Wednesday, July 18.

FIRST DIVISION.

[Lord Kyllachy, Ordinary.

MACKENZIE'S TRUSTEES *v.* SOMERVILLE.

Sale—Sale of Heritage—Rents—Assignation of Rents—Legal and Conventional Terms—Seller and Purchaser—Pastoral or Arable—Titles to Land Consolidation (Scotland) Act 1868 (31 *and* 32 *Vict. cap.* 101), *sec.* 8, *Sched. B, No.* 1.

The Titles to Land Consolidation (Scotland) Act 1868, section 8, enacts that a clause of assignation of rents in the statutory form "shall, unless specially qualified, be held to import an assignation to the rents to become due for the possession following the term of entry according to the legal and not the conventional terms, unless in the case of forehand rents, in which case it shall be held to import an assignation to the rents payable at the conventional terms subsequent to the date of entry."

The disposition of certain heritage, which included, *inter alia*, four farms, contained an assignation to the purchaser of the rents in the statutory form, the words used being "and we assign the rents," without any qualification. The term of entry was Martinmas 1897. The farms were let under leases, with entry to houses and grass at Whitsunday, and the first half-year's rents were payable at Martinmas in the year of entry, and the next half-year's rents at Whitsunday in the next year, for the first year's possession and crop. In a question between the purchaser and seller as to the right to the rents payable at Whitsunday 1898, which were collected by the purchaser, the seller maintained that the farms were pastoral, that the rents in question were legally due at Martinmas 1897 in respect of the second half of the crop and year 1897, though conventionally payable at the Whitsunday following, and that accordingly they did not fall under the assignation to the purchaser. The purchaser maintained that the farms were arable, and that the rents were payable forehand, or otherwise that even if the farms were pastoral the rents payable at Whitsunday 1898 were due in respect of possession from Whitsunday 1897 to Martinmas 1898, and that consequently in either view the rents in question belonged to him.

A proof was taken, by which it was established that only a comparatively small proportion of these farms was, or under the provisions of the leases could be, actually under cultivation at any one time, that the arable land was used as an adjunct of the pasture, and that the rent and profit were mainly derived from pasturing sheep. It appeared, however, that proportions of the ground, varying in the case of the various farms from one-third to the whole, had actually at some time been, and were capable of being, put under the plough. A rotation of crops was prescribed by the leases, and the defender led evidence to the effect that the farm buildings were such as were appropriate to arable farms.

The Court, proceeding on the principle that the question must be solved by looking to the character of the farms *de facto* at the time when it arose, and that they must be treated as wholly pastoral or wholly arable according to their predominant characteristics, *held* (1) that the farms were pastoral, and (2) that consequently the rents in question were legally due at Martinmas 1897, and were derived from possession prior to the purchaser's entry, and that accordingly under the statutory provision they belonged to the seller.

The trustees of the late Colin James Mackenzie of Portmore sold the estate of Portmore to Mr John Somerville, with entry at the term of Martinmas 1897. The disposition contained the usual clauses, and, *inter alia*, a clause assigning the rents in the statutory form provided by the Titles to Lands Consolidation (Scotland) Act 1868, viz., "and we assign the rents." This clause was not qualified in any way.

The trustees raised an action against Mr Somerville for payment of the sum of £1346, being the rents payable at Whitsunday 1898 in respect of the ten farms on the estate, which had been collected by the defender.

The pursuers averred—"(Cond. 3) The farms on the Portmore estate are pastoral. The term of entry under the leases is Whitsunday, and the rents for the first year, which are legally payable at Whitsunday, the term of entry, and Martinmas thereafter, are conventionally payable by the leases at Martinmas and Whitsunday following. The term of payment is thus conventionally postponed for six months, and the half-year's rents payable at Whitsunday 1898 are those legally payable at Martinmas 1897 in respect of the second half of the crop and year 1897. The pursuers maintain that they are, by the terms of the contract of sale, entitled to the rents (whensoever payable) which were legally due in respect of the possession up to Martinmas 1897, and accordingly claim the whole rents of crop and year 1897, including the second half-year's rents legally payable at Martinmas 1897, but conventionally payable at Whitsunday 1898. (Cond. 4) The rents payable at Whitsunday 1898 for the second half of crop and year 1897, in respect of the said pastoral farms and the grass park, are as follows—1. Longcote, £125; 2. Kingside, £300; 3. Nether Fala, £125; 4. West Loch, £375; 5. Shiplaw, £167, 10s.; 6. Harcus, £115; 7. Earlypier, £76, 10s.; 8. Shiphorns, £32, 10s.; 9. Craigburn, £23; 10. Park, &c., Eddleston, £6, 10s.—£1346."

They pleaded—"(2) The rents sued for being for the second half of crop and year

1897, the pursuers are, by the terms of the disposition, entitled to decree as craved."

The defenders averred—"Said farms are arable, not pastoral, and were let by the late Mr Mackenzie and by the pursuers as such, under leases with the usual clauses regarding the rotation of crops. The leases are referred to. Under reference to the leases, it is explained that the respective tenants of said farms all obtained possession at the term of Whitsunday; that, by the lease of the farm of Longcote the first half-year's rent is declared payable at Martinmas after entry, and the next half-year's rent is payable at Whitsunday thereafter, for the first year's possession, and so forth yearly and termly; that by the leases of the farms of Kingside, Nether Fala, Westloch, Shiplaw, Harcus, Early Pier, and Craigburn (under the leases of which entry was given to the houses and grass at Whitsunday, and from and after the separation of the crop of the year of entry to the rest of the ground), the first half-year's rent is declared payable at Martinmas after entry, and the next half-year's rent at Whitsunday thereafter for the first year's possession and crop, and so forth yearly and termly thereafter; and that by the lease of the farm of Shiphorns, the first half-year's rent is declared payable at Martinmas after entry, and the next half-year's rent at Whitsunday thereafter, and so forth yearly and termly thereafter. A statement showing the rents collected by the defender will be produced. *Quoad ultra* denied. The rents collected by the defender were for possession following the term of his entry, namely, Martinmas 1897."

The defenders pleaded—"(3) *Esto*, that any of said farms are pastoral, the defender having collected rents for possession following the term of his entry is entitled to retain the same, and therefore to be assoilzied from the conclusions of the summons. (4) On a sound construction of the contract of sale founded on, and said leases, the defender is entitled to decree of absolvitor, with expenses."

A joint-minute of admissions was ultimately lodged in which the pursuers stated that they had withdrawn all claim to the rents of the farms of Early Pier, Shiphorns, and Craigburn, while the defender admitted that the farms of Longcote and West Loch were to be taken as pastoral for the purposes of this action.

A proof was taken, evidence being led with regard to the question whether the farms of Kingside, Nether Fala, Shiplaw, and Harcus were pastoral or arable.

Mr James Inglis Davidson deponed as follows—"I am a land valuator, and have had a wide experience in connection with the valuation and management of landed property and farming matters generally. I know the estate of Portmore. In 1896 I visited it with the view of reporting upon its character and value to the agents of the late Mr Mackenzie. I valued it as for sale. The elevation of the estate above sea level is from 650 to 1750 feet, the average being about 900. From my inspection of the estate it is clear to me that cropping is now carried on to a more limited extent than it had been in previous years, as is general in such districts. It is carried on mainly for the purpose of providing food for the live stock, and for renewing the pasture. It is found in experience that it is a very desirable and necessary adjunct of a stock farm to have a portion of land in crop. You can thus keep a better class of stock than would be practicable if no portion was cropped. Since this question was raised I have re-inspected the estate on two occasions with the view of giving evidence as to the character of the farms and the method of their administration. The state of cropping carried on in 1896 and subsequent years was approximately the same as the state of cropping this year. As regards Kingside farm, the average elevation above the sea is about 900 feet, and I may say that the cropping land on the farm is rather higher than the other land on an average. The extent of the farm is 1600 acres, and the rent under the lease in 1897 is £600. The information given to me was that 800 acres of the farm were arable in the sense that it had been ploughed at one time or other, and that 800 acres consisted of moor pasture, but, so far as I can see from the plan, I am afraid there must have been some slight exaggeration as regards the arable land, because all I can identify from this small scale plan as having been ploughed is roughly between 600 and 700 acres. The representation upon the plan corresponds with the state of facts as existing on the ground when I made my inspection. I examined the lease of Kingside. I am aware there is a cropping clause referable to the arable land. Speaking generally, the course of cropping prescribed for the arable land is the ordinary five-shift rotation—(1) white crop after lea; (2) green crop after white; (3) white crop after green; (4) young grass or hay; (5) pasture. There is also a clause providing that the tenant is not to break up more lea than 50 acres in any one year. The effect of that clause is that, including first year's grass as a crop, there would be exactly 200 acres under crop, as against 1400 acres in pasture of a more or less permanent kind. That provision automatically prescribes that whatever portion of the ground is arable in the sense of being capable of cultivation, there cannot be in any one year, in fact, more than 200 acres, consistently with the five years' shift. With regard to the remainder of the farm, the 1400 acres not under cultivation, that must necessarily be grass. As matter of fact, about 200 acres are under rotation. As regards the stock on the farm, there are 410 half-bred ewes, besides a proportion of ewe hoggs, which would be one-fourth of that number—about 520 half-breds, young and old, and 415 blackfaced ewes, besides ewe hoggs, and there again you require to add about 100 to 120 ewe hoggs. I consider that the main purpose for which the 200 acres of land are annually cropped is to keep the half-bred ewes on the farm. There is a certain proportion of cattle wintered to put down straw, but there is

no cattle grazing practised to any extent. The main purpose for which the cropping of the arable land is carried on is to provide turnips in winter for the half-bred ewes, and young grass in spring, and for renewing the pasture. In point of fact, if you did not crop you would require to put on a different class of sheep. In a district of that kind I think no practical farmer would try to make a direct cropping profit off the land under rotation by selling the crops. I speak with some little experience of farming in a high district. They grow nothing but oats, and in an ordinary season the oats will be largely consumed by the sheep and horses. I should think that over the whole of this estate which is under white crop there will be nothing grown but oats; the elevation precludes any other variety. . . . As matters stand, I think that the course of management which is followed is in point of fact the most judicious that could be adopted, and when one reflects that this state of matters was entered into between the late Mr Mackenzie and the late Mr John Kerr, one of the most practical farmers in Scotland, you may assume they did the best that could be devised in the interest of all concerned. I do not think it is debateable what the source is from which the bulk of the profits come. There are 1400 acres in pasture and 200 acres in crop, and if the suggestion is that the profit from 200 acres at an elevation of 900 feet is as great as the grazing profit of 1400 acres in the same district, I do not think it is discussable. The answer is that the profit must be largely greater on the grazing portion of the farm. (Q) The rent of the farm being £600, supposing the arable portion were let separately, what, as a valuator, do you think would be a fair rent to expect from the arable land which is under cultivation? — (A) Assuming it was an average portion of the land that has been ploughed, I should say about 12s. per acre, which would give about £120 for the 200 acres. Deducting that from the £600, you have £480 left as the rent of the pasture. For Inland Revenue and other purposes the rent is regarded as being the basis on which profits, or possible profits, may be calculated. Shiplaw is a farm similar in character to Kingside. It extends to about 1100 acres, of which about one-third is arable in the sense I have described. The rent is £335. The lease also prescribes that the arable land is to be cultivated according to the five-shift rotation, and the tenant is limited to break up 40 acres of lea in any one year. The effect of that stipulation is that approximately, out of 360 acres that have been ploughed at one time or other, 160 acres may, in terms of the lease, be in rotation, including 40 acres of first year's grass. . . . The result of the prohibition in the lease is that only 160 acres out of the 1100 acres of which the farm consists can in any one year be under crop, including first year's grass as crop. The stock of sheep consists of 465 Cheviot ewes, 112 Cheviot ewe hoggs, and 80 blackfaced ewes. I think the main purpose of the cropping on this farm is precisely similar to the purpose in the case of Kingside. In the case of this farm the stock is a Cheviot one, but they are crossed with Leicesters, and half-bred lambs are taken from them; and it is necessary to provide very much the same class of food as for half-breds. I do not think that any part of the crop grown on the arable portion of Shiplaw is or can be grown with a view to sell. In a very favourable season they might sell a little, but as a general proposition that would not be done. In regard to the proportion of profit derived from the two classes of land, I should say it would largely preponderate in favour of the grazing, which largely preponderates in extent. In the case of this farm I think probably 10s. an acre would be a fair annual rent for the arable land, which would give £80 out of the total rent of £335, leaving as the rental derived from the pasture, £255. The elevation of this farm is slightly lower than Kingside on the average, but not appreciably. As regards Nether Fala, the greater proportion of that farm has at one time or another been under the plough, but the land above or on the west side of the railway has apparently been a long time under grass—the bulk of it at anyrate. The cropping has been of late years mainly confined to the land below the railway. The bulk of the land above the railway consists of rough pasture. The extent of Nether Fala is 500 acres. The elevation is about the same as, or a little lower than the other two farms. Under the lease the tenant is bound to follow the five-shift rotation in regard to the arable land, and he is also bound to keep on part of the farm a regular and sufficient stock of sheep as well as other bestial. There is likewise a prohibition prohibiting the breaking up of meadow land, and also limiting the extent of the land which may be broken up in any one year to 40 acres, the effect being that out of the 500 acres only 160 acres can be under crop, including first year's grass. . . . Obviously the bit of 40 or 50 acres which had returned to pasture in the fifth year would in ordinary course be pasture. This farm carries 300 Cheviot ewes, 80 Cheviot ewe hoggs, and 40 blackfaced ewes. I think that here as in other cases the cultivation of the arable land is mainly an incident of the stock-carrying capacity of the farm, but this may be more a matter of opinion than in the other cases, because the land cropped is larger in proportion to the whole extent than in the other two farms. However, in my view, no one would crop this farm for the purpose of producing a cropping profit; it must be in conjunction with stock. The rent of this farm is overhead about 10s. per acre, but seeing that the land usually cropped is below the railway, I would put 12s. upon it, and 8s. upon the land above. That would give for the 160 acres of arable £96, leaving £154 as the rent of the pastoral portion of the farm. The extent of Harcus is 307 acres. That is the home farm of the estate, and the rent is £230. It includes the policy parks which surround the mansion-house. In the lease there are express conditions prohibiting the tenant from breaking up certain fields which are mentioned in the lease,

and these fields I understand amount to 225 acres. He is also prohibited from breaking up more than 20 acres of lea in any one year. The course of cropping is the usual five-shift rotation as to the arable land. The elevation of the farm is between 600 and 700 feet. Not more than 80 acres can be cropped in any one year. The lease also prescribes that the Law, which is said to be partly under rotation, shall be laid down as soon as possible in permanent grass. That is the part below the letter C in Harcus on the plan. It is in course of being returned to permanent pasture. I think it is perfectly clear in terms of the lease that the larger proportion of the tenant's profits must arise from the pastoral part of the farm, which preponderates very much over the other. My view is confirmed by the results of my inspection of the ground. It is right to say that this farm differs to some extent from the others. It is a lower-lying farm, and it has been practically all ploughed, and it could be all ploughed, but that is subject to two very obvious disabilities. The fields are policy fields, far from rectangular in shape, and entirely surrounded by trees, which makes harvesting most precarious in such a district, and I do not think it would be politic, apart from the possibility of ploughing them, to crop them to any material extent. Looking to the character of this farm, and assuming that the plantations are not let, it consists really of a series of detached grass fields—such as in ordinary practice would be let as grass parks. I think you may take the rent of the arable land at an average of the total rent, which is something like 15s. per acre, so that 80 acres would give £60, leaving £170 for the balance."

The evidence led for the defender did not contradict in the main Mr Davidson's evidence as to the proportion of the ground which was actually under crop, and the proportion which had at one time been or was capable of being cultivated. They led evidence to show that the buildings and accommodation for farm servants on the farms were such as were appropriate to arable farms, and that the provisions as to rotation of crops found in the leases were not usually found in leases of farms when the arable land was merely an adjunct of the pasturage.

The leases of each of the farms except Harcus bore that the entry was to be "the term of Whitsunday . . . as to the houses and grass lands, and from and after the separation of that year's crop from the ground as to the rest of the lands." In that of Harcus the entry was to be "the term of Whitsunday 1897 as to the houses, grass, and fallow or green crop land, and from the separation of that year's crop from the ground as to the land in white crop."

All the leases bore that the rent was payable at two terms, "beginning the first term's payment at Martinmas" in the year of entry, "and making the next term's payment at Whitsunday" in the next year, "for the first year's possession and crop." The stipulations as to cropping, &c., are summarised by Mr Davidson in his evidence, which is quoted *supra*.

The Lord Ordinary (KYLLACHY), on 25th November 1899, pronounced the following interlocutor:—"Decerns against the defender for payment to the pursuers of the sum of £1182, 10s., with interest thereon, as concluded for, in full of the conclusions of the action: Finds the pursuers entitled to expenses," &c.

Opinion.—"In this case I am of opinion that the four farms about whose character the parties differ must be considered as mainly pastoral.

"I hold it proved—(1) that in each of the four farms the land under grass largely exceeds, both in extent and value, the land under crop; (2) that this has been so during the whole course of the current leases, and indeed for a longer period; and (3) that the preponderance of grass over crop has been in conformity with the leases and with the most approved methods of management applicable to farms of the class in question.

"I do not think it necessary to go into details. Two of the farms include a large area of hill ground; another consists mainly of grass parks, which under the lease cannot be broken up at all; and the fourth consists entirely of land which, if not wholly ploughable, was at one time in that position. Discarding, however, those distinctions, and considering for simplicity only the ground which has at some time been under plough, it is not, I think, disputable that a great proportion of the ground has on all the four farms been for a number of years in permanent pasture. It may be that there has been no sharp line or division between the ground grazed and the ground kept in tillage. The pasture was no doubt broken up, as a rule, at long intervals in order to maintain its quality. It would appear also that in some instances the tillage was more or less distributed over the whole ploughable area, so as in effect to place that whole area, or most of it, under what might be called a ten or eleven or twelve years' rotation. But that does not appear to me to make any substantial difference. The bulk of the land was always in fact under grass; and even if each field or each division were to be considered separately, I should not see my way to describe as otherwise than pastoral a farm of which every field or division was, although under tillage say for three years in every decade, yet for the remaining seven years continuously under grass. Nor, while I appreciate the argument, can I accept as sound the suggestion of Mr Gordon that a farm once arable must always remain so, if the only reason for laying it down in grass has been a thing so transitory as the market price of cereals. I am afraid that it would be a somewhat sanguine view which would anticipate such rise of prices as would make it profitable to put these farms wholly or mainly under plough. But in any case the character of the farms must in my opinion be for the present purpose taken as at the date of the sale; at all events, where, as here, the conditions existing at that date are not quite plainly temporary or accidental.

"The four farms being therefore pastoral, or mainly pastoral, it follows that the

rents in question, which were conventionally payable at Whitsunday 1898, were legally due at Martinmas 1897, and were so due as being the second half of the rent payable for the grass crop of 1897. To put it otherwise, they were legally due for the possession from Whitsunday to Martinmas 1897, the possession during the winter and spring of 1897-98 being thrown in as an unimportant accessory. In this view I am not able to see an answer to the claim of the pursuers. The defender, who was the purchaser of the estate, entered at Martinmas 1897, and his right to the rents is defined by the assignation expressed in his disposition. By that assignation he has, as I construe the statutory expansion of the actual clause, right only to such rents as are (1) legally due after Martinmas 1897, and (2) so due for possession subsequent to that term. It appears to me that the rents in question do not satisfy either, and certainly do not satisfy both, of those conditions, and therefore that the pursuers are entitled to judgment."

The defender reclaimed, and argued—If they could establish the fact that the farms were arable they were entitled to succeed. If the farms were arable the rents were payable forehand, and in terms of the statute the rents collected at Whitsunday 1898 passed to the purchaser. What was meant by arable land was not land actually under crop, but land *de facto* under course of cultivation, land fit to be ploughed, and which formerly had been ploughed. The nature of the land as opposed to the actual use at the moment was the true test—*Minister of Kilbride* v. *Maule*, May 18, 1809, F.C.; *Bruce* v. *Carstairs*, May 30, 1826, 4 S. 626; *Macmillan* v. *Presbytery of Kintyre*, November 19, 1867, 6 Macph. 36. In the last mentioned case the fact that land had been converted into a lawn was held not to destroy its arable character. In the cases relied upon by the pursuers the portions of the farms ever cultivated were very small, or the cultivation was of ancient date. The facts proved showed that these lands were of an arable character, there being a large proportion of them entirely arable. This view was confirmed by the terms of the leases, which contained the ordinary clauses of rotation applicable to arable farms. It was true that they were situated at a high elevation, but certain of the farms which the pursuers admitted to be arable were at the same elevation. (2) Even if the farms were held to be pastoral the purchaser was entitled to rents payable at Whitsunday 1898—*Hunter* v. *Stewart*, Nov. 18, 1857, 20 D. 60. The rents to which he was entitled were those which "were to become" legally due after his disposition and for possession subsequent to it. Both these conditions were satisfied. These rents were legally due for the possession from Martinmas 1897 to Whitsunday 1898—*Binny* v. *Binny*, January 22, 1820, F.C., at p. 93; *Kerr* v. *Turnbull*, 1760, 5 Brown Sup. 876; M'Laren on Wills, i. 213, note. The cases on which the pursuers founded, dealing with the question as between heir and executor, were not conclusive of the point as they contended — Ersk. ii. 9, 64; *Blaikie* v. *Farquharson*, 1849, 11 D. 1456.

Argued for the respondents—To determine the character of a farm the right course was to look at its actual *de facto* use, to ascertain the source from which the rents were derived—*Petley* v. *Mackenzie*, November 21, 1805, Hume 186; *M'Clymonts* v. *Cathcart*, July 14, 1848, 10 D. 1489; *Campbell* v. *Anstruther*, December 20, 1836, 9 Sc. Jur. 163. Accordingly it was not accurate to describe as arable a farm which at some former date might have been, or at some future date might be, under the plough. Nor was the defender entitled to refer to the leases to support his contention. In point of fact their terms went far to refute it, as they clearly indicated that the tenants were not encouraged to treat their farms as arable, they being bound to keep a number of sheep, and only to cultivate a small part. If the farms were looked at in accordance with this principle, the great preponderance of the ground was clearly pastoral, and they must be treated as a whole as pastoral. That being the state of the facts, the law on the question was very clear, that the defender was not entitled to these rents. They did not satisfy either of the conditions prescribed in the statute. They did not become legally due at Whitsunday 1898, but at Martinmas 1897, and were for possession prior to the purchaser's term of entry—Ersk. ii. 9, 64; Bell's Conveyancing, i. 639. A tenant in a pastoral farm was legally bound to pay the first half-year's rent when he entered, and it was in respect of the crop on the ground—*Johnston* v. *Marquis of Annandale*, 1727, M. 15,913; *Elliot's Trustees* v. *Elliot*, 1792, M. 15,917; *Kerr* v. *Turnbull, supra*; *Pringle* v. *Pringle*, 1741, M. 15,907. The condition imported into the conveyance by the statutory provision was a legal and not a conventional condition, so the terms of the leases could not regulate the legal apportionment of the rents—*Campbell* v. *Campbell*, July 18, 1849, 11 D. 1426; *Lord Glasgow's Trustees* v. *Clark*, February 27, 1889, 16 R. 545; *Campbell's Trustees* v. *Campbell*, 1800, M. *sub voce* Term, Legal and Conventional, App. 1; Bell's Prin., sec. 1499.

LORD ADAM—This question relates to the right to the rents of the estate of Portmore, collected by the defender, who is purchaser of the estate, at Whitsunday 1898. There is no dispute, as I understand, as to the amount of the rents due. The rents in dispute originally were the rents of ten farms, but parties have agreed that certain of these farms are to be taken as pastoral and certain of them as agricultural, so that we are left to deal with the rents of four farms—the farms of Kingside, Nether Fala, Shiplaw, and Harcus; and in a certain view of the case urged by Mr Guthrie there is also a question about the rents of two other farms. Now the entry of the defender Mr Somerville to the lands was at Martinmas 1897. We have

in the print an excerpt from the disposition in his favour, which shows that the entry was the term of Martinmas 1897; and it goes on to say that "we as trustees foresaid assign the writs, and we as trustees foresaid assign the rents," and a question has arisen as to the effect to be given to that clause "we assign the rents." According to the Act of 1868, we are told that a clause simply assigning the rents without qualification is to be "held to import an assignation to the rents to become due for the possession following the term of entry according to the legal and not the conventional terms, unless in the case of forehand rents, in which case it shall be held to import an assignation to the rents payable at the conventional terms subsequent to the date of entry." Now, in this case the rents which were collected on Whitsunday 1898 were, no doubt, collected according to the conventional terms. It will be observed that, according to this clause in the Act, we have nothing to do with the conventional terms upon which these rents were paid, because we are told that a clause of assignation of rents shall, unless specially qualified, import an assignation of the rents to become due according to the legal and not the conventional terms. That raises the question, were the rents collected at Whitsunday 1898 due according to the legal terms? and it is because the legal terms on which rents become due are different in the case of pastoral farms and agricultural or arable farms that the present question arises. That is what raises the question of fact whether these are to be considered as pastoral or arable farms, and I understand that, if they are to be considered as arable farms, the pursuers do not lay any claim to the rents in question. It is only in the case of the Court coming to be of the opinion with the Lord Ordinary that these farms are to be considered as pastoral farms that the question arises, and that the pursuers make a claim. That is the first question of fact on which the law turns.

Now, I suppose there is no farm in this country almost in hilly districts which has not some mixture of arable land along with the pasture, just as we see in this case, and of course the relative proportions of the arable and pasture land may vary indefinitely. However that may be, I think the law is sufficiently clear that in these questions such farms must be treated as one or the other, according to the preponderance of the one characteristic or the other. If a farm is essentially an arable farm it will not detract from that character that it also contains a proportion of hill or grass land. The question is which of the two qualities preponderates, and they will be called pastoral or arable farms accordingly. That is the sort of question we have to deal with here, because all the farms in question are partly arable and partly pastoral. In all of them there is a far greater amount of grass land, but there is connected with each of them a lesser proportion of arable land, and that being so, the question is to which of the classes, looking at the whole circumstances, is one or more of them to be relegated. The principle which, I think, is to be applied to solve such a question is this:—What *de facto*, at the time the question arises, is the character of the farm? I do not accept Mr Guthrie's proposition that that question is to be solved by merely looking at the character of the land. It may be that a farm may contain a larger or a smaller proportion of arable land in the sense of land which has been at some more or less remote time, or which may at some more or less remote time in the future be again reduced to arable. I think we must look to the facts and to the character of the possession of the farm at the time the question arises, and not to what Mr Craigie calls the essential character of the ground, and so on. For what are the rents in question paid? Is the essential or major part of the farmer's profits made out of sheep or out of arable land? That is really the principle which ought to solve this question. I think the legal question depends upon whether the farms in question, one or more of them, are in that sense to be treated as pastoral or arable farms. If that be so, I do not think upon the question of fact that there is really much doubt. I think, looking to the existing circumstances, that these farms are essentially pastoral farms. We know that all of them are used as sheep farms at the present moment. In the case of at least three of them the farmers are bound to keep a larger or smaller stock of sheep on the lands. Take, for example, Kingside farm. That farm contains 1600 acres, and of that acreage 1400 are pasture land; 200 acres I think are arable, in the sense of being at one time or another under the lease and in rotation capable of being used for cropping. No doubt there is some arable land on that farm, and accordingly, as one might very well expect, the lease prescribes a rotation by which the arable part—200 acres—is to be cultivated, apparently more for the purpose of being laid down again in pasture than for any other purpose, though no doubt the crops produced are used partly to supply fodder for the feeding of the sheep in winter. Then we have set forth the large stock of sheep kept on that farm, and we have it in the lease that the farmer is bound to keep a regular and sufficient stock of sheep on his farm. The words are—"The tenant binds himself at all times to keep on the lands hereby let a regular and sufficient stock of sheep." If we come to the matter of the proportion, it was put to Mr Davidson and he said—"There are 1400 acres in pasture and 200 acres in crop, and if the suggestion is that the profit from 200 acres at an elevation of 900 feet is as great as the grazing profit of 1400 acres in the same district I do not think it is discussable. The answer is that the profit must be largely greater on the grazing portion of the farm." Taking that to be the proper description of the farm, what is it? It is nothing more than what everybody calls a sheep farm, in which the major part of the rent and profit is derived, not from the sale of agricultural produce

—corn, wheat, and so on—but from sheep. It is essentially a sheep farm and essentially a pastoral farm.

I do not think that any particular observations were made with regard to Shiplaw, but Nether Fala was fixed upon by Mr Guthrie as a specimen, and I suppose the most favourable specimen, he could found upon for establishing that it at least was an agricultural farm, But I think, though not to so marked a degree as Kingside, it has all the characteristics to which I have referred in the case of that farm. Nether Fala is 500 acres in extent, and of these 160 are arable. The proportion of pastoral land is not so great, but still there is no doubt that it is used as a sheep farm just as Kingside is. Mr Davidson without contradiction gives us the stock of ewes and hoggs which the farm carries, aud he says—"I think that here, as in other cases, the cultivation of the arable land is mainly an incident of the stock-carrying capacity of the farm, but this may be more a matter of opinion than in the other cases." But it is essentially a farm of the same kind. It is a sheep farm on which the tenant is bound to keep up a stock of sheep. The much larger extent of the land is pastoral and in that respect the principle which applies to Kingside exactly applies to it.

Mr Guthrie also emphasised the case of the farm of Harcus which he says is in a different position. The case is different in point of fact though not in point of principle. Harcus is the home farm of the estate, and apparently it includes the policy parks around the mansion-house. We have the lease, and it is different from the others because more of the land is capable from its situation of being made arable. The peculiarity of Harcus is that by the lease, which is for nineteen years, the tenant is prohibited from cultivating that farm in any other way than as a pastoral farm. The object of the proprietor in insisting upon that I do not think is material. In point of fact the farm of Harcus is occupied and used as a grass farm. Well then, if that be so, I do not think it matters if parties choose to use their land otherwise, that it might be more profitably employed in the production of grain. That is not the use which is being made of the farm at present, or when the rent was collected at Whitsunday 1898. That rent was payable for a grass farm, and therefore I do not think we can except the case of Harcus and differentiate it from the other three.

Perhaps I have said too much upon the question of fact in this case, but I think these farms are all clearly and essentially pastoral farms in the sense that much the greater proportion of each of them is of that character.

Assuming them to be pastoral farms, the next question which arises is, what are the legal terms at which the rent of grass farms becomes due? I do not think that is a matter of controversy between the parties. Where there is a Whitsunday entry as in this case, then the first half-year's rent for the crop of that year is payable at entry, and the second half of the rent is payable at Martinmas. I do not think it was at al disputed that these were the legal terms at which the rent was due. I do not think we need speculate very much upon why this is the case, but when the rent of a pastoral farm comes to be paid, the tenant has practically the benefit of the whole grass on the farm, whereas in the case of arable farms it is not so, because the incoming tenant does not get the crop on the ground at the year of his entry. That goes to the outgoing tenant, and therefore it is that there is a difference in the legal terms at which the rent for arable and the rent for pastoral land becomes due. But however that may be, I do not think it was disputed, and if it was I do not think it can be successfully disputed, that the legal terms at which rents for pastoral farms become due are the first half of the year at Whitsunday in the year of entry, and the second half at Martinmas.

Now, if that be so, we require to turn to the leases to see for what terms the rents in question, which were collected at Whitsunday 1898 conventionally, were legally due. We are told that the terms of entry under all the leases are the same. In the case of Kingside we find that the lease is for nineteen years "from and after the term of Whitsunday 1891 as to the houses and grass, and from and after the separation of that year's crop from the ground as to the rest of the lands." The rent is to be £600 "payable at two terms in the year, Whitsunday and Martinmas, by equal portions, beginning the first term's payment at Martinmas 1891, and making the next term's payment at Whitsunday 1892 for the first year's possession and crop, and so forth yearly and termly thereafter." Now, if the legal term for the payment of the first half-year of the rent was Whitsunday 1891, it is quite clear that that rent, which was conventionally due, and was in fact collected at Martinmas 1891, was legally due at the preceding Whitsunday. I think there can be no question about that. If that be so, we may take this particular rent as a sample of the rest and see how the clause in the Act of Parliament of 1868 deals with it. That clause regulates the rights of a seller and a purchaser where, as in this case, there is an assignation of the rents without any special qualification. It deals affirmatively, if I may say so, with the rents which the assignation is to carry to the purchaser, leaving, as I think, a direct implication and inference that the rents which are not carried to the purchaser necessarily belong or are intended to belong to the seller. I do not think there is any answer to that implication.

The question is, therefore, whether, upon a just construction of this eighth clause of the Act, the purchaser, the present defender, can make out a right to these rents which he collected? I agree with the Lord Ordinary that there are two things necessary. It is only rents to become due for the possession following the term of entry which he is entitled to. That is the first thing which the Lord Ordinary says the defender fails to comply with, so to speak, or to come within the words which

would give him right to these rents, because if what I have said is correct, the rents in question are not rents to become due. They are rents which were legally due at, not after or before, the entry of the purchaser. If I am right in saying that these are grass farms, and that the legal term when rents of grass farms become due is Whitsunday of the year of entry, these rents were rents of the current year. I think these rents were the rents due for the possession of the crop of 1897. The rent is due for the year in which the crop, whether agricultural or sheep, is raised. I agree with the Lord Ordinary upon the construction of this clause, that the assignation does not give the defender right to the rents in question, in the first place because they are not rents to become due after the term of entry, and in the next place, because they were not rents payable for the possession after his entry. I think these rents are payable for the possession of the crop and year 1897, and not for any part of the crop and year 1898, which was the first crop and year following the entry.

Upon these grounds I am of opinion that the interlocutor of the Lord Ordinary should be adhered to.

LORD M'LAREN—This action relates to the right to the rents which were received by the purchaser of the estate of Portmore at Whitsunday 1898, his entry according to the agreement being Martinmas 1897. But for the argument upon the legal question I should have thought it perfectly clear that the right to these rents depended entirely on the question whether the farms were to be treated as grass farms or as arable farms, because it has been settled for a very long time—I think Mr Campbell told us for two centuries—as appears from the earlier decisions, that in the case of grass farms the first term's half-yearly rent is held to be due at Whitsunday and the second at Martinmas. That is because the tenant gets the chief value of the farm during the summer months. It is to be noticed that in the case of arable farms, where the first half of the rent becomes due at Martinmas after entry to the houses and grass, and the second half at Whitsunday, there is still the same consideration, because the chief value of an arable farm comes in to the tenant during the half-year succeeding Martinmas. It is then he gets in his crop and thrashes it, and it is put into a condition to be sold, and it is then that his turnips and potatoes are in a condition to be brought to market. In both cases the first term's rent is legally due at the term immediately preceding the time when the tenant gets the benefit of the year's possession. That was probably a rule devised under the earlier law for giving a landlord a better security for his rent, but by general custom the rent is only payable six months later.

In this case there is nothing peculiar in the conditions of the lease. The conventional terms of payment are precisely what would be customary all over the country if these are grass farms, but they would be unusual if the farms are to be treated as arable farms. The question is—on the oral evidence and on the documents—to which head do these four farms on which alone the parties are in dispute belong? We have not so much information about the home farm, and that is probably because it is wholly devoted to the rearing of stock, but as regards the other three it appears that they support 2100 sheep upon an acreage of 3200. That is about two sheep to every three acres. If you walk over an estate of this size and you see nothing but green hills pastured by sheep, and no servants about the place except shepherds, an uninstructed person would naturally come to the conclusion that these were grass farms. But the argument is that we are not to believe the evidence of our senses in such a matter, because it can be proved from the furrow marks upon the land that at one time or another a great deal of this land had been under the plough, and I think it was said that even if that ploughing had been for no other purpose than to break up the ground and make proper pasture after taking one or more crops off the land, still as the lands had been actually ploughed, the whole must be treated as an arable farm. I think there is not much substance in the defender's case when he is obliged to resort to such a far-fetched and artificial definition of an arable farm. As I read the decisions, and according to what I understand to be the practice, the question of whether a farm is arable or pastoral must be determined at the time the question arises, because the reasons for the rent being payable at different times in the two cases depend upon the relations of landlord and tenant at the time when the rent is to be paid, and not upon the relations which may have existed half a century before. I think there can be no doubt that according to the acreage and the amount of stock kept, and to the fact that the witnesses are generally agreed that it was impossible to make a living out of these farms by the sale of the small portions of crop raised, that the Lord Ordinary has come to a right conclusion in holding that these are grass farms, and that the rents are regulated by the special rule applicable to grass farms. In regard to the home farm there might perhaps be a doubt, but such doubt as exists in my mind is not sufficient to outweigh the evidence on which the Lord Ordinary has proceeded.

LORD KINNEAR—I have no doubt as to the question of fact that the farms in dispute are pastoral farms. It is of no consequence that they include arable land, because, as your Lordship has observed, and as was observed during the discussion, it is almost invariably the case that a pastoral farm has some arable land annexed to it, and if part be pastoral and part be arable the question whether the farm as a whole belongs to the one class or the other is a mere question of fact dependent upon the general character of the occupation which the tenant has of it, or, in other words, it depends upon

whether the tenant makes his profit from cropping the arable farm or from pasturing or breeding sheep or cattle. On the question of fact I think it would be quite idle to to say more than that I agree with the Lord Ordinary and with your Lordships. If the predominant character of the farm is pastoral, then it is settled in law that the legal character of the farm must be fixed with reference to that fact, and that it is of no consequence though any separate part of it may be in fact arable. The farm must be treated as if it were wholly arable or wholly pastoral, according to the extent to which the one or the other characteristic predominates.

If they are pastoral farms I presume there can be no question that the rents which in this case were conventionally payable at Whitsunday 1898 had become legally due at the preceding term of Martinmas 1897 as being the second part of the rent for the grass crop of that year. The tenants by their leases entered at Whitsunday, and the rent is payable at Whitsunday and Martinmas by equal proportions, the first term's payment at the Martinmas following entry, and the next term's payment at the Whitsunday following. These are conventional terms; and I think it is settled law that the legal term for the first payment is the first Whitsunday and not the first Martinmas. Therefore I do not think it open to question that the rents drawn by the defender at Whitsunday 1898 were legally due at the previous Martinmas. Then the question is whether these rents fall to the purchaser or to the seller, and as to that the clause of assignation of rents which we have to construe as it is interpreted in the statute is clear and is quite in accordance with the settled rules of law and with the obvious and necessary consequences of a contract for the purchase and sale of land, because it comes to this, that the purchaser is entitled to the rents which become due according to the legal terms for the possession following the first term of his entry, and that the rents for the possession prior to his term of entry belong to the seller. But the rent in question although collected by this defender was rent derived from possession prior to his entry as purchaser although it was payable at a term after that entry.

I therefore entirely agree with your Lordships that the Lord Ordinary has come to a right conclusion.

The LORD PRESIDENT was absent.

The Court adhered.

Counsel for the Pursuers—W. Campbell, Q.C.—Cook. Agents—Dundas & Wilson, C.S.

Counsel for the Defender—Guthrie, Q.C.—Craigie—Cooper. Agents—Millar, Robson, & M'Lean, W.S.

Tuesday, July 17.

SECOND DIVISION.

[Lord Kyllachy, Ordinary.

JOHN PATERSON & SON, LIMITED *v.* CORPORATION OF GLASGOW.

Arbitration—Decree-Arbitral—Reduction—Question Depending upon Disputed Facts — Misapprehension by Arbiter as to Question Submitted — Refusal to Hear Evidence — Right of Party to Have Legal Assistance—Award of Gross Sum where Separate Claims Referred—Ultra fines compromissi.

A firm of contractors undertook a contract to construct a sewer for the Corporation of Glasgow at certain scheduled rates. During the progress of the work it was found impossible, owing to the nature of the ground, to drive a tunnel by the ordinary method. The contractors were thereupon instructed to continue the work by means of the air-pressure system, which was more costly, and the Corporation agreed to refer the question of the amount to be paid to them "in respect of the extra cost incurred by the necessary adoption of the said system of air-pressure" to a certain arbiter who was a civil engineer. No formal submission was entered into. The parties subsequently agreed to submit to the arbiter certain items of the contractors' account other than those relative to the use of air-pressure, which they were unable to adjust. The arbiter issued an order for proof, and in a note appended thereto added—"Both parties having distinctly agreed that they were not to be represented by law-agents, the arbiter cannot now see his way to allow this arrangement to be broken unless mutually agreed upon." The contractors refused to accept a proof upon these conditions, and denied that they had entered into such an arrangement. The arbiter thereupon cancelled the order for proof and issued a decree-arbitral, by which he awarded a gross sum as "the total amount due in respect of the work done by the claimants in connection with this contract." The decree-arbitral did not show what sum was awarded in respect of the use of air-pressure, or in respect of the disputed items of the account.

In an action by the contractors for reduction of the decree-arbitral—*held* that it fell to be reduced, in respect (1) that the first matter referred to the arbiter was the extra cost properly incurred by the pursuers in consequence of the use of air-pressure, that such extra cost could only be ascertained by determining the amount of time and material properly expended for that purpose, that this was a question of disputed fact which the arbiter could not decide either by his own skill or by personal inspection, that consequently