Counsel for the Pursuer (Appellant)—C. N. Johnston, K.C.—Cochran Patrick. Agents—Oliphant & Murray, W.S.

Counsel for the Defenders (Respondents)—Guthrie, K.C.—Macmillan. Agents—John C. Brodie & Sons, W.S.

Saturday, February 10.

SECOND DIVISION.

[Lord Dundas, Ordinary.

POLLOKSHAWS CO-OPERATIVE SOCIETY, LIMITED *v.* STIRLING MAXWELL.

Superior and Vassal—Casualty—Redemption—Calculation of Redemption Price—Building Site—Conveyancing (Scotland) Act 1874 (37 *and* 38 *Vict. cap.* 94), *sec.* 15.

A co-operative society purchased certain subjects which were at the date of the purchase, and had been for years previously, covered with buildings. With a view to the erection of new buildings they demolished these, and when the ground was bare, except for the foundations of the new buildings, brought an action against the superior concluding for declarator, *inter alia*, that the redemption price of the casualties was a certain sum which was arrived at by taking as a basis of the calculation the value of the subjects if let on a lease of ordinary duration for such a purpose as a builder's yard.

Held (*aff.* the Lord Ordinary (Dundas), that in estimating the "yeir's mail" the subjects must be regarded as a building site, and that inasmuch as, on the evidence, £67, 10s. would have been a fair feu-duty, that sum, with the addition of the fifty per cent. required by statute, the casualties being exigible only on the death of the vassal, *i.e.*, £101, 5s., was the amount payable for the redemption of the casualties.

Superior and Vassal—Casualty—Redemption of Casualties—Payment of Outstanding Casualties—Time before which Payment must be Made—"Before Redemption shall be Allowed"—"Allowed"—Conveyancing (Scotland) Act 1874 (37 *and* 38 *Vict. cap.* 94), *sec.* 15.

Section 15 of the Conveyancing (Scotland) Act 1874 has the following proviso:—"And provided always that before any such redemption, otherwise than by agreement, shall be allowed, any casualty which has become due shall be paid." . . .

Held (*per* Lord Dundas, Ordinary) that, where agreement has failed, redemption is only "allowed" when the decree of the Court is pronounced, and consequently that a casualty being due and outstanding at the raising of the action did not make incompetent an action brought by a vassal for the redemption of the casualties of his holding.

Superior and Vassal—Casualty—Redemption of Casualties—Date of Redemption—Date at which Casualty to be Estimated—Conveyancing (Scotland) Act 1874 (37 *and* 38 *Vict. cap.* 94), *sec.* 15.

In an action by a vassal for redemption of casualties, *held* (*per* Lord Dundas, Ordinary) that "the date of redemption" as at which "the amount of the highest casualty" is to be "estimated" is the date at which the matter becomes litigious by the raising of the action.

By the 15th section of the Conveyancing (Scotland) Act 1874 it is provided—"The casualties incident to any feu created prior to the commencement of this Act shall be redeemable on such terms as may be agreed on between the superior and the proprietor of the feu in respect of which they are payable: And failing agreement, all such casualties, except those which consist of a fixed amount stipulated and agreed to be paid in money or in fungibles at fixed periods or intervals, may be redeemed by the proprietor of the feu in respect of which the same are payable on the following terms, viz.—In cases where casualties are exigible only on the death of the vassal, such casualties may be redeemed on payment to the superior of the amount of the highest casualty, estimated as at the date of redemption, with an addition of fifty per cent. . . .: And provided always, that before any such redemption, otherwise than by agreement, shall be allowed, any casualty which has become due shall be paid . . . and that the redemption shall apply only to future and prospective casualties."

This was an action brought on 7th September 1904 by the Pollokshaws Co-operative Society, Limited, against Sir John Maxwell Stirling Maxwell of Pollok, to have it found and declared (1) "that the pursuers are entitled to redeem the casualties which may hereafter become due and payable or exigible to the defender, as superior of the subjects . . . for the said subjects," which were there described, and (2) "that the redemption price of the said casualties (inclusive of an addition of fifty per cent. thereon) amounts to £26, 1s. 3d. sterling, or such other sum, more or less, as may be ascertained in the course of the process to follow hereon to be the amount of the highest casualty, estimated as at the date of signeting hereof, inclusive of said addition of fifty per cent." The subjects in question extended to 1495 square yards or thereby and were situated in Main Street, Pollokshaws. The sum of £26, 1s. 3d. pursuers arrived at by adding £4, 7s. 6d., at which part of the subjects in question were let, and £13, which pursuers averred was the annual value of the remainder, and adding to the result the additional fifty per cent. as required by the statute.

The pursuers had become proprietors of these subjects (which had been feued in or prior to 1752) at Martinmas 1903, the purchase price, including the buildings which then stood thereon, being £1350. At the date of the purchase and for many years prior thereto the ground had been covered

with buildings, but on acquiring it the pursuers, with a view to erecting new buildings, had proceeded to demolish the then existing buildings. At the date of signeting the summons the old buildings had, with one unimportant exception, been removed and the ground was bare except that there had been laid for the new buildings concrete foundations, and on these certain walls had been raised to a height of about two feet above the ground. The subjects (*i.e.*, the old buildings on the ground) had been let for the year from Whitsunday 1903 to Whitsunday 1904 for £107, 12s. 6d., and were entered in the valuation roll for 1903-04 at £135, 2s. 6d. The defender averred that the annual value was not less than this sum, and offered to accept as the basis of calculating the redemption, the sum of £86, 2s., which was the sum paid by the pursuers on the 17th October 1904, after the raising of the action and lodging of defences, as a casualty in respect of their entry. Casualties were exigible only on the death of the vassal.

The defenders, *inter alia*, pleaded—"(1) The pursuers' statements being irrelevant and insufficient to support the conclusions of the summons, the action should be dismissed. (3) The pursuers being, at the date of raising the action, still due to the defender a composition in respect of their implied entry with the defender, the action is premature and should be dismissed. (4) *Separatim*—In respect that payment of all prior due casualties is a statutory precedent to redemption, and that a casualty was still due when the action was raised, the date at which the redemption price fell to be estimated had not arrived, and the action is therefore incompetent, and falls to be dismissed. (5) In respect that the sum at which the pursuers seek to redeem the casualties is inadequate, having regard to the yearly rental or value of the subjects at the present time, the defender should be assoilzied. (6) The pursuers, as vassals, having at their own hand demolished the buildings, which, at their entry, formed the security for the defender's rights as superior, the value of the subjects in a question with him, if they thereupon claim to redeem the casualties of superiority, is to be taken as it stood before they commenced the process of demolition, and not just as the process of demolition is complete."

On 8th March 1905 the Lord Ordinary (DUNDAS) pronounced this interlocutor:—"Repels the first, third, fourth, and sixth pleas-in-law for the defender: Finds that the redemption price of the future casualties ought to be ascertained upon the basis of the true yearly value of the subjects described in the summons as at 7th September 1904, being the date when the action was raised, having in view their actual condition as at that date, and all their potentialities and capacities in the direction of feuing or otherwise: *Quoad ultra* continues the cause."

Opinion.—"The pursuers became proprietors in 1903 of certain lands in the burgh of Pollokshaws, of which the defender is the superior, and which were originally feued out by an ancestor and predecessor of his in or prior to 1752. The leading conclusion of the summons is . . . [*His Lordship here narrated the conclusions of the summons as above quoted.*] . . . The defender states preliminary pleas to the effect that the action is (*a*) premature, and (*b*) incompetent. These pleas are based upon the allegation that, when the action was raised, a composition of a year's rent of the subjects, due by the pursuers to the defenders in respect of their implied entry at Martinmas 1903, had not been paid. The summons was signeted on 7th September 1904, and it is admitted that on 17th September 1904, after defences had been lodged, a composition of £86, 2s. was paid to and accepted by the defender as the adjusted amount of that composition. The receipt, which is in unqualified terms, is produced in process. . . . [*His Lordship here stated a contention that the casualty had been paid or tendered prior to the raising of the action, which was based on correspondence, but which he found unnecessary to decide.*] . . . The point, I think, must be decided upon a construction of section 15 of the Conveyancing (Scotland) Act 1874, and particularly of its proviso 'that before any such redemption, otherwise than by agreement, shall be allowed any casualty which has become due shall be paid.' In my opinion, where agreement has failed, and the matter is litigated, the redemption is only 'allowed' when the decree of the Court is pronounced. It seems to me that this is the proper and natural meaning of the words used, and that any other reading might be productive of hardship and injustice to the vassal. The preliminary pleas stated by the defender may now be briefly examined. Plea 3 states that the action is 'premature,' because at the date of raising it the pursuers were due to the defender a composition. This plea, in my judgment, proceeds upon an erroneous construction of the statute. The composition was admittedly paid on 17th October 1904, and I think, for the reasons which I have indicated, that that was timeous payment. Plea 4, which goes to the competency of the action, begins with the words—'In respect that payment of all prior due casualties is a statutory precedent to redemption.' So far I agree. But it proceeds thus—'and that a casualty was still due when the action was raised, the date at which the redemption price fell to be estimated had not arrived and the action is therefore incompetent.' This, in my opinion, is false reasoning. I think, as I shall explain immediately, that the redemption price payable in satisfaction of future casualties must be estimated as at the date of the action, but, as I have already stated, the amount of any outstanding casualty may, in my judgment, be adjusted at any time before redemption is 'allowed' by the Court. I am therefore against the defender in regard to his preliminary pleas.

"The question upon the merits of the case relates to the mode in which the redemption price is to be ascertained, or, in other words, the proper principle upon which the 'amount of the highest casualty, estimated as at the date of redemption,'

ought to be calculated. The facts are peculiar, and the question is an interesting one. It appears from the defender's statement of facts and the pursuers' answers thereto, that when the latter acquired the subjects, which are situated in Main Street, Pollokshaws, the ground was, and had been for years, covered with buildings, yielding a yearly rental of somewhere over £107. The pursuers, after acquiring the subjects at Martinmas 1903, warned the tenants to remove from the buildings, which were vacated about April 1904, and, with a view to erecting new buildings, they proceeded to demolish the buildings then existing. The parties are agreed that at the date of raising the action the buildings had all (with I think one unimportant exception) been removed, and the ground was practically bare, except that concrete foundations for new buildings had been laid by the pursuers. Parties did not seem to be quite at one as to how far towards completion these new buildings have now proceeded, but the fact does not seem to be material. In these circumstances the parties concurred in asking me to decide upon what basis in principle the redemption price (assuming that the action is allowed to proceed) ought to be ascertained. The pursuers argued that when the action was raised, the ground, being in the condition above indicated, was capable of yielding only a very modest rental, but that upon that rental, plus 50 per cent. extra, the defender's rights must be estimated. The defender, on the other hand, maintained in terms of his sixth plea-in-law that the value of the subjects 'is to be taken as it stood before they' (*i.e.*, the pursuers) commenced the process of demolition, and not just 'as the process of demolition is complete.' I think the first point is to determine what the statute means as 'the date of redemption' as at which 'the amount of the highest casualty' is to be 'estimated.' It appears to me that that date must be taken to be that at which the matter becomes litigious by the raising of the action, and that this is made clear by the case of *School Board of Neilston*, 15 R. 44, and the later case of *The City of Aberdeen Land Association, Ltd.*, 2nd July 1904, 41 S.L.R. 647. If this be so, then I think that the 'highest casualty' should be 'estimated by ascertaining what at that date (in this case 7th September 1904) would have been the true yearly value of the subjects, having in view their actual condition, and all their potentialities and capacities in the direction of feuing or otherwise. The case of *Neilston School Board*, to which I have referred, carries one far in that direction. There, in an action for redemption of future casualties, the value of the subjects for the purpose of computing the redemption price was taken upon its actual and not upon a future or conjectural basis, although the ground had been bought avowedly for the purpose of erecting school buildings upon it. The defender's proposal seems to be to value the subjects upon the footing that they were covered with buildings which did not in fact exist at the time when, as I hold, the amount of the highest casualty must be estimated. This in my judgment is an unsound view, and is not in accordance with the case of *Neilston School Board*. It is also, I think, not in accordance with the principles laid down in the important case of *Earl of Home* v. *Lord Belhaven*, 5 F. (H.L.) 13. I shall therefore repel the 1st, 3rd, 4th, and 6th pleas for the defender; pronounce a finding in the sense above indicated as to the principle upon which the redemption price should be ascertained; and *quoad ultra* continue the cause. If leave to reclaim is desired, I will of course grant it."

Thereafter the Lord Ordinary allowed a proof, and on 1st July 1905 pronounced this interlocutor:—"Finds and declares that the pursuers are entitled to redeem the casualties which may hereafter become due and payable or exigible to the defender, as superior of the subjects and others described in the summons, for the said subjects, and decerns: And further, finds and declares that the redemption price of the said casualties amounts to £101, 5s. sterling, being the amount of the highest casualty estimated as at the date of the signeting of the summons, with an addition of fifty per cent., and decerns: *Quoad ultra* continues the cause: On the motion of the pursuers grants leave to reclaim."

Opinion—"On 7th September 1904 the subjects in question were not let, and did not produce rent to the pursuers, who were in the natural possession of them. The problem therefore is to ascertain 'the sum for which they might then be let.' (*Blantyre* v. *Dunn*, 20 D. 1188, Lord Curriehill, 1198.) This clearly involves an estimate of some sort, and one must consider upon what basis the estimate ought to be made. The decided cases establish that a feu is within the expression in the Act 1469, c. 36, 'as the lands are set,' and that when the lands are sub-feued the stipulated *reddendo*, if adequate and not illusory, forms the measure of the superior's claim for a composition, and not the rental actually derived by the feuar. (*E. of Home*, 5 Fr. (H.L.) 13, Lord Davey, 16; *City of Aberdeen Land Association, Limited*, 6 Fr. 1067.) The subjects here in question were, at the date at which the casualty falls to be assessed, admittedly and undoubtedly 'a building site,' although they were practically bare at the time. They had been covered with buildings for many years prior to 1904, and are now so covered, and their appropriate use was as a site for buildings. Now, I think that the result of the evidence is that a fair feu-duty, if these then vacant lands had been sub-feued in 1904, would have been not less than £67, 10s., and I consider that that must be taken as 'the sum for which they might then be let.' It represents, in my judgment, the true yearly value to the pursuers, or to anyone whom they had put in their place, of this building site at the time. Mr Craigie pointed out that by the terms of their titles the pursuers are prohibited from sub-feuing without the consent of the superior, but while,

of course, the superior could not compel the pursuers to feu, the state of the title does not appear to me to affect the legitimacy of referring to the feu-duty which might have been obtained if the prohibition had been non-existent, or had been waived by the superior, in order to estimate the true yearly value of the ground at the date in question. Mr Craigie further argued that, in fixing the amount of the composition I must have regard to the rent which could have been got for the subjects in 1904 upon a lease for one year only. I know of no authority for this proposition, which I consider to be unsound, and which would, I apprehend, lead to extraordinary results if universally applied. The pursuers' proposal is to treat the subjects as if they had been let for one year only for a purpose to which they never were put in fact, and which was not their appropriate use, viz.—as a store yard for a contractor or a builder, or for some other similar purpose. This seems to me to err in favour of the vassal as gravely as the defender's original proposition, embodied in his sixth plea-in-law, erred in favour of the superior. Mr Craigie laid great stress upon the view that 'wherever and so far as a payment or the conditions on the exercise of a right are determined by statute, there is no room for equitable considerations in applying it' (per Lord Davey in *E. of Home*, 5 Fr. (H.L.), at p. 16); and similar doctrine may be found in the case of *Lord Belhaven*, 23 R. 423, which was decided upon a construction of the Aberdeen Act. But in these cases there were actual rents or royalties during the years respectively in question, and the Court, in holding that these must be taken as fixing the amount of the composition, pointed out the error, in such circumstances, of departing from the plain direction of an Act, and substituting, upon considerations of supposed equity, for the actual rent of the year a sum arrived at either by taking an average of the rents of other years or by way of a percentage upon a basis of capitalisation. The doctrine therefore which I entirely accept seems to me to have no application to the present case, where I find no actual rent, and must arrive, by some method of estimation, at what the 'yeir's mail' should be held to be. I do not think that the present case is precisely governed by any of the preceding decisions, because the facts are different and peculiar; but the conclusion which I have reached seems to me to be in harmony with the principles laid down in those cases. I therefore assess the composition at the sum of £101, 5s., being the sum of £67, 10s. with an addition of 50 per cent., and find and declare accordingly."

The pursuers reclaimed. In the course of the hearing in the Inner House it was pointed out that the Lord Ordinary had not dealt separately with the part of the subjects actually let (a temporary building let as a hall) at £4, 7s. 6d., but parties agreed that this was a small matter, and that its not being dealt with separately was of no moment.

Argued for pursuers—What had to be determined was the sum for which the lands might have been let at September 7, 1904, if let on a lease of ordinary duration (not necessarily, as the Lord Ordinary had represented their argument, on a lease for one year only)—*Lord Blantyre* v. *Dunn*, July 1, 1858, 20 D. 1188, Lord Curriehill at 1198. In the same street an adjoining stance was let as a builder's yard on a five years' lease at £10 per annum, and the proportionate yearly value of the ground in question was not more than £13. The Lord Ordinary had taken as the sum for which the ground might be let the feu-duty which he estimated would have been obtained if the lands had been sub-feued in 1904. An estimated feu-duty had never been taken as the annual letting value. He had reached the sum of £67, 10s. by taking 5 per cent. on the purchase price of £1350—a price which represented not merely the ground but also the buildings on it at the date of purchase. This method of arriving at the yearly value was contrary to *Earl of Home* v. *Lord Belhaven and Stenton*, May 25, 1903, 5 F. (H.L.) 13, 40 S.L.R. 607; and *City of Aberdeen Land Association, Limited* v. *Magistrates of Aberdeen*, July 2, 1904, 6 F. 1067, 41 S.L.R. 647. Further, as regarded about two-thirds of the ground in question, there was a prohibition against subinfeudation; of this the Lord Ordinary, when he pronounced the interlocutor of 8th March, was not aware—that portion had no "potentialities and capacities in the direction of feuing." In estimating its yearly value the ground ought not to be treated as a building site—the vassals might, after the action was raised, have changed their minds and not built. That a vassal proposed to build did not affect the basis of calculating the redemption price of casualties—*School Board of Neilston* v. *Graham*, November 16, 1887, 15 R. 44, 25 S.L.R. 51. [Lord Kyllachy asked for a reference to *Cockburn Ross* v. *Governors of George Heriot's Hospital*, June 6, 1815, F.C. App., 6 Pat. App. 640, 2 Ross's Leading Cases (Land Rights) 193.]

Argued for the defender—The sum for which the land might be let—the principle laid down by Lord Curriehill in *Blantyre* v. *Dunn*, *supra*—must form the basis of the redemption price, because here there was no actual rent—*Stewart* v. *Bulloch*, January 14, 1881, 8 R. 384, 18 S.L.R. 240. For this reason too *Home* v. *Belhaven*, *supra*, and similar cases, were inapplicable. The prohibition against subinfeudation applied only to about one-third not two-thirds of the ground, but in any case it could not affect the annual value of the ground, for it might have been let on a long lease—long enough to make it worth while the tenant building—99 or even 999 years; feu-duties and tack-duties equally fell under the Act of 1469, cap. 36; and a feu was but a perpetual lease—Stair, ii, 3, 34, ii, 4, 16, ii, 4, 21. The ground had for many years been dedicated as a building site, and had at the raising of the action again begun to be applied as such. This distin-

guished it from *The School Board of Neilston, supra*, and it fell under the saving clause of the Lord Justice-Clerk's opinion therein. That case, moreover, dealt with a ground annual, a *debitum fundi*, not with a contract of location. The commencement of building operations showed that to the pursuer the value was as a building site, and the open market was not necessarily the test of value — *M'Laren* v. *Burns*, February 18, 1886, 13 R. 580, 23 S.L.R. 398; *Hill* v. *Caledonian Railway*, December 21, 1877, 5 R. 386. To ascertain the appropriate use of the ground and the year's rent therefor, the whole year must be looked at, not one isolated day in it when it happened to be bare—*Houstoun* v. *Buchanan*, March 1, 1892, 19 R. 524, 29 S.L.R. 436.

At advising—

LORD JUSTICE-CLERK—The subject in respect to which a casualty has to be fixed in this case is one which up to 1904 was occupied by buildings, and which, although it was not occupied by buildings at the date of the summons, was in an unoccupied state solely because the buildings were pulled down with a view to the immediate erection of new buildings which have since been placed upon the ground. It was therefore plainly a building site, and the question to be decided is for what could it be let at the date of the raising of the action in these circumstances. The pursuers maintain that this should be ascertained by a consideration of what could be got for the site, not as a building stance but as a piece of bare ground let for a year for some temporary purpose, such as a builder's yard or any similar use to which a piece of ground on which there was no immediate prospect of buildings being put up might be put for a time. I can see no ground for taking any such course in estimating the fair value from year to year of this ground, which was only for the moment a site without buildings actually standing on it, but which never for any year of time stood in that position. The facts in this case are peculiar, and I agree with the Lord Ordinary that it cannot be ruled by any previous decision. But I agree with him also that in taking the course he has done, he infringes in no way any principle on which any of the decided cases is based. I think the assessment of the fair feu-duty at the sum at which he has fixed it, is a perfectly fair assessment on the data before him, and must be taken as "the sum for which they might then be let."

I would therefore move that his judgment be affirmed.

LORD KYLLACHY—I am of the same opinion. I am entirely satisfied with the Lord Ordinary's judgment.

LORD STORMONTH DARLING and LORD LOW concurred.

The Court adhered.

Counsel for Pursuers (Reclaimers) — Craigie, K.C.—J. D. Millar. Agents—Inglis, Orr, & Bruce, W.S.

Counsel for Defender (Respondent) — Wilson, K.C.—Chree. Agents—Carment, Wedderburn, & Watson, W.S.

Saturday, February 10.

SECOND DIVISION.

CORBET'S TRUSTEES *v.* ELLIOTT'S TRUSTEES AND OTHERS.

Succession — Vesting — Vesting subject to Defeasance — Conditional Institution of Class Members of which not Ascertained —Direction to Sell and Divide—Effect on Postponement of Vesting.

A truster directed his trustees to hold his heritable property and apply the annual proceeds for the maintenance of A, declaring that if A should be survived by lawful issue his trustees should hold the heritable property and apply the proceeds for the maintenance and education of said issue, and should convey it to said issue equally on their attaining majority; but in the event of A not having lawful issue, or of his issue dying before majority, then his trustees were to "thereupon sell said heritable property and divide the free proceeds thereof as follows:—viz., one-fourth part thereof to the children of B equally, one-fourth to the children of C equally, one-fourth to E, one-fourth to F, whom failing to his children equally *per capita*." A survived the testator and died unmarried.

In a special case dealing with the provisions to B's children, *held* that vesting was not postponed till the death of A, but took place *a morte testatoris* in the children of B alive at the time of the testator's death, subject to defeasance in the event of A dying leaving issue.

Forbes v. *Luckie*, January 26, 1838, 16 S. 374; *Carleton* v. *Thomson*, July 30, 1867, 5 Macph. (H.L.) 151; *Miller* v. *Finlay's Trustees*, February 25, 1875, 2 R. (H.L.) 1, *commented on.*

Succession—Vesting—Uniform Period of Vesting—No Presumption in favour of.

Per Lord Kyllachy—"I think it is clear both on principle and authority that there is no general presumption as against vesting of different provisions at different periods."

Succession—Vesting—Destination to Issue —Contingencies depending on Birth or Survivance of Issue—Conditional Institution of Issue—Suspensive or Resolutive Condition.

Per Lord Kyllachy—"It is now, I apprehend, settled law that destinations to issue or contingencies depending on the birth or survivance of issue operate generally not as suspensive but as resolutive conditions, and have therefore no effect in the event of no issue in fact existing.

Thompson's Trustees v. *Jamieson*, January 26, 1900, 2 F. 470, 37 S.L.R. 346,