Saturday, January 19.

FIRST DIVISION.

[Lord Low, Ordinary.

LAMONT-CAMPBELL *v.* CARTER-CAMPBELL.

Process—Entail—Petition to Fix Widow's Annuity—Competency.

Held that a petition at the instance of an heir of entail to have the amount of the annuity fixed to which the widow of a former heir is entitled, is incompetent.

Entail—Widow's Annuity—Yearly Rental or Value—Unpaid Feu-duty—Duplicands of Feu-duties—Interest upon Compensation for Lands Taken under Compulsory Powers.

Held (*aff.* judgment of Lord Low), in calculating the free yearly rent of an entailed estate for the purposes of ascertaining the amount of an annuity of one-third thereof provided for a widow, (1) that where a portion of the entailed estate had been given out under a feu-contract, and no steps had been taken to irritate the feu, the feu-duty stipulated for was to be taken as the measure of its annual value, although no feu-duty had in fact been paid during the two years preceding the granter's death; (2) that where duplicands of feu-duties were recurring annually, the average of these was to be taken, and neither the sum actually received in the year of the granter's death, nor a percentage on their capitalised value; and (3) that where 5 per cent. was being received at the granter's death upon money to be afterwards paid by a railway company as compensation for lands taken under compulsory powers, that was to be regarded as the yearly value, although the entailed money after being paid would yield only 3 per cent.

Entail—Annuity—Terms of Payments.

An heir of entail executed a bond of provision wherein he provided an annuity to his wife, and directed that it should be uplifted at Whitsunday and Martinmas by equal portions, beginning the first term's payment at the first of these terms which should happen after his death, "for the half-year following, and so forth half-yearly and termly thereafter."

Held (*aff.* judgment of Lord Low) that the annuitant was entitled to payment at the terms specified in the bond.

Colonel Celestine Norman Lamont-Campbell, institute of entail in possession of the entailed lands of Possil and Keppoch, and certain entailed money, granted a bond of provision in favour of his wife, in virtue of the powers contained in the deed of entail and the Entail Acts, whereby he bound the succeeding heirs of entail to pay to her in the event of her survivance a free liferent annuity equal to but not exceeding one-third of the free yearly rent or value of the said entailed lands and money as the same might be at his death.

Colonel Campbell died in January 1893, and after his death questions arose as to the amount of the annuity and whether it was payable in advance. The circumstances giving rise to these questions sufficiently appear from the opinions of the Lord Ordinary, and from the report of Mr J. P. Wright, W.S.

Accordingly, in November 1893 Mrs Carter-Campbell of Possil, the heiress of entail in possession of the said entailed lands and funds, presented a petition to the Junior Lord Ordinary to have the amount of the annuity or jointure payable to Mrs Lamont-Campbell, the widow of the said Colonel Lamont-Campbell, fixed by the Court.

Answers were lodged for Mrs Lamont-Campbell.

After hearing parties, the Lord Ordinary (Low) pronounced an interlocutor disposing of certain of the questions raised.

The following opinion (which is referred to in the action hereinafter mentioned) was appended to the Lord Ordinary's interlocutor—"1. There is first the question whether certain feu-duties should be taken into account in fixing the income of the estate.

"A feu of 35 acres was granted in 1874 for a feu-duty of £1195. The feu was acquired by the Phœnix Iron Company, which in 1891 granted a trust-deed for creditors. The feu-duty was regularly paid until Whitsunday 1891, since which date no feu-duty has been paid. The late Celestine Norman Lamont-Campbell, the granter of the bond of annuity which is in question in this petition, died on 27th January 1893.

"The petitioner argues that as no feu-duty was received for the year in which the late Mr Lamont-Campbell died, and as the vassals were insolvent, the yearly value of the ground contained in the feu should be taken at its agricultural value, viz., £90.

"I am of opinion that the petitioner's argument is not well founded. The feu-duty was regularly paid for seventeen years, and it was not paid for the year in which Mr Lamont-Campbell died and the preceding year, only because the vassals had become insolvent. I do not think that that is a sufficient reason for not taking the feu-duty as the annual value of the lands. If lands were let under lease, I apprehend that the rent stipulated in the lease would be taken as the annual value, although the tenant might have been unable, from circumstances personal to himself, to pay his rent for the year during which the heir of entail died. It seems to me that a similar principle is applicable here. . . .

"2. In 1891 the Lanarkshire and Dumbartonshire Railway Company took for the purposes of their undertaking some ten acres of land. The amount of compensation has been fixed by arbitration at £9372, with interest thereon at 5 per cent. per

annum from the date of the statutory notice.

"I am of opinion that the value of the land so acquired by the Railway Company falls to be taken at 5 per cent upon the amount of the compensation. This point seems to be ruled by the decision in *Irving* v. *Irving*, 9 Macph. 539. . . .

"5. By the bond of provision the annuity is to be uplifted at Whitsunday and Martinmas by equal portions, beginning the first term's payment at the first of these terms which should happen after the granter's death 'for the half-year following, and so forth half-yearly and termly thereafter.'

The petitioner contends that the respondent is not entitled to payment of the annuity in terms of the bond of provision as from Whitsunday 1893 in advance, but only as at that date proportionately for the period from her husband's death to the said term of Whitsunday, and thereafter half-yearly at the terms of Martinmas and Whitsunday for the half-year preceding.

"I see no sufficient reason for refusing payment to the respondent of her annuity at the terms specified in the bond. Such an annuity is in its nature alimentary and payable in advance, and the form of the bond is in this respect in the form sanctioned by practice in such cases."

Mrs Carter-Campbell reclaimed. No objection was taken to the competency of the petition, but the Court, *ex proprio motu*, dismissed it as incompetent.

Thereafter Mrs Lamont-Campbell raised an action of declarator against Mrs Carter-Campbell to have it found and declared that she was entitled to a free annuity of £3000 or such other sum as represented one-third of the free income of the entailed estate.

Upon 20th March 1894 the Lord Ordinary (Low) remitted to Mr J. P. Wright, W.S., to inquire into the circumstances set forth in the record, and to report.

Mr Wright in his report gave effect to the decision of the Lord Ordinary in the petition with regard to the feu-duties, and the dates at which the annuity was payable. He further reported—"A difficult question arises with regard to certain duplicands of feu-duties. The entailed estate comprises the superiority of lands which have been feued, and under the feu-charters duplicands of the feu-duties are payable at stated intervals. During the year current at the death of the granter of the bond of provision, duplicands amounting to £387, 12s. 11d. fell due. The pursuer maintains that these ought to be included in the rental, but the defenders object on the ground that items of that nature are exceptional, and not to be computed as part of the annual income. There are several ways in which such an item may be dealt with in a case like the present.

"1. The duplicands may be excluded from the computation of the rental, as arising only at long intervals, and consequently not being regarded as part of the 'yearly rent.' The defenders say that such casualties fall to capital, and do not belong to a liferenter, as is illustrated in the case of *Ewing* v. *Ewing*, March 20, 1872, 10 Macph. 670. But an heir of entail is not a mere liferenter,—he is a fiar, although with restricted powers; and as a matter of fact the casualties in the present case are uplifted and retained by the heir in possession when they become due. The principle of *Ewing's* case, therefore, seems inapplicable.

"2. Although the actual casualties which happen to fall due in the year of the granter's death may not be strictly part of the 'yearly rent,' it is to be kept in mind that in the present case the total amount of casualties falling due in the course of each recurring period of nineteen years in the case of most of the feus, and of twenty-one years in the case of the remainder, is £4984, 3s. 2d. That sum (which is admitted by both parties to the action) is spread unequally over the periods, but the certainty and regularity of the payment may not unreasonably be regarded as having an annual value, such as should be computed for the present purpose. The statnte provides that the free yearly rent is to be taken as at the death of the granter, but this has been construed according to its spirit, and not literally. Thus, instead of taking the actual rent of minerals drawn during the year of the granter's death, the average of years is taken according to circumstances. In the case of *Wellwood* v. *Wellwood*, July 12, 1848, 10 D. 1480, and December 20, 1848, 11 D. 248, the average of seven years was taken, which is now a common method. In *Douglas* v. *Scott*, December 17, 1869, 8 Macph. 360, the average of three years was taken, being the duration of the current lease; and in *Christie* v. *Christie*, December 10, 1878, 6 R. 301, the actual rent of the year was taken, although the lease only lasted for five years in all. The Court held that the latter was a 'reasonable permanency.' The words 'yearly rent' have been held as equivalent to annual income or produce (*Wellwood's* case). In fact, an heir of entail appears to be entitled to give his wife an annuity not exceeding one-third part of what he is entitled to draw himself in the year current at his death, subject to the qualification that regard will be had to equitable average where there are variable items, such, *e.g.*, as mineral rents. It humbly appears to the reporter that in the present case the duplicands have such an element of permanence that they should be computed either by allowing the actual sums which happen to be payable during the year of the granter's death, or according to some principle of equitable average. What that principle of average should be he is not aware of any authority prescribing. In the present case during each of said respective recurring periods, as already mentioned, the casualties amount to £4984, 3s. 2d. If that sum were spread equally over the respective periods—that is, over the nineteen years in the case of the periods of that duration, and over the twenty-one years in the case of those of the

latter duration—it would give an average of £259, 0s. 2d. in each year. Another way would be to capitalise the value of the duplicands, and take 4 per cent. on that amount as representing the 'yearly value.' The three methods thus indicated are accordingly to take (*a*) the actual duplicands payable during the year of the granter's death, amounting to £387, 12s. 11d.; (*b*) the yearly average of the total duplicands spread equally over the respective periods of nineteen and twenty-one years, which would be £259, 0s. 2d.; (*c*) a fixed rate of interest, say 4 per cent., on £7059, 7s. 4d., the capitalised value of the duplicands, which would give £282, 7s. 6d. . . .

"The reporter is humbly of opinion that the duplicands ought to be computed, and he suggests the third method above mentioned, which gives an annual sum of £282, 7s. 6d. If your Lordship should prefer one of the other methods, the state after mentioned can be easily adjusted.

"The next item in dispute is the return from a toom. The parties are agreed that the gross return is £222, 11s. 11d., but they differ as to whether the wages which require to be paid to two men in connection with it, amounting to £104, should be deducted. The reporter considers that these ought to be deducted. It is the free yearly rent that has to be taken, not the gross, and the subject in question is only made rent-producing by expenditure of the wages.

The pursuer claims interest on the amount of compensation money received from the Lanarkshire and Dumbartonshire Railway Company. In the petition your Lordship expresses the opinion that this item should be taken into computation, and that the interest might be at the rate of 5 per cent. The pursuer however agrees to take 4 per cent., which gives £374, 17s. 4d. The defenders do not now object to this, except that they suggest 3 per cent instead of 4 per cent. The reporter considers that 4 per cent should be allowed in consequence of the pursuer restricting her claim on this item to that rate. There are next three, which consist of interest on compensation to be received from railway companies and from the city of Glasgow in respect of lands compulsorily taken, but in which the amount of compensation has not yet been fixed. Possession having been taken, interest was in fact at the granter's death, and still is, running at 5 per cent., and accordingly the reporter considers that that rate should be allowed here. The difficulty is to arrive at a sum upon which the interest should be calculated, as the defenders prefer to allow the arbitration to lie over because of the high rate of interest. As, however, the defenders cannot be allowed to prejudice the pursuer by such a course, the reporter, after hearing the parties, is of opinion that the justice of the case will be met if for the purpose of the present case (without prejudice to defenders in questions with the purchasers) the compensation on the three items is taken as amounting to £1500. Five per cent. on that sum gives an income of £75, which the reporter has accordingly allowed. The pursuer's restriction of claim for interest to 4 per cent. on record does not apply to this item.

"The reporter begs to annex a state giving effect to the views which he has now expressed." . . .

Upon 26th September 1894 LORD LOW found that the pursuer was entitled to a free annuity or jointure of £2642, 5s. 9d., being one-third of the free yearly rent or free yearly value and income of the lands and estate . . . payable the said annuity as at the term of Whitsunday 1893 to the extent of one-half thereof, and so for the half-year, and termly thereafter at the terms of Whitsunday and Martinmas during her life; ordained the defender and her successors in the entailed lands . . . to make payment to the pursuer of the foresaid annuity of £2642, 5s. 9d., and found the pursuer entitled to expenses.

"*Opinion.*—The first question which is raised upon Mr Wright's report is in regard to the duplicands of feu-duty.

"I am of opinion that these duplicands must be taken into account as part of the annual income or produce of the estate, and the question is, whether the actual amount payable in the year of the granter's death, or an average of the proceeds of a series of years, or 4 per cent. upon the capitalised value of the duplicands should be taken.

"I understand that some duplicands are payable every year, but that the amount varies considerably from year to year. Further, the amount actually received in the year of the granter's death was very considerably larger than the average amount received. In these circumstances I think that the principle of taking an average, which has been adopted in the case of varying mineral rents, is applicable. The reporter is in favour of capitalising the duplicands and taking 4 per cent. upon the amount. The result which that method of calculation gives is only slightly in excess of the actual average amount received, so that it is not a matter of much practical importance whether the matter approved by the reporter or the method of striking an average is adopted. The latter method, however, has been repeatedly taken by the Court, while the former method is, so far as I know, a novelty in such cases. Further, as the duplicands are all payable at recurring periods of nineteen or twenty-one years, it is possible to ascertain with precision the average yearly amount which the estate yields from that source. I therefore think that it is more in accordance with precedent to take the actual average, which brings out the amount at £259, 0s. 2d.

"The next point upon which there was discussion was as to the rate of interest to be allowed upon compensation money received from the Lanarkshire and Dumbartonshire Railway Company. The rate of interest which was actually being paid upon the money in the year of the granter's death was 5 per cent., but the pur-

suer offers to restrict the amount to 4 per cent. That appears to me to be a reasonable proposal, and I accordingly agree with the reporter that it should be adopted.

"There is also a question as to the rate of interest to be charged upon the compensation which will fall to be paid by certain railway companies and by the city of Glasgow for lands compulsorily taken. The actual amount of the compensation has not yet been ascertained, but neither party objected to the sum taken by the reporter, namely, £1500. Now, possession was taken of the lands prior to the granter's death, and under the Lands Clauses Act interest at the rate of 5 per cent. per annum upon the purchase-money or compensation will fall to be paid from the date when possession was taken until actual payment of the purchase-money or compensation. That rate of interest therefore will be received for the year in which the granter died and is still running. In these circumstances I am of opinion with the reporter that the actual rate of interest, namely, 5 per cent., must be allowed upon the sum of £1500. . . .

"Except, therefore, in regard to the amount to be allowed for the duplicands of feu-duty, I approve of the report, and shall pronounce an interlocutor in terms thereof."

The defender reclaimed, and argued—(1) The feu-duty should not be included. It had not been paid during the year in which the last heir died, and there was no prospect of its ever being paid. The value of the land feued could only be its agricultural value, looking to the circumstances of the case. (2) Only 4 per cent. interest should be given on the compensation that would be paid by the railway company. No doubt 5 per cent. was being received at present, but that was for a limited time. The arrangement was not permanent, but only for eight years. When the railway company paid up only 3 per cent. would be received upon the entailed money. The case of *Irving*, February 22, 1871, 9 Macph. 539, was not in point. The rule was to be found in *Christie*, December 10, 1878, 6 R. 301 (Lord Shand, p. 309). (3) The present heir of entail was only bound to pay annuity out of rents she received; it would therefore be inequitable to have to pay in advance, or to pay at the first term more than the proportion from the date of death to that term—*Learmonth* v. *Sinclair's Trustees*, January 23, 1878, 5 R. 548. If that was what the last heir meant to give, more than that it was *ultra vires*. The case of *Paul* was not in point. (4) Success had been divided, and the points required judicial determination; accordingly the expenses should not fall solely upon the defender.

Argued for the respondent—The Lord Ordinary's judgment was right, and for the reasons stated by his Lordship.

At advising—

LORD M'LAREN—The case came before us originally in the form of a petition and answers, Mrs Carter-Campbell having petitioned the Court to fix the sum to which Mrs Lamont-Campbell was entitled as an annuitant under the combined effect of the Aberdeen Act and a power in the deed of entail regulating the succession to the estate. Your Lordships were of opinion that the case did not fall within the scope of the summary jurisdiction which the Lord Ordinary is empowered to exercise upon applications by petition, and the petition was accordingly dismissed as incompetent. Mrs Lamont-Campbell then instituted the present action of declarator to have the amount of her annuity ascertained. The estate is mainly heritable, but includes a certain sum of entailed money which is invested in income-producing securities, and an account of the income has been made up by a professional accountant under a remit made by the Lord Ordinary. By the interlocutor reclaimed against the Lord Ordinary has found that the pursuer is entitled to a free liferent annuity or jointure of £2642, 5s. 9d., being one-third of the free rent and income of the said estate and residue.

The question of chief importance relates to the estimated income from 35 acres of land, which were feued by the late proprietor in 1874 to a person who disponed to the Phœnix Iron Company. The stipulated feu-duty is £1195, and the feuar came under an obligation to erect buildings sufficient to secure payment of the feu-duty, but this obligation was not fulfilled. The feu-duty was regularly paid during the life of the late proprietor until Whitsunday 1891, but in that year the Phœnix Company went into liquidation, and the payment of feu-duty ceased. The parties are not agreed as to the present value of the feu as an income-producing subject. In the view presented for the heir there is no immediate prospect of the subject realising its feuing value, and its agricultural value appears to be only £90.

On behalf of the pursuer it is pointed out that the subject was considered a good security, along with another subject, for the sum of £18,000, and it is therefore contended that it ought to be taken as capable of producing an income equal to the stipulated feu-duty. In the view I take of the question it is not necessary to determine the prospective value of this subject. It is the right of an heir in possession to burden the income of the estate in favour of his widow to the extent of one-third of the free rental at the time of his death, and in the administration of this chapter of the law of entail, it has been settled in principle that rent payable under a current lease is the true rental on which the widow's annuity is to be calculated. Indeed, it is provided in terms by the Act of Parliament that the annuity may be "one-third part of the free yearly rent of the said lands and estates where the same shall be let, or of the free yearly value thereof where the same shall not be let." This rule may at times operate disadvantageously to the heir; in other cases it may operate in his favour, as in the case of a farm which is let on an improving lease which has not

many years to run. But it has been considered that rental means actual rental under a continuing contract of location. It is, I think, demonstrably clear that this rule applies to a lease in perpetuity or feu-contract, where the price of the subject takes the form of a fixed annual return. Now, if in this case the feu had come to an end through the inability of the tenant to perform his obligations to the superior, or if the superior had instituted, or declared his intention of instituting an action of declarator of irritancy, your Lordships would, I think, have held that the rule of the statute was displaced, and that there was a case for inquiring as to the actual annual value of the lands at the death of the limited owner who exercised the power. But no such proceedings were instituted, and the land was in fact let on a feu-contract at the death of the late proprietor, and I am unable to admit that the right of the pursuer can be affected by a variation of the value of the subject or of the opinions which have been formed as to its value subsequent to that period. I may add that even at the present moment the feu is a subsisting contract, and it is not impossible that by an arrangement between the superior and the liquidator the land may be sold upon terms which will compensate the superior for the loss of his feu-duty.

The question on which I have stated my opinion is considered in the note to Lord Low's interlocutor in the petition process, to which we were referred as expressing his Lordship's view on this question. In that view I entirely concur.

The other points brought under our notice are dealt with in the note to the interlocutor under review. They relate to the ascertainment of the annual value or annual return from compensation money payable for land taken under the powers of the Lands Clauses Consolidation Acts. I concur with the Lord Ordinary on all the points considered in his judgment (for the reasons given by his Lordship), including the question of expenses in the Outer House, and if your Lordships agree with me, adhere to the interlocutor under review.

LORD ADAM and LORD KINNEAR concurred.

The LORD PRESIDENT was absent.

The Court adhered.

Counsel for the Pursuer — Lord Adv. Balfour, Q.C.—Rankine—Pitman. Agents —Cooper & Brodie, W.S.

Counsel for the Defender—H. Johnston—Howden. Agents—J. & F. Anderson, W.S.

Saturday, January 19.

SECOND DIVISION.

[Sheriff of Aberdeenshire.

M'GEE *v.* ANDERSON.

Reparation—Joint-Adventure—Liability of One Joint-Adventurer for Wrongful Act of Another—Ship—Herring Boat—Share System.

A herring boat was given out by its owner to another "in deal," according to a system common among herring fishermen, under which the net proceeds were divided into fifteen half shares, of which two went to the owner, seven to the crew, and six to the nets.

Held that the position of parties was one of joint-adventure, and that the owner of the boat was liable for damage wrongfully caused by the master and crew to a third party for the protection of the interests of the joint-adventure.

George M'Gee, master of the herring boat, the "Family's Pride," brought an action in the Sheriff Court at Peterhead against Alexander Watson, the master, and Thomas Anderson, the owner, of the herring boat, the "Good Hope," conjunctly and severally.

The circumstances giving rise to the action were thus narrated by the Sheriff-Substitute (ROBERTSON)—"This action arises out of injury done to herring-nets, &c., belonging to pursuer and others of the crew of the 'Family's Pride' of Peterhead on the morning of 15th August last.

"The facts as regards how the injury was done and who did it are really not questioned in this action.

"The pursuer's boat was drifting south, the crew being at the time engaged in hauling the nets. They came down on top of the defenders' boat and nets, the defenders' nets having gone to the bottom from weight of fish in them, and their boat being thus stationary and anchored to the nets. As the pursuer's boat came on, those in the defenders' boat, fearing injury to their own nets from the pursuer's nets fouling, cut the pursuer's bush-rope or messenger to which the nets are attached without obtaining pursuer's permission to do so, and 37 nets, with the accompanying buoys, rope, and fish were lost. The pursuer is now suing the defenders for the recovery of the value for these. I should say in passing that, according to my view, the pursuer was not entitled to sue as representing the crew (or those of them who were joint-owners of the nets) without an assignation, which he had not got, and therefore the claim in the action, so far as I am concerned, is confined to the pursuer's own share.

"The action is brought against Alexander Watson as master of and representing the owners of the boat 'Good Hope' (who was on board and in command at the time), and also against Watson and Thomas Anderson as individual owners of the boat, conjunctly and severally.