Saturday, July 2.

SECOND DIVISION.

[Lord Low, Ordinary.

THE CITY OF ABERDEEN LAND ASSOCIATION, LIMITED *v.* THE MAGISTRATES OF ABERDEEN.

Process—Summons—Competency—Action for Redemption of Casualties—Lands on which Casualties to be Redeemed of Greater Extent than those Particularly Described in Summons—Court of Session Act 1868 (31 *and* 32 *Vict. cap.* 100), *sec.* 29.

Section 29 of the Court of Session Act 1868 provides—"It shall not be competent by amendment of the record . . . to subject to the adjudication of the Court any larger sum or any other fund or property than such as are specified in the summons . . . unless all the parties interested shall consent to such amendment."

A vassal raised against his superior an action for the redemption of the casualties of the lands of R and others held by him of the defender, in terms of section 15 of the Conveyancing Act of 1874. The action concluded for declarator that the pursuer as proprietor, in virtue of a disposition dated in 1875 of all and whole the lands thereby conveyed to him of R and others, under certain exceptions specified, the subjects of which the casualties are to be redeemed as after mentioned, being the parts in so far as belonging to the pursuer at the date of signeting hereof, of the lands of R and others, contained in a certain charter of resignation, was entitled to redeem the whole casualties of superiority incident to the lands and others belonging to the superiors, on the pursuer making payment to the defender of a specified sum, being the amount of the highest casualty exigible therefrom at the date of redemption, with an addition of 50 per cent., "or in the event of the defenders establishing any valid objection to the said amount, then of such other sum as shall be found in the course of the process to follow hereon to be the true amount of said highest casualty, with said addition of 50 per cent."

In the course of the action it was ascertained that the pursuer was a vassal of the defender in other parts of the lands of R besides those covered by the particular description of the lands in the summons, and the sum tendered as the redemption price was therefore less than the amount actually due.

The defender having on this ground objected to the competency of the action, *held* (*aff.* judgment of Lord Low, Ordinary—*diss.* Lord Moncreiff) that the objection to the competency of the action was unfounded.

Superior and Vassal—Casualty—Redemption of Casualties — Split — Competing Titles — Indefeasible Mid-Superiority — General Exception of Feu-rights and Infeftments in Warrandice Clause.

Prior to 1861, A, the proprietor of lands of which the Magistrates of Aberdeen were superiors, feued these lands, and then conveyed the mid-superiority thereof to B, by disposition expressly bearing to be a conveyance of the mid-superiority, and with an *a me vel de me* holding. B was infeft but did not enter with the superior. In 1861 A disponed the lands to C. In the warrandice clause of this disposition there was an exception of "the feu-rights and infeftments of certain portions of the said lands granted by me and my authors to our vassals therein." In 1865 C entered with the superiors, and in 1875 conveyed the lands to D. In an action for the redemption of casualties due in respect of subjects of which the lands above mentioned formed a part, brought by D against the Magistrates of Aberdeen, D maintained that no casualties were due by him in respect of the mid-superiority of these lands, on the ground that the said mid-superiority had vested in B by A's conveyance to him. *Held* (*aff.* judgment of Lord Low, Ordinary) (1) that the disposition to B was not included in the reservation of feu-rights in the disposition to C; (2) that the mid-superiority vested in D, in respect that he first completed his title by entry with the superiors; (3) that this entry formed an impediment which prevented B from being impliedly entered in virtue of the provisions of the Conveyancing Act 1874, and consequently that D was now vested in the mid-superiority, and therefore liable for the casualties due in respect thereof.

Superior and Vassal—Casualty—Redemption of Casualty — Sub-Feu — Entry — Lands Feued for Nominal Feu-Duty and Grassum—Measure of Casualty.

A vassal feued a portion of his feu for a nominal feu-duty and a grassum, In an action thereafter brought by the vassal against his superior to redeem the untaxed casualty of non-entry applicable to his feu—*held* that the measure of the casualty incident to the sub-feu was not the nominal sub-feu-duty and 5 per cent. interest on the grassum, but the actual rent of the land at the date of the raising of the action.

Campbell v. *Westenra*, June 28, 1832, 10 S. 734, *not followed*, as disapproved of in *Earl of Home* v. *Lord Belhaven and Stenton*, May 25, 1903, 5 F. (H.L.) 13, 40 S.L.R. 607.

Superior and Vassal—Casualty—Redemption of Casualty — Sub-Feu — Entry—Lands Feued for Progressive Feu-Duty —Measure of Casualty.

A vassal sub-feued a portion of his feu for a progressive-feu-duy amount-

ing to £26 the first year, £52 the second year, £78 the third year, and £104 thereafter.

In an action brought in the second year by the vassal against his superior to redeem the untaxed casualty of non-entry applicable to his feu—*held* (*rev.* judgment of Lord Low) that the measure of the casualty incident to the sub-feu was the sub-feu-duty actually paid in the year in which the action was brought, viz., £52.

Superior and Vassal—Casualty—Redemption of Casualty — Sub-Feu — Entry—Lands Feued for Postponed Feu-Duty——Measure of Casualty.

A vassal sub-feued a portion of his feu for a feu-duty of £50, but the feu-charter provided that no feu-duty was to be exigible for two years after the date of the feu-right.

In an action brought during the second year by the vassal against his superior to redeem the untaxed casualty of non-entry applicable to his feu, *held* (*aff.* judgment of Lord Low—*diss.* Lord Moncreiff) that the measure of the casualty incident to the land sub-feued was the postponed sub-feu-duty of £50.

Superior and Vassal—Casualty—Redemption of Casualty—Sub-Feu—Entry—Sum Paid by Sub-Feuar under Feu-Contract for Expense of Streets Formed on Sub-Feu—Measure of Casualty.

A vassal constructed streets on his feu, and thereafter sub-feued a portion of his feu for a feu-duty besides taking the sub-feuar bound to repay him a proportion of the sum expended by him in forming the streets.

In an action thereafter brought by the vassal against his superior to redeem the untaxed casualty of non-entry applicable to his feu—*held* that the measure of the casualty incident to the sub-feu was the sub-feu-duty, and that the payment made by the sub-feuars in respect of the streets did not fall to be taken into consideration in calculating the amount of the casualty.

Superior and Vassal — Redemption of Casualty — Part of Feu Sold without Notice of Change of Ownership to Superior—Conveyancing Act 1874 (37 *and* 38 *Vict. c.* 94), *sec.* 4 (2), (3), *and* (4).

Held by Lord Low, Ordinary, and acquiesced in, that a vassal was not bound to redeem the casualties applicable to portions of his feu which he had sold without giving to his superior the notice of change of ownership which is required by section 4 (2) of the Conveyancing Act 1874.

By charter of resignation and novodamus dated 18th July 1805, upon which infeftment followed, the Magistrates of Aberdeen feued out the lands of Rubislaw and others to James Skene.

By disposition dated 15th May 1861 James Skene "for various causes and considerations" disponed the lands of Rubislaw and others with certain exceptions to his son George Skene. The disposition contained the following clause:—"And I grant warrandice under exception of the feu-rights and infeftments of certain portions of the said lands and others granted by me and my authors to our vassals therein." The disposition was confirmed by writ of confirmation by the Magistrates of Aberdeen in favour of George Skene dated 26th April 1865.

By disposition dated 19th and recorded 21st June 1862 George Skene disponed his lands of Rubislaw and others to Sir Alexander Anderson for £56,541. In this deed the clause of warrandice ran—"I grant warrandice under exception of the current tacks and feu-rights of and affecting said subjects."

By disposition dated 25th and 26th May and recorded 22nd July 1875 Francis Edmond, advocate in Aberdeen, trustee on the sequestrated estate of Sir Alexander Anderson, disponed the lands of Rubislaw and others, excepting certain portions therein specified, to the City of Aberdeen Land Association, Limited, for £105,000.

Numerous feu-dispositions of portions of the lands of Rubislaw and others were granted by the Aberdeen Land Association Limited and their authors, and many of the mid-superiorities thus created were sold to sub-vassals and others.

In these circumstances the Aberdeen Land Association, Limited, desired to redeem the casualties of, *inter alia*, the lands of Rubislaw and others. As they were unable to come to terms witn the Magistrates of Aberdeen as to the amount of the redemption price and the extent of the subjects on the yearly value of which it was to be estimated, they raised an action on 13th May 1898 against the Magistrates of Aberdeen, concluding for declarator that they were entitled to redeem the casualties in terms of the 15th section of the Conveyancing (Scotland) Act 1874, and for decree ordaining the defenders to discharge the casualties on payment of the redemption money.

Various questions were discussed in this action, and by direction of the Lord Ordinary the pursuers lodged a plan in which the portions of the land to which different questions applied were distinguished by colours. Of these questions the following seven are reported, each being distinguished by a number, and where applicable by the colour on the plan of the lands to which the question referred:—

First Question—Competency of Action.—The action concluded for declarator "that in terms of and in accordance with the said 15th section of The Conveyancing (Scotland) Act 1874, the pursuers, as proprietors in virtue of a disposition in their favour [the disposition of 1875 referred to above] of All and Whole the lands thereby conveyed to them, being the lands of Rubislaw . . . and others, excepting and reserving as there was by said disposition in their favour excepted and reserved [certain portions], the subjects of which the casualties are to be redeemed as after mentioned, being the parts in so far as

belonging to the pursuers at the date of signeting hereof, of All and Whole the towns and lands of Rubislaw and others contained in the charter of resignation and novodamus [the deed of 1805 referred to above], are entitled, upon payment to the defenders as the immediate lawful superiors of the pursuers in said subjects of the amount of the highest casualty estimated as at the date of redemption, with an addition thereto of 50 per centum, to redeem the whole casualties of superiority incident to the lands and others belonging to the pursuers . . . and that the pursuers are entitled to insist upon the defenders granting and delivering to them, and are entitled to receive from the defenders, but always at the expense of the pursuers, a discharge in terms of said statute of all such casualties incident to the subjects belonging to the pursuers as aforesaid. . . . and payable to the defenders therefrom, subsequently to the date of signeting hereof, upon the pursuers making payment to the defenders of the sum of £3317, 16s. 6d., being the amount of the highest casualty owing and exigible therefrom, including the said addition of 50 per centum; or in the event of the defenders establishing any valid objection to the said amount, then of such other sum as shall be found in the course of the process to follow hereon to be the true amount of the said highest casualty, with the said addition of 50 per centum."

In the course of the action it was ascertained that the pursuers were vassals of the defenders in other parts of the lands of Rubislaw besides those covered by the particular description of the lands in the summons, and the sum of £3317, 16s. 6d. tendered as the redemption price of the casualties was therefore less than the amount actually due. Section 29 of the Court of Session Act 1868 provides—"It shall not be competent by amendment of the record . . . to subject to the adjudication of the Court any larger sum or any other fund or property than such as are specified in the summons . . . unless all the parties interested shall assent to such amendment." The defender founding on this section objected to the competency of the action.

Second Question — Green Lands. — The mid-superiorities of certain lands feued out by James Skene and George Skene were disponed for a price paid to various persons by James Skene prior to his dispositions of the lands of Rubislaw and others in 1861, and by George Skene prior to his disposition of these lands to Sir Alexander Anderson in 1862. The holding in these cases were either *a me* or *a me vel de me*, the disponees were infeft but never took entry with the defenders, and the dispositions of these mid-superiorities were not specially excepted in the general dispositions to George Skene and Sir Alexander Anderson.

The defenders contended that as there was no exception of these mid-superiorities in the general dispositions to George Skene and Sir Alexander Anderson, and as George Skene was entered with the defenders by writ of confirmation in 1865, the disponees of the mid-superiorities could not thereafter enter with the defenders, and were not entered by implication on the passing of the Conveyancing Act 1874, and that the pursuers must be treated in the present action as if the dispositions of the mid-superiorities had never been granted. The pursuers contended that these dispositions came under the general exception of feu-rights in the warrandice clauses in the general dispositions to George Skene and Sir Alexander Anderson.

Third Question—Brown Lands.—These lands were admittedly held by the pursuers of the defenders, and the casualties required to be redeemed, but the question was, how was the redemption money to be calculated. The lands had been disponed at different dates to various persons in consideration of sums (such as in one case £500, in another £959) paid to the disponer "as the agreed value of the same," to be holden in feu farm *de me*, "for payment of a penny sterling at the term of Whitsunday, if asked only."

The pursuers contended that the highest casualty at the date of redemption was a penny, and that this was all that they were bound to pay as redemption money, while the defenders contended that the highest casualty was the actual rent of the lands current at the date of redemption.

Fourth and Fifth Questions—Yellow Lands.—These questions also related to the redemption money to be paid for lands admittedly held by the pursuers of the defenders. They dealt with two sets of feus. (1) In some cases the feu-duty beginning at a substantial amount increased year by year till in four or five years it attained its full amount. Thus in a feu-disposition granted by the pursuers in 1896 the vassals were taken bound to pay in name of feu-duty £13, 4s. 2d. At each of the terms of Martinmas 1897 and Whitsunday 1898, twice that sum the following year, thrice that sum the next year, and thereafter the sum of £105, 13s. 6d. annually. In these cases the pursuers contended that the amount of the casualty was the sum actually payable in the year of redemption, while the defenders maintained that it was the highest rate of feu-duty contracted for in the deed. (2) In other cases the feu-duty was fixed at a substantial sum but the feuar was relieved from paying any feu-duty during the first year after the date of the feu-charter, and this first year happened to be the year in which the redemption of casualties was claimed. The pursuers contended that in such a case the highest casualty for that year was the agricultural value of the lands, while the defenders contended that it was the amount of the postponed feu-duty.

Sixth Question—Construction of Streets.—In some cases before the lands were feued the pursuers had constructed streets on or adjoining the feus, and when the lands were feued had in the feu-charter taken the sub-feuars bound to repay the proportion of the amount expended in that way effeiring to their feus. For example,

in a feu-disposition granted in 1896 this proportion of this expense levied upon the sub-feuars was £327, 9s., payable in four annual instalments of £81, 17s. 3d. The pursuers contended that this sum did not fall to be taken account of, while the defenders maintained that the amount must be taken into account as a grassum, and that the year's rent on which the casualty applicable to the lands was based must include not only the feu-duty but interest at five per cent. on the grassum.

Seventh Question—Blue Lands.—In certain cases the pursuers, prior to the raising of the action, had disponed portions of the lands to third parties, but had never intimated the change of ownership to the defenders. The pursuers maintained that they were not bound to redeem the casualties on such lands, as a superior would never recover a casualty except from the successor of the vassal in the lands, whether by conveyance or otherwise, "whether he shall be infeft or not," in terms of section 4 (4) of the Conveyancing Act 1874. The defenders maintained that in these lands the pursuers must still be regarded as their vassals, in respect that no notice of change of ownership had been given under section 4 (2) of the Act of 1874.

On 22nd August 1900 the Lord Ordinary (Low) allowed the parties a proof of their averments.

After a proof the Lord Ordinary on 29th January 1902 pronounced an interlocutor containing, *inter alia*, the following findings—"(2) That the pursuers are not bound to redeem the casualties of those portions of the lands coloured blue upon said plan which they have alienated although notice of change of ownership was not given to the defenders. . . . (4) That for the purposes of redeeming the casualties the pursuers fall in the circumstances to be regarded as the vassals of the defenders in the estate of mid-superiority of the lands (coloured green upon the said plan) which were feued by James Skene prior to the date of his disposition to George Skene in 1861 and by George Skene prior to the date of his disposition to Sir Alexander Anderson in 1862, and which mid-superiorities were sold by the said James Skene or George Skene but excluding therefrom . . . the four feus which are specially excepted by description from the conveyance by George Skene to Alexander Anderson dated 19th, and recorded 21st June 1862." . . .

On 16th April 1903 the Lord Ordinary pronounced the following interlocutor:—"Finds and declares that in terms of and in accordance with the said 15th section of The Conveyancing (Scotland) Act 1874 the pursuers, as proprietors of All and Whole the towns and lands of Rubislaw and others contained in the charter of resignation and novodamus granted by the Provost, Bailies, Council, and community of the burgh of Aberdeen, in favour of James Skene of Rubislaw, dated 18th July 1805, and in an instrument of sasine following thereon in his favour, dated the 4th, and recorded in the General Register of Sasines at Edinburgh the 8th, days of June 1841, with the exceptions hereinafter enumerated (it being declared that the boundaries shewn on the plan hereinafter mentioned, and the numbers marked thereon, are referred to herein subject and without prejudice to the descriptions of the respective parts and portions as set forth in the titles relating thereto), viz."—[*here followed a description of eight excepted parts in detail*]—"are entitled upon payment to the defenders as the immediate lawful superiors of the pursuers in said subjects, other than those excepted as aforesaid, of the amount of the highest casualty estimated as at 13th May 1898, the date of signeting the summons, with an addition thereto of 50 per centum, to redeem the whole casualties of superiority incident to the said subjects, and that the pursuers are entitled to insist upon the defenders granting and delivering to them, and are entitled to receive from the defenders, but always at the expense of the pursuers, a discharge in terms of the said statute of all such casualties incident to the said subjects, and payable to the defenders therefrom subsequently to the 13th day of May 1898, being the date of signeting the summons, upon the pursuers making payment to the defenders of the sum of £6128, 18s. 7d. sterling, being the amount of the highest casualty owing and exigible therefrom, including the said addition of 50 per centum with interest on said sum at the rate of 4 per centum per annum from the said date of signeting till payment to the defenders: And further ordains the defenders to execute and deliver to the pursuers at the pursuers' expense such discharge upon the pursuers making payment to the defenders of the said sum of £6128, 18s. 7d., with interest as aforesaid, but reserving always to the defenders, notwithstanding such redemption of the casualties of superiority, full right and title to levy the future feu-duties payable from the said subjects in the same manner and to the same effect as they have heretofore been and are at present entitled to do; and also reserving to them the right and option to insist, if so advised, that the said principal sum of redemption money to be paid by the pursuers shall be commuted into an annual sum or feu-duty equal to 4 per cent. upon the capital."

The Lord Ordinary's judgment on the seven questions dealt with in this report appear in opinions which his Lordship issued on various dates, from which the following extracts are made:—

First Question — Competency of Action—"The only question which I can dispose of at this stage of the case is that raised by certain criticisms which were made upon the conclusions of the summons which deal with the lands of Rubislaw, and which the Solicitor-General contended justified him in asking that these conclusions should now be thrown out.

It was, in the first place, pointed out that the sum mentioned in the summons as the amount for which the pursuers are entitled to redeem the casualties is based only upon the rental of the lands coloured

yellow upon the plan, although the pursuers seek to redeem casualties applicable to other lands. That seems to be the case, but the pursuers do not tie themselves down in the summons to the sum which they specify, but add the words 'or such other sum as shall be found in the course of the process to follow hereon to be the true amount.' If therefore the sum specified is too small the true amount can be ascertained under this summons.

"It was also maintained that the description of the lands in the summons does not square with the plan which the pursuers have now lodged for the purpose of showing precisely what are the lands the casualties of which they seek to redeem. Whether that is so or not I am unable to judge at this stage, but assuming it to be the case I do not think that it would be fatal to the action. The leading parts of the conclusion of the summons with which I am dealing are quite distinct. The conclusion is to the effect that the pursuers as proprietors in virtue of a disposition dated in 1875 of 'All and Whole the lands thereby conveyed to them of Rubislaw and others under certain exceptions are entitled . . . to redeem the whole casualties of superiority incident to the lands and others belonging to the pursuers' upon payment of the highest casualty estimated as at the date of redemption with an addition thereto of 50 per cent.

"That seems to me to state distinctly enough what the pursuers' claim is, and the questions which are in controversy between the parties are—(1) What are precisely the lands the casualties of which the pursuers seek to redeem and are entitled to redeem? and (2) What is the amount of the redemption money? If it turns out that there has been an error or omission in the description of the lands, I am inclined to think that that is a matter which could be put right by an amendment of the summons, as being an amendment which was necessary to determine the real question in controversy.

"I am therefore of opinion that a proof must be allowed for the purpose of ascertaining in what part of the lands contained in the disposition of 1875 the pursuers are still vassals of the defenders and liable to payment of feu-duties and casualties, and what is the amount at which the pursuers are entitled to redeem the casualties." . . .

Second Question—Green Lands—(Opinion of 29th January 1902)—"There is next a question in regard to the mid-superiorities of certain of the lands coloured green upon the plan. These were lands which were feued by James Skene prior to his disposition to George Skene in 1861, and (I think in one case only) by George Skene prior to his disposition to Sir Alexander Anderson in 1862. The mid-superiorities of these feus were sold by James and George Skene respectively, the holding being either *a me* or *a me vel de me*. The purchasers were infeft, but never took entry with the defenders.

"The defenders maintain that as there was exception of these mid-superiorities in the dispositions to George Skene and Sir Alexander Anderson, and as George Skene was entered with the defenders by writ of confirmation in 1865, the disponees of the mid-superiorities could not thereafter enter with the defenders, and were not on the passing of the Conveyancing Act in 1874 entered with them by implication. Therefore it was contended that, so far as the present action is concerned, the pursuers must be treated as if the disposition of the mid-superiorities had never been granted.

"The pursuers, upon the other hand, founded upon the general exception of feu-rights in the warrandice clauses in the dispositions to George Skene and Sir Alexander Anderson, and they relied upon the principle laid down in the case of *Cheyne*, 10 S. 622, and *Pringle*, 17 R. 1229.

"If the rights taken by the disponees of the mid-superiorities had been proper feu-rights, then I am inclined to think that the general exception in the warrandice clauses of the dispositions to George Skene and Sir Alexander Anderson would have been sufficient to render the right of the latter to the lands subject to that of the holders of the mid-superiorities. But the dispositions of the mid-superiorities were dispositions of the lands for a price paid. In like manner the dispositions to George Skene and Sir Alexander Anderson were dispositions of the lands—the former 'for various causes and considerations' and the latter for a price—and so far as their form went carried the mid-superiorities in question. There were therefore two disponees—or rather two sets of disponees—of the same estates of mid-superiority, but the disponees whose conveyances were later in date first completed their title by taking entry with the superiors. It seems to me that that entry operated as an impediment to the disponees under the earlier conveyances entering with the superiors. If they had demanded an entry, the answer would have been that the fee was full, and therefore I do not think that there was any room for the implied entry under the Conveyancing Act.

"The result is, that in a question between the pursuers and defenders the former must, in my opinion, be regarded as still being the vassals of the latter in the mid-superiorities in question."

Third Question—Brown Lands—(Opinion of 31st May 1902)—"The next point is, how the casualty can be calculated in a case where the lands have been feued out for a price, and where there is also, in order to keep up the recognition of the superiority, a nominal duty. I have always understood that in such a case the casualty is the duty plus interest upon price. Now, the Solicitor-General said there was no evidence that it was a fair price for the lands. I agree very much with what Mr Campbell said on that subject. The disposition bears to be the sale of the lands for a price fixed, and the presumption is that it was a fair and

reasonable price; and I think if it be contended it was a special transaction, and not a fair price at all, then really it lay on the defenders to shew that that is the case, so that in the cases to which I understand No. 149 of process applies I should take the casualty to be the 5 per cent. upon the price."

Fourth and Fifth Questions—Yellow Lands—(Opinion of 18th July 1902.)—"The next question with which I shall deal relates to cases in which the full feu-duty was not payable during the first few years of the feuar's possession. In such cases the pursuers contend that the sum actually payable for the year, in reference to which the amount of the casualty falls to be fixed, must be taken as the year's rent. Further, I understand that in some cases the feuar was relieved from any payment during the first year (which happened to be the year in which redemption of the casualties was claimed), and in such cases the pursuers contend that, although the feuar was possessing under a feu-charter or feu-contract, the feu-duty falls to be altogether disregarded and the agricultural value of the lands taken.

"I am of opinion that the pursuers' contention is not well founded. It is settled that where lands have been sub-feued for an adequate value at the time, the sub-feu-duty is to be taken as the rent in a question with the superior, and that the latter cannot demand a year's rent of houses built by the sub-feuar under a contract to which he was no party. In the cases with which I am dealing, there is no question what the feu-duty is. That was unequivocally fixed by the titles, but it was agreed between the mid-superior who sub-feued the lands and the sub-feuar that for a certain time the full feu-duty should not be exacted. I do not think that such an agreement can affect the rights of the superior to demand payment of the full feu-duty as the annual value of the subjects."

Sixth Question—(Opinion of 18th July 1902)—"The next question relates to cases in which, before feuing their lands, the pursuers had constructed streets, and when the lands were feued, had taken the sub-feuars bound to repay the amount expended in that way. The defenders argued that in such a case the feu-duty did not adequately represent the value of the subjects, but that the sum paid in respect of the streets was truly a grassum, and that therefore in calculating the amount of the casualty interest at the rate of 5 per cent. upon the sum paid for the streets fell to be added to the sub-feu-duty.

"In my opinion the sums in question were *not* of the nature of a grassum. A grassum is a capital sum paid in anticipation of rent or of feu-duties, so that the rent or feu-duty is necessarily smaller than it would have been if the grassum had not been paid. In the cases in question, however, I see no reason to suppose that the payments made for the streets had any effect upon the amount of the feu-duty, because, if the sub-feuar had not paid the mid-superior for making the street, he would have had to incur the expense directly by making the street himself. I am therefore of opinion that the payments do not fall to be taken into consideration."

Seventh Question—Blue Lands—(Opinion of 29th January 1902)—"The next question with which I shall deal relates to certain portions of the lands (coloured blue upon the plan No. 34) which the pursuers have alienated altogether, but in regard to which the defenders contend that they must still be regarded as their vassals, in respect that notices of change of ownership in terms of the Conveyancing Act were not given.

"I am of opinion that as regards lands in which the pursuers are in fact no longer vassals of the defenders, the former are not bound to redeem the casualties, even although notice of change of ownership was not given.

"Notice of change of ownership of a feu was introduced by section 4 (2) of the Conveyancing Act 1874, to protect superiors against results which might otherwise have followed the entry implied by infeftment.

"Under the law prior to the Act there could not be a change of vassal without the knowledge of the superior, but when the implied entry was introduced, the superior might know nothing of the transaction whereby a new vassal was entered with him. Further, by the old law the entry given by the superior to a new vassal discharged the old vassal and his representatives of all personal liability for feu-duty or the other obligations of the feu. If, therefore, some provision had not been made to meet the case, the result of the implied entry might have been that the only person liable to the superior in feu-duty and the other obligations of the feu was one whom he knew nothing about. It was accordingly provided 'that notwithstanding such implied entry, the proprietor last entered in the lands, and his heirs and representatives, shall continue personally liable to the superior for payment of the whole feu-duties affecting the said lands, and for performance of the whole obligations of the feu, until notice of change of ownership of the feu shall have been given to the superior . . . without prejudice to the right of the proprietor last entered in the lands and his foresaids to recover from the entered proprietor of the lands all feu-duties which such proprietor last entered in the lands or his foresaids may have had to pay in consequence of any failure or omission to give such notice.'

"I do not think that the casualties of non-entry fall within the scope of that provision. Further, these casualties are dealt with in the 3rd and 4th sub-sections. By the latter non-entry is abolished, and for a declarator of non-entry there is substituted an action of declarator, and for payment of a casualty. I do not know of any other way in which a superior can recover a casualty, and the action can only be directed against the 'successor of the vassal in the lands . . . whether he shall be

infeft or not,' and nothing is said about notice, or want of notice, of change of ownership. In regard, therefore, to the portions of the lands with which I am now dealing, it seems to me that the defenders could in no circumstances have enforced payment of a casualty from the pursuers, and that accordingly the latter cannot be compelled to redeem the casualties."

The defenders reclaimed against the decision of the Lord Ordinary in the first, third, and sixth questions, and the pursuers took advantage of the reclaiming-note to submit to review his judgment on the second, fourth, and fifth questions. The Lord Ordinary's decision on the seventh question was not challenged by either party.

Argued for the defenders—*First Question—Competency of Action*—The description of the lands in the conclusions of the summons was a specific description. The parenthetical words at the close of the description were merely exegetical of what went before and did not extend the scope of the description. That the description was specific was further shown by the fact that the amount of the redemption money proposed was the exact amount of the rental of the lands, the casualties of which the pursuers at that date thought they were bound to redeem. It now turned out that the pursuers were vassals of other lands than those specifically set forth in the summons. This rendered the action incompetent, because it was impossible to enlarge the scope of an action without the consent of all parties, and the whole casualties incident to the lands must be redeemed in the one action —*Leslie's Trustees* v. *Magistrates of Aberdeen*, 6th July 1898, 35 S.L.R. 855. In the case of a summons such as this, it was specially necessary that it should be construed strictly, as it was brought for the purpose of depriving the superior of former rights. *Second Question—Green Lands*—The decision of the Lord Ordinary on this point was correct. The mid-superiorities of these lands were included in the general conveyance to George Skene and Alexander Aitchison and did not fall under the exception in the warrandice clauses, that exception dealing only with feu-rights and not with dispositions of the mid-superiority. George Skene having entered in 1865, this excluded any possible entry by implication in 1874 of the special disponee of the mid-superiority. The pursuers as disponees of the lands held by George Skene were still the vassals of the defenders in these mid-superiorities—*Ceres School Board* v. *Macfarlane*, December 12, 1895, 23 R. 279, 33 S.L.R. 158. In both *Cheyne*, *infra*, and *Pringle*, *infra*, the specific deed excepted was set out in the warrandice. *Third Question—Brown Lands*—The Lord Ordinary had held that interest at 5 per cent on the grassum was the rent of the land on which the amount of the casualty was to be calculated. This was erroneous in law. Where there was a full and adequate feu-duty at the time when the feu was granted that was looked upon as the annual value of the land at that date. A feu for which a *bona fide* feu-duty was paid was looked upon as a perpetual tack, and for all time the amount of the feu-duty would regulate the amount of the casualty. The ground on which a feu-duty was accepted as the rent of the feu was in order to encourage feuing. But where there was no real feu-duty, but merely an elusory feu-duty or blench duty, that was looked upon not as a year's maills but simply as a recognition of the superior's position. If there was no full and adequate feu-duty, as in the present case, the superior, in calculating the amount of the casualty, was entitled to regard the year's maill as a year's rent of the lands at the date of the redemption—1469, c. 36; 1681, c. 17; Tenure Abolition Act 1747 (20 Geo. II, c. 50), sec. 13; Stair, ii, 3, 33, ii, 4, 21, ii, 11, 13, iii, 2, 27; Bankton, ii, 3, 52 and 53, ii, 4, 31; Erskine, ii, 5, 36 and 44; *Ross* v. *Governors of Heriot's Hospital*, June 6, 1815, F.C., *aff.* July 24, 1820, 6 Paton's App. Cas. 640; *Anderson* v. *Marshall*, November 30, 1824, 3 S. 334; *Lord Blantyre* v. *Dunn*, July 1, 1858, 20 D. 1188, opinion of Lord Mackenzie, 1194. The case of *Campbell* v. *Westenra*, June 28, 1832, 10 S. 734, on which the Lord Ordinary relied, was a bad decision, and since the date of the Lord Ordinary's judgment had been disregarded by the House of Lords in *Earl of Home* v. *Lord Belhaven and Stenton*, May 25, 1903, 5 F. (H.L.) 13, 40 S.L.R. 607. *Fourth and Fifth Questions—Yellow Lands.* —On these questions they were content with the Lord Ordinary's judgment. The rent on which the casualty was calculated was the highest rent for the lands, and it did not matter that by arrangement the payment of the feu-duty or part of the feu-duty was not exacted for a year or two by the landlord. *Sixth Question—Construction of Streets.*—The sum paid in respect of streets was a grassum, and 5 per cent. should be added to the feu-duty in calculating the entry-money.

Argued for the pursuers and respondents —*First Question—Competency of Action.*— They admitted that they did not know when they brought the action that certain of the lands, since ascertained to be within the feus were in that position. But the conclusions of the summons were purposely made wide enough to cover all the lands of Rubislaw, &c., held by the pursuers of the defenders, and for which casualties were found to be due. *Second Question—Green Lands.*—The judgment of the Lord Ordinary should be reversed. The mid-superiorities were included in the general exception in the warrandice clause. The exception included not only feu-rights, but infeftments of every description. This included infeftments of property sold. It was thus left open to the special disponees of these mid-superiorities to go to the superior at any time for entry, and on the passing of the Conveyancing Act of 1874 they were entered with the defenders by implication—*Cheyne* v. *Smith*, June 7, 1832, 10 S. 622; *Pringle* v. *Pringle*, July 17, 1890, 17 R. 1229, 27 S.L.R. 954. *Ceres School Board*, *supra*, did not apply, as in that

case the ground of judgment was that the exception only covered feu-rights completed by infeftment. *Third Question—Brown Lands.*—Where there was a nominal feu-duty or blench-duty the practice in Scotland had been, since the date of *Campbell* v. *Westenra, supra,* to consider interest at 5 per cent. on the grassum as the rent of the land in calculating the amount of casualties. The judgment in the House of Lords in the case of the *Earl of Home* v. *Lord Belhaven, supra,* did not necessarily overrule this decision. None of the judges in that case took exception to the proposition laid down in *Campbell* that where the feu-duty was elusory the superior was not entitled to the full rent of the subjects at the time of redemption. There was not a word in any of the statutes about full or fair or adequate rent. Where there was a feu-duty, however nominal, the Court were not entitled to inquire as to whether the feu-duty was adequate or not. If the principle laid down in *Campbell, supra,* had been overruled, all the superior was entitled to calculate his casualty on was the annual maill or value that the vassal was in fact receiving at the date of the redemption—*Monkton* v. *Lord Yester,* February 15, 1634, M. 15,020; *Cowan* v. *Elphinston,* March 29, 1636, M. 15,055; *Almond* v. *Hope,* March 9, 1639, M. 15,056; *Ross* v. *Governors of Heriot's Hospital, supra,* opinion of Lord Glenlee, quoting MS. notes of Lord Elchies on Stair, 18 F.C. pp. 404 and 405; *Wellwood* v. *Wellwood,* July 12, 1848, 10 D. 1480; *Earl of Home* v. *Lord Belhaven and Stenton, supra,* opinion of Lord Davey, 5 F. (H.L.) p. 16, 40 S.L.R. 608. *Fourth and Fifth Questions — Yellow Lands*—On this question the decision in the *Earl of Home, supra,* provided a complete argument against the decision of the Lord Ordinary. The rent must be taken in the year of entry, "year's maill as the land is set for the time," in the words of the Statute 1469, c. 36. It followed that in the case of the increasing feu-duty the sum actually payable for the year was the year's rent, while in the case where no feu-duty was payable for three or four years, and the date of entry occurred within that period, the agricultural rent of the land must be taken for that year, and not the amount of the feu-duty payable in a succeeding year—*School Board of Neilston* v. *Graham,* November 16, 1887, 15 R. 44, 25 S.L.R. 51. *Sixth Question—Construction of Streets*—The sums paid by the sub-feuars in respect of streets were repayments for work done by the pursuers, which if it had not been done by them would have had to be done by the sub-feuars themselves. Such repayments had no connection in any way with the annual rent of the subjects. The Lord Ordinary's judgment on this point was right.

At advising—

LORD TRAYNER — The pursuers of this action are the owners of certain lands held by them of and under the defenders as superiors thereof, and the action is brought to have it declared that the pursuers are entitled to redeem the whole casualties incident to these lands in terms of the provisions of the Act of 1874 on payment of a sum which they tender, or any other sum which the Court may fix to be the proper amount of the redemption money. The lands may be described generally as the lands of Oakbank and the lands of Rubislaw. With regard to the former of these, no question has been raised under this reclaiming-note, but several questions of a somewhat complicated character have been discussed in reference to the rights and liabilities of the parties in connection with the lands of Rubislaw, in regard to which both parties are dissatisfied with the Lord Ordinary's judgment, and upon which the Court has now to decide.

First Question — Competency of Action —There is, however, a preliminary question to consider, raised by the defenders, to the effect that the present action is incompetent. If that be a sound objection no other question of course arises for determination here. The question of competency arises in this way. It is conceded that a vassal desirous of redeeming the casualties incident to his holding is not entitled to redeem the casualties of a part, but must offer to redeem the casualties incident to the whole, and it is only "on payment or tender of *such* redemption money" that a superior is bound to discharge his right. That being so, the defenders maintain that the pursuers cannot get here the decree they ask, having only in their summons tendered the redemption money of part of the casualties, and this they say is established by the fact that the Lord Ordinary has found that the pursuers are bound to pay as redemption money more than the sum tendered. In my opinion this objection by the defenders cannot be sustained. It is quite true, and the pursuers do not dispute that they are bound to pay more than they have tendered, as it has turned out in the course of the process, and been so determined by the Lord Ordinary, that they are liable for casualties their liability for which was not admitted when the action was raised. But their summons was framed to meet, and in my opinion adequately meets, that contingency. The pursuers tender a certain sum in redemption of the whole casualties, but add, "or in the event of the defenders establishing any valid objection to the said amount, then of such other sum as shall be found in the course of the process to follow hereon to be the true amount," &c. The defenders' view is that a vassal is not entitled to call on the superiors to discharge the casualties unless he pays or tenders the exact amount which the superior is entitled to exact. That is so if the vassal and superior are at one as to the casualties to be redeemed. But if they differ as to the amount of the casualty, or as to whether the vassal is liable for that casualty, and require such difference to be settled by a court of law, such an exact or precise tender is impossible. The amount of the tender or payment will depend on the decision pronounced by the Court on the submitted differences, and in that view

it is not possible for the vassal to do more than tender what he believes to be the sum due for redemption, or such other sum as the Court may determine to be the taxed amount. If the defenders' objection were sustained it would result in this, that no vassal could ever call on his superior to discharge the casualties incident to the feu, unless (1) parties were agreed as to the amount, or (2) that the vassal paid without question what the superior demanded. I accordingly think the objection to the competency of the action is unfounded.

Coming now to the merits of the case, it will be convenient, in dealing with the several points discussed, to take them as was done by the parties in the debate in connection with the different portions of the lands in regard to which the several questions arise, and distinguishing the lands by the colour in which they were delineated on the plan No. 42 of process. . . .

(*Second Question*)—*The Green Lands.*—The point raised here is more technical than that of which I have disposed. The Lord Ordinary has dealt with this matter in his opinion of 29th January 1902, and I do not think I could make it any clearer than he has done. I content myself, therefore, with saying that I agree with the Lord Ordinary.

(*Third Question*)—*The Brown Lands.*—These lands are admittedly held by the pursuers of and under the defenders. And it is further admitted that the casualties incident to them must be redeemed. The question here is, by what standard or on what basis is the amount of the redemption money to be ascertained and fixed, and I can best explain my views in regard to it by taking a single example. By disposition dated in 1811 James Skene (the pursuer's author) conveyed to Adam Cumin certain lands in consideration of the sum of £500 paid to him (the disponer) "as the agreed value of the same.' The holding was *de me* "for payment of a penny sterling at the term of Whitsunday yearly if asked only." Now, the redemption money for the casualties incident to lands is fixed by statute to be "the amount of the highest casualty, estimated as at the date of redemption, with an addition of 50 per cent." and there were two views presented as to what is "the highest casualty exigible in respect of these lands at that date. The pursuers say that the highest casualty is the penny sterling to which they as mid-superiors are entitled yearly; the defenders maintain that it is the actual rent of the lands for the year "a year's maill as the land is set for the time" according to the provision of the Act 1469, c. 36. The Lord Ordinary (adopting neither of these views) has held that the casualty is the yearly return paid by the vassal to the mid-superior with 5 per cent. on the price or grassum in respect of which the lands were conveyed. There was a very copious citation of authority on this point of the case, but I do not intend to examine any of them in detail. I deduce from them, however, two rules which I think may be regarded as conclusively selected. First, that where a mid-superior gives out lands for a merely nominal or illusory feu-duty (whether he receive an additional payment or grassum or not) the over-superior is not restricted to it when demanding a composition from a singular successor in the lands, and consequently is not bound to accept the nominal feu-duty as the highest casualty where redemption of casualties is sought. The reason for this rule is obvious. If the mid-superior could take the value of his land in price or grassum, and charge only a nominal feu-duty, to impose that upon the over-superior would simply be depriving him of a valuable estate in his land by a transaction to which he was no party. The mid-superior would simply be putting in his own pocket what properly belonged to the over-superior. The application of this rule, accordingly, excludes the contention here maintained by the pursuers. The second rule which I deduce from the authorities cited is that when a mid-superior gives out land with a reddendo which is not illusory but reasonably represents the value of the lands at the time they are feued, the over-superior is bound to accept the sub-feu-duty as thus fixed, and cannot claim more in name of composition from an entering vassal, although in the meantime the value or rents of the lands have increased. If, however, the sub-feu is illusory, then the over-superior is entitled to a year's rent. Accordingly, I am of opinion that in the case of those lands with which I am now dealing, the defenders are entitled to claim as the highest casualty exigible from them the amount of the actual rent thereof at the time when this action was brought because the sub-feu-duty stipulated was merely nominal and did not reasonably represent the value of the lands at the time they were feued. But the Lord Ordinary has taken a different view, and I shall explain briefly the ground on which I differ from him. I know of no authority for what I may call the middle course, which he has adopted, except the case of *Campbell* (10 Sh., 734), to which I shall advert in a moment. Apart from the course adopted in that case, an over-superior's right has always been one or other of the two things I have already mentioned, namely, a year's maill as the land is let for the time, or the sub-feu which reasonably represented the value of the lands at the time they were set. In the case of *Campbell* the over-superior insisted on his right to a year's actual rent from the entering vassal, who tendered payment of the sub-feu-duty and 5 per cent. on the price or grassum (the consideration money of her conveyance), and on payment of the sum thus offered she obtained her entry with the over-superior, "upon an understanding, however, that she should still be liable for any further composition which" the over-superior "might be found entitled to." The action was therefore brought by the over-superior to have the extent of his right determined, and the decision of the Court was, that the over-superior, who claimed a full year's rent, was not entitled to anything more than the vassal had paid. I confess to thinking that the reasons as-

signed for that decision are not very satisfactory. The Judges who decided that case (or some of them) appear to have proceeded on the view (and they say it was so admitted by the over-superior) that the grassum and sub-feu-duty taken together represented the fair and full value of the ground. Perhaps it did; and the same might perhaps be assumed here, but it is not admitted. That, however, is a detail. I know of no authority warranting the judgment in *Campbell's* case, either in decisions or text writers in our law, for, as I have pointed out, all the authorities point to this, that the over-superior's right is either a year's maill (that is, actual rent) or the sub-feu, which in itself reasonably represents the value of the ground. In the case of the *Earl of Home* (1903, App. Cas. 327), recently decided in the House of Lords (decided since the date of the interlocutor now under review), the case of *Campbell* was evidently not regarded as of much, if any, authority. One of the learned Lords (Lord Davey) remarks that he could not reconcile it with the terms of the Act 1469. If, then, the decision in the case of *Campbell* is not to be followed, the right of the defenders in the present case is to have the casualty to be redeemed fixed at what would be the usual and legal composition payable on the entry of a singular successor, namely, a year's actual rent.

(*Fourth and Fifth Questions*)—*The Yellow Lands.*—The questions raised here are, What is the "highest casualty" in the case (1) where there is a progressive or increasing sub-feu-duty? and (2) Where one sub-feu-duty is fixed, but not payable during the first year or two after the date of the feu-right? Of the first of these cases an example will be found in the feu-disposition by the pursuers in favour of King and Anderson, dated in October 1896. In it the vassals are taken bound to pay in name of feu-duty £13, 4s. 1d. "at each of the terms of Martinmas 1897 and Whitsunday 1898," twice that sum the following year, and increasing gradually until Whitsunday 1900, after which the feu-duty is fixed at £105, 13s. 6d. per annum. In this case and any other like it, I am of opinion, according to the rule I have already explained, that the highest casualty that can be claimed by the defenders is the feu-duty actually payable for the year when redemption is asked, that feu-duty not being merely nominal. Accordingly, in the particular case I have instanced, the amount due for redemption is £26, 8s. 4d., being the feu-duty for the year current at the date when the summons was signeted, with the addition of the statutory 50 per cent. There is no example among the printed documents of what I have mentioned as the second case. But the case put to us was this: A feu-disposition in which a feu-duty is fixed—say £50 a-year—but no feu-duty to be exigible by the mid-superior for two or three years after the date of the feu-right. If the claim for redemption is made during the two or three years in which the feuar is *not* to pay any feu-duty, what is the right of the over-superior? In that case I think the over-superior is entitled to take the fixed feu-duty as the basis of his claim. The feu-duty in that case represents the value of the lands; and the fact that the mid-superior agrees not to exact it for two or three years is a matter of arrangement entirely between the feuar and the mid-superior, with which the over-superior has no concern, and which cannot affect his right.

(*Sixth Question*)—*Construction of Streets.*—The only remaining question is whether the defenders are entitled to take into account as a grassum a sum which the feuars are taken bound to pay the said superior in respect of the formation of certain streets on or adjoining their feus. An example of the case now under consideration will be found in the feu-disposition I have already referred to, granted in 1896 by the pursuers in favour of King and Anderson. I agree with the Lord Ordinary in thinking that that is not a grassum, and cannot be taken into account in estimating the amount of the casualty. It is nothing more than a stipulation by the said superiors that as they have expended a certain sum in the formation of streets (which otherwise the feuars would have been bound to do for themselves), they shall be reimbursed by the feuars. It is not a grassum, nor has it anything to do with the feu-right—it is merely a debt which the feuar owes and the mid-superior stipulates shall be paid as such.

The result of my opinion is that I concur with the Lord Ordinary in all points except two. I differ from him in so far as I hold (1) that as regards the *brown* lands, the casualties are to be ascertained on the basis of the real rent, and not by taking five per cent. on the amount of the grassum or price, and (2)—[*point not reported*].

LORD JUSTICE-CLERK—I concur in the opinion of Lord Trayner, and Lord Young (who was present at the hearing but absent at the advising) has asked me to say that he also concurs.

LORD MONCREIFF—(*First Question—Competency of Action*).—As regards the lands of Rubislaw the pursuers are vassals of the defenders only in parts thereof. The defenders object to the pursuers proceeding with the action in so far as it relates to the lands of Rubislaw, on the ground that it has now been disclosed that the pursuers are vassals of the defenders in other parts of the lands of Rubislaw than those which the summons was originally intended to cover. The Lord Ordinary, with whom I understand your Lordships agree, is of opinion that this objection is not well founded. I have no sympathy with the objection, the undisguised object of which is to get the benefit of a rise in rents which has taken place since the summons was signeted, but I am not prepared to say that the objection is unfounded.

The reasons given by the Lord Ordinary do not seem to me to be convincing. He relies in the first place on the passage in

the summons which follows what professes to be but is not a complete or an accurate description of the extent to which the lands of Rubislaw belong to the pursuers:—"The subjects of which the casualties are to be redeemed as after mentioned being the parts in so far as belonging to the pursuers at the date of signeting hereof" of the lands of Rubislaw. This, as I read it, simply refers us back to the incomplete description previously given. If so, by now seeking to redeem casualties of lands other than those originally covered by the summons the pursuers are seeking, contrary to section 29 of the Court of Session Act of 1868, to submit to the adjudication of the Court other funds or property of the defenders than those originally submitted.

But secondly, supposing that the parenthetical clause quoted is intended to have and admits of a wider signification, I know of no precedent, by analogy or otherwise, for a vassal coming to the Court without defining specifically the lands, the casualties of which he desires to redeem. And I am not prepared to agree to a precedent being established for such a loose form of process. I think that such a summons should be framed with sufficient exactness to admit of a decree following upon it being extracted from the terms of the summons. It may be regretted that section 29 of the Court of Session Act does not permit wider amendment, but it is still in force. The casualties of lands not covered by the summons are "other funds or property" in the sense of the section, and involve "a larger sum."

The Lord Ordinary refers also to the following words in the summons:—"Upon the pursuers making payment to the defenders of the sum of £3317, 16s. 6d., being the amount of the highest casualty owing and exigible therefrom, including the said addition of 50 per centum, or in the event of the defenders establishing any valid objection to the said amount then of such other sum as shall be found, in the course of the process to follow hereon to be the true amount of the said highest casualty with the said addition of 50 per centum." And he adds:—"If therefore the sum specified is too small the true amount can be ascertained under this summons." Bnt the sun (£3317, 16s. 6d.) is the return for certain specified lands enumerated, and plainly "such other sum" in the summons is such other sum as may be found to be the true redemption money payable in respect of those lands. The Lord Ordinary decerns for £6128, which is nearly double the sum mentioned in the summons.

On the merits I do not find it necessary to say much. With the aid of information furnished by the parties and the plans and documents in process I have been at pains to check the various points decided by the Lord Ordinary, and I have also had the advantage of considering Lord Trayner's opinion. I shall content myself with making a few observations upon two points.

I. *Third Question—Brown Lands.*—The first point is as to the mode of calculation of casualties in those cases in which feus were given off by the vassal for capital sums with blench holdings or for a feu-duty of small amount, or given off for feu-duties which were subsequently redeemed, the sub-feuar remaining bound only to pay a nominal feu-duty. A list of these cases I believe is to be found, and particulars are given, in the Appendix. The mode of calculation adopted by the Lord Ordinary is to allow 5 per cent. upon the capital sum plus the feu-duty, if any, as representing the year's rent. The pursuer maintains that they are only liable in the return which they receive from their sub-vassals, viz., a penny Scots, or a nominal feu-duty, or at most that they are only liable for interest at 5 per cent. on the sum paid plus the feu-duty. The defenders on the other hand claim the actual rents of the *dominium utile* of the lands current at the date of redemption.

The Lord Ordinary's judgment upon this point was pronounced between the date of the judgment in this Court (19th July 1900) in the case of *The Earl of Home* v. *Lord Belhaven and Stenton*, 2 F. 1218, and the reversal by the House of Lords of that judgment (May 25th 1903), L.R., 1903, App. Cas. 327. Therefore the Lord Ordinary was at the time justified, and indeed bound, to decide as he did, especially as his judgment was in strict accordance with the old case of *Campbell* v. *Westenra*, June 28, 1832, 10 S. 734. But that case and the principles upon which the majority of the Court of Seven Judges decided the case of the *Earl of Home* v. *Lord Belhaven and Stenton* have been expressly disapproved in the recent judgment of the House of Lords. The argument for the superiors in *Campbell* v. *Westenra*, which was rejected by the Court, states concisely and with remarkable accuracy what I understand to have been now finally decided to be the law by the House of Lords (p. 734)—"It is no doubt settled by the case of *Cockburn Ross* that where the feu-duties stipulated for are a fair return for the lands at the time, the superior can draw no more from the vassal than this fair return. But the question which here arises was specially reserved in that case, and is not affected by it. This question is, whether, where the vassal has sub-feued the lands for a nominal or illusory duty, taking himself a price or grassum, the superior is not entitled to a year's actual rent of the subjects as at the date of entry. The statutes reserve to the superior a year's rent as the lands 'are set for the time.' Now, when the feu-duty has been a fair return at the time it was stipulated for, it is the same as if the lands had been let for an extremely long lease; the feu-duties are truly the 'year's rent as the lands are set for the time.' But when the feu-duty is illusory, it cannot be permitted that the superior's right should be thus evaded, and such feu-duty can never be held a year's rent in the sense of the statute. Then if so the superior must be entitled to a year's actual rent of the land, and his claim to this cannot be precluded by an offer of the interest on the grassums or price, because that in no respect can be considered

a year's rent in terms of the statute, and there is no authority or principle for substituting it instead thereof."

What I understand to be now decided by the House of Lords is that the rights of parties must be measured and determined by the statutes—in particular, the Act 1469, c. 36; that in fixing "the year's maill" there is no room for equitable considerations; and that no regard should be paid to alleged practice not in accordance with the statutory rule, however long it may have continued. Although the case of the *Earl of Home* did not raise precisely the question with which we are now dealing, the principles upon which the House of Lords proceeded apply to and rule this case. The case of *Campbell* v. *Westenra* was pressed upon the House of Lords by the respondent, but disregarded both by Lord Davey (p. 339), and Lord Robertson (p. 347).

I am therefore of opinion that the method adopted by the Lord Ordinary is erroneous, and that the calculation must in those cases be made on the basis of the actual rent.

II. *Fourth and Fifth Questions—Yellow Lands*—The second class of cases to which I wish to refer are those in which there were postponed or graduated feu-duties. A specimen of the graduated feu-duty is to be found in Appendix A, the feu-duty being fixed at £13, 4s. 2d. for the first year, rising to £105, 13s. 6d. for the fourth and subsequent years. In that case I think there is room for holding that the actual feu-duty payable for the year of redemption should be taken. But I am not equally satisfied of the soundness of the Lord Ordinary's judgment in regard to those cases in which no feu-duty was payable before the date of the summons. The Lord Ordinary I understand has allowed the superiors the feu-duty which did not become payable until two years after the feu was granted. Now, I fully admit that the vassal by agreeing to demand no feu-duty could not affect the superior's rights. But then I think the logical result is not that the superiors should get the full feu-duty which was not exigible for some years, but that the lands should be treated as if they were unlet or unfeued and the letting value as at the date of the summons should be taken.

Subject to these remarks, I concur in and adopt Lord Trayner's opinion on the merits of the case. On the competency as I have said I feel bound to dissent.

The Court recalled certain findings in the interlocutor of the Lord Ordinary of 29th January 1902, but not either (3) or (4); found further "that in the case of all lands in which the pursuers are vassals of the defenders and which the pursuers or their predecessors sub-feued either (*a*) for a feu-duty without a grassum afterwards redeemed by the sub-vassal, or (*b*) for a nominal feu or blench duty and a grassum, the rent at the date of raising the action, subject to deduction for rates, teind, and repairs, is to be taken as the yearly rent for the pupose of redeeming casualties: Find as regards the lands feued by the pursuers with entry before raising the action (*a*) for a feu-duty stipulated to be paid in progressive amounts, there being a feu-duty although not the ultimate full feu-duty payable during the year current at the date of signeting the summons; (*b*) for a feu-duty stipulated to commence to be paid for a year subsequent to the expiry of the year current at the date of signeting the summons; and (*c*) for a feu-duty stipulated to be paid in progressive amounts, there being no feu-duty payable for the year current at the date of signeting the summons—that in the first case the feu-duty payable during the year current at the date of signeting the summons; in the second case the feu-duty, and in the third case the feu-duty payable during the first year in which a feu-duty fell to be paid, are to be taken as the yearly rent for the purpose of redeeming the casualties"; further, they recalled the portion of the interlocutor of 16th April 1903 after the description of the seventh excepted part, and pronounced a finding similar to that of the Lord Ordinary with the substitution of £12,144, 10s. 4d. for £6128, 18s. 7d. as the amount of the highest casualty, and *quoad ultra* adhered to said interlocutors.

Counsel for the Pursuers and Respondents—Campbell, K.C.—Cooper. Agents—Alexander Morison & Company, W.S.

Counsel for the Defenders and Reclaimers—Lord Advocate (Dickson, K.C.)—Ure, K.C.—Chree. Agents—Morton, Smart, Macdonald, & Prosser, W.S.

Wednesday, June 1.

SECOND DIVISION.

[Lord Low, Ordinary.

GREENOCK HARBOUR TRUSTEES *v.* MAGISTRATES OF GREENOCK.

Burgh — Rate — Harbour—Public Health (Scotland) Act 1897 (60 *and* 61 *Vict. c.* 38), *sec.* 136—*General Assessments in Burghs.*

Held that the trustees of the port and harbours of Greenock were not exempt from liability for the Public Health General Assessment leviable under the Act of 1897.

This was an action at the instance of the trustees of the port and harbour of Greenock against the Provost, Magistrates, and Councillors of the Burgh of Greenock for declarator "that the pursuers are exempt from liability for the Public Health General Assessment under the Public Health (Scotland) Act 1897 in respect of their undertaking of the port and harbours of Greenock; and the defenders ought and should be interdicted, by decree foresaid, from imposing or levying the said assessment on the pursuers in respect of their said undertaking in time coming, so