The other points which arise under this petition are more difficult. The valuation of the estate is £19,194, and that is sufficient almost to exhaust the consigned fund. The price which is asked for the estate is £19,000. That includes timber valued at £3000, mansion house £600, other houses £750, shooting and fishing £4000. The question is, whether as to these different items we can authorise payment to be made out of the consigned fund, or whether the petitioner must pay them out of his own pocket.

As to the mansion house I have no difficulty. It is very moderate, in fact a mere shooting box. As the other houses, however, I am equally clear that we cannot allow them as part of the investment. The Duke of Hamilton's case decides that point.

In regard to the timber, a great part of it is growing timber, which although a great amenity to the estate, can at any time be cut down by the heir of entail in possession, and so is not a part of the estate in which the consigned money can be invested. If, however, there is part of the timber of such a nature that the heir could not cut it down and carry it off, that is a proper subject for investment. Here we are told that from £400 to £500 worth of timber is of such a nature, being necessary for the protection and beauty of the mansion house. In the case of *Boyd* v. *Boyd*, March 2, 1870, 8 Macph. 637, the Court decided that the heir of entail could not cut down and carry off timber of that sort. So, following that case, I think that £400 should be allowed for timber, but beyond that the petitioner must pay out of his own pocket.

The only question which remains is as to the fishing and shooting. The former need not have been mentioned, for it is only the ordinary right of trout fishing in loch and stream which goes with all properties in the north. But the shooting may raise the rent of the estate, and £4000 is set down as the capitalized value of the shooting. Now this is a highland sporting estate, and I am of opinion that the shooting value is a portion of the estate which may be paid for out of the consigned fund, just as much as the agricultural value.

So I think that the Lord Ordinary should require the petitioner to provide out of his own funds £2600 for timber and £750 for houses, but that the remainder of the price may be paid out of the consigned money.

The other Judges concurred.

The Court pronounced the following interlocutor:—

> "Find that the estate of Aigas in the proceedings mentioned is a competent and proper investment of the consigned money, or so much thereof as may be necessary; find that the value of the mansion house (£660) and of the shootings (£4000) may be stated as part of the price to be paid out of the consigned money; find that the value of the timber to the extent of £2600, and the value of houses other than the mansion house, are not to be stated as part of the price to be paid out of the consigned money; and remit to the Lord Ordinary to proceed farther as shall be just and consistent with these findings."

Counsel for Petitioner—Thoms. Agents—R. & J. A. Haldane, W.S.

Saturday, July 17.

FIRST DIVISION.

[Lord Shand, Ordinary.

CADZOW *v.* LOCKHART.

Process—Damage—Game—Proof—Jury Trial.

Circumstances in which *held* that the defender in an action of damages for injury caused by game had shown good cause why the case should not be tried by jury.

This was an action of damages for injury caused by rabbits, at the instance of William Cadzow, against his landlord, Sir Simon Macdonald Lockhart of Lee. The pursuer was tenant of two farms belonging to the defender, under leases containing respectively the following clauses:—"Reserving also to the proprietor and his foresaids the sole right to the whole game and fish of every kind within the lands hereby let, with full power to himself and to those having his permission to hunt, shoot, or fish and sport on the farm without liability in damages; and the tenant shall be bound to preserve the game of all kinds to the utmost of his power, to interrupt poachers and unqualified persons, and to give information of them to the proprietor and his foresaids, or those acting for him or them; and it is hereby expressly declared and agreed that the tenant shall have no claim whatever for any damage he may sustain from game, hares or rabbits, during the lease, this being held to have been calculated upon and allowed for by him in offering for the farm." "Reserving also to the proprietor and his foresaids the sole right to the whole game, including hares and rabbits of every kind, and to all the fish in the rivers and burns within the lands hereby let, with full power to himself and to those having his permission to hunt, shoot, or fish and sport on the farm, without liability in damages: and the tenant shall be bound to preserve the game of all kinds, including hares and rabbits, to the utmost of his power, to interrupt poachers and unqualified persons, and to give information of them to the proprietor and his foresaids, or those acting for him or them: and it is hereby expressly declared and agreed that the tenant shall have no claim whatever for any damage he may sustain from game, hares and rabbits during the lease, this being held to have been calculated upon and allowed for by him in offering for the farm."

The pursuer moved that the case be tried by jury, but the defender opposed the motion on the ground that the case principally turned upon the construction of the above clauses, and the case was therefore better fitted for trial by proof before the Lord Ordinary than by jury.

The Lord Ordinary allowed a proof, and the pursuer reclaimed.

At advising—

LORD PRESIDENT—The question is whether the defender in this case has shown good cause why it should not be sent to a jury. The clause of reservation of game in the lease is peculiar, and questions of delicacy may arise as to what kind of proof is required to enable the tenant to get the better of the clause. The result of the case will thus depend upon what is held to be the construction of the clause—a question which the Lord Ordinary

has rightly declined to determine before he has the facts of the case before him. If the case went to a jury, the construction of the clause would form matter of direction to them by the presiding Judge. If he went wrong, the only remedy would be by the somewhat awkward mode of a bill of exceptions. If, however, we send the case to proof before the Lord Ordinary, a reclaiming note in ordinary form will bring the whole matter before the Court. A further consideration is the great difficulty there would be to adjust issues to try the case. I am therefore of opinion that the interlocutor of the Lord Ordinary should be adhered to.

The other Judges concurred.

The Court adhered.

Agents for Pursuer—J. & R. D. Ross, W.S.
Agent for Defender—Hector F. M'Lean, W.S.

OUTER HOUSE.

HENRY REEDIE *v.* GEORGE YEAMAN AND JAMES YEAMAN.

Husband and Wife—Property—Beneficial Expenditure—Heir—Recompense.

Held that a husband who improved his wife's property, making it more valuable to her heir, has no claim against the heir for the amount to which he is *lucratus*.

Husband and Wife—Mutual Settlement—Revocation—Gratuitous Disponee—Recompense.

A wife possessed certain heritable property, and by a mutual disposition executed by her and her husband after marriage, she conveyed this property to him after her death. The mutual deed contained a power of revocation to either of the spouses, and the wife exercised the power by settling the property on her children by a former marriage, to the exclusion of her husband. The husband became aware of the deed for the first time at her death, and in the meantime he had expended a considerable sum in improving the property. The money so expended was principally obtained from his wife or her property. *Held* that as the husband's reasonable expectations had been disappointed by the wife's secret revocation of the mutual settlement, he was entitled to recompense from the disponee taking the property for the value of the expenditure thereon in so far as beneficial.

Observations on case of *Nelson* v. *Gordon*, 26th June 1874, 1 Rettie 1093.

This was an action of reduction and payment, raised the instance of Henry Reedie, a labourer at Lady-nk, under the following circumstances. The pur-er had in the year 1855 married a Mrs Helen imsden or Yeaman, widow of Alexander Yeaman, d mother by him of the present defenders. At e date of this marriage Mrs Yeaman was possessed a small heritable property near Ladybank, inding a house, but burdened to the extent of 00. Upon 27th January 1860 the pursuer and wife, the mother of the defenders, executed a tual disposition and settlement, by which there conveyed to the survivor of the spouses whole of their joint property. The settle-nt contained the following clause:—"And we, each of us, reserve full power and liberty, ny time during our lives, and even on deathbed, to alter, innovate, or revoke these presents in whole or in part." The pursuer alleged that after the marriage he expended from his own funds a considerable sum in building additions to the property, and had in this way considerably *increased* its rental. A further burden of £50 was, however, laid on the property. On 23d November 1866 Mrs Reedie, without the knowledge of the pursuer, executed a settlement by which she bequeathed the whole of her property to her two sons, the present defenders. Mrs Reedie died in April 1872. It was this second deed which the pursuer now sought to have reduced, on the ground that the mutual disposition and settlement was not revocable by Mrs Reedie without his consent. There was an alternative conclusion that in the event of the deed not being set aside the defender should make payment to him of the sum of £150, being the amount which he alleged had been expended by him *bona fide* in the improvement of the property in the lifetime of his wife.

The defenders, on the other hand, contended that as the mutual disposition and settlement contained an express power of revocation, Mrs Reedie was entitled to execute the settlement of 1866, and that, as the pursuer had never expended any funds upon the property in question, he had no pecuniary claim against them.

The action having come before Lord Mackenzie, his Lordship, after hearing parties, issued an interlocutor repelling the conclusions for reduction, but allowing a proof of the pursuer's averments relative to his expenditure upon the property. This proof was afterwards taken before Lord Young, who pronounced the following interlocutor:—

"The Lord Ordinary having heard counsel for the parties, and considered the proof, record, and process, Finds, that the pursuer is entitled to be recompensed by the defenders for improvements made by him on the property referred to on record, now belonging to the defenders, and that to the extent of £120, but subject to deduction of the sum of £50 borrowed on the said property in 1867, and now constituting a burden thereon. Therefore decerns against the defenders for payment to the pursuer of the sum of £70 sterling, with interest from 23d April 1872, at five per cent. Finds no expenses due to or by either of the parties.

"*Note.*—The material facts of the case as admitted or proved seem to be as follows:—The pursuer's deceased wife was at the date of her marriage to him in 1855 proprietor of house property of the fee simple value of £190, and of the yearly value of £14—burdened with the debt of £100. In 1860 the spouses executed a mutual settlement, whereby the wife on her part conveyed her whole estate, and specially the house property (and indeed she had no other) to the pursuer after her death. This settlement was expressly declared to be revocable not only by both parties but by either of them, and it was in fact revoked by the wife, who conveyed her property to the defenders, her sons by a former marriage; she died in 1872, and the pursuer then first became aware of the revocation by her of the settlement of 1860. During the subsistence of the marriage the pursuer made additions to the house property at a cost of about £150—and they must be regarded as real improvements, for it is proved that the property is now more valuable by about that amount than it was at the date of the marriage. The additions were made at various times between 1859 and 1871, and I think probably with funds which the pursuer derived from his wife or her