulty. The benefit to the present incumbent is manifest, and probably the transaction would be beneficial to the benefice for thirty, forty, or fifty years. But instances are numerous of land having far more than doubled in value in less than half a century; and when the permanent advantage of the benefice is to be consulted, it may be doubtful how far it is expedient to alienate the glebe for a feu-duty of only 4s. per acre, although that amount is double the present agricultural or grazing rent.

"On the whole, though not without serious misgivings, the Lord Ordinary thinks that the application in the present case may be granted. The character of the ground in question, the hopelessness of its reclamation, and the extreme improbability of its ever being in demand in connection with buildings, favour the application. The contemplated feu will yield nearly £80 a-year to the minister for what he is now drawing only about £40, and the securing to the benefice a permanent annual increase of £40 a-year is not lightly to be refused. The possible prospective value of the land at some distant period may probably be held to be a contingency too remote and uncertain to warrant the rejection of a present and certain gain.

"*Second.* The glebe of Kilmaveonaig.—The question regarding this glebe is somewhat different. The reporter says (first report), that although the access is circuitous, and the water supply doubtful, still, 'upon the whole, it is suitable feuing ground for building purposes,' and the minimum feuing rate as such, the reporter now says in his second report, is £8, 10s. per acre. If feued for agricultural purposes, the value is £5 per acre.

"If there were no specialties attending the case, £8, 10s. per acre would be the minimum rate now to be fixed by the Court. For, upon the face of Mr Ritchie's report, the land must be taken as reasonably suitable for building, and this rate of feu-duty is reported as the fitting one for building purposes in the circumstances.

"But appearance is now entered for Mr M'Inroy of Lude, within whose policies the whole glebe of Kilmaveonaig (4¼ acres) happens to be situated. He objects that to feu this small glebe for building purposes will injure the amenity of his lands, and he prays that no authority be granted to feu the ground for building purposes. The objection is stated under the 11th section of the Statute, which authorizes the Court, on considering such an objection, 'to give effect thereto by refusing the application in whole or in part.'

"The injury to the amenity of Mr M'Inroy's grounds by building on the glebe is instructed (though rather in a qualified manner) by Mr Ritchie's second report.

"Mr M'Inroy does not object to authority being given to feu the ground for agricultural purposes at £5 per acre. On the contrary, he supports the application to that extent, and, as instructed by the agreement, No. 36 of process, he is willing to give within a fraction of £5 an acre, and probably will give the full £5 per acre as conterminous proprietor, and make the glebe part of his policy. The Lord Ordinary understood the minister as being willing to give way to Mr M'Inroy's objection, provided the Court are satisfied.

"On the whole, the Lord Ordinary is of opinion that authority to feu the glebe of Kilmaveonaig as for agricultural purposes, may be granted at the rate of £5 per annum per acre. He thinks Mr M'Inroy's objections are not unreasonable. The Statute itself seems to contemplate, if it does not actually provide, that the feuing of the glebe shall not injure the value or amenity of the lands conterminous therewith, and it authorizes the Court to protect the adjoining proprietor against such injury. Building on this ground does not seem to be very suitable or very certain, and the conditional agreement with Mr M'Inroy seems a fair and equitable one.

"The drafts of the feu-charters, Nos. 20 and 21 of process, seem to be in the usual form. This was formerly under the notice of Lord Mure, and was reported upon by him; but as it was afterwards instructed that the conterminous heritors are willing to feu and purchase the hill-pasture of Blair-Athole mentioned, and the glebe of Kilmaveonaig, for other than building purposes, the Court directed that additional drafts of feu-charters not containing the building-clauses should be lodged in process. Such additional drafts were lodged accordingly, superseding the drafts first mentioned. These additional drafts form Nos. 30 and 31 of process, and do not contain the building-clauses. If authority is now granted to feu the hill pasture of Blair-Athole and the glebe of Kilmaveonaig for other than building purposes, the additional drafts, Nos. 30 and 31 of process, may be approved of."

On June 24th, Mr M'Inroy of Lude lodged a minute of objections, in which he objected to the glebe of Kilmaveonaig being feued for building purposes, as thereby the value and amenity of his property would be very seriously impaired.

BALFOUR for Mr M'Inroy.

MARSHALL, for the minister, stated that in neither case did he ask that the feuing should be for building purposes. Neither glebe would ever be suitable for such a purpose. As regarded the Blair-Athole glebe, the Duke of Athole did not oppose the petition, and would take the 385 acres. Mr M'Inroy would purchase the Kilmaveonaig glebe. The Act of 1866 did not restrict the power to grant feus only for building purposes.

The Court approved of the Lord Ordinary's report.

LORD GIFFORD thought the present advantage to the benefice was sufficient to justify the feus being granted.

LORD COWAN was of the same opinion, but thought that if buildings were afterwards erected on the Kilmaveonaig glebe, the feuar should be ordained by the interlocutor to come back and get the feuing price raised to £8, 15s. per acre.

LORD BENHOLME thought this would be unne-

cessary, since nothing short of an independent application by all the parties interested could justify buildings being erected on the feu. The feu-charter would be sufficient for the purpose.

LORD ARDMILLAN was of the same opinion.

LORD JUSTICE-CLERK was also of the same opinion. The statute contemplated the ground of the glebe being acquired for any purpose. Near a large town a person might well be desirous to acquire the area of a feu, without any intention of building on it. As to the Blair-Athole glebe, the Duke of Athole would probably, in course of time, make more of the ground he had acquired than the feuing price; but the benefit to the glebe was so great, the application ought to be granted in terms of the Lord Ordinary's interlocutor.

Agents for Minister—Tods, Murray & Jamieson, W.S.

Agents for Mr M'Inroy—Gibson-Craig, Dalziel & Brodies, W.S.

Friday, July 8.

FIRST DIVISION.

PEEBLES & WATSON *v.* SCOTTS.

Executors—Revocation—Deed of Settlement. B appointed C and others his sole disponees and legatees under his deed of settlement, and, by an after clause, his sole executors and universal legatories. Trustees were not named. By subsequent codicils he altered the disposition of his property, and made C his universal legatory and disponee; but declared his deed of settlement in so far as not altered to be ratified and confirmed. *Held* the nomination of executors was not revoked.

By a probative deed of settlement, dated 12th March 1856, the late Peter Peebles assigned and disponed his heritable and moveable estate as follows—"to and in favour of my brother James Peebles, residing in Linlithgow, in liferent, for his liferent use allenarly, and to my nephew James Peebles, merchant in Glasgow, son of the now deceased John Peebles, my brother, and his heirs and assignees, one fourth share *pro indiviso;* Helen Peebles or Dunlop, widow of the now deceased John Dunlop, sometime residing in Glasgow, and her heirs and assignees, one-fourth share *pro indiviso;* Mary Peebles or Scott, wife of John Scott, joiner in Glasgow, and her heirs and assignees, one-fourth share *pro indiviso;* and to Peter Peebles and Isabella Peebles, children of my now deceased nephew John Peebles, warper in Manchester, jointly, and their respective heirs and assignees, the remaining one-fourth share *pro indiviso.*" He also appointed these parties, viz.,—the two James Peebles, Helen Peebles or Dunlop, Mary Peebles or Scott, Peter Peebles, and Isabella Peebles, to be his sole executors and universal legatories, with the usual powers. The deed was probative, revoked all previous settlements, and reserved power of revocation.

By probative codicil dated 19th December 1866 Mr Peebles recalled the disposition of one-fourth of his estate to the pursuers; and, on the narrative of the death of his brother and nephew James, altered the conveyance by giving to each of his nieces Helen Peebles or Dunlop and Mary Peebles or Scott one-fourth more of his estate. To this extent he declared his deed of settlement altered, but he ratified and confirmed it in all other respects.

By probative codicil dated 13th February 1867 Mr Peebles, on the narrative of Mrs Dunlop's death, made Mrs Scott, whom failing her husband, universal legatory. To this extent he declared his deed of settlement and foregoing codicil altered, but so far as the deed of settlement was not altered by the two codicils he ratified and confirmed it.

On 7th December 1869 Peter Peebles and Isabella Peebles or Watson presented a petition to the Commissary of Lanarkshire, in which they asked that they should be conjoined with Mrs Scott in any confirmation of executors at her instance, or, if she declined to act with them, that they alone should be confirmed executors.

The Sheriff-Substitute (GALBRAITH), and on appeal the Sheriff (GLASSFORD BELL), authorised confirmation to go forth in names of the whole executors nominated in the deed of settlement.

Mr and Mrs Scott appealed.

WATSON for them.

M'LAREN, in answer, at the close of the debate offered to insist only on the nomination of one of the petitioners.

The Court adhered to the principle of the Sheriff's interlocutor.

LORD PRESIDENT observed it was very unusual to have a competition for the office of executor-nominate, as it was generally quite plain who were named executors; though testators were very often successful in obscuring what was their intention as to who were to be beneficiaries. The only question in this case was, who were the executors-nominate? No one claimed on any other ground than nomination. Mrs Scott, as universal legatory and disponee would, in the absence of a nomination of executors, be entitled to the office. That was not the rule formerly, but it had been so settled ever since the well-known case of the *Earl of Crawford.* Still, however, an executor-nominate was always entitled to the office in preference to any one else. The one party maintained there was only one executor-nominate; the other party said there were three. The question was, whether the nomination of executors in the settlement was recalled? The first codicil proceeded on the narrative of the death of the testator's nephew and brother, and his determination that the pursuers should not receive the fourth of his property assigned to them; and made certain alterations in the disposition of his property. The second codicil proceeded on the narrative of the death of Mrs Dunlop, and made Mrs Scott universal legatory. But neither codicil dealt with the clause of nomination of executors, and only dealt with the disposition of the property. And by both codicils the deed of settlement was expressly ratified and confirmed in so far as not altered. There was no room, therefore, for any question as to what was the intention of the testator; the nomination of executors as in the deed of settlement must be held to subsist. As Mr M'Laren, however, had expressed the satisfaction of his clients if only one was appointed executor, that would be given effect to.

The other Judges concurred.

Agents for Pursuers—J. & R. D. Ross, W.S.

Agents for Defenders—J. & A. Peddie, W.S.
