Thursday February 18.

SECOND DIVISION.

COCKBURN *v.* HOGG.

Process—Jury Trial—Notice of Motion for New Trial—"February Week"—A.S., 16th February 1841, *sec.* 34—*Court of Session Act* 1868 (31 *and* 32 *Vict. cap.* 100), *sec.* 4.

Held that with regard to a notice of motion to show cause why a new trial should not be granted, the "February Week" is in the same position as the Christmas recess.

By section 36 of the Act of Sederunt regulating proceedings in jury causes, dated 16th February 1841, it is enacted—"When the party against whom the verdict has been found intends, without lodging a bill of exceptions, to apply for a new trial in causes which have been tried at the sittings after the end of the session, or during the Christmas recess, or at the circuits, such party shall give notice of a motion for a rule to show cause why the verdict should not be set aside and a new trial granted, within six days after the commencement of the new session or the meeting of the Court after the Christmas recess, or ten days after the trial of the cause if the cause has been tried during the session or immediately before the sitting down of the session."

By section 4 of the Court of Session Act 1868 (31 and 32 Vict. cap. 100) it is provided, *inter alia*—"It shall be lawful for the Court at the time of the Christmas recess to adjourn for a period not exceeding fourteen days, and to adjourn at such time during the month of February as shall be most convenient, for a period not exceeding seven days."

The jury trial in the action at the instance of Peter Cockburn and Others *v.* Peter Hogg and Others took place before the Lord Justice-Clerk on Saturday, 6th February. The jury returned a verdict at 6·30 p.m.

On February 6th the Court adjourned for the "February Week," and did not sit till Tuesday, February 16th.

On February 17th the defender gave notice of a motion for a rule to show cause. When this motion appeared in the Single Bills of February 18th the pursuer opposed the motion on the ground that the notice was too late according to the Act of Sederunt of 1841, section 36, as it had not been given till later than ten days after the trial.

Argued for the defender—The "February Week" was instituted after the Act of Sederunt 1841, and was therefore not provided for specifically. But the "February Week" was a recess of the same kind as the Christmas recess, and should be considered to be on the same footing as the latter.

LORD JUSTICE-CLERK—I think we must allow this motion.

LORD TRAYNER—I also agree. The principle of the matter is that notice of a motion to show cause should be given within six days after the sitting of the court after vacation or recess. To make the matter quite plain, perhaps an Act of Sederunt should be passed putting the February Week in the same position as the Christmas recess.

LORD YOUNG and LORD MONCREIFF concurred.

The Court allowed the motion.

Counsel for Pursuer—Clyde. Agents—Reid & Guild, W.S.

Counsel for Defender—T. B. Morison. Agent—W. Hamilton, S.S.C.

Friday, February 19.

SECOND DIVISION.

[Sheriff of Aberdeen, Kincardine, and Banff.

JAFFRAY'S TRUSTEE *v.* MILNE.

Compensation—Bankruptcy—Lease—Insolvency of Tenant—Trust-Deed for Creditors—Arrears of Rent and Sum Due for Crop, Manure, &c.

Under an agricultural lease the landlord, in the event of the tenant becoming insolvent, was entitled to terminate the lease, and in the event of his exercising this option he was bound to settle with the tenant as if the lease had naturally expired. With regard to certain meliorations on buildings taken over by the tenant upon his entry, the lease provided that the tenant should be entitled to payment for the same at the termination of the lease; with regard to crop, manure, &c., it provided that the outgoing and incoming tenants should settle between themselves as to payment therefor without any responsibility upon the part of the landlord unless he chose to interfere.

The tenant became insolvent and granted a trust-deed for behoof of his creditors. The arrears of rent then due to the landlord amounted to £197, 12s. 6d. Thereafter the landlord re-let the subjects and agreed with the incoming tenant to settle with the trustee for the creditors for the meliorations and for the crop, manure, &c., upon the farm, and he accordingly entered into a reference with the trustee under which the meliorations on buildings were valued at £125, 4s., and the crop, manure, &c., on the farm at £63, 17s.

In an action by the trustee against the landlord for the amount of these valuations the trustee maintained that the right to the meliorations and to the crop, manure, &c., upon the farm having vested in him at the date of deed, the defender was not entitled to plead com-

pensation in respect of his counterclaims for rent against his tenant.

Held that the landlord's plea was valid, both as regards the meliorations (*following Smith* v. *Harrison & Co.'s Trustee*, December 22, 1893, 21 R. 330) and also as regards the crop, manure, &c., and that he was therefore entitled to decree of absolvitor.

Opinion reserved (*by* Lord Moncreiff) whether the landlord's plea would have been available against a trustee in a sequestration.

By lease dated 5th February 1880 John Henderson Milne of Craigellie let to James Jaffray the farm of Mosstown of Craigellie, Lonmay, for nineteen years, with entry at Whitsunday 1880, at the yearly rent of £56, 10s. on the terms stipulated in the lease, and under the general regulations and conditions of the estate of Craigellie prefixed thereto.

By No. 2 of the general regulations and provisions it was provided—"In the event of the tenant's bankruptcy or public insolvency, he shall, in the option of the heritor, forfeit his lease, so far as unexpired at the time, and shall be bound to remove when required. It is also declared that if the tenant shall fail to make payment of any of the half-year's rent within six months after the term of payment, so that one year's rent shall be due and unpaid at one time, the lease shall thereupon, in the option of the heritor, become null and void, and the tenant shall be bound to remove when required. In the event of the heritor availing himself of these options, he shall be bound to settle with the tenant as if the lease had naturally expired, under deduction of damages, in the event of the possession being re-let by the heritor on less favourable terms. . . . . No. 10. The outgoing and incoming tenants must settle between themselves regarding the payment of crop, manure, and other things, without any responsibility on the heritor, unless the heritor choose to interfere."

By the lease it was further expressly stipulated that "With regard to houses, &c., the said James Jaffray binds himself to relieve the heritor of all claims of the outgoing tenant for meliorations, and in particular for—[*here followed a specification of the meliorations*]. And at the expiry of this lease the said James Jaffray shall be entitled to payment in like manner for the said meliorations as the same may then be valued, but not exceeding the value paid by him for the same at their own entry. And if the mason-work belonging to the heritor shall be deteriorated, the tenant must pay for the deterioration as the same may be determined by valuation."

By a further provision of the lease the tenant was prohibited from removing the dung or straw.

On 19th July 1895 the landlord brought an action against the tenant in the Sheriff Court at Peterhead for sequestration for the year's rent of £56, 10s., for summary removing, and payment of arrears of rent amounting to £215, 12s. 6d., in terms of the irritancy under the lease.

On 6th August 1895 the tenant, having become insolvent, granted a trust-deed in favour of John Whyte, decorator, Aberdeen, for behoof of his creditors.

After the granting of this deed, by joint-minute and under a separate agreement between the landlord and the trustee, it was arranged that decree should pass, which was accordingly passed for £197, 12s. 6d. as arrears of rent, and that the landlord should receive payment of everything secured under the sequestration, and that no further proceedings should be taken under the sequestration.

Thereafter the trustee entered into the possession and management of the tenant's estates for the purpose of winding them up, and distributing the proceeds among the creditors.

In November 1895 the defender entered into a minute of reference with the pursuer for the purpose of valuing the machinery and buildings, and the straw, dung, &c. upon the farm. Under the reference the sum of £125, 4s. was fixed as the value of the meliorations, &c., and £63, 17s. as the value of the dung, straw, &c.

The landlord maintained that he was entitled to set off the arrears of rent amounting to £56, 10s. and £197, 12s. 6d. against the amount of these valuations. The trustee refused to agree to this, and raised an action against him in the Sheriff Court at Aberdeen for £189, 1s.

The defender pleaded, *inter alia*—"(5) The defender is entitled to set off against the sums sued for the sums due to him under the lease."

On 5th December 1896 the Sheriff-Substitute (BROWN) pronounced an interlocutor, in which, after finding facts as above stated, he found in law "that the defender the said John Henderson Milne is entitled to compensate the sums due by him to the pursuer as trustee foresaid under the valuations, by the arrears of rent due to him by the pursuer as trustee foresaid: Therefore sustains the fifth plea-in-law for the defender John Henderson Milne: Assoilzies the defender from the conclusions of the action."

Note.—" . . . The ultimate question in the case is a very simple one, and, in my opinion, is conclusively determined in the landlord's favour by the judgment of the Court in *Davidson's Trustees* v. *Urquhart*, May 26, 1892, 19 R. 808.

"The agreement was between the landlord and the outgoing tenant to ascertain their respective rights and obligations under the lease, and was nothing more.

"The trustee was in possession of the estate no doubt, but before he entered on that the lease had been irritated, and he expressly admits on record that his possession was solely for the purpose of winding-up the bankrupt estate; there was no agreement within the meaning of *Taylor's Trustee* v. *Paul*, January 24, 1888, 15 R. 313—an authority on which the pursuer laid particular stress, and there could be none such, because there was no covenant of any kind under the lease between him and the incoming tenant or between the incoming tenant and the landlord. . . .

"It is admitted that a year's rent, for which sequestration was used, is due preferably, amounting to £56, 10s., the valuations amounting to £189, 1s., being what the landlord is bound to pay under the lease, and on the principle of balancing accounts in bankruptcy, which I think clearly governs the case, the landlord is entitled to compensate what is due by him under the lease by what is due to him under the lease, viz., arrears of rent, amounting to £197, 12s. 6d., and on the one obligation being set off against the other leaves the landlord still a creditor of the tenant or of the trustee representing him. It follows that he must have absolvitor from the action."

Against this interlocutor the pursuer appealed to the Court of Session, and argued—In a question of this kind the granting of a trust-deed acted in the same manner as bankruptcy — *Mill* v. *Paul*, November 22, 1825, 4 S. 219. After the date of such a deed there could be no *concursus debiti et crediti* — *Meldrum's Trustees* v. *Clark*, December 13, 1826, 5 S. 122. The landlord must be held to have acceded to the trust-deed as he entered into a minute of reference with the trustee. No preference was constituted by a landlord's right under a lease to buy stock or take over dung or straw at a valuation at the termination of the lease—*Maclean's Trustee* v. *Maclean of Coll's Trustee*, November 23, 1850, 13 D. 90 (opinion of Lord Cuninghame, p. 97). The dung and straw were the moveable property of the tenant, unsecured to the landlord in any shape, and never in his possession. A creditor who poinded the crop had been held to have a preference over the landlord even although there was a stipulation in the lease against the removal of the crop before payment of the rent—*Stewart* v. *Rose*, February 2, 1816, Hume's Dec. 229; *Dunn* v. *Johnston*, January 28, 1818, Hume's Dec. 451. A trustee under a trust-deed granted for behoof of creditors to which the landlord had acceded was in the same position as a poinding creditor. Until the landlord declared his election to settle with the tenant for meliorations and the value of the dung and straw, the debt due by him had not been incurred, and as this was done after the granting of the trust-deed, such a debt could not be compensated by the arrears of rent due by the tenant prior to the trust-deed—*Taylor's Trustee* v. *Paul*, January 24, 1888, 15 R. 313. The landlord must therefore rank as an ordinary creditor.

Argued for the defender—The judgment of the Sheriff-Substitute was right. There was no poinding creditor or trustee in bankruptcy here; there was only a voluntary trust to which the landlord had never acceded. The cases quoted did not therefore apply. As regards the meliorations they were made on fixed property belonging to the landlord, and the claims of the tenants, both with respect to them and with respect to the dung and straw, arose out of the lease—*Smith* v. *Harrison & Co.'s Trustee*, Dec. 22, 1893, 21 R. 330. The claims of the landlord for arrears of rent arose out of the same contract, and there was no reason why the two sets of claims should not be set off one against the other.

At advising—

LORD TRAYNER—As regards the defender Milne, I think the judgment of the Sheriff-Substitute is well founded, and for the reasons which he very clearly states. I should have contented myself with saying so had it not been that the appellant referred to two cases which apparently were not brought under the notice of the Sheriff-Substitute, and which were said to be contrary to the judgment which has been pronounced. These were the cases of *Stewart* (Hume 229) and *Dunn* (Hume 451). In my opinion these cases are in no respect adverse to the judgment we are considering. It is a remark applicable to both of them, that no question was decided as to the right of the landlord to compensate or set off the arrears of rent due to him under the lease against sums due by him to his tenant for meliorations, or crop or dung left on the farm at the end of the lease. There was no question between landlord and tenant, or debtor and creditor, at all. The questions were between the landlord maintaining rights under the lease against creditors of the tenant, who had made their rights effectual against the tenant's estate by diligence. In the circumstances existing in these cases the creditors' diligence was held to prevail against the landlord's claim. There is no such question here. The parties are the landlord and tenant, or the tenant's trustee under a voluntary trust, which is the same thing in effect. Between these two parties there are mutual claims equally liquid, and arising out of the same contract. That being so, I can see no ground for refusing the landlord his right to plead compensation as he does.

I think the appeal should be refused.

LORD MONCREIFF—I am of the same opinion, and have little to add. The pursuer's claim against the landlord in respect of meliorations presents no difficulty, because the subjects on which they are said to have been made are *partes soli*, the fixed property of the landlord, and the bankrupt's claim can only be made good through the lease. The case is therefore ruled by *Smith* v. *Harrison*, 21 R. 330.

As regards the dung, straw, &c., the question is more difficult, because the dung is just the personal property of the tenant over which the landlord has no security for his rent. A poinding creditor could have attached them — *Stewart*, Hume's Dec. 229, and *Dunn*, Hume 451; and perhaps if sequestration had taken place, the trustee, in virtue of his act and warrant, would have been in as good a position as a poinding creditor. On this, however, it is not necessary to express an opinion, because here there was only a voluntary trust for creditors, and I do not think it is satisfactorily established that the landlord acceded to it. If so, the trustee, the pursuer, is in no better position than the bankrupt, and the landlord is entitled to set off his counter claim.

With these remarks I concur in Lord Trayner's opinion, and with the judgment proposed.

The LORD JUSTICE-CLERK concurred.

LORD YOUNG was absent.

The Court dismissed the appeal and affirmed the interlocutor of the Sheriff-Substitute.

Counsel for the Pursuer — Constable. Agents—Simpson & Marwick, W.S.

Counsel for the Defender—W. Campbell—Brown. Agents—Morton, Smart, & Macdonald, W.S.

Friday, February 19.

SECOND DIVISION.

[Lord Kyllachy, Ordinary.

SCHOLEFIELD AND OTHERS *v.* JAMES LINDSAY & SON.

Agent and Principal — Shipping Law — Charter-Party — Powers of Charterers' Agent.

Under a charter-party by which a steamship was chartered to carry 1500 cases of oranges from Seville to Leith, it was provided that the steamer "should not be ballasted with sand or mud or anything prejudicial to the fruit, but should have liberty before loading fruit to load lead or mineral, also cork-wood for owners' benefit, same to be discharged after fruit."

Held that the charterers' agent at the port of loading had no implied authority to vary the contract to the extent of consenting to a change in the mode of loading by which the oranges were loaded first and discharged last, and that his action in so doing did not bind the charterers.

By charter-party dated 6th November 1895, entered into between Messrs Henry Scholefield & Son, managing owners of the ss. "Andalusia" of Newcastle-on-Tyne, on the one part and James Lindsay & Son, fruit salesmen, Edinburgh, on the other part, it was mutually agreed that the said steamer should proceed to Seville and there load from the charterers or their agents 1500 half chests of oranges, and being so loaded therewith should proceed to Leith direct, and deliver the same agreeably to bills of lading.

The charter-party contained the following clauses—"Steamer to load as fast as she can receive, as customary, weather permitting (Sundays and holidays excepted), and to be discharged, as customary, as fast as steamer can deliver, in a safe berth as ordered by charterers. . . . Steamer to have her holds properly cleaned before loading fruit, and she shall not be ballasted with sand or mud, or anything prejudicial to the cargo, but has liberty to load lead or mineral before loading fruit, also cork-wood for owners' benefit, same to be discharged after the fruit. Ballast to be properly separated from oranges and other cargo. . . . Should anything occur to the steamer after the fruit is shipped, causing her to be detained at any port or place more than twenty-four hours, captain, if practicable, shall instantly telegraph information of same to the charterers, and in any case, give them earliest possible advice; the owners shall also be bound, if delay exceeds seven days, to allow the charterers the option of forwarding the cargo immediately by some other steamer, and if at less than chartered freight, the steamer to receive the difference, less cost of transhipment."

The steamer arrived at Seville, and was ready to load on the 15th November 1895. But she had to wait her turn for her mineral cargo, which turn did not arrive until the 18th. In these circumstances the captain arranged with the shipper of the fruit (who had at that time no copy of the charter-party) that the fruit should be loaded at once; and it accordingly was so loaded on the 15th, 16th, and 17th November and stowed at the fore and aft ends of the hold. The cork-wood, or part of it, was put on board simultaneously, and placed fore and aft between the oranges and the fore and aft hatches. On the 18th the mineral began to be loaded, and the loading occupied five days, being completed on the evening of the 22nd, by which time also the deck cargo of cork had been put on board. The steamer therefore did not sail until the 23rd. The result was that the oranges which, if loaded last in terms of the charter, would have been only (on the average) one and a-half days stowed in the vessel's hold before sailing, were in fact in that position for (on the average) six and a-half days before sailing. Similarly when the vessel arrived at Leith on 2nd December, the cork-wood had to be discharged first, and in consequence the oranges were kept on board for at least an additional twelve hours. Altogether, the voyage as regards the oranges was practically prolonged by six days beyond the period permitted by the charter.

When the discharge of the oranges was completed it was found that they were in bad condition, having become heated and sweated. The cargo on this account realised a gross price of only 5s. 11d. per case, while the cargoes of other vessels arriving about the same time realised a gross price of 8s. per case.

The charterers, James Lindsay & Company, accordingly raised an action against Henry Ernest Scholefield & Others, the registered owners of the ss. "Andalusia" for £304, 15s. for loss and damage.

They pleaded—"(1) The defenders having received the goods in question in good order and condition, and having failed to deliver same in like good order and condition as above set forth, and the pursuers having in consequence suffered loss and damage to the amount sued for, decree ought to be granted as craved. (2) The pursuers having suffered loss and damage to the extent