"It is a different question whether a curator is entitled to charge the petitioner with the expense of consulting an actuary, and I am not disposed to lay down any general rule more absolute than this, that I think all the expenses which are necessary to enable a curator to discharge his duty are proper expenses to be charged against the petitioner. It must be remembered that the office of a curator *ad litem* is not a merely nominal but a highly responsible office, and if a curator finds that he cannot form a satisfactory judgment as to the value of his ward's interest, either for himself or with the assistance of the reporter to whom the Court may have remitted, it is plainly in accordance with his duty that he should inform his mind by advising with persons of skill. It does not follow that in every case a curator *ad litem* should be entitled to charge the petitioner with the expense of a separate actuary. Experience shows that, in general, curators have little difficulty in determining for themselves, with such explanations as they may receive from the actuary appointed by the Court, whether his report should be accepted or not. It is a question of circumstances, and I should not suppose that curators, who are generally persons of experience in business, will have any difficulty in practice in deciding whether it is necessary and proper to take farther advice. If they have incurred expense unnecessarily and improperly, the petitioner may object upon the audit of the account. But I think he must pay the expenses which have been properly incurred."

Counsel for Petitioner—Dundas. Agents—Dundas & Wilson, C.S.

Counsel for the Curator *ad litem*—R. Johnstone. Agents—J. C. & A. Steuart, W.S.

*Thursday, December* 11.

## OUTER HOUSE.

[Lord Fraser.

### CAMPBELL *v.* STUARTS.

*Superior and Vassal—Entry—Untaxed Entry—Casualty—Year of which Rent to be Taken in Estimating Causalty—Conveyancing (Scotland) Act* 1874 (37 *and* 38 *Vict. cap.* 94), *sec.* 4.

*Held* that the year the rent of which is to be taken as the amount of the casualty due in respect of an implied entry under the Conveyancing (Scotland) Act 1874, is the year of the implied entry, and not the year in which the casualty may be demanded.

At the date at which the causalty due in respect of an entry fell to be estimated, the lands were under a lease and the tenant had sublet them at an increased rental. *Held* that the rent payable under the lease, and not that under the sublease, was to be taken as the measure of the casualty.

The Conveyancing (Scotland) Act 1874 (37 and 38 Vict. cap. 94), sec. 4, provides—"When lands have been feued, whether before or after the commencement of this Act, (1) It shall not, notwithstanding any provision, declaration, or condition to the contrary in any statute in force at the passing of this Act, or in any deed, instrument, or writing, whether dated before or after the passing of this Act, be necessary in order to the completion of the title of any person having a right to the lands in whole or in part, whether such right shall have been acquired by succession, bequest, gift, or conveyance, that he shall obtain from the superior any charter, receipt, or other writ by progress" . . .

Sub-section (2) provides that infeftment shall imply entry with the superior. (3) "Such implied entry shall not prejudice or affect the right or title of any superior to any casualties, feu-duties, or arrears of feu-duties which may be due or exigible in respect of the lands at or prior to the date of such entry . . . . . but provided always that such implied entry shall not entitle any superior to demand any casualty sooner than he could by the law prior to this Act or by the conditions of the feu-right have required the vassal to enter or to pay such casualty irrespective of his entering."

Sub-section (4) provides that "No lands shall after the commencement of this Act be held to be in non-entry, but a superior who would but for this Act be entitled to sue an action of declarator of non-entry against the successor of the vassal in the lands, whether by succession, bequest, gift, or conveyance, may raise in the Court of Session against such successor, whether he shall be infeft or not, an action of declarator and for payment of any casualty exigible at the date of such action, and no implied entry shall be pleadable in defence against such action . . . and the summons in such action may be in or as nearly as may be in the form of Schedule B hereto annexed." In Schedule B the pursuer (superior) and the defender (vassal) are respectively denoted by the letters A and B, and the last vassal by the letter C. The first conclusion is for declarator that "in consequence of the death of C (*or otherwise as the case may be*), who was the vassal last vest and seised in All and Whole the lands of X (*describe or refer to the lands, and if the casualty due is a taxed composition or an heir's relief-duty, say*) the casualty of £ (*or if a singular successor's untaxed composition be due, say*) a casualty, being one year's rent of the lands, became due to the said A as superior of the said lands upon the day of being the date of the death of the said C (*or*) the date of the infeftment of the said B in the said lands (*or otherwise as the case may be*) and that the said casualty is still unpaid." . . .

The last vassal infeft and entered with the superior in the lands of Dalness, in the county of Argyll, under the law as it stood prior to the Conveyancing Act of 1874, was Coll Macdonald, W.S. He died in 1837. By his settlement Coll Macdonald conveyed the lands in trust for certain purposes to his eldest son James Macdonald, whom failing to Charles Neaves, afterwards Lord Neaves, and Duncan Macdonald. After all other purposes of the trust were satisfied, the truster directed that the lands should be conveyed to his son and his heirs.

In 1845, by the son's death, the trust devolved on Lord Neaves, the other trustee named along with him, Duncan Macdonald, having previously died.

Lord Neaves, as trustee, held the *dominium utile* of the lands at the date of the passing of the Act of 1874. He had not entered with the superior. By the Act of 1874 he was impliedly

entered with the superior. The entry was untaxed. Lord Neaves did not pay or tender any composition.

In June 1876, the period for making a conveyance as directed by the truster having come, Lord Neaves conveyed the lands to Mrs Margaret Macdonald or Stuart, the defender of this action, whom failing the heirs-male of her body, whom failing as therein mentioned. This disposition was duly recorded in July 1876. The defender thus, as was admitted in this action, acquired the lands as a singular successor.

Lord Neaves died on 22d December 1876.

In April 1883 the pursuer of this action, Miss Jane Campbell of Inverawe, the immediate lawful superior in the lands, demanded a casualty in respect of the entry of Lord Neaves as at 1st October 1874, under the Conveyancing Act 1874. She claimed £550 as the amount of this casualty, which sum was arrived at by taking the rental of the lands according to the valuation roll of the year Whitsunday 1882 to Whitsunday 1883, the year current when the claim was first made. That rental was £750, and the pursuer admitted that deduction of £200 might be made in respect of usual and legal deductions.

The pursuer also demanded a second casualty or composition of one year's rent in respect of the death of Lord Neaves in 1876, and of the defender having in the circumstances above stated acquired the lands from him on a singular title, and being at the same time by implication of law under the Act of 1874 impliedly entered with her (pursuer) as superior. In respect of this casualty also she claimed £550.

The defender stated that in 1876, when she was infeft, and when also Lord Neaves died, the rental was only £375. She was willing to pay one casualty of that sum under the proper deductions, but refused to pay, and denied the pursuer's right to demand, two casualties as demanded of her.

The pursuer then brought this action for declarator—(1) that in consequence of the death of Coll Macdonald, the vassal last entered and infeft under the old law before the Act of 1874, a casualty of one year's rent became due on 1st October 1874, the day on which the Act came into operation, to the trustees of pursuer's father (who had since conveyed the superiority to her), and was still due to her, or otherwise became due on such date as the Court should determine, and for payment thereof, the amount being "estimated according to the rental of the said lands and others from Whitsunday 1882 to Whitsunday 1883, being the year current when the pursuer as present superior for the first time made a claim for payment of the said casualty, or otherwise should be estimated according to the rental of such other year and in such manner as our said Lords may determine." Then followed a conclusion for £550 as the amount of one year's rent. (2) In the second place, the pursuer concluded that in consequence of the death of Lord Neaves, "the vassal first entered and infeft in the lands and others above described after the death of the said Coll Macdonald, by virtue of the said Conveyancing (Scotland) Act 1874," another casualty, being one year's rent of the said lands, became due on 22d December 1876, the date of the death of Lord Neaves, and that that casualty was still unpaid. Then followed a conclusion that the amount of that casualty should be "estimated according to the rental for the year from Whitsunday 1882 to Whitsunday 1883, being the year current when the pursuer as present superior for the first time made a claim for payment of the said casualty, or otherwise, should be estimated according to the rental of such other years and in such manner as our said Lords may determine;" and a petitory conclusion for £550 or such sum as should be found to be a year's rent.

The defender, besides pleading that the pursuer was not entitled to more than one casualty in respect of her (defender's) entry, pleaded—"(4) Whether one or both of the casualties are held to be due, their amount should be calculated according to the rental after the proper deductions at the date or dates when such casualty or casualties are held to have become due, and not according to the rental at the date of the present action."

In respect of the decision in *Mounsey* v. *Palmer*, Nov. 20, 1884, *supra*, p. 118, the pursuer departed from the claim for two casualties.

The question remained for decision whether the year's rent was to be estimated by the rent in 1876, when the defender obtained her implied entry by being infeft, or by the rent in 1882-3, the year of the demand, as the pursuer contended for. The rent in 1876 was stated to be £200 less than the rent at the later period 1883.

The Lord Ordinary (Lord Fraser) pronounced this interlocutor—"The Lord Ordinary having considered the cause, Finds that the pursuer is the immediate lawful superior of the lands of Dalness and others described in the record: Finds that the said lands were held in trust by the now deceased Lord Neaves, who stood infeft therein at the time when the Conveyancing (Scotland) Act 1874 was passed, and consequently that his infeftment in the lands operated as an implied entry with the superior as at the date of the said statute: Finds that Lord Neaves conveyed over the said lands to the defender in June 1876, and that the defender consequently as at said date became entered with the superior: Finds that only one casualty for composition is due by the defender to the superior, and that the same amounts to a year's rent, under the usual deductions for the year 1876, and with the view to ascertaining the amount of the casualty payable, appoints the defender within ten days to lodge a minute in process, setting forth the gross rent for the year from Whitsunday 1876 to Whitsunday 1877, and the deductions claimable therefrom in fixing the sum due as casualty.

"*Note.*—The claim for payment of two casualties was given up by the pursuer in consequence of the decision of the First Division in *Mounsey* v. *Palmer*, Nov. 20, 1884 [*supra*, p. 118]. The only question remaining therefore is, whether the one composition now claimable shall be a year's rent as at the date of the implied entry of the defender in the year 1876, when the disposition in her favour was granted by Lord Neaves, or whether it shall be a year's rent for the year from Whitsunday 1882 to Whitsunday 1883, the demand for composition having been made by the pursuer in April 1883?

"Now, before the passing of the Conveyancing Act of 1874, there could be no doubt as to this point. The Act 1469, c. 36, first gave statutory sanction to compositions payable to the superior. That was the statute which gave a right

to apprisers to insist upon an entry. It enacts 'that the overlord receive the creditour or ony ither buyer tenand till him payand to the overlord a year's maill as the land is set for the time.' The Act of 20 Geo. II. c. 50, obliged the superior to receive as his vassal any person who produced a proper conveyance, and charged him with horning to enter him upon payment of such fees and casualties as the superior is entitled by law to receive. What he was 'entitled by law to receive' was very distinctly stated in the interlocutor in the leading case of *Aitchison* v. *Hopekirk*, decided in 1775, 2 Ross' L.C. 183, as follows:—'That the pursuer as superior is entitled for the entry of singular successors, in all cases where such entries are not taxed, to a year's rent of the subject, whether lands or houses, as the same are set or may be set at the time, deducting the feu-duty and all public burdens, and likewise all annual burdens imposed on the lands by the consent of the superior, with all reasonable annual repairs of houses and other perishable subjects." This decision settled the rule which guided the practice till 1874. It was not the rent of the year when the lands fell into non-entry, nor the rent of the year when the superior raised his declarator of non-entry and took possession of the lands, but the rent of the year when the entry was actually given. Under the old law there could be no question as to the rent of the year when a demand for composition was made, because the superior was not entitled to demand composition. His only mode of enforcing payment of that casualty was by declarator of non-entry, and if the vassal chose to submit to decree in such an action without taking out an entry, the superior could not compel him to pay composition.

"Now, all this is changed by the Act of 1874, which gives to the superior a right to bring a petitory action for payment of the composition when there is an implied entry under the statute. But in the opinion of the Lord Ordinary it does not alter the rule of the old law, that the rental of the year of entry is to be looked to. By taking the rental of that year it operates to the superior's disadvantage in this case to the extent of about £200, and it was strenuously maintained for the pursuer that the statute did not intend in any way to prejudice the rights of the superiors but to preserve them. This it has certainly done in several particulars where it was not intended. Granting all this, it does not follow that by adhering to the old rule, that the rental of the year of entry is to be taken, superiors will in all cases suffer. It was an accident merely in the present case that the rental of the year of entry (1876) was less than the rental of the year of demand (1883). It might have been otherwise, and the pursuer would in that case have been a gainer.

"Now, after considering carefully the Act of 1874, the Lord Ordinary has come to the conclusion that although there is not in it an express declaration that the old rule shall be followed, the whole spirit of the 4th section of that Act with the relative schedule is to that effect. It is unnecessary to offer any comment upon it, because that has been already done in a reported judgment by Lord Curriehill—*Stewart* v. *Murdoch* and *Rodger* (19 Scot. Law Rep. 649)—in terms with which the Lord Ordinary entirely concurs. The learned Judge has completely expressed the opinion which the Lord Ordinary has formed of the meaning of the statute, and of the expediency of adhering to a rule which is at once simple and intelligible, and excludes all opportunity for so managing matters as that the superior shall delay making his claim until he sees improving operations on the property, which are in progress or in prospect, completed."

Following upon this interlocutor the parties entered into a joint-minute, in which they concurred in stating that in 1876 the lands were held by the trustees of the late Alexander Campbell, Esq. of Monzie and Inverawe, under a lease entered into between the late James Macdonald, Esq. of Dalness, and the said Alexander Campbell, dated 21st February 1839, for 44 years from Whitsunday 1838 at a rent of £375 sterling; that in 1873 the lands were sublet by the trustees to the Rev. J. A. Gould at a rent of £750 for a term of nine years from Whitsunday 1873.

If the casualty fell to be ascertained at the rent paid for the year 1876 under the original lease to Alexander Campbell, the parties admitted that the rent was £375, and that the deductions to be made amounted to £103, 19s. 8d., leaving the sum of £271, 0s. 4d. as the amount of casualty payable to the superior. But if the casualty was to be ascertained on the rent paid by the Rev. J. A. Gould, the parties admitted that the rent was £750, and the deductions falling to be made amounted to £205, 18s. 10d., leaving the sum of £544 as the amount of casualty due.

The Lord Ordinary issued the following interlocutor:—"The Lord Ordinary having considered the joint-minute for the parties, and heard counsel, Finds that the rent that must be taken as the casualty payable to the pursuer is the rent payable under the lease between James Macdonald of Dalness and Alexander Campbell of Monzie, dated 21st February 1839, and not the rent payable under the sub-lease between the trustees of the said Alexander Campbell and the Rev. J. A. Gould, dated 20th, 26th, and 29th May 1873: Therefore decerns against the defender for the sum of £271, 0s. 4d., being the amount of casualty payable to the pursuer: Finds the defender entitled to expenses."

Counsel for Pursuer—W. Campbell. Agents—Murray, Beith, & Murray, W.S.

Counsel for Defender — Gloag — Mackay. Agents—Mackenzie & Kermack, W.S.

---

*Friday, December* 12.

## OUTER HOUSE.

[Lord Kinnear.

A B, PETITIONER.

*Partnership—Judicial Factor—Sisting Executors of Partner in Petition to Wind up Partnership.*

A partner of a firm of law-agents presented a petition stating that his firm was in consequence of his partners' extravagance drifting into bankruptcy, and craving the appointment of a judicial factor for the purpose