

to sue this action." On 30th October 1885 his Lordship found that the pursuers had no title to sue, and dismissed the action as incompetent. The defender reclaimed, and on 10th December 1885 the Second Division pronounced this interlocutor—"Recal the said interlocutor, repel the first plea-in-law stated for the defender, and before further answer allow the parties a proof of their respective averments: Find the pursuers entitled to expenses from the date of said interlocutor . . . and remit the cause to the Lord Ordinary to proceed therein as accords, with power to decern for the expenses now found due when taxed, and decern." The Lord Ordinary appointed the proof allowed by that interlocutor to take place upon Wednesday 17th February. On that day objection was taken, under the 62d section of the Court of Session Act 1868, to the competency of the Lord Ordinary taking the proof. The ground of objection was that under the 62d section of the Court of Session Act 1868, as amending the Evidence (Scotland) Act 1866, the Court could no longer remit the case to a Lord Ordinary to take the proof. In the case of *Main v. Galbraith and Others (Fleming's Trustees)*, June 30, 1883, 8 R. 880, the interlocutor was in the following terms—"Recal the interlocutor, and remit to the Lord Ordinary to allow the parties a proof before answer." In that case the Court was of opinion that the 62d section of the Act of 1868 did not apply. But the interlocutor here was different. Two reasons had been suggested by counsel to the Lord Ordinary why this case fell under the 62d section of the Act of 1868—(1) That that Act had been passed so as to lessen the expenses of litigation. (2) That if the Court thought that any proof was necessary they might have the advantage of at least one of the Judges who were to decide the cause having seen the witnesses.

LORD JUSTICE-CLERK—My impression is that the clause in the Act of Parliament was only intended to apply to cases where the case having been brought into the Division on the merits, the Court thought it necessary that proof should be taken before judgment could be pronounced. But the clause does not apply to this case, where an action having been begun in the Outer House in the usual way, and the Lord Ordinary having pronounced a judgment on a preliminary plea, the case is brought before the Inner House on a reclaiming-note, and the Inner House has altered the judgment of the Lord Ordinary.

LORD YOUNG—That is also my opinion. The case is simple enough. The case was begun in the Outer House, and the parties sought a judgment from the Lord Ordinary as they were entitled to do. But the Lord Ordinary was of opinion that the action was incompetent—that the pursuer had no title to sue. The case was not argued or decided on its merits in the Outer House. Well, the case came here on a reclaiming-note, on the question whether the action is a competent one. We were of opinion that the action was a competent action—that the pursuer had title to sue. The proper course was then to send the case back to the Outer House to be tried there. We were of opinion that the pursuer had a title to sue his action, and therefore we remitted back to the Lord Ordinary to take the proof. I agree

with your Lordship that the form of the interlocutor had better be changed, but even as it stands it is not impossible to be worked out. This is quite a different case from that to which the Act of Parliament is meant to apply. A case has passed through the Outer House; it has been heard and decided there. Well, if it comes here on a reclaiming-note, and we think that a proof of the facts is necessary before we can give a proper judgment upon it, we may order it, and we order that it should be taken before one of the Judges of the Division, and do not remit the case back to the Lord Ordinary who has already disposed of it. But that is not the case here. The only thing before us on the reclaiming-note was the question whether the case was a competent one or not. I believe, although I do not remember the case, that that was the only question before us. We remitted the case back to the Outer House to be dealt with by the Lord Ordinary as a competent case. I agree with your Lordship that that was the substance of an interlocutor, and that the case ought to go on in the Outer House.

LORD CRAIGHILL—I am of the same opinion. I have always understood that this section in the Court of Session Act was to provide against that which might have been an inconvenient arrangement. The words of the clause in the former statute were so wide that the Lord Ordinary might have been employed as a mere commissioner, and it was to provide against that that the section in the Act was so framed. But I never understood that in a case which fell to be decided by the Lord Ordinary, but which had been reclaimed on a preliminary point to the Inner House, the Division could not pronounce an interlocutor ordering the proof in the cause to be taken by the Lord Ordinary.

LORD RUTHERFURD CLARK concurred.

Counsel for Pursuers—Gloag—Lang. Agent—Thomas White, S.S.C.

Counsel for Defender—Comrie Thomson—Alison. Agents—Welsh & Forbes, S.S.C.

Thursday, February, 18.

SECOND DIVISION.

M'LAREN AND OTHERS (TRUSTEES FOR BARONY PARISH OF GLASGOW) v. BURNS.

Superior and Vassal—Casualty—Redemption of Casualty—One Year's Rent—Special Value of Subject to Vassal—Conveyancing (Scotland) Act 1874 (37 and 38 Vict. cap. 94), sec. 15.

A parochial board who were proprietors of the *dominium utile* of lands (fined prior to 1874) on which they had erected at great expense an asylum for pauper lunatics, desired to redeem the casualties incident thereto on payment, under section 15 of the Conveyancing (Scotland) Act 1874, of the amount

of the highest casualty, with an addition of 50 per cent. The highest casualty was a year's rent. The lands were of special value to the board, and to them the annual value was £2007, while in the open market the annual value was estimated at £1350. *Held* (rev. judgment of Lord Trayner) that the latter sum, with an addition of 50 per cent., was the amount of the redemption price of the casualties.

Superior and Vassal—Casualty—Minerals.

Opinion that in estimating the amount of the highest casualty for the purposes of redemption, the Court will not inquire whether there are minerals in the land capable of being worked if searched for, and what their value would be if found.

The Conveyancing (Scotland) Act 1874 provides by section 15—"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 50 per cent."

The Parochial Board of the Barony Parish of Glasgow were proprietors of the lands and estate of Woodilee, on part of which an asylum for pauper lunatics was erected in the parish of Kirkintilloch and county of Dumbar-ton. Mr John William Burns of Kilmahew and Cumbernauld was the superior of these lands. The last entered vassal in these lands was Alexander Bennet M'Grigor, writer in Glasgow, who was alive at the date of this action, and the said lands were consequently not in non-entry. The entry of singular successors was untaxed.

The Parochial Board became desirous of redeeming the casualties of superiority incident to the lands in virtue of the provisions of The Conveyancing (Scotland) Act 1874. On 29th December 1883 the law agents for the board wrote to Mr Burns' law agents to intimate to them the intention of the board. The parties, however, were unable to come to any agreement as to the amount of the redemption money of the said casualties.

On 5th September 1884 Alexander M'Laren, Peter Beattie, and John Maxton, trustees for behoof of the Parochial Board of the Barony Parish of Glasgow, and as such trustees heritable proprietors of the lands and estate of Woodilee, raised this action against Mr Burns. The summons concluded (1) that the pursuers were entitled, in virtue of sec. 15 of the Conveyancing Act 1874, on payment to the defender, as superior, of the amount of the highest casualty estimated at the date of redemption, with an addition of 50 per cent., to redeem the whole casualties of superiority payable from their lands; and further (2) that they had validly exercised their right as at 29th December 1883; (3) they concluded that the re-

demption price of the casualties should be fixed at £131, 1s. 1d., or such other sum as should be fixed to be one year's rent of the lands as at the 29th December 1883, with an addition of 50 per cent.

The defender maintained that the sum tendered was grossly inadequate. He set forth that the lands contained valuable minerals, part of which were let at a rent of £900, and that the whole rental, or value, including buildings, lands, woods, shootings, minerals, and a railway passing through the lands, was not less than £4250, and he claimed that sum, with an addition of 50 per cent., but under the usual deductions.

On 22d November 1884 LORD ADAM (Ordinary) pronounced this interlocutor:—"Of consent, remits to Mr John Blackley, valuator, Hope Street, Glasgow, to inquire into and report upon the annual rent or value of the lands referred to in the summons, and the amount or value of the deductions to be allowed therefrom, with power to the reporter, if he thinks fit, to take the assistance or advice of an architect, or of such other skilled person as he may deem necessary; and recommends the reporter, after hearing the parties, to frame his report in such heads or branches as he may consider most expedient for the purposes of this action."

On 24th June 1885 Mr Blackley issued his report, in which he stated, *inter alia*—"The ground set forth in the summons consists of 107.482 acres.

"Upon about four acres of these lands the Barony Parochial Board have erected buildings known as the Woodilee Asylum, capable of accommodating about 250 patients.

"The whole remaining lands and other lands in the neighbourhood leased by the board are used solely in connection with the said asylum, and in the opinion of the reporter properly so, as he has been credibly informed that the Board of Lunacy would be unwilling now to license an asylum like that in question without from one-third to one-half acre of ground for each patient.

The buildings and grounds are entered in the valuation roll at the sum of £1820, to which the reporter adds £130 as the value of the agricultural lands embraced in the summons, making a total of £1950. . . . The buildings as erected could be put to no other purpose except an asylum or a poorhouse.

"Having the whole facts in view, the reporter has to report that he has considered the valuation on two principles, and he reports these for the information of the Court, that the Court may adopt whichever they may consider the proper one.

First.—He has considered the value of the subjects as in the occupation of the Barony Parochial Board, and on this basis he values the buildings, ground, and land used for agricultural purposes at the sum of £2230, from which there falls to be deducted ten per cent. for public and parochial burdens, repairs, minister's stipend, &c., £223, leaving £2007.

"The subjects have been specially fitted up in connection with the purposes of the Barony Parochial Board, and they are worth more to them than to any other party.

"The board have a greater number of patients than any other board in Scotland, and it is in this view that the buildings have been made both so large and so expensive.

"*Second.*—On the assumption that the subjects were to be let in the open market.

"It is somewhat difficult to say, looking to the nature of the buildings, what they might be expected to bring, but having in view the limited uses to which they could be put, the reporter is of opinion that the buildings, ground, and lands used for agricultural purposes could not reasonably be expected to produce more than £1500 per annum, from which there falls to be deducted ten per cent. for burdens, &c., as before mentioned, £150, leaving £1350.

"In estimating this sum the reporter has taken into account every probability of both county boards and private parties coming forward as tenants.

"It was contended before him that besides valuing the buildings separately he should put a separate value upon the lands, but he is of opinion that it is impossible to separate the subjects, looking to the use to which they have been or can be put.

"As he has already mentioned, a sufficient quantity of ground to enable the premises to be licensed by the Lunacy Board must be left, and seeing that the subjects have been devoted to the purpose of a lunatic asylum, he has in estimating their value taken the subjects as a whole; even assuming the subjects to be used for any other purpose, a similar quantity of land would be required."

As to the value of the minerals under the surface, Mr Blackley reported that it was impossible for him to give any opinion as to whether there were minerals in the ground, or if there were, whether they were workable to profit. At the same time he would consider that even if minerals were found, and were workable to profit, they were of trifling value. The working of them under or near the buildings would reduce the value of the subjects.

The Lord Ordinary (FRAYNER) issued the following interlocutor:—"Finds, decerns, and declares in terms of the first and second conclusions of the summons: Finds that the redemption price of the casualties in question amounts to the sum of £2007, with an addition of 50 per cent., &c.

"*Opinion.*—The pursuers in this action conclude for declarator that they are entitled, under the provisions of the Conveyancing Act of 1874, to redeem the whole casualties of superiority incident to and payable from the lands of Woodilee and others described in the summons, of which the defender is the superior. The defender does not object to this. But the parties are not agreed as to the amount of the redemption price to be paid. The statute fixes the redemption price in a case like the present at 'the amount of the highest casualty estimated as at the date of redemption, with an addition of 50 per cent.' The highest casualty is that which would be payable on the entry of a singular successor, namely, a year's rent.

"A remit was made by Lord Adam to Mr John Blackley to inquire into and report upon the annual value or rent of the said lands, and the amount or value of the deductions to be allowed therefrom. Mr Blackley's report is now lodged, and I have heard parties thereon.

"Mr Blackley presents alternative views of the value of the subjects, which may be briefly stated thus—(1) He values the lands and buildings thereon as in the occupation of the pursuers,

and as specially fitted up for the purpose to which they have been and are applied, at the nett annual value of £2007, and expresses the opinion that 'they are worth more to them (pursuers) than to any other party.' (2) On the assumption that the lands and buildings were to be let in the open market, and taking into account every probability of both county boards and private parties coming forward as tenants, he values the subjects at the nett yearly rental of £1350. The defender contends for the adoption of the former, the pursuers of the latter view.

"With regard to Mr Blackley's second alternative, it has to be noticed—(1) That it is less in amount than the value at which the subjects in question appear on the valuation roll. That value represents what, in the opinion of the district valuator, the subjects in question might reasonably be expected to realise as rent if let from year to year, and I should have been disposed to adopt that valuation as a solution of the present question, if either party had asked me to do so. That was not done, however, by either party. (2) In reaching his second alternative Mr Blackley has not taken into account, apparently, the probability of the pursuers coming forward themselves to offer for a lease of the subjects if they were in the open market to be let. If they did, they would probably offer a higher rent than any other would be disposed to give, and it is not unreasonable to suppose that they would in such a case offer the full amount which the subjects would be worth to them—that is, the amount mentioned in Mr Blackley's first alternative.

"It was urged by the pursuers that the fact of the subjects being of more value to them than to any other party was no reason why they should be compelled to pay an enhanced value or rent. Certainly not if they can get the subjects for less. But the fact that the subjects are of more value to them than to any other leads to this, that to get the subjects so suitable for their purposes they would give a rent higher than any other person for whose purposes the subjects were not so suitable would give. The rent so fixed, enhanced doubtless by the suitability of the premises to the purposes of the person taking them, would be the standard by which the superior's composition would be ascertained.

"I am therefore of opinion that the first alternative of Mr Blackley's report should be adopted.

"The defender did not insist in the view referred to by Mr Blackley that the value of the minerals should be taken into account."

The pursuers reclaimed, and argued—The sole question here was the amount of redemption money to be paid to the superior for the casualties. The amount of composition due to the superior was the rent of the lands as they were let at the time—*Aitchison v. Hopkirk*, February 14, 1775, 2 Ross Leading Cases, 183. The reporter had dealt with the letting value of the pursuers' property in two ways—the first as the value that the lands were to the pursuers in particular for carrying on their own business, as managing the business of the Barony Parish, and that value he had erroneously taken as the value of the lands. The other way, which brought out a smaller sum, viz., the value of the subjects as they would let if ex-

posed to open competition from year to year, was the proper mode of calculation. In estimating the value of the lands for payment of a composition the superior was not entitled to claim a greater sum on account of exceptional circumstances which might make the subjects of greater value to a particular person or persons than to the outside world. The date at which they were entitled to claim the benefit of their right to redeem was the 29th December 1883, at which date they intimated their intention to redeem.

Argued for the defender—In estimating £1350 as the value of the subjects, on one hypothesis the reporter had put out of view the fact that if these lands were to be let the Parochial Board would be the largest bidder for them. If they were of exceptional value to the board, then the board would be willing to pay the larger sum for them. The pursuer was entitled to hold that things would remain as they were at the present time, and that the value to the Parochial Board was £2007, which accordingly was the amount of composition payable. II. As to the minerals, if there were any minerals under the ground, they must be taken into account in fixing the amount of composition to be paid to the superior—*Sivwright v. The Straiton Estate Company (Limited)*, July 8, 1879, 6 R. 1208. There was no fixed rule as to mineral rents—*Allan's Trustees v. The Duke of Hamilton*, January 12, 1878, 5 R. 510. The Court must also find the date at which the year's rent was to be taken as the value of the lands, and not merely fix a sum of money as the reporter had done. The date to be taken was not the 29th December 1883. When the intention to redeem was intimated the pursuers were not entitled to the benefit of their right of redemption till they tendered the redemption-money in full, which they had not done.

At advising—

LORD JUSTICE-CLERK—In this case, in my opinion, the Court cannot come to any other rule for estimating the amount of the redemption money than that of taking the annual value of the subjects for which feu-duty is paid—that is, the annual value as it is one year with another. I know no other way in which the amount can be calculated. It may happen that the building has an excessive value to some particular person or persons from circumstances connected with it, and that value may be permanent or temporary, and its greater or less permanency may be an element in calculating the amount the subject may bring. I do not think that it enters that question that there may be persons with a greater interest than others to acquire the subjects. I think that the second principle stated in the report is the sound one in this case, viz., the value of the subjects as they would let one year with another, and the sum that the reporter estimates as the value of the subjects if so let is £1350. I think it right that this result should be judicially affirmed, and that the second principle stated in the report should be held to be the right one. As to the minerals there can be no claims. Where minerals have not been worked, their value could not enter into the question at all. This was brought out in certain recent cases, notably in the case of *Wardlaw* about ten years ago [23d Jan. 1875, 2 R. 368]. But no such question arises here, and that for two reasons—first, that the

reporter says that minerals were never worked on this property; and secondly, I think that the defender is foreclosed in regard to that part of the case, since he did not raise the question before the Lord Ordinary.

LORD YOUNG—I concur.

LORD CRAIGHILL—I am surprised that in this case, in which it is necessary to find out the yearly value of certain heritable subjects, the value as set down in the valuation-roll was not taken by the parties as a fair value for the subjects. But the parties have not taken that plan, but have referred it to a man of skill, who has issued a report giving two different values according to two different views which may be taken. I am clearly of opinion that the second or alternative view is the proper one to take, and that the £1350 he there states as the value that the subjects would bring if let one year with another is the proper value of the subjects.

LORD RUTHERFURD CLARK—I confess I sympathise with Lord Craighill in his opinion that parties might have taken the entry in the valuation-roll as the value of the subjects. But parties have submitted the case to Mr Blackley to report, and we have to decide on his report, and I am of opinion that the smaller sum mentioned there is the one that should be adopted. As to the minerals, I am not surprised that the defender should have withdrawn that part of his case, and that for several reasons. I think it is clearly ill founded, even on Mr Blackley's report. He reports, in the first place, that there is no mineral value which could be given as an addition to the rent. In the second place, even if minerals were found and worked to a profit, the value of the subjects would be greatly reduced. Thirdly, I doubt if we could order an inquiry as to whether the minerals could be taken into the value of the subject in estimating the value of a composition. I know that some time ago the question was raised whether minerals could be valued at all in estimating a composition, but in the recent case of *Sivwright* minerals were taken into account on the average of the preceding three years. But it would be going a very much further step—and a step I am not willing to go—to inquire in a question of fixing a composition not only what value the minerals would be to the subjects if let, but if minerals exist at all capable of being let. I therefore agree with your Lordship that the alternative sum in the report should be taken as the value of the subjects.

The Court pronounced this interlocutor:—

“Having heard counsel on the reclaiming-note for the pursuers against Lord Trayner's interlocutor of 17th November last, Recal said interlocutor: Find that the redemption price of the casualties in question amounts to the sum of £1350, with an addition of 50 per cent.: Find the pursuers entitled to expenses from the date of the said interlocutor,” &c.

Counsel for Pursuers—R. V. Campbell—Ure. Agents—Mackenzie, Innes, & Logan, W.S.

Counsel for Defenders—Mackintosh—Dickson. Agents—J. & J. Ross, W.S.