*Friday, November* 16.

## SECOND DIVISION.

[Sheriff of Dumfriesshire.

## NIVISON *v.* HOWAT.

*Lease—Landlord and Tenant—Last White Crop to be taken at a Valuation—Straw.*

A tenant bound himself by his lease "never to sell or remove off the lands let any straw." It was also stipulated that the tenant should sell (if desired) to the incoming tenant, "the last white crop to be reaped under this lease . . . at a valuation to be put thereon by two men mutually chosen, or by an oversman to be named by them should they differ in opinion," and that if the incoming tenant should decline to take the crop at a valuation, "then the tenant shall be entitled to dispose of the same, inclusive of the straw, as he pleases." The incoming tenant having elected to take the last white crop at a valuation as here provided for—*held* that the term "last white crop" in the clause included the straw.

*Arbiter—Arbitration—Valuation.*

Two farmers appointed to value an outgoing tenant's crop were authorised, if they disagreed, to appoint an oversman. They agreed on some, and differed on other points, and they referred the points on which they differed to a third party. He decided these, and simply adopted their conclusions on the points as to which they agreed. To an action for payment of the sum thus brought out it was answered that owing to the irregularities in conduct of the arbitration it was null and void. *Held* that this was merely a valuation not subject to the formalities of a regular arbitration, and that it was unobjectionable.

*Process—Interim Decree—Consignation.*

An action was raised for a sum as the value of a crop as ascertained by an arbitration, the validity of which was disputed by the defender, who admitted that he was liable to make some payment to the pursuer for the crop in question. The Sheriff ordered the defender to consign a sum with the Clerk of Court, and he not having done so, gave interim decree therefor. *Held* that the interim decree was incompetent, and decree *suspended* accordingly.

Alexander Nivison, pursuer in this action, was formerly tenant of the farm of Newmains of Waterside, in the parish of Keir and county of Dumfries, under a lease for fifteen years from 1873. This lease contained this stipulation—"The tenant farther binds himself and his foresaids never to sell or remove off the lands let any straw, bogue hay, or manure produced thereon for their melioration. . . . The tenant farther binds himself and his foresaids to sell to the proprietor or incoming tenant, should either of them incline to purchase it, the last white crop to be reaped under this lease, as also the last crop of potatoes to be planted by him, and that at a valuation to be put thereon by two men mutually chosen, or by an oversman to be named by them should they differ in opinion, and should the proprietor or incoming tenant decline to take both or either of said crops at valuation as aforesaid, then the tenant and his foresaids shall be entitled to dispose of the same inclusive of the straw as he pleases." He agreed with Mr Hoggan, the proprietor, to renounce the lease from and after the term of Whitsunday and separation of the crop of the year 1882, and the new tenant, the defender James Howat, entered into possession at Whitsunday 1882. The defender, as incoming tenant, intimated to the pursuer his wish to purchase the outgoing white crop at a valuation. Robert Dalziel and James Dalziel, farmers, were asked, the former by the pursuer and the latter by the defender, to value the crop, and a minute, unstamped but signed by pursuer and defender, agreeing to the valuation, and giving power to the Dalziels to appoint an oversman in case they disagreed, was made out. After examining the crop separately, the Dalziels did not agree as to the value of the crop, and they executed a minute devolving the valuation on William Bell, another farmer, who valued the crop at £310, 0s. 3d. In doing so he adopted the price per bushel of oats on which the Dalziels had agreed, and he fixed the number of bushels of corn and the amount of straw, on which points they were not agreed. He deponed in this action that he had formed no opinion as to whether the price per bushel fixed by the Dalziels was a fair one. This award was intimated to the defender, who reaped and used the crop, including the straw, without making formal objection to the valuation. The pursuer drew an order on him for £20 in favour of the proprietor, which he paid, but he paid no other sum for the crop.

This was an action by the pursuer for the sum of £310, 0s. 3d. brought out by the valuation. The defence was that the minute of reference to arbiters was unstamped, improbative, and null, and that the pursuer had no right to refer the question as to the value of the straw, which the pursuer had no right under his lease to refer, and did not pretend to refer, to valuation. The defender averred that he had always been willing to pay the value of the crop, and pleaded that decree could only be given for such value. He offered £230 in full of all claims.

The pursuer having moved for an interim decree against the defender, the Sheriff-Substitute (Boyle Hope) refused the motion, but appointed the defender to consign in the hands of the Clerk of Court within eight days a sum of £200.

"*Note.*—Although the defender admits that he has received possession of the crop in question, and will ultimately be due the value thereof, he impugns the validity of the alleged award by arbiters, and disputes the pursuer's right to obtain decree for any sum in respect of it. In these circumstances, and as the action is based solely on the arbitration, the Sheriff-Substitute does not think that an interim decree can be awarded, but he thinks that this is eminently a case for consignation, as suggested by pursuer's procurator at the bar. Defender's procurator argued that there was the same objection to consignation as there was to interim decree, but the case of *Rolfe* v. *Drummond*, 1 Macph. 39, which is somewhat analogous to this case, shows that consignation may sometimes competently be ordered where an interim decree is incompetent."

Consignation not having been made, the Sheriff-

Substitute, in respect of the defender's failure to consign, granted an interim decree against him for £200, and allowed interim extract to go out. A charge was at once given on this decree. The defender brought a suspension of this interim decree and of the charge on the ground that the order was incompetent.

Before this suspension was decided, proof in the action was led, and thereafter on 14th June 1883 the Sheriff-Substitute pronounced this interlocutor: — [*After findings in fact to the effect stated above*]—"Finds in law (1) that on a sound construction of the lease the valuation of the last white crop which the pursuer was empowered to sell should include the value of the straw thereof; (2) that in virtue of the renunciation of his lease, the pursuer became entitled to deal with the white crop of year 1882 in the same way as he would have been entitled to deal with the last crop if his lease had run to its termination; (3) that the defender is barred by homologation from now objecting to the validity of the reference and award; (4) that these, however informal or defective, have become validated by *rei interventus;* and (5) that the defender is bound to pay to the pursuer the balance of the price as fixed by said award: Therefore repels the defences, and in respect of the interim decree for £200, decerns against the defender for the sum of £90, 0s. 3d., being the balance of the sum fixed by the award, less the payment to account of £20, with interest as libelled, &c.

"*Note.*—The Sheriff-Substitute thinks that the defender's interpretation of pursuer's lease is wrong. The pursuer is allowed to sell his last white crop, either by valuation to the proprietor or incoming tenant, if they wish to have it, or, by any mode he pleases, to anyone else, if they decline to take it.

"The term 'the last white crop' must include the straw, unless there be anything in the lease to exclude it.

"The defender argues that it is excluded by the clause quoted in the interlocutor [that quoted *supra*]. If the clause against selling or removing from the lands any straw, &c., stood by itself, the point would be clear enough. Undoubtedly in every year but the last it would receive its full effect. But it seems to the Sheriff-Substitute that it does not apply at all to the last year. There is a clause specially dealing with the crop of that year, and in one part of it a power to sell the straw is distinctly given to the pursuer. There seems no intelligible reason why in selling to one person he should get value for the straw, and not when selling to another. The probable reason why the words 'inclusive of the straw' were not inserted in the part of the clause which refers to the sale to the landlord or incoming tenant is, that the question of the removal of the straw from the farm would not arise if either of them took over the crop. But apparently when the sale to other persons was being provided for, the possibility of the clause against selling or removing straw operating against the provision occurred to the framer of the lease, and so the words 'inclusive of the straw' were inserted. They were intended and were probably necessary to neutralise the restriction as to removing the straw from the farm, but, as has been remarked, they were not necessary to prevent removal if the proprietor or incoming tenant took the crop.

"If this reading of the lease be correct, the straw was properly included in the valuation of the crop.

"The proof shows that in connection with the submission there was some very lax procedure, but the objections which are stated in the defences do not touch that. The objection that the reference did not and could not include the value of the straw has been already disposed of. It is averred that the reference was collusively got up between the arbiters. It is not apparent what is meant by this; but at any rate there is no proof of collusion. It is averred that the arbiters did not examine the crop, but this is disproved. No doubt they did not make their examination together, but this is not essential, so long as they put themselves in a position to form an opinion.

"The evidence of William Bell, the oversman, is very strange from its contrast to that of the two arbiters in regard to the matters which were devolved on him to decide, and in regard to those which he actually did decide. His statements are not corroborated, but if they are true, then the arbiters were guilty of great irregularity in their procedure. If the award had not been acted upon or homologated, it could probably have been entirely set aside from the irregularities referred to, but the Sheriff-Substitute does not think it necessary to discuss these, because he is strongly of opinion that objections to the award have come too late.

"It is denied in the defences that defender got any intimation of the award. If this means from the oversman it is correct, but undoubtedly he must have got a copy through one of the arbiters. Mr James Dalziel states that he sent it to him, and he did not deny this at the proof. And, besides, when he first saw the arbiters after the award was made, he grumbled at the amount of the valuation, which shows that he must have seen it.

"No objection was intimated until long after the crop was reaped. If the defender intended to dispute the valuation, and to demand, as he is now doing, a new valuation, he had no right to touch the crop. If the reference was to fall, the pursuer should at once have been put in a position to get a fresh valuation at a time when it could best be done, or to dispose of his crop to the best advantage if defender would not enter into a new valuation. It would be impossible to refer the value of the crop now, and that is the defender's fault. It is therefore thought that he must pay the price which the award fixed.

"It is right to say that although the procedure in the submission was very faulty, the Sheriff-Substitute does not see any sign of injustice having been done to the defender in the matter of value. The same value would probably have been fixed even if all had been done rightly."

On appeal the Sheriff (MACPHERSON) remitted to the Sheriff-Substitute to re-examine Mr Bell, and thereafter on August 29, 1883, he adhered to the interlocutor of the Sheriff-Substitute.

"*Note.*—The Sheriff concurs generally in the views expressed by the Sheriff-Substitute, both as to the interpretation of the lease and the effect of the proceedings in the valuation. These have been most irregular, but there is no reason to doubt that all was done in perfectly good faith,

and that the result arrived at by the arbiters served the ends of justice and fairness. Still the Sheriff felt some hesitation as to sustaining the final award on the account given of it by the oversman. But on his re-examination by the Sheriff-Substitute he deponed that when he signed the award he thought the valuation a fair one, and he added, 'If I had not thought so, I would not have signed it.' This shows that he knew his duty, and that the award expressed his opinion. In such circumstances it would be a great misfortune if on any technical grounds a fair determination of the question between the parties were to be upset, and the expense of this litigation thrown away merely to commence a new one."

On 19th October 1883 the Lord Ordinary (LEE) pronounced this interlocutor in the suspension:—"Finds that the action in the Sheriff Court was based solely on the award the validity of which was disputed, and that the interim decree pronounced by the Sheriff-Substitute on 17th April was incompetent: Therefore sustains the reasons of suspension; suspends the decree and charge *simpliciter*, and whole grounds and warrants thereof, in terms of the note of suspension, and decerns: Finds the suspender entitled to expenses, &c.

"*Note.*—As the case stood at the time, the interim decree now under suspension was in my opinion incompetent. It was inconsistent with the Sheriff-Substitute's view of the record as expressed in the note to his interlocutor of 30th March, and I think that that view was correct. It was scarcely maintained before me that his proceedings in that view of the case could be supported. But it was urged that I should report this cause to the Inner House in case the suspension of the interim decree should prejudice the pursuer in the original action.

"Assuming that the Sheriff-Substitute's judgment sustaining the award may be affirmed, I think that the respondent has no ground for apprehending any failure on the part of the Court to give decree for the full sum to which he is entitled. The whole cause will be before the Court, and the suspension of the interim decree (as incompetent) will not interpose any obstacle in the way of putting the final decree in proper form. The suspender pressed for a judgment, and as I think it cannot prejudice the respondent in the appeal before the Court, I consider him entitled to have the question of suspension disposed of.

"As to expenses, although it is possible that the suspender by appealing to the Sheriff might have got the interim decree recalled, I think that the respondent must be held responsible for having asked the Sheriff-Substitute to allow immediate extract, and for having extracted and charged upon the decree the day after it was granted."

Nivison reclaimed. The appeal and reclaiming note were put out for hearing together.

Argued for Howat in the appeal—(1) The oversman should have given his opinion on the whole matter of the reference, and his failure to do so nullified the proceedings. (2) "Crops" does not include straw.

Authority—*Brown* v. *Lang*, November 23, 1852, 15 D. 38, 2 Macq. App. 93.

Counsel for Nivison were not called on.

No argument was offered for Nivison against the interlocutor of the Lord Ordinary in the suspension.

At advising—

LORD YOUNG—I do not think that this case is attended with any considerable doubt. It is a case of a very common character. The outgoing and ingoing tenants agree that the former shall sell the last crop at a price to be fixed by two men, and failing these two, by another to be named by by them, and this contract is in accordance with the conditions required by the lease.

The parties might themselves have agreed. This, however, is not the case. They refer the prices to two farmers in the neighbourhood, who agree with each other in some respects, but differ as to others, and they refer the matters about which they differ to a third gentleman. I avoid calling him "oversman," because the use of these technical terms is misleading in regard to a reference merely for the ascertainment of value.

This gentleman put into his note the price upon which he understood the arbiters agreed, and determined for himself what they differed on. He thought that all the prices overhead were reasonable. Now, this action is brought for the valuation, and it is opposed on the ground of alleged irregularities in the submission process, and on the more substantial grounds that the oversman had decided matters not referred to him, or that he had not decided all the matters referred to him. But it appears to me that all that was done was perfectly regular. No formalities are required in a valuation by two farmers, or by a third farmer if the former fail to agree.

I think we must grant decree, and I differ from the Sheriff as to the irregularities.

As to the question of the straw, my opinion is that it is to be paid for just as much as grain.

The clause providing as to the straw during the currency of the lease has no bearing here. The outgoing tenant, as regards his last crop, reaps no benefit, while the incoming tenant does.

LORD CRAIGHILL and LORD RUTHERFURD CLARK concurred.

The LORD JUSTICE-CLERK was absent.

The Court refused the appeal. In the suspension the Court adhered to the interlocutor of the Lord Ordinary.

Counsel for Nivison—Trayner—W. Campbell. Agents—J. & J. Galletly, S.S.C.

Counsel for Howat—Goudy—Salvesen. Agent—Thomas M'Naught, S.S.C.