

of the money to the assignee. But that would be an assignment by a creditor of a debt due to him as security for an advance.

Here we have an assignation of this friendly society's shares tried in 1882 as an experiment. What was that assignation supposed to comprehend? We find that at the date of the assignation there was only £77, 0s. 10d. paid upon the shares. Did the pursuers expect to become assignees for more than that as security for their debt? I do not think they can have contemplated becoming members of the society. Then was that an assignation to the sums to be afterwards paid by their debtor so as to make up the value of the shares? Did he make these payments as payments for himself, or as the representative of his creditor? The debtor did go on paying, and in July 1884 he got £100 from the society, which was due to him on his shares. That payment was characterised as a payment in fraud of the pursuers' rights. Now, that affects the question of the necessity of intimation to the society. The assignation of these shares was never intimated to the society. Certainly there was no intimation before the 25th of November 1885, and I do not think that what occurred then was intimation to the society. What is relied on by the pursuers in regard to that is that the cedent was the manager of the society, and it is said that his private knowledge was equivalent to intimation. Now, intimation is for two purposes—the one is to complete a title, and the other is to put the debtor of the assignor in bad faith to pay to any other person than the assignee. Now it was not here necessary for the first purpose, but it was necessary in order to put the debtor in bad faith if he paid to anyone else than the assignee, that is to say, to make the payment by the debtor to the cedent a fraud upon the assignee. Therefore the pursuers say that the payment of £100 made by the society to Duffes was a fraud upon them after the party making the payment was put in the knowledge of the assignation. But what does that come to? The cedent Duffes was manager of the society, but he was also a creditor, and the purpose of intimation was to put the society in bad faith to pay the debt to Duffes. His knowledge was not theirs in that relation of debtor and creditor, and the pursuers ought to have had it in view that to put the society in bad faith in dealing with Duffes as their creditor they must have knowledge of the assignation. But how could Duffes' knowledge be theirs? Take the case of any bank manager. He has a large private credit, and in ignorance of anything having been done to affect that balance the bank pay over to him the debt which is due—honestly due, by them. Then up starts a third party and says, "You paid this money to the manager in bad faith, as he has assigned it to me." They answer that they were not told of this so as to be in bad faith in paying the money to him; but the assignee says, "Your manager knew that he had granted an assignation to me, and his knowledge is yours." I do not think that will do.

Then it was said that the pursuers had become members of the society in November 1885, when it appears that an alteration had been made in the ledger upon the heading of Duffes' account. It is said that in this manner the shares were

transferred to them, and that they were put in the room of Duffes as shareholders. I do not think that any transfer of the shares was received by the society. I cannot regard this alteration in the ledger as a transfer of the shares, accepted by the society, and putting the pursuers in the place of Duffes, although even if that were so they would take nothing, because they could only take the shares subject to all payments made before that time. But suppose they did become shareholders, then they are subject to the rules of the society, and must pay up the value of their shares till their full value is reached, and then they may go out, or they may go out before according to the rules. But they are not paying up the value of their shares, nor have they given notice of their withdrawal, so that even if they were shareholders they could take nothing by their action. In my view the action is unfounded.

LORD RUTHERFURD CLARK—I agree. I do not think that this assignation was intimated by its execution and delivery so as to put the society in bad faith in paying to Duffes. That being so, the interest in the case is diminished to £23. If the pursuers have any right it is as shareholders only, and if they have not taken the necessary steps under the rules, then the action is unfounded. Whether they could make themselves shareholders, is, I think, very doubtful.

LORD CRAIGHILL was absent on circuit.

The Court pronounced this interlocutor:—

"Find that the assignation founded on by the pursuers was not duly intimated to the defenders: Therefore dismiss the appeal, and affirm the judgment of the Sheriff-Substitute appealed against," &c.

Counsel for the Appellants—Sol.-Gen. Robertson—Graham Murray. Agents—Tods, Murray, & Jamieson, W.S.

Counsel for the Respondents—Balfour, Q.C.—Shaw. Agents—Philip, Laing, & Trail, S.S.C.

Wednesday, November 16.

SECOND DIVISION.

[Lord Kinnear, Ordinary.]

SCHOOL BOARD OF NEILSTON *v.* BARNES
GRAHAM.

Superior and Vassal—Redemption of Casualties—Composition—Statute 1469, c. 36—Agricultural Rent.

By contract of ground-annual a school board acquired, for the purpose of building, land which had previously been let for grazing. Held that in fixing the sum to be paid to the superior in redemption of the casualties, the measure of the composition was the rent payable to the vassal by his tenant at the date of entry, not the sum payable under the contract of ground-annual.

By contract of ground-annual, dated 2nd February 1886, the School Board of the parish of Neilston, Renfrewshire, acquired from Admiral Fairfax, of Fereneze and Ravenswood, a piece of ground on

the estate of Fereneze extending to about three roods. In the original charter containing these subjects the entry of singular successors was untaxed. Being desirous of erecting buildings on the subjects, the School Board proposed to redeem the casualties of superiority under The Conveyancing (Scotland) Act 1874 (37 and 38 Vict. cap. 94), sec. 15, which provides, *inter alia*, as follows:—"In cases where casualties are exigible on occasion of each sale or transfer of the property, as well as on the death of the vassal, such casualties may be redeemed on payment of two and a-half times the amount of the casualty, estimated as aforesaid (*i.e.*, 'as at the date of redemption'), payable on said occasions: Provided always that before any such redemption, otherwise than by agreement, shall be allowed, any casualty which has become due shall be paid." They failed, however, to come to terms as to the value of the casualties with Allan Graham Barns Graham, Esq. of Craighallian, who was then in right of the superiority.

This action was raised in December 1886 at the instance of the School Board against Mr Barns Graham for redemption of the casualties, and to have the redemption money fixed at £4, 1s. 11d.

The pursuers maintained that the amount payable by the pursuers in redemption of the casualties of superiority, applicable to their plot of ground, amounted to (1) two and one-half times the amount of the highest casualty for the said subjects, the highest casualty being one year's rent thereof (subject to the usual deductions), and (2) the casualty, being one year's rent (subject to the usual deductions), presently due and owing through the pursuers' acquisition of the subjects. They further maintained that the rental of the subjects at the date when they acquired them, and at the date of the action, did not exceed the sum of £1, 9s. 2d., being at the rate of £1, 18s. 11d. per acre, the amount commonly paid in the immediate neighbourhood. They tendered in payment £1, 3s. 5d. (being one year's rent of the subjects, £1, 9s. 2d. less the usual deduction of one-fifth or 5s. 9d.), along with £2, 18s. 6d. (being two and a-half times the amount of the highest casualty, *viz.*, £1, 3s. 5d.) in redemption of future casualties incident to the subjects. These sums amounted to £4, 1s. 11d.

In defence it was maintained that the sum tendered did not represent the actual rent or value of the subjects per year; that the pursuers were using them not for agricultural but for building purposes, and under the contract of ground-annual they agreed to pay £15 a-year for the ground; further, that the annual worth of the subjects, which were in close proximity to a provincial town, and formed part of lands suitable for building purposes, was about £18, being at the rate of £24 per acre.

The pursuers pleaded—" (1) The pursuers are entitled to redeem the casualties of superiority of the subjects within described, upon payment of two and a-half times the amount of the highest casualty, estimated as at the date of redemption, payable on the occasions of the sale or transfer of the property, or on the death of the vassal, subject always to the payment of any past-due casualty. (2) The amount of said highest casualty, of which the said multiple is payable as aforesaid, consists of one year's rent of the said

subjects as the same existed at the date of the pursuer's tender. (3) The fair annual rent of the said subjects does not exceed the sum of £1, 9s. 2d., and the sum payable in redemption of said casualties falls to be calculated on this footing."

The defender pleaded—" (1) The subjects not being let for a rent, the actual worth or yearly value of the lands falls to be taken as the basis in calculating the redemption money, and in the circumstances the defender is not bound to accept the sum tendered. (2) The pursuers having, at or about the date of redemption, contracted to pay £15 yearly for the ground, the same must be held to be of at least that value.

A joint-minute for the parties was lodged, in which the following admissions were made:—"That at 13th May 1886, the date at which the pursuers became entitled to redeem the casualties payable to the defender in respect of the subjects which they acquired from Admiral H. Fairfax by contract of ground-annual dated 2d February and 23d April, and recorded in the Register of Sasines 13th May 1886, the ground in the immediate neighbourhood, so far as used for agricultural purposes, was let by Admiral Fairfax as grass parks at the rate of £1, 18s. 11d. per acre, or thereby. That the ground acquired by the pursuers, which extends to three-quarters of an acre, if so let at the date mentioned, would have yielded an annual return of £1, 9s. 2d. or thereby. That the same had been let as part of a grass park at £1, 18s. 11d. per acre, or thereby, for the season to Martinmas 1885. That the purpose for which the pursuers acquired the ground was for building a school and offices, and that they have become bound to pay £15 a-year for it by contract of ground-annual dated 2d February and 23d April, and recorded on said 13th May, all in the year 1886, said £15 being at the rate of £20 an acre. That the piece of ground acquired by the pursuers is situated on that side of Admiral Fairfax's lands which adjoins the town of Barhead, and is suitable for fencing. That Admiral Fairfax's lands extend in all to about 272 acres. That he and his predecessors have during fourteen years given off for building, pieces of ground, six in number (exclusive of the pursuers' ground), the title in four cases being taken in the form of contract of ground-annual, and in two cases in the form of long lease for 999 years, and the rates of annual payment therefor varying from £20 to £28 and upwards per acre."

In an additional joint-minute it was further admitted—" (1) That the ground acquired by the pursuers was, at the letting in February 1886 of the grass park of which it had previously formed part, specially excluded from the set, and the rent payable by the tenant of the grass park reduced accordingly. (2) That the said ground was staked off by the surveyors after the first date, and prior to the last date, of the contract of ground-annual in favour of the pursuers. (3) That the contracts with the builders were entered into, and the ground broken in September 1886."

The Lord Ordinary (KINNEAR) found, declared, and ordained in terms of the prayer of the petition.

"*Note.*— . . . The only question in this case is whether the sum tendered by the pursuers for

the redemption of casualties of superiority is sufficient in amount to meet the superior's claim, and the facts upon which that question depends are fully ascertained by the minute of admissions.

"In its actual condition at the time when the question became litigious, the ground would not have yielded more to the proprietor if it had been let for grazing, which was the only purpose for which it was then available, than £1, 9s. 2d. But it is admitted that it is suitable for building, and that the pursuers have acquired it for the purpose of building a school, and although there is no evidence or admission as to the revenue which the pursuers might derive from it if it were occupied with buildings, it is said that it must be assumed that if they were to sub-feu, or to grant a long lease for building purposes, they might obtain for it at least as much as £15 a-year, that being the amount of the ground-annual which they have agreed to pay to the former owner.

"These considerations are, in my opinion, irrelevant to the question. The measure of the superior's right is stated by Lord Curriehill in *Lord Blantyre v. Dunn*, 20 D. 1198. According to the established construction of the enactment, the measure of the composition payable by an entering vassal is the rent payable to him by his tenant in the lands at the time of the entry if they be then set in lease to a tenant, or the sum for which they might then be let if 'they are in the possession of the vassal himself.' The superior has no concern with the price paid by his vassal to the former owner, and just as little with the prospective value of the land for building, if it is not actually built upon or set in lease for that purpose. The obligations of the contract of ground-annual are *res inter alios* to the defender. The vassal contemplates building. The fact that the ground is staked out seems to show that he intends to build, but he is under no obligation to the superior to carry out his building operations, and the superior has no title to inquire whether he means to build or to sub-feu, or to put his land to any other use than that to which in its actual condition it may be applied. I think it established by the admissions that when the demand for redemption was made, which for the present purpose must be taken as equivalent to the time of the entry, the return which might have been obtained for the use of the land for a year was not more than £1, 9s. 2d. But the year's rent must be subject to the usual deductions, and it follows that the sum tendered is the full amount for which the pursuers are liable.

"The defender founded on the case of *Hill v. The Caledonian Railway Company*, 5 R. 338, as an authority for taking the price into consideration. But that was a very exceptional case, and the ground stated by the Lord President for taking into consideration the price and the expenditure on the land is quite sufficient to show that the judgment has no application to such a case as the present. His Lordship says—'The annual value of this subject cannot be tested in any of the usual ways, because it is impossible to conceive of the subject as the subject of a separate lease in any way whatever, and therefore it becomes indispensable to resort

to some other mode of ascertaining what the composition ought to be.'

"But there is no difficulty in supposing the ground in question to be let as a separate subject, and the ordinary rule must therefore be applied."

The defender reclaimed, and argued—By the Statute 1469, c. 36, the terms on which an appraiser was to be entered was his paying the overlord a year's mail "as the land is set for the time." At the date of the demand the lands were not "set for the time," and thus it was purely a question of fact as to what in the absence of a lease was the actual value of the lands at the date when the pursuers became entitled to redeem the casualties. There was no hard-and-fast rule for calculating that value. Here, however, the contract of ground-annual afforded a fair and reasonable criterion of it. The £15 of ground-annual was just ground rent. If there had been a sub-feu, that sum would have been the measure of the casualty. In *Hill v. Caledonian Railway Company*, Dec. 21, 1877, 5 R. 386, the actual price paid for the land by the railway company was taken in fixing the composition. The Court in fact searched out the fair mode of arriving at the equitable result. In *Allan's Trustees v. The Duke of Hamilton*, January 12, 1878, 5 R. 510, the annual value of the minerals was added to the actual value.—See also *Campbell v. Westerra*, June 28, 1832, 10 S. 734; *Stewart v. Bullock*, January 14, 1881, 8 R. 381.

The pursuers replied—At the date when the subjects were acquired they were part of a grazing farm. It was reasonable that if they improved the subjects by building on them, they should get the whole benefit of their improvements. Lord Curriehill in *Lord Blantyre v. Dunn*, July 1, 1858, 20 D. 1188, had defined the measure of the superior's right to a composition. It was just the rent which a tenant would have given in the existing state of the land. The question did not depend on speculative conjectures as to what the land might possibly ultimately be worth. The sum offered was adequate—*Cockburn Ross v. Heriot's Hospital*, June 6, 1815, F.C.; *Sivright v. Straiton Estate Company*, July 8, 1879, 6 R. 1208; *M'Laren v. Burns*, February 18, 1866, 13 R. 580. The price paid was never held as the estimate except in *Hill's* case, and the reasons for that were obvious.

At advising—

LORD JUSTICE-CLERK—This question is not without difficulty or interest; but I think that the Lord Ordinary is right. The Act of Parliament on which the superior's claim is founded is very ancient, but it is perfectly clear in its provisions. The superior's right is founded on the amount of rent at which the lands are let at the time. The whole question, then, is what is the rent which a tenant would give in the existing state of the land. That in the general case is not to be ascertained by speculation, but by finding out what in fact is its market value in a reasonable view, and considering the existing condition of the ground. The question is whether the Lord Ordinary is not perfectly right in holding that the fair agricultural rent of the land is the measure of the superior's right. I think he is. There may be contingencies so imminent that the Court might take them into account in

considering the question, but this case presents none. I am therefore for adhering.

LORD YOUNG, LORD CRAIGHILL, and LORD RUTHERFURD CLARK concurred.

The Court adhered.

Counsel for the Reclaimers—Sir Charles Pearson—Sir Ludovic Grant. Agents—Graham, Johnston, & Fleming, W.S.

Counsel for Respondents—Guthrie—Baxter. Agents—F. J. Martin, W.S.

Wednesday, November 16.

FIRST DIVISION.

THE TAY DISTRICT FISHERY BOARD *v.*
ROBERTSON AND OTHERS.

Fishings—Salmon Fisheries (Scotland) Acts 1862 and 1868 (25 & 26 Vict. cap. 97, and 31 & 32 Vict. cap. 123)—Fishery Board—Title to Sue—Interdict.

Held that a district fishery board constituted under the Salmon Fisheries Acts 1862 and 1868, which empowered the board to prosecute for offences and recover penalties, and to apply to the Sheriff by summary petition for the enforcement of regulations and by-laws, had no title to present an application for interdict against what was alleged to be an offence at common law.

This note of suspension and interdict was presented by the Tay District Board constituted under the Salmon Fisheries (Scotland) Acts 1862 and 1868, and Messrs Mackenzie & Dickson, solicitors, Perth, clerks to the board, to have the respondents Andrew Robertson and others, who were owners of fishing-smacks on the river Tay, interdicted from "fishing with, or using in the river Tay, from and after the 20th day of August, being the commencement of the annual close time in the said river, until the 15th day of September following in any year, the species of bag-net known as a spirling-net, or any other net of similar construction, attached to a smack, or other boat or vessel, anchored, or otherwise kept stationary, in the said river; or otherwise, to interdict, prohibit, and discharge the said respondents from using at any time in the said river the said spirling-nets, or any other nets of similar construction, for the purpose of taking salmon, or other fish of the salmon kind, in the said river."

The claimants averred—"Immediately after the close of the salmon net-fishing season on the Tay, which takes place on the 20th of August, the respondents have, in the years 1885 and 1886, commenced to use fishing smacks in the river below Newburgh, ostensibly for the capture of spirlings by means of spirling-nets, and have continued to use these nets until the 14th day of September, being the day on which the river Tweed is closed for salmon-fishing by net. Nearly all of the smacks then ceased to fish for about a fortnight, when a certain number returned to their fishing-ground. The proper season for spirling fishing does not commence

until about the beginning of October, as it is only in cool weather that spirling can be conveyed to a distance. During the period from the 20th August to 15th September large quantities of salmon were consigned in the years 1885 and 1886 by rail from Newburgh to Manchester, and and various other places, and the claimants aver that these salmon were caught by the respondents in the spirling-nets, and that the main object of the respondents in fishing with these nets in the time between 20th August and 15th September was the capture of salmon. Since the close of the salmon net-fishing season on the Tay on 20th August the respondents have resumed the illegal fishing complained of, and on Thursday, 25th August, a large quantity of salmon caught by the respondents in their spirling-nets were landed near Newburgh, and were seized on behalf of the claimants. . . . The smacks of the respondents were anchored for the whole period above mentioned in the open channel of the river, and were stationary except so far as they swung round with the tide, their catch being sent ashore by boats. Their position was in the main channel, where the salmon run, and where few spirlings are to be got."

The respondents denied that the salmon seized as aforesaid were caught in their nets, or that there was any special season for spirling-fishing. They averred that their smacks occupied the only possible position for spirling-fishing, and that the net they used was not adapted for salmon-fishing, and was the net universally used for spirling at all seasons when that fishing was carried on.

The claimants pleaded—" (1) The nets complained of being intended for the taking of salmon during the period of time in question, the respondents are not entitled to use them, and interdict should be granted against their use during that period, as craved. (2) *Separatim*—The nets being of the nature of fixed engines placed in the river, the claimants are entitled to interdict against their use."

The respondents pleaded, *inter alia*—" (1) The claimants have no title under the statutes mentioned to sue this action."

The Salmon Fisheries Act 1862, sec. 28, provides that "All offences under this Act may be prosecuted, and all penalties recovered, before any sheriff, or any two justices acting together, and having jurisdiction in the place where the offence was committed, at the instance of the clerk of any district board, or of any other person." Section 29 provides—"In the event of any person refusing or neglecting to obey any byelaw made by the commissioners, or any regulation made by the district board, the clerk may apply to the sheriff by summary petition in ordinary form, praying to have such person ordained to obey the same, and the sheriff shall take such proceedings and make such orders thereupon as he shall think just."

The Salmon Fisheries Act 1868 (31 and 32 Vict. cap. 123), sec. 15, imposes a penalty upon every person who fishes for salmon during the annual close time by any means other than rod and line. Section 21 imposes a penalty upon any person who shall "buy, sell, or expose for sale, or have in his possession, any salmon taken within the limits of this Act between the commencement of the latest and the termination of the earliest annual close time which is in force at the time for any district." Section 30 re-enacts the provisions