*Saturday, July 3.*

## FIRST DIVISION.

### MACDOUGAL AND OTHERS.

*Court of Session Act* 1868—*Special Case—Judgment of Court.* In a Special Case under section 63 of the Court of Session Act 1868, when parties wish a judgment which can be extracted and appealed to the House of Lords, they must ask a judgment, not an opinion.

This was a Special Case under the Court of Session Act 1868. The 63d section of that Act declares that any parties interested in the decision of a question of law shall be agreed on the facts, and shall dispute only on the law applicable thereto; it shall be competent to present to the Court a special case, "setting forth the facts upon which they are so agreed, and the question of law thence arising upon which they desire to obtain the opinion of the Court; and which case may set forth alternately the terms in which the parties agree that judgment shall be pronounced, according to the opinion of the Court, upon the question of law aforesaid. When a special case is laid before one of the Divisions, the Court shall . . give their opinion, and pronounce judgment, as the case may be, and such judgment shall be extractable in common form. . . Judgments pronounced in virtue of this section shall be liable to review by the House of Lords, unless such review shall be concluded of consent of all parties." In this case the parties asked only the opinion, and not the judgment, of the Court.

The LORD PRESIDENT, in advising the case, drew attention to the distinction between these, and expressed a wish that it should be known that where parties wish a *judgment* which can be extracted and taken to review by the House of Lords, they must ask a judgment, and not an opinion, in their special case.

MILLAR (Q.C.) and WATSON for Macdougal.
Agents—Adam & Sang, S.S.C.
CLARK and BIRNIE for other parties.
Agent—George Binny, W.S.

*Saturday, July 3.*

## SECOND DIVISION.

### MINISTER OF BANCHORY-DEVENICK *v.* THE HERITORS.

*Teinds—Valued Lands—Moss-Lands—Parts and Pertinents—Decree of Valuation. Held* (diss. Lord Cowan) that moss-lands which did not merely yield "moss-mail" but formed an outrun to, and were pastured in connexion with lands admittedly valued by a decree of valuation, must be held to be included in the valuation, even when they were especially mentioned in the titles and not in the valuation.

In this case, which involved the question whether a number of parcels of land in the parish of Banchory-Devenick were to be dealt with as unvalued, and so available to make good to the minister a large augmentation obtained by him from the Court of Teinds, the House of Lords, on 14th May 1867, held that certain lands were to be taken as unvalued, and that as to certain other lands the minister was entitled to a proof before answer of his averments.

The case having been remitted to the Court of Session, a proof was allowed, and upon that proof two sets of questions arose:—(1) What were the boundaries of the lands held by the House of Lords to be unvalued? and (2) Had the minister made good his averments with reference to those other lands as to which he had been allowed a proof?

The Lord Ordinary (MURE), on 6th April last, pronounced an interlocutor in the following terms:—

"*6th April* 1869.—The Lord Ordinary having heard parties' procurators, and considered the closed record, proof adduced, plans, and whole process,—Finds, with reference to the lands of Barclayhill, Calseyend, and Meddens, the teinds of which were, by the interlocutor of the 3d of February 1865, found to be unvalued by the decree of valuation of 1682, (1st), That the said lands of Meddens extend to about twenty acres or thereby, as the same are coloured blue on the plan No. 304 of process; (2d) That the lands of Barclayhill extend to about fifty-eight acres or thereby, as the same are coloured blue on the said plan, and are situated to the east of the turnpike road leading from Stonehaven to Aberdeen, with the exceptions of three small portions marked Nos. 1283, 1284, and 1285 on the said plan, which are situated on the west and north of the said turnpike road; (3d), That the rest of the ground coloured blue on the said plan is part of the lands of Calseyend, and unvalued: Finds, with reference to the proof allowed by the said interlocutor, relative to the teinds of the parcels of land mentioned in the eleventh article of the condescendence, (1st), That the ground coloured yellow, and marked Lot 1 and Lot 2 of reserved moss on the said plan, and also the ground coloured yellow, and marked 'Haremoss' on the said plan, to the west of the road called the Old Great South Road, are unvalued; and (2d), That the whole of the ground marked pink on the said plan is admitted to have been valued by the said decree, and that it is not proved that any portions of the ground coloured yellow on the said plan, other than the portions referred to in the preceding findings, were not valued by the said decree; and, with reference to the barony of Portlethen, referred to in the said interlocutor, finds it not proved that there were any portions of that barony the teinds of which were not embraced within the subjects specially enumerated in the prepared state of the proof, which forms the basis of the decree of valuation in 1709, and are unvalued; and with these findings, appoints the case to be put to the Roll, that parties may adjust the value of the several portions of ground found to have been unvalued, and may be heard on any other points which it may be necessary to dispose of before a remit is made to the Teind Clerk to prepare a scheme of locality, and reserves all questions of expenses.

"*Note.*—The leading questions arising for consideration upon the proof allowed by the interlocutor of the 3d of February 1865 relate, (1st), to the extent and value of the lands of Barclayhill, Calseyend, and Meddens, which were held not to have been valued by the decree of valuation of 1682, founded upon by the respondents; (2d), to whether there is evidence sufficient to instruct that the teinds of the lands mentioned in the eleventh article of the condescendence for the minister, or any of them, were unvalued by that decree? and (3d), to whether the teinds of these portions of the barony of Portlethen, if any, which are not em-

braced within the subjects enumerated in the prepared state of the proof on which the decree of valuation of 1709 proceeded, are unvalued?

"With reference to these questions, a good deal of argument was addressed to the Lord Ordinary as to the party upon whom the burden of proof ought in this case to be laid. It was contended on the part of the minister that the *onus* rested on the heritors, respondents, of shewing not only the identity and precise extent of the lands now possessed by them, which had been found to be unvalued, but also of proving that the parcels of lands mentioned in the eleventh and fourteenth articles of the condescendence, with reference to which proof had been allowed, were embraced within the lands valued by the respective decrees. But although the burden is in the ordinary case held to lie upon the heritor pleading upon a valuation to make out that the teinds of his property are valued, and for that purpose to shew that the disputed lands are comprehended among the subjects embraced in the decree of valuation, the Lord Ordinary is disposed to think that in the present case this rule might be adopted with some qualification. For the case is peculiar in this respect, viz., that the teinds of the parish have for long been understood to have been valued and exhausted, and the stipend of the minister has consequently been supplemented under the provisions of the Act 50 Geo. III, c. 84.

"The presumptions, therefore, seem rather in favour of the plea maintained by the heritors, viz., that the decrees of valuation founded on should be held to embrace the whole of their respective properties, unless the contrary be shewn; and the interlocutor of the 3d of February 1865, as well as those of Lord Barcaple of the 16th and 19th of July 1867, seems to countenance this plea, for it is to the minister that a proof is allowed whether the teinds of the parcels of land mentioned in certain articles of the condescendence, or any of them, are unvalued. The application of the ordinary rule, therefore, in its absolute sense, has, in the opinion of the Lord Ordinary, been excluded by the terms of these interlocutors; and in dealing with the proof he has endeavoured to carry out and act upon the views expressed by Lord Colonsay in the House of Lords, when the appeal was disposed of on the 14th of May 1867, when, with reference to the interlocutor of the 3d of February 1865, his Lordship is reported to have stated:—'The Court has not said how far the *onus* may rest, or how long the *onus* may rest, upon the pursuer or upon the defender. That is left open for investigation. It may shift in the course of the inquiry, and some things may be adduced which will throw the *onus* upon the one side, and other circumstances may be proved which may throw it upon the other. It is upon the balance of the whole evidence that the Court has eventually to determine whether, upon the fair construction of the decreet, it did or did not comprehend any of those parcels of land which the minister describes in his condescendence.'

"I. As regards the lands of Barclayhill, Calseyend, and Meddens, which have been held to be unvalued, there is, in some respects, not much difference between the parties. In regard to Meddens, for instance, the Lord Ordinary understands that they are agreed, and he is of opinion that it is proved, that the ground coloured blue upon the plan No. 304 of process, represents with substantial accuracy that part of the property. And the same observation applies to Barclayhill; for although, in regard to it, the proprietor disputes the precise accuracy of the boundaries given upon the plan, the Lord Ordinary has considered himself warranted in adopting these boundaries, because they seem to be substantially the same as those shewn upon the plan of 1783, No. 204 of process, which was prepared when the whole property was possessed by the Governors of Gordon's Hospital, Aberdeen, from whom it was acquired in 1785.

"With reference, again, to the property called Calseyend, it is not disputed on the part of the proprietor that a considerable quantity of land lying on both sides of the road, marked the 'Old Great South Road' on the plan, and extending to about 43 Acres or thereby, is unvalued; and this appears to have been conceded, because that ground is marked and designated as Causeyend on the plan of 1783. It is, however, contended that, with the exception of these 43 acres, no part of the ground coloured blue can be held to be Causeyend; but the Lord Ordinary has been unable to give effect to this contention, because the ground coloured blue on the northern part of Lot 1 upon the plan seems to be of the same character of moss as that for which moss mail was in use to be paid, and is marked as the moss of Causeyend upon the old plan. And the fact that the ground was so known in 1783, and marked on the plan of the party through whom the present proprietor acquired right to the property, is, in the opinion of the Lord Ordinary, sufficient to throw upon the proprietor the *onus*,—even assuming it not to have been laid on him by the interlocutor,—of showing that this moss did not pass under that name in 1682, and was valued by the decree. But this the respondent has not done, and the Lord Ordinary has therefore held the whole of what is coloured blue on the northern part of Lot 1 to be unvalued.

"The portion of the blue ground marked as Lot 3 upon the plan is in a somewhat different position, because, although it appears to be moss land of the same description as that marked as Causeyend moss, it is not so described upon the plan of 1783, but is there entered under the name of 'Reserved Moss.' It is, however, spoken to by the minister (print, p. 30, A), who seems to have been well acquainted with the localities for upwards of forty years, as being part of the old moss of Causeyend, and in the charter of 1789 by Gordon's Hospital in favour of Mr Duff of Fetteresso it is expressly described (print, p. 95, G) as 'the north-east part of the moss called the moss of Causeyend, lying on the south side of the hill of Turnamiddle.' Now this is the title under which the present proprietor holds the reserved moss, and as there is no evidence to show that it was not known as Causeyend in 1682, it appears to the Lord Ordinary that the minister has established this part of his claim.

"The only other portion of ground coloured blue which remains to be dealt with, is that lying between Barclayhill and Lot 3 of the reserved moss, which appears to have been divided into three separate portions on the sale of the property by Gordon's Hospital in 1785. The westmost portion having been allotted to the Milltown of Findon, or Lot 3, the centre part to the Seatown of Findon, or Lot 9, and the westmost part to the Synod lands, or Lot 4, from which it was separated by the public road from Stonehaven to Aberdeen. Now, all this land is spoken to in the evidence as being peculiarly well adapted for the

manufacture of peat, and was evidently divided and allotted to those different portions of the property in 1785 to be used for that purpose. It is of the same description of land therefore as that which the Commissioners declined to value in 1682, and this rather tends to raise the presumption that it would not be included in the valuation. It is described in the charter of 1785 (print, p. 90, E) 'as part of the east moss,' and it adjoins what is called Causeyend Moss, by which it is bounded on the north-west. It is deponed to by the pursuer as being part of the moss of Causeyend; and in the title to Lot 3 of the reserved moss, which has already been referred to, it is expressly described as being 'part of the moss of Causeyend allocate to Milltown, or Lot 3 of said lands of Findon and Cookston, from the mosses reserved by us successively' (print, p. 96, B, C).

"Such being the nature of the evidence founded on by the minister in support of this part of his case, he appears to the Lord Ordinary to have done enough to shift the *onus* upon the heritor; and as there is in the opinion of the Lord Ordinary no evidence to contradict that on which the minister relies, he has come to the conclusion that this portion of the ground now under consideration, and also the portions of it which have been alloted to Lot 4 and Lot 9, and which are described in the charter already referred to (p. 96, B, C) as 'part of the said moss of Causeyend,' must be dealt with as unvalued lands.

"II. The next question for consideration relates to the parcels of lands mentioned in the 11th article of the condescendence, (1) and first, as to Redmyre and Bishoptown, and the land coloured yellow on Lot 5 of the plan, which are claimed as unvalued land, but which the Lord Ordinary thinks the minister has failed to show were not included in the valuation of 1682. In the decree of valuation, Cookston and Badentoy are brought into valuation 'with their pertinents.' If, then, it appears that what are now called Redmyre and Bishoptown may, from their position or otherwise, fairly be considered to have been pertinents of Cookston or Badentoy in 1682, they must, it is thought, be held to be covered by the decree of valuation. Now, each of these properties immediately adjoins a large block of land admitted to have been valued either as Badentoy or Cookston, and although they are not expressly mentioned as pertinents either of Badentoy or of Cookston in the earlier titles, they are expressly so described in a disposition of 1736 (print, p. 75, E, F), and must, in the opinion of the Lord Ordinary, be presumed, in the absence of any evidence to the contrary, to have been valued as pertinents of those portions of the property.

"And if the Lord Ordinary is right in this view, he thinks the same rule must be applied to those small portions of the lands of Bishoptown which belong to Mrs Donald, although she does not appear to oppose the minister's claim, because they are understood to be held by her under the same title as that by which the larger part of the same property is held by Mr Dyce Nicol; and the Lord Ordinary does not consider he would be warranted in a case of this description, in respect merely of the non-appearance of a feuar, in holding a property to be unvalued which appears to have in reality been valued as part of the larger property which it adjoins.

"(2) The next property in order upon the plan is that marked 'Haremoss,' lying between Bishoptown and Causeyend, and this, the Lord Ordinary thinks, must be held to be unvalued, for it is of the same description of ground as that let for moss mail, and is spoken to by the witnesses as being 'exhausted moss' at the time it was reclaimed. This, therefore, raises a presumption that it was not included in the valuation; and as it is expressly mentioned by name in the charter of resignation of 1682 as a separate subject from the other properties mentioned in the charter, and which are all separately dealt with in the rental and decree, the Lord Ordinary has come to the conclusion that the minister is entitled to have it held to be unvalued land.

"(3) Lots 1 and 2 of the reserved moss are spoken to by several of the witnesses as having been made use of, and that down to a comparatively recent date, chiefly, if not entirely, for the manufacture of peats for sale in Aberdeen. They are therefore of the same description of lands as those of Calseyend, which they adjoin, and which, in respect of the uses to which they were applied, were not valued in 1682; and although these two lots do not appear to have been known by a separate name in 1682, as the Haremoss was, they are so completely detached from any portion of the lands valued in that year, and so separated from those lands by unvalued ground, as, in the opinion of the Lord Ordinary, to lead necessarily to the inference, in the absence of any evidence to the contrary, that they were not valued by the decree of 1682.

"No appearance has been made in opposition to the present proceedings by the proprietors either of Lot 1 of the reserved moss, or of the Haremoss, which is a circumstance tending to strengthen the conclusion which the Lord Ordinary has arrived at, that these lands were not valued; although, as already explained with reference to the lands of Mrs Donald, he doubts whether that circumstance would of itself have warranted him in holding these lots to be unvalued, unless on other grounds satisfied that they were so.

"(4) The question raised relative to the property coloured yellow in Lots 3, 4, and 9 upon the plan, No. 304 of process, may, the Lord Ordinary thinks, be dealt with together. For the yellow portions of these lots adjoin lands called Findon, which are admitted to have been valued by the decree; and the main ground on which it was contended that these yellow portions of the property were unvalued was, that they had been brought into cultivation since the date of the decree. They were not, however, according to the evidence, moss lands of the description that has already been dealt with; and that they were not so, except to a very small extent, may account for a portion of the moss of Calseyend having been allotted to each of these three lots when the property was sold in 1785. But they are spoken to as consisting for the most part of rough heathery ground, on which the cattle of the tenants of the arable land were in use to graze in the recollection of several of the witnesses examined, and there is very distinct evidence from Mr Walker, a witness examined for both parties, to the effect that it was the practice in the district to let the rough pasture ground with the arable land so long as he recollects. Now there is no reason to suppose, and certainly no evidence to show, that this was not the practice in 1682; and unless the decree of valuation in that year can be held to be limited to a valuation of the lands actually under cultivation, the fact that these

portions of the property, or the greater part of them, have been brought into cultivation since 1682, is not, in the opinion of the Lord Ordinary, sufficient to warrant the inference that they were not valued by that decree. But the Lord Ordinary cannot so read the decree, for it bears to be a valuation, not of parsonage teinds only, but of teinds 'parsonage and vicarage,' and each portion of the lands is expressly declared to be valued in 'stock and teind.' Having regard, therefore, to the rules which were laid down in the recent case of *Plummer*, 11th December 1867, it appears to the Lord Ordinary that this valuation in 'stock and teind' of both 'parsonage and vicarage teinds' is sufficient to show that the valuation was not necessarily confined to cultivated lands, but included the pasture lands which adjoined the arable farms, and for which it may, it is thought, be presumed that the tenants paid rent as an accessory of the cultivated portions of their farms.

"It is not unimportant to observe, in dealing with this part of the case, that the value at which the three farms called Findon were rated in 1682 may fairly be held to correspond with, and represent, the full extent of the ground contained in these three lots. The question is put to Mr Walker, (proof, p. 62), with reference to Lot 3, or the Milltown lot, whether, looking to that lot as laid down upon the plan, he would consider that the valuation in victual and in money would represent a farm of that extent ? and his answer is that it would. There is no similar evidence in regard to lots 4 or 9, but when the gross number of bolls at which the three Findons are valued in 1682 is compared with the number of bolls at which Cookston and Badentoy are valued, it is difficult to resist the conclusion that the extent of ground covered by that valuation must have been considerably greater than the comparatively small piece of ground coloured pink in connection with these three lots. For the ground so coloured pink does not amount to more than a fourth part of what is coloured pink in Lots 1, 2, 5, and 8, and yet Cookston and Badentoy were valued at 72 bolls only, while the three Findons were valued at 104 bolls. Making all due allowance then for some difference in the value of the ground, the valuation of 104 bolls may, it is thought, be held to represent the full extent of ground contained in these lots; and in the whole circumstances the Lord Ordinary has come to be of opinion, upon considering the evidence applicable to those three lots, that, as regards them, the minister has not discharged himself of the burden of proof which was laid upon him by the interlocutor of 3d February 1865.

"III. As regards the Portlethen decree of 1709, it appears to the Lord Ordinary that no evidence has been adduced sufficient to instruct that there were any lands within that barony in 1709 which were known by any other names than those of the four parcels of land specifically mentioned in the prepared state of the proof on which the decree of valuation proceeded, viz., Over Mains, Nether Mains, Philipshill, and Nine Bank Acres of Portlethen. In the plan of 1764, founded upon in the evidence, these names are to some extent changed, but that, in the opinion of the Lord Ordinary, is not of itself enough, even where the change of name is material, to warrant the inference that there were portions of land in the barony known fifty years before under different names from those included in the valuation. In the present case, however, the names do not appear to have been materially changed. For in the plan of 1764 there is Mains and Netherton (which may be fairly held to be Over Mains and Nether Mains) and Philipshill, but there is no specific mention of Nine Bank Acres, although that must have been a property of some extent, looking to its valuation in the decree as compared with that of Philipshill.

"In this view of the evidence, the question is, in the opinion of the Lord Ordinary, reduced to this, whether,—standing that decree as a valuation of the barony,—the circumstance that a large amount of land which is said to have been uncultivated moss or heather in 1709 has since been brought into cultivation, entitles the minister to have that land dealt with as hitherto unvalued, and as now liable in teind. The Lord Ordinary is of opinion that it does not, and that as the decree of 1709 must now be held to have related to the whole barony, this branch of the case falls to be disposed of according to the rules applied by the Court in dealing with the Banchory decree. For the valuation in both cases appears to have proceeded upon the precise same principle, viz., that of separately ascertaining the value of every kind of land, and then deducting that portion of the rent which was applicable to moss, &c. Thus the moss and grass of each separate parcel is separately valued, and, after deduction of service silver and the value of the moss, grass, and cothouses, the rental is fixed in the same manner as the rental was struck in the case of Banchory. It may be that in so dealing with the valuation the Commissioners proceeded upon an erroneous principle, but having regard to the decision pronounced in this case relative to the Banchory decree, it appears to the Lord Ordinary that the minister is foreclosed from raising that objection in the present process of locality."

CLARK and HALL for pursuer.

GORDON, Q.C., GIFFORD, H. SMITH, BALFOUR, ASHER and KEIR for defenders.

At advising—

LORD JUSTICE-CLERK—This case, as presented to us in the reclaiming note against the judgment of Lord Mure, involves substantially two questions, one as to the limits of three specific subjects, which have been found in this Court and the House of Lords to be unvalued; and the next, as to whether large and extensive tracts of ground, chiefly composed of what is said to have been moss and waste land at the time of the valuation, are or are not to be held included in the decrees of valuation.

The valuation under which this question arises was led in 1682; we have no contemporaneous plan or rental or document, other than the titledeeds of the lands, by which light can be held to be thrown on the matter. About a century later, the lands of Findone and Cookstone were sold in lots, and the plan made with a view to the division in 1783 is extant. It is minute and precise, and it must be taken to represent the state of the property faithfully as it then existed.

Meddens is very distinctly delineated within lines on the plan. The extent as there defined is not disputed, and Barclayhill may be taken to be in the same situation. I think that the Lord Ordinary's judgment is correct so far as these lands are concerned.

As to Causewayend, there is an important difference between the parties. The minister maintains that it extends over a large tract of ground, stretching from the old causewayed road, leading

to Aberdeen over ground stated in some of the titles as the east moss, the heritor maintaining that it is of definite extent, not exceeding 43 acres in all, and situated within boundaries which he says are well defined, partly to the west of that road, and partly to a greater extent on the east.

The contention of the minister is founded on the fact that the tract which he claims to be unvalued is part of the moss of Causewayend, and he appeals to the map of 1783 and to the titles as showing that the east moss bore that designation; the heritors maintaining that the Causewayend found to be unvalued was a subject let for moss maill allenarly, and that from the map and titles it appears to have been limited to the comparatively narrow limits assigned by them. Two facts are clear, that the Causewayend, not being valued by the Commissioners, was then let for the production of peats, and that the only rent to be paid was for moss maill. It was for that reason that they refused to value it. The other, that a century after the moss had ceased to be worked, and the lands so far at least brought into culture.

The first lot of the new division of the lands in 1783 was called by the name of Calsayend, and Calsayend formed the subject of a disposition in 1785 in favour of the predecessor of Mr Dyce Nicol, which seems to me of the very greatest importance in the present question. The description runs thus:—"All and whole the foresaid first lott of the said lands of Findon and Cookstone, called Calsie-end, containing that part of Calsie-end which lyes to the east of the Great South Road leading from Aberdeen to Stonehaven, and the Cot-town and some folds and detached parts of East Cookston, with a piece of moss," &c.

It is upon this description that the heritors rely. They say that it contains conclusive evidence that it was limited in extent, because a piece of moss is added to it, which, if the minister was right, must have been already given. One point of importance to ascertain is, whether the moss bore the name of the moss of Causewayend anterior to the division; and the second is, whether, assuming it to have borne that designation, we are or are not to infer that it formed part of the subject called Calsayend, found to be unvalued.

In the disposition of 1785 in favour of Mr Nicol, the moss is described, not as the moss of Calsayend, but as the east moss, and it is so described in a disposition of Lot 3 in the same year. But in April 1789 we have a charter in favour of Mr Duff of Fetteresso, we have a disposition of Lot 3 of the moss, described "as all and whole Lot 3 of the foresaid moss," *i.e.*, as I understand, the moss of Findon, and Cookston, "containing the north-east part of the moss called the moss of Causewayend, lying on the south side of the Hill of Turnamiddle," and that there is reference made to a rhind 15 feet broad "dividing that part of the said moss of Causewayend allocated to Findon or Lot 4, Seaton or Lot 9, and Milltown or Lot 3, from the mosses reserved by us."

It thence seems to me to follow that the moss did in point of fact bear the name of the moss of Causewayend in 1789, and I think that it cannot be held to have acquired that name between the year 1785, when the Causewayend had a certain portion moss attached to it, and 1789; because, as to the very portions of the moss to which the name was attached, one portion had been reserved in the allocation of the ground which was to form Lot 1 or the Calsayend lot, and two had been assigned to other lots, so that, though the portion attached to Causewayend in the act of division might be very well held to have acquired the name in the few years which intervened, the other could not, I think, be held to have done so.

I hold, therefore, that though the moss was truly part of the range of moss ground in question, the property of Findone and Cookstone, and known in the title-deeds as the east moss, that portion of it coloured blue on the minister's plan did really go by the name of the moss of Causewayend.

I do so independently of any argument derived from the marking of the plan; for the writing "Moss of Causewayend" is plainly of a date more recent than the date of the plan, and intended to mark, not the boundaries of the east moss, but the boundary of the portion attached to Causewayend. The fact seems to be made out by independent and unexceptionable evidence. But the question is, assuming it to be so, does it or does it not prove the extent of the unvalued subject to be co-extensive with the east moss.

It does not appear to me at all to follow that, because the moss was known as the moss of Causewayend, it really formed in its entireity the unvalued subjects dealt with in the decree of valuation. In this very disposition of 1789 there is reference to a rhind "dividing the moss particularly allocate to lot first of the said lands or Causewayend from the reserved moss;" and a similar expression occurs in the following sentence. Taking these together with the disposition, and the nature of the possession at the time of valuation, I cannot think that the lands extended beyond the boundaries as given in the plan. We read the disposition with the plan without being satisfied that the moss allocated was allocated not from itself but from the moss of the barony.

The expression of the deed of division in forming the new lot seems to me conclusive as to this point in conjunction with what appears in the map. The new first lot is to consist of "that part of Calsie-end which lyes to the east of the Great South Road leading from Aberdeen to Stonehaven, and the Cot-town and some folds and detached parts of East Cookston, with a piece of moss." It is thus to contain all of Causewayend which is to the eastward of the road, certain portions of Cookstone, "with a piece of moss." Does that mean a piece of moss extra, or a reserved portion of itself? And then the boundaries are given, from which the extent of moss may with absolute certainty be fixed. If Causewayend *in se* included the moss which in that deed is described as the east moss, then the new lot could not be said to contain that part of Causewayend lying to the eastward of the road; and, instead of a piece of moss being added to form the new lot, there would have been an exclusion of right to the portion of the moss intended to be reserved or allotted to the other portions of the divided property. The terms of that conveyance are to my mind inexplicable on any other footing than that the original Causewayend to the boundaries is to be found on the map of 1783, exclusive of the moss land beyond its eastern limits,—so exclusive as that a moss required to be added, and was added to the subject. And this view I hold to be quite conformable to all reasonable presumptions as to the condition of matters as they stood in 1682. Causewayend was not valued because moss maill allenarly was paid for it. I cannot suppose such an

enormous consumption of peats as to require so very large a range of moss land to be embraced in a lease of lands from which peats were to be raised for sale. Surely 42 acres supplies a sufficient area for the demand at that early period, and we have, moreover, examples in Meddens and Barclayhill,—to the latter of which it may be observed there would have been, if the minister were correct, a party entitled to compete in the sale in his immediate neighbourhood.

From these considerations I must confess myself unable to adopt the views of the Lord Ordinary as to the true limits of Calsayend. I think that any inference which might be drawn from the similarity of the subject is not sufficient to prevail against the evidence derived from the titles; and that though the east moss of Findon and Cookston may have occasionally been called the moss of Causewayend, it by no means follows that the moss so designated was part of the property of the unvalued lands of Causewayend, extended so as to embrace it. That name may have been given in repect of a well known subject adjacent, and not as indicating or proving that it formed the property.

The extent of the subjects found express to be unvalued being fixed, the next question which we have to consider is, as to the valuation or non-valuation of the lands enumerated in the 11th article of the condescendence for the minister.

Following the order in which the Lord Ordinary deals with the subject in his note, he first deals with Redmyre and Bishopton. He deals with these as pertinents of valued subjects, and extends his finding to the part of the Bishopton lands of Mrs Donald, the proprietor of Haremoss, who has not entered appearance in the process. His Lordship's view is, that although Mrs Donald does not object that her lands of Bishopton are unvalued, they must be held to be valued, because they are part of a larger subject belonging to Mr Dyce Nicol. He finds Mrs Donald's other property at Haremoss to be unvalued.

In my view Bishopton is really an improved part of the Haremoss; and if I could hold the Haremoss unvalued, I should have the greatest possible difficulty in coming to a conclusion unfavourable to the minister, either as to the lands of Bishopton, belonging to Mr Dyce Nicol, or to the lands of Bishopton, belonging to Mrs Donald. She does not contest the question; and, in respect of that fact, I presume that, as in a question with her, we must, if asked, pronounce a decree finding, in absence, that the Haremoss is not valued, nor the lands of Bishopton, which belong to her. But in the view which I take as to Mr Nicol's lands of Bishopton, I feel myself constrained to decide, as in a question with him, whether Haremoss is to be held as valued; and, further, I feel it necessary to come to a conclusion on the subject, because, on the view of the valuation or non-valuation of Haremoss, the decision as to the lands as lying beyond the Haremoss would be affected.

The question as to the valuation of Haremoss, with which I, for the reasons stated, feel compelled to deal, raises in a form the most favourable to the minister the general point as to the inclusion or non-inclusion of moss land not specially referred to in the valuation. It was a known subject in Haremoss in 1682; it is found in a title-deed in the close of that very year described as a glebarium or peat-moss. We have a charter of resignation and an infeftment following upon the charter in December 1682, in which the subjects are described as "terras de Cuikston Badentoy Calsiend Meddens et glebarium vocat lie Haremoss et lie Burntland super eodem." *Glebarium* is just a peat-moss, and therefore I take it to be clear that in 1682 this subject was partly in a condition of an unreclaimed moss and partly in the condition of a subject improved by the burning of the surface, and prepared for the rearing of crops.

That Bishopton corresponded with the portion of the moss land which is called the "burntland super eodem," *i.e.*, on the moss, seems clear from the title to Bishopton in 1736, in which Sir Alexander Bannerman dispones to John Robertson "that part of the moss commonly called the Haremoss, belonging in property to me, with the houses and croft of land thereupon called Bishopton, and which part of the said moss and croft of land are part and pertinent of the said towns and lands of Cookstone, Badentoy, and Meddens."

I hold it to be clear that the croft and land thereupon on the Haremoss is just the "*lie* burntland super eodem" of the earlier title; in other words, an improved part of the Haremoss.

It results from the quotation I have read that the Haremoss was a *pertinent*;—it is described in 1736 as a pertinent of Cookstone, Badentoy, and Meddens. From the earlier title of 1680 we find that Cookstone was the subject of which the lands of Badentoy and Meddens were themselves pertinents.

The case then presented for consideration is, whether this moss and pertinent of Cookstone, known by a specific name and so described in the title under which it was held at the time of the valuation, of which part had then been improved on the surface and rendered by such improvement capable of crops, was or was not valued by the decree of 1682.

The procurator for the pursuer Bannerman, the proprietor of the lands, is said to have produced a rental of the "haill lands libelled." The lands libelled, embracing the barony of Findon generally, contained the lands of Cookstone specially; and in the rental there are two tenants named, each paying 27 bolls victual rent for their possession in Cookstone. The oath of the pursuer was taken on this rental, which I understand to mean that the true rental of the subjects was that stated; in other words, that no more rent was payable to him out of the lands. There follows "The actual valuation of the teinds and lands of Cookstone possest by James Mouatt, and the actual valuation of that part of the lands of Cookstone possessed by Magnis Mowat," the two tenants formerly mentioned. It is set out that an infeftment was produced of 1680 of the foresaid lands of Cookstone, of which the lands of Calsayend, Meddens and Badentoy are proper parts and pertinents, and lastly we find that the pursuer, at the instance of the defender's procurator, was called upon to depone, as on a reference to his oath, on the verity of a rental prepared by the defender, which as I hold we must conclude that the full and true rental of the *lands* libelled, and *inter alia* the lands of Cookstone, were given up for valuation.

As to the improved portion of the moss or Bishopton,—the burntland,—it must, I think, have produced some rent, and I am unable to conceive how we can hold that it was not within the rental unless it was in the personal possession of the proprietor, or unless the proprietor is to be held to have sworn falsely upon the reference. The

proprietor had no house on the lands; there is not the slightest ground for believing that he occupied a farm or in any way occupied or possessed any part of the subject except through tenancy. If it had been so I think it must have appeared in the proceedings in the valuation, or at all events some evidence would have existed of the fact. As to Bishopton, *i.e.*, the portion of Haremoss which had been improved, therefore we must, I think, hold it to have been valued. Apart from all questions of *onus* or presumption, I think it proved these lands must necessarily have been and were in fact valued, and so the Lord Ordinary expressly has found.

If one portion of the same subject was valued, the other may be assigned to have been so, unless it be held that the Commissioners valued all ground cultivated and no ground whatever that was not.

There remains the moss still unreclaimed.

Though the tenants of Cookstone may no doubt cut such peats out of that moss as was necessary for their own consumption, is was certainly not actually let as a peat moss; if it had been so let we should have had the rent stated, as in the case of Calsayend and Meddens, and deducted.

As certainly it was not in the occupation of the landlord, for the reason I have stated. It was therefore a portion of ground—a pertinent of Cookstone—not so occupied in the manufacture of peats as to exclude pastoral tenants from using it, affording pasturage, scanty no doubt, and depending for its extent or value on the season, according to its dryness or moisture. I cannot look upon it as a *caput mortuum*, a mere mass of peat without any growth on the surface. I take it to be like other mosses, in part containing rank vegetation and coarse grass, in parts covered with heather. Must we deal with it as a subject occupied at the time of the valuation, or not? If occupied, then it must have been so occupied in conjunction with the neighbouring farms.

I cannot doubt, in reference to such a subject, that, in conjunction with the rough uncultivated ground surrounding, it formed the subject of summer pasture for the cattle of the tenants of Cookstone. The Lord Ordinary has very properly held that the rough uncultivated ground—stoney and comparatively unproductive—where cattle were in use to graze, must be held to have been included within the rental of the lands whose occupants so used them. Can we hold differently with reference to moss land not in actual use, or what may be called a peat quarry? Surely, if the cattle pastured on the higher lands of Turnamiddle, they did not fail to range over and browse on the surface of the moss; and if so, the question is virtually solved.

The fact of the moss having been partially improved—especially if we are entitled to infer, as I think we are, that the improvements were progressing—points to some one in occupation of the moss who had improved and was improving it. If Bishopton was in the occupation of the Cookstone tenants, was not the remainder of the subject on which the improvements were being made also in their tenancy?

As to the matter of the pasture of mosses, we have evidence which seems to me to support the position which I have assumed. The case is of a moss or pertinent of lands on which there is bad and scanty pasture. When the lands are valued, is such a moss included, or is it not?

The view of the minister, if supported, would lead to very startling results. It would come to this, that wherever large tracts of moss occur in moorland pastures fit for the manufacture of peats—especially where the names of the mosses are mentioned—they should be held unvalued, though the lands of which they are unquestionable pertinents are valued, and that after the lapse of centuries, during which the lands may have been universally held to be considered valued.

The Lord Ordinary has apparently held that the Commissioners excluded mosses, because they gave no effect to that part of the rental of Calsayend, Barclayhill, and Meddens, which was moss-maill, and that all mosses must be held to have been excluded. I think the inference not supported by the fact. They deducted the moss-mail as a rent payable subsequently for a manufacture, and by an abstraction of a part of the soil, not from the mere tenancy or occupation of the soil. But that mosses were not excluded *in toto*, because the character of the lands was that of moss, is clear from the case of Badentoy, where, the rent being mixed, the whole subject was held to be valued, implying that the rental, in so far as not from moss-maill, *i.e.*, for land in cultivation or land under rough pasture, must be computed.

I hold that the rental of the farm of Cookstone must, in the absence of anything made out as to separate occupation of these mosses, be held to be within them.

The observations now made seem to me to occur as applicable to the other mosses, as to which a question has been raised. The east moss must be taken, in the absence of evidence or plausible suggestion, as pertinent of the adjacent lands, and as having been pastured in connection with them. They apply to the waste ground, stoney pasture, rough pasture, &c., which occurs in so many parts of the estate.

Taking the subjects in the order in which the Lord Ordinary deals with them, the lots 1 and 2 of the reserved moss.

Lot 1 is not contested, but lot 2 is. I do not think that the pleas of No. 11 can be affected by his neighbour not joining in the suit.

The first point is the application of the ground, in the memory of witnesses, to the production of peat. The second, that they are separated from valued lands by unvalued lands. The first point is not material, except in so far as it shows the quality of the ground and its adaptation for peats, because matters must be regarded as at the date of the valuation, and we know that the moss was not let for such manufacture, otherwise we should have had the rent in the rental given in by the pursuer, or in the rental as to which a reference to the oath of the pursuer was taken by the defender. The moss maill was given in the cases where it was paid. The second point depends on the view taken of the matter already considered. If the intervening land is to be held as valued, the obligation has no application.

I see no reason for holding these mosses unvalued which would not equally apply in every case where mosses are to be found on Highland estates. I conceive that all mountain land, muir, or moss, good or bad for pasture, must be held to be valued when the lands to which they are attached are so; and as the mosses in question were pertinents of lands valued, they must be held to be valued here.

As I come to a conclusion adverse to the minister, I come to the same conclusion as to all mosses and muirs, pertinents of lands valued, and having

no special designation. Consequently, I conceive that the proof of the existence of extensive mosses on these lands, which is made out in the proof, really carries no farther than the fact of there being tracts of bare stoney ground, with very scanty herbage. If heritors were to be subject to have lands unvalued in reference to moss lands on their estates at the time of the valuation, which might have been improved and made valuable subsequently, the object of the law would be defeated, and every landowner of a Highland estate might be involved in litigation.

Redmyre, as we learn from the disposition of 1736, is a "pendicle" of the town and lands of Badentoy—partly moss, partly croft land, probably altogether, certainly in part, improved from the moss. As Badentoy is valued, this pendicle must be held to have been valued with the lands to which it is attached. As to Findon, I concur entirely with the Lord Ordinary. If any difficulty occurrs as to mosses, it does not occur here. There is a very large proportion of ground which has been brought recently into cultivation, but which, until this operation was performed, was stoney or heathery pasture.

It is said that though the barony land of Findon was intended to be valued, but that *de facto* only the possessions of three tenants were so. The pursuer produced a rental sworn to as a rental of the haill lands libelled, *i.e.*, *inter alia*, a rental of Findon, in which three tenants are given as paying rent. One Robert Hunter in Findon, another Richard Bannerman in Findone, and the third Robert Anderson at the mill of Findon, who had the mill, plough, and croft thereof; and on this the valuation proceeds, not valuing the entire lands or barony of Findon as is said, but only the several lands as so occupied. If it could be satisfactorily shown that there were lands in Findon not in the possession of these three tenants, these lands would fall to be excluded; but as the rental was sworn to as the total rental of the lands, and a similar result followed the reference, I hold that we must take the fact to be that there was no other lands, in the absence of any evidence that there was a subject in the hands of the proprietor, or in the possession of other tenants of his. It is said that the titles embraced fishings, and that there was a fishtown or seatown called Attens, of which there is no trace in the valuations. It is certain that such a "town" existed in 1736; it is equally certain that in 1682 the description does not embrace any other "town," by which phrase we understand a steading or collection of houses on a farm, other than the town and lands of Findon. There is reference to the fishing or harbour, but it is not necessary to hold that these were possessions held of the landlord. The fact of the rental ignoring them seems to supply a strong presumption; and here also the presumption in favour of the using of the lands hitherto comes in. It is argued with much apparent plausibility that this presumption, ordinary so strong in favour of an heir, is of not much consequence in reference to such subjects as moss or moorlands, which, until brought into cultivation, have but very slender value in a question as to teinds, but if there be a case here it is for crofts, assumed to be enjoyed in connection with the occupations of the fishermen, as to which no such point can be urged.

There remains Portlethen. The terms of the valuation there must be attended to.

There is a presumptive valuation of the lands; but, inasmuch as the valuation proceeded on an estimate as to the specified individual subjects, it was to be open to the minister to show that parts remained unvalued. A difficult but not impossible task, if occupation by the landlord had been proved, or possession by tenants other than the possessions specified.

The first point made is to muirs, &c., as to which I need not say anything additional to what I have said already. The second is to lands known at a later period by the name of Hallcroft or Placecroft, Hillacres, and Nethertown, and as the Seatown or Fishers' town.

The lands mentioned do not occur in the titles, or in any deed earlier than the middle of the next century. In one branch of the recent decision in the case of *Morven*, we had to consider a similar obligation. Differences of name will occur in every case. The question is—Whether we have or have not evidence that, under the names used and said, as I read it, by the decree to constitute the lands of Portlethen, there has been any omission. I see no ground for holding that any land was omitted. The strongest case is as to the Seatown or Fishertown as in Findone, but it is open to the same answer.

The result will be a partial recal and partial affirmance of the interlocutor.

LORD COWAN—To a great extent I agree with what has been said by your Lordship, especially with regard to Findone and Portlethen. As to Calsayend, I feel so much difficulty that I am unwilling to touch the Lord Ordinary's interlocutor. The preponderance of evidence is, I think, in favour of the view to which his Lordship has given effect. There is no evidence of the state of matters at the date of the valuation in 1682. But in the oldest plan of the locality which is extant, prepared in 1783, there is marked Calsayend "*Moss*" beyond the black line, which is supposed to be the limit of the property of Calsayend held to be unvalued by the former judgment of this Court. That being so, I think the Lord Ordinary has arrived at a just conclusion.

I am as alive to the importance of adhering to the principle, that the greatest weight is to be ascribed to old valuations, as any one. But as regards the lands now in question, we have not to deal with a valuation of a whole parish or of a whole barony; and the completeness of which, as embracing the whole of the heritors' estate, has not been materially encroached on. On the contrary, it has been successfully impugned by the judgment of this Court, affirmed by the House of Lords. Further, one principle, I think, has been recognised in the judgments in this valuation, that is, that mosses were excluded from it. Where moss maill was paid, it was expressly deducted; and I can see no evidence that mosses were valued unless they were valued as *pertinents* of lands included in the valuation or as embraced within a barony. Take as a contrast the valuation of Portlethen, where there is an express declaration that mosses were included in the rental and valued. I think the case of the *Heritors of Calder*, M. 15,739, is instructive; there a deduction was allowed on account of a moss let to a tenant, out of which he was allowed to win and sell peats, because moss is not a teindable subject; and a higher rent must be understood to be given on account of this privilege.

The practical question here is, what is to be held regarding Calsayend "moss?" Calseyend has been held not to be valued. What are its boundaries?

I am not satisfied with the explanations given by Mr Balfour as to the black line marked on the plan; and, on the whole, I see no good reason for disturbing the interlocutor of the Lord Ordinary. It seems true that the *onus* has been shifted from the minister and lies on the heritors; and that the disadvantage, of what I cannot but feel to be very considerable uncertainty in the evidence, must fall on the heritors.

LORD BENHOLME—The point which has been raised in this case as to the valuation of moss ground is of some importance, but it is not, I think, difficult to solve.

The distinction is *luce clarius* between mosses which produce nothing but moss maill for the privilege of selling peats for fuel, which is not a tiendable produce, and mosses which not only produce this silver duty for peats, or afford peats for home use, but, as producing pasture, are adjuncts to the arable farms adjacent to them, and of which they may form part.

It is said that the integrity of this valuation of Findone and Cookston has been encroached upon—but why? It is because certain subjects are expressly mentioned as producing moss maill allenarly, which maill was deducted from the rental, and the Court held that subjects in this position were clearly not valued. But where a moss is a part or adjunct of lands valued, being possessed as part of an agricultural subject, we must hold the moss to have been valued along with the principal lands. I concur with your Lordship in the alterations proposed on the Lord Ordinary's interlocutor.

LORD NEAVES concurred with the Lord Justice-Clerk.

Agents for Pursuer—Tods, Murray, & Jameson, W.S.

Agents for Defenders—Hill, Reid, & Drummond, W.S.; James Webster, S.S.C.; Hagart & Burn Murdoch, W.S.; Maconochie & Hare, W.S.

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*Tuesday, June* 29.

## FIRST DIVISION.

### HINSHAW & CO. *v.* FLEMING, REID & CO. *et e contra.*

*Reparation—Breach of Contract—Jury Trial.* Motion for a new trial *refused*, the issues, which involved questions under a mercantile contract, having been fairly and fully tried.

These were counter actions of damages for breach of contract. In the year 1866 Hinshaw & Co. had purchased from Fleming, Reid & Co. 8500 gross hank yarn, which was paid for. Hinshaw & Co. became desirous of getting quit of so much of this yarn as they had not used, and on 21st June 1867 the parties met at Greenock, and the following letters were exchanged, viz.:—

"Messrs Fleming, Reid & Co. agree to take back what we have of 30 L. hank yarn, about 6000 grs., at price invoiced, and we order in place thereof about 10,000 grs. B. qu. spool, to sample last submitted. For each gross of spool up to the quantity of hank returned, we pay 17/3, and for balance we pay 15/6 (fifteen and six), comn. colours. Yarn to be delivered, and to take date as our last orders of July 23d and August 10th, 1866.

"*June* 21*st* 1867. WILLIAM HINSHAW & Co.

"21*st June* 1867.

"We accept your order as contained in yours of 21st inst. FLEMING, REID & Co."

In order to the manufacture of spool yarn it is necessary that the yarn spinner should have at an early period instructions as to the different colours and shades of yarn which are wanted. In this case no instructions were furnished until 10th September 1867, and the main question betwixt the parties was whether Hinshaw & Co. had furnished "dyeing instructions" in time, so as to enable Fleming, Reid, & Co. to deliver the spool yarn within the time specified in the contract.

The following were the issues in *Hinshaw & Co. v. Fleming, Reid, & Co.*, viz.:—

"Whether, on or about the 21st June 1867, the pursuers and defenders entered into the contract contained in the documents Nos. 31 and 12 of process; and whether the defenders, in breach of said contract, failed to implement the same, to the loss, injury, and damage of the pursuers?

"Damages laid at £6032, with interest at 5 per cent. from 9th December 1868.

OR,

"Whether the pursuers, in breach of the contract betwixt the parties, failed to implement the same?"

In the counter action the issue was as follows, viz.:—

"Whether, on or about 21st June 1867, the pursuers and defenders entered into the contract contained in the documents Nos. 20 and 45 of process; and whether the defenders wrongfully failed duly to furnish the pursuers with dyeing instructions necessary to enable them to implement their part of the said contract, to the loss, injury, and damage of the pursuers?

"Damages claimed £2000, with interest from 29th January 1869."

The cases were tried together at the last Glasgow Spring Circuit, when the Jury returned verdicts for Fleming, Reid & Co. on all the issues, and assessed the damages due to them at £300.

Hinshaw & Co. moved for a new trial, on the ground that the verdicts were contrary to evidence. Rules having been granted,

SHAND (BURNET with him) shewed cause.

WATSON (with him CLARK) replied.

The rules were unanimously discharged.

LORD PRESIDENT—The case before us arises upon two counter actions, one at the instance of Hinshaw & Co. against Fleming, Reid & Co. and the other at the instance of Fleming, Reid & Co. against Hinshaw & Co. These parties were under a contract for the supply by Fleming, Reid & Co. to Hinshaw & Co. of a certain quantity of spool yarn. In these actions they charge one another with breach of contract, and perhaps it is not very easy to say that either of them is absolutely free from the imputation of breach of contract; but the case is one purely of a mercantile character, and therefore eminently fitted for the determination of a jury. The contract is contained in the letters which occur in the course of a correspondence between the parties, and while we don't at all doubt that the construction of the letters which constitute the contract was for the Court—that is to say for the Court after hearing the evidence and understanding the whole circumstances of the case—the question whether there was breach of contract on either the one side or the other, and, above all, which party was in the end mainly in the right or mainly in the wrong, was entirely for the jury. The jury