Thursday, February 9.

SECOND DIVISION.

[Lord Fraser, Ordinary.

WAUGH *v.* MORE NISBETT.

Lease—Bankruptcy of Tenant—Removing—Necessity of Notice to Tenant to Remove notwithstanding Stipulation that in the event of his Bankruptcy the Landlord should be entitled to Resume Possession without any Process of Law.

A lease of a farm contained a stipulation that if the tenant should become bankrupt the landlord should be entitled to put an end to the lease and to resume possession without declarator or process of law to that effect. The tenant having been sequestrated, *held* that the above clause did not dispense with the necessity of notice to remove.

Reparation—Right of Person who has Suffered a Legal Wrong to Damages though no actual Damage proved.

A landlord having illegally resumed possession of land let to a tenant, and the tenant having thereafter been found entitled to the possession, the tenant reaped a crop which had been sown by the interim tenant with the authority of the landlord without paying for the seed and labour. After a proof, from which it appeared that the tenant had suffered no actual damage, but was a gainer by the crop thus reaped—*held* that he was not entitled to damages for being illegally deprived of possession.

Mala fide *Possession—Claim for Meliorations.*

Opinion (*per* Lord Fraser, Ordinary) that the landlord having rashly, without sufficient regard to the tenant's legal rights, resumed possession of the lands, was to be dealt with as a *mala fide* possessor, and was not entitled to be reimbursed for the seed and labour he expended on the lands.

Robert Waugh was tenant under John More Nisbett of Cairnhill, of the farm of Gartness, in the parish of Shotts. The lease contained a stipulation to the effect that if the tenant should become bankrupt the landlord should be entitled to put an end to the lease and to resume possession without any declarator or process of law to that effect. Waugh became bankrupt, and his estates were sequestrated on 10th May 1879.

The landlord thereupon advertised the farm to let, and having received an offer from a Mr Carswell, let the farm to him. Previously to doing so he had endeavoured to obtain from Waugh a letter of removal, which Waugh had refused to sign, though it was signed by his trustee. A copy of the advertisement offering the farm to let had also been sent to Waugh, but he had received no other notice to quit possession.

Waugh declined to cede possession to Carswell, the new tenant, and the landlord then brought an action to have it found and declared—"(1) That the estates of Waugh having been sequestrated under the Bankrupt Statutes, the landlord was entitled to put an end to the lease; (2) That the lease terminated at Martinmas 1879 as to the arable land, and at Whitsunday 1880 as to the houses and grass; (3) That Waugh should be decerned to remove from the land, houses, and grass as at these terms.

The Lord Ordinary (RUTHERFURD CLARK) on 8th July 1880 assoilzied the tenant from the conclusions of the summons.

He added this note:—"The estates of the defender were sequestrated on 10th May 1879, and it was not disputed that the pursuer was in consequence entitled to put an end to the lease. The first question is, whether he did so before the term of Martinmas 1879?

"In the opinion of the Lord Ordinary the pursuer was bound to give very distinct notice of his resolution to put an end to the lease, and in such a manner that the notice should be binding on himself as well as on the defender. Nothing could have been more easy than to give such notice, but no notice of any direct kind was ever given. The case of the pursuer is that he resolved to resume possession of the farm at Martinmas 1879, and that the defender knew of this resolution. The Lord Ordinary is not willing to admit of equivalents for the notice, which was the proper method of enforcing a penal clause, and though it is probable that the defender knew that the pursuer was taking measures for letting the farm, he thinks that nothing took place before Martinmas 1879 which was equivalent to notice. For all that happened the pursuer might have held the defender bound if he had been so disposed. If so, the pursuer is not entitled to the decree of declarator which he seeks.

"But on 31st January 1880 the pursuer presented a petition of interdict to the Sheriff of Lanarkshire to have the defender interdicted from ploughing or working the farm. This made it plain enough that the pursuer was insisting on the irritancy, and in consequence the pursuer, if he cannot obtain the declarator which he asks, maintains that he is entitled to decree of removing. But the only decree of removing which is sought is a decree of removing between terms; for the pursuer asks that the defender shall be decerned to remove from the arable land 'forthwith."—that is, as at the date of the summons, which is signetted on 6th May. The Lord Ordinary thinks that there is no authority to justify him in pronouncing such a decree.

"No argument was offered to support the pursuer's right to decree either on the letter of removal which was signed by the trustee, or on the renunciation signed by the trustee and one of the commissioners, and to which it was said that the other commissioners had signified their verbal assent. The Lord Ordinary therefore takes no further notice of these matters."

On a reclaiming note for Mr More Nisbett, the First Division on 20th July 1880 recalled the interlocutor of the Lord Ordinary and gave decree of declarator in terms of the first conclusion of the summons, but assoilzied the defender from the other conclusions.

Thereafter Mr More Nisbett raised another action of declarator and removing for decree that the lease would terminate at Martinmas 1880 as to the arable land and at Whitsunday 1881 as to the houses and grass, and to have Waugh ordained to remove from the premises as at these terms. He obtained decree in this action in consequence of an agreement between the parties as set forth in a letter written to him by Waugh agreeing to

remove at these terms, but reserving "all my claims for compensation and damage and all other claims of whatever nature competent to me."

Thereafter Waugh ceded possession of the farm and then raised the present action concluding for £1000 damages, in respect that the defender had, by himself or by others, in the months of February, March, April, and May 1880, while the pursuer was still in actual and legal possession of the farm, intruded and trespassed thereon, and taken possession of and ploughed up part of the lands without any legal title, and thereby and in other ways prevented the pursuer from attending to the proper business of the farm. The pursuer further averred that some of the farm work thus done by the defender, or those acting with his authority, was done at an improper time and was so carelessly done as to injure certain growing crop belonging to him, and he alleged also that in the course of these operations a quantity of manure belonging to him had been improperly taken and used.

The defender admitted that Carswell, to whom, as already stated, he had let the farm previously to the interlocutor of Court finding that the pursuer was entitled to be assoilzied from the first action of removing in respect that he had not formal notice to quit the possession, had ploughed and laboured a part of the farm. He denied that the pursuer had suffered any damage thereby and averred that, on the contrary, he had derived benefit from what Carswell had done, and had reaped and sold without having to pay for crops which Carswell had sowed. He averred, in respect of an assignation from Carsewell to him of all his claims against the pursuer, that the pursuer was liable to him in £200 as the value of the seed and labour so applied.

After a proof the Lord Ordinary (FRASER) found that the pursuer had not suffered any loss or damage at the hands of the defender and therefore assoilzied him. His Lordship appended this note to his interlocutor—[*After narrating the proceedings in the previous litigation*]—"The pursuer's claims have their origin in the blunder committed by the landlord, in supposing that he had a right to let the farm as from Martinmas 1879 to a new tenant, and to turn the pursuer out of the possession. The judgment of the Court instructed him otherwise; but before that judgment was obtained, Carswell, the new tenant, proceeded to the farm and began ploughing it up and sowing those fields which he had selected for growing crops. He began to do this early in the year 1880, chiefly in the months of February and March, and (through the goodwill of his neighbours, who came on a day in the month of March with forty ploughs) he was enabled to plough up a large portion of the land fitted for the purpose. All this time Carswell was acting in the *bona fide* belief that he had obtained a valid lease from the proprietor, and he paid no heed whatever to the remonstrances of the pursuer, who refused to give up his hold of the farm, and maintained that he was the rightful tenant—a position in which he was sustained by the decree of the Court down to at least Martinmas 1880.

"The pursuer's claim of damage is founded upon the alleged wrongful invasion of the farm by Carswell, acting under the authority of the defender Mr Nisbett, who had granted him the lease. Carswell has not been called as a defender to this action; and the defender Mr Nisbett has assumed the whole responsibility for Carswell's actings, and has made compensation to him for the loss he sustained in being kept for a year out of the farm.

"The damage which the pursuer says he has suffered is detailed in the record, and each of the several items will be separately noticed, it being, however, here premised, that while Carswell ploughed all the land that grew crops during the year 1880, and sowed the seeds which produced these crops, the crops themselves were all reaped by the pursuer and sold by him, and the prices obtained have been kept by him. None (or if any, very little) of the labour of producing the crop was undertaken by the pursuer. The ploughing, the harrowing, the clearing the fields of stones, the application of artificial manure, were all done and paid for by Carswell, and the farm produced a crop in the year 1880 such as the neighbours had not previously seen on Gartness. Still there was a wrong committed in going upon the farm without any right or title, and it is necessary, therefore, to consider whether there was any damage sustained." [*His Lordship then reviewed the evidence as to the various items of damage claimed as above narrated*]. The note then proceeded—"With regard to the counter claims set up by the defender, there can be no decree pronounced in this action, because they are merely stated in the way of set-off, and it is unnecessary to give effect to this plea, because no damages have been found due to the pursuer. At the same time, it is proper to indicate the opinion of the Lord Ordinary thereon, more especially in reference to the claim of damages by the pursuer for the invasion of his farm without legal right—apart from the special damage claimed—and on the assumption that all the items of special damage claimed are rejected.

"There can be no doubt that Carswell, as authorised by the defender, was guilty of a wrong in proceeding to plough up the pursuer's farm in the spring of 1880, and in retaining possession of it against the pursuer's remonstrances. He, no doubt, cultivated the farm in a skilful way, and produced a crop from it the like of which the pursuer had not obtained during the whole of his tenancy. For the expenditure to which he was thus put, and for which he has been reimbursed by the landlord, to whom he has assigned his rights, a claim is now made against the pursuer. This claim cannot be sustained. It is settled law that a *mala fide* possessor of another man's property is not entitled to recompense for any meliorations he may have made (*Barbour* v. *Halliday*, 2 D. 1279; *Hamilton* v. *Johnston*, February 2, 1877, 14 Scot. Law Rep. 298; *Cardross* v. *Hamilton*, M. 1747); and the law thus laid down is, in the opinion of the Lord Ordinary, applicable to the present case. It is true that the landlord did not give authority to Carswell to take possession of the pursuer's farm in the consciousness that the pursuer had a legal right to retain it. But *mala fides* in the sense of the decisions does not require to come up to this. Rashness in asserting a supposed legal right, which turns out to be no legal right but a positive tort, puts a man in the same position as if he had deliberately and of set purpose committed a trespass, knowing it to be such. No careful consideration of the defender's rights *qua* landlord, after the bankruptcy

of the tenant, appears to have been had. The opinion of counsel was not taken, and the defender, assuming the law to be in his favour, as he wished it, proceeded at his own hand to take from the pursuer the farm which he legally possessed. Therefore the defender is subject to the inconveniences which the law has attached to possession in *mala fide*. If he did not know what were his powers, and the mode of enforcing them, he ought to have known them, or, at all events, he ought to have taken all the means within his power of ascertaining what were his rights before he resorted to the step he did. Therefore, if it were necessary in this action to pronounce judgment upon these counter claims arising from the cultivation of the farm by Carswell, the Lord Ordinary would be prepared to repel them. The pursuer thus receives all the benefit of the labour and expenditure made by Carswell, and thus he is most amply recompensed for any general damage or annoyance arising out of the invasion of his farm."

The pursuer reclaimed, and argued—A legal wrong had been done to the pursuer, and for that he was entitled to damages even if the damages were only nominal.

Authority—*Webster* v. *Cramond Iron Company*, June 4, 1875, 2 R. 752.

The Court, without calling on counsel for the defender, unanimously adhered to the interlocutor of the Lord Ordinary.

Counsel for Pursuer—Campbell Smith—Rhind. Agent—William Officer, S.S.C.
Counsel for Defender — Mackay — Dundas. Agents—Dundas & Wilson, C.S.

Friday, February 10.

FIRST DIVISION.

[Sheriff-Substitute of Lanarkshire.

STEWART *v.* FERGUSON (YUILL'S TRUSTEE).

Bankrupt—Bankruptcy (Scotland) Act 1856 (19 *and* 20 *Vict c.* 79), *sec.* 65—*Conveyancing (Scotland) Act* 1874 (37 *and* 38 *Vict. c.* 94), *sec.* 47—*Heritable Security—Transmission of Personal Obligation — Valuing and Deducting Security.*

A creditor claiming in a sequestration is not required to value and deduct any security except a security over what is the estate of the bankrupt at the date of the sequestration.

A received £9000 from B, granting him in return a bond and disposition in security over heritable subjects. Thereafter A disponed the said subjects to C, the disposition declaring that C bound and obliged himself, and his heirs, &c., to pay and implement the foresaid "bond and disposition in security, and whole personal obligations therein contained," and so "free and relieve the said A of the same, so that the said bond and disposition in security, together with all personal obligations to pay principal, interest, and penalty therein contained, may transmit against the said C and his foresaids, in terms of the Conveyancing (Scotland) Act 1874, from and after the said term of entry." A became bankrupt, and B claimed to rank on his sequestrated estate for a dividend on his debt of £9000. *Held*, on an appeal against a deliverance by A's trustee, (1) that A's personal obligation to B for the debt was not discharged by his disposition to C, and (2) that B was not bound to "value and deduct" the security in question in ranking on A's estate, that security not being over "any part of the estate of the bankrupt."

By bond and disposition in security, dated 11th and recorded 13th November 1876, John Clark Yuill, wholesale saddlers' ironmonger, Glasgow, acknowledged to have received from the Principal and Professors of the University and College of Glasgow the sum of £9000, which sum he bound himself, his heirs and executors whomsoever, without the necessity of discussing them in their order, to repay with interest and penalty as therein written, and in security of the said personal obligation he disponed in their favour certain heritable subjects belonging to him in Glasgow.

By disposition, dated in May and recorded in June 1877, the said John Clark Yuill, considering that he sold the subjects thereinafter disponed to A. M. Glass, merchant in Glasgow, at the price of £12,200, and the said Glass, without obtaining a title thereto, resold the same to David Horne, builder in Glasgow, at the price of £14,500; and considering that Horne had paid to Yuill £3200, and to Glass £2300, and that the remainder, £9000, was contained in the bond and disposition in security by Yuill in favour of the University of Glasgow, above recited, "which bond and disposition in security, and whole personal obligations therein contained, the said David Horne has become bound, as by acceptance hereof he agrees and binds himself, and his heirs, executors, and successors, to pay and implement, from and after the term of entry after mentioned, and so free and relieve me the said John Clark Yuill of the same, so that the said bond and disposition in security, together with all personal obligations to pay principal, interest, and penalty therein contained, may transmit against the said David Horne and his foresaids, in terms of the Conveyancing (Scotland) Act 1874, as from and after the said term of entry;" therefore Yuill, with consent of Glass, sold and disponed to Horne the said subjects over which security had been created by the previous deed.

Yuill having subsequently become insolvent, and his estates sequestrated, a claim was lodged in his sequestration for William Stewart, D.D., as representing the University of Glasgow, to be ranked and draw a dividend for a debt of £9465, 7s. 8d., in respect of the said bond and disposition in security.

The Conveyancing (Scotland) Act 1874 enacts (section 47) that "Subject to the limitation hereinbefore provided as to the liability of an heir for the debts of his ancestor, an heritable security for money duly constituted upon an estate in land, shall, together with any personal obligation to pay principal, interest, and penalty contained in the deed or instrument whereby the security is constituted, transmit against any person taking such estate by succession, gift, or