Wednesday, January 14.

SECOND DIVISION.

[Sheriff Court at Oban.

STEWART *v.* MARQUIS OF BREADALBANE.

Lease — Termination — Premature Termination — Irritancy — Effect on Tenant's Rights at "Awaygoing"—Outgoing—Obligation on Landlord to Take over Sheep Stock.

A lease of a farm for ten years from Whitsunday 1897 contained a stipulation that at the tenant's waygoing the landlord should be bound to take over the sheep-stock on the farm by valuation. In February 1902, the rent being five terms in arrear, the landlord availed himself of a conventional irritancy available to him in that state of matters, and put an end to the lease. *Held* (*diss.* Lord Moncreiff) that though the lease was brought to an end under the conventional irritancy before its natural expiry, the landlord was bound to take over the sheep-stock at valuation, as provided in terms of the lease with regard to the tenant's waygoing.

This case raised a question whether a farm lease having been brought to an end under a conventional irritancy incurred by the tenant, the landlord was relieved from the obligations imposed upon him under a stipulation in the lease whereby he agreed to take over the sheep-stock on the farm by valuation at the tenant's waygoing.

Peter Stewart, farmer, Fernochs, Loch Awe, became tenant of the farm of Fernochs and Achnamaddy under a lease for ten years from Whitsunday 1897 entered into between him and the Marquis of Breadalbane. By the terms of the lease Stewart agreed to take over the sheep-stock of the farm from the former tenant by valuation, and it was provided that Lord Breadalbane, or the next tenant, should be bound to take over the sheep-stock from Stewart at his "awaygoing."

This lease by reference incorporated the articles and conditions of lease of farms on the Breadalbane estates "in so far as not altered" by the lease. These articles provided, *inter alia*, as follows—"*Twenty-fifth.* — In the event of the rent stipulated not being fully paid to the proprietor or his factor within three months after the same becomes due in any year . . . it shall be in the option of the proprietor . . . to put an end to the lease, without prejudice to his claim for past due or current rent, or for implement of any of the obligations of the lease up to the date of such forfeiture, or for damages in respect of failure to implement any of the obligations, and that by the simple form of a written intimation that he has exercised this option, under his own hand or the hand of his factor or agent, addressed to the tenant and despatched by post; declaring that the despatch by post of the said intimation shall have the effect, *ipso facto*, of bringing the lease to an end as at that date . . . *Twenty-seventh.*—All questions that may arise between the proprietor and tenant, or between the outgoing and incoming tenants, shall be submitted to the decision of two arbiters, one to be named by each party, or in case of such arbiters differing in opinion, of an oversman to be appointed by them before entering on the reference; and in the event of either party failing to name an arbiter within ten days after being required by the other party to do so, or in case of such arbiters failing to agree upon an oversman within ten days after their acceptance of the reference, it shall be in the power of either party to apply to the Sheriff of the county in which the lands lie to name an arbiter to act for the party so failing, or an oversman to act in the event of the arbiters, whether named by the parties or appointed by the Sheriff, differing in opinion." The *twenty-first* article provided that the tenant should be bound to take at entry the usual sheep-stock of the farm at prices to be fixed by arbitration, and that "at the expiry of the lease" the incoming tenant should "in like manner" take the regular sheep-stock of the farm.

There was a break in the lease at Whitsunday 1902, and the tenant gave notice that he was to take advantage of it.

On 8th February 1902, Stewart's rent being five terms in arrear, intimation was made to him that Lord Breadalbane had exercised his option to put an end to the lease.

Thereafter the landlord and the tenant each named an arbiter for the purpose of taking the valuation of the sheep-stock on the farm, but when these arbiters met for the purpose of appointing an oversman, the arbiter nominated by Lord Breadalbane intimated that his Lordship declined to take over the stock, and refused to make any appointment of an oversman.

Stewart then presented an application in the Sheriff Court at Oban for the appointment of an oversman by the Sheriff in terms of the articles and conditions of lease.

Lord Breadalbane lodged answers, and pleaded—"(3) The pursuer Stewart having forfeited his rights under said lease as condescended on, the defender is not bound to take over the sheep-stock on said farm, and the present proceedings are unwarranted and incompetent, and ought to be dismissed with expenses."

Stewart's estates having been sequestrated, a judicial factor was appointed thereon, who was sisted as an additional pursuer in the application for appointment of an oversman.

On 21st May 1902 the Sheriff-Substitute (MACLACHLAN) appointed an oversman, reserving all pleas.

The defender appealed to the Sheriff (FERGUSON) who recalled the interlocutor complained of, sustained the third plea in law for the defender, and dismissed the petition.

Note.—"The application proceeds on the footing that there is a subsisting obligation

upon the defender, the landlord of two farms of which the original pursuer Stewart was lately tenant, to take over the sheep-stock and have its value fixed by arbitration. If such an obligation does not subsist, there is nothing to arbitrate about, and the application must be dismissed.

"There was a break in the lease at Whitsunday 1902, of which the pursuer had intimated his intention to take advantage. Had there been no other proceedings, and the termination of tenancy been in virtue of this decision, after the fulfilment of his obligations by the tenant, the obligation to take over the stock would undoubtedly have come into force. But in February 1902, the tenant, so far from fulfilling his obligations, was five terms in arrear with his rent, and the landlord exercised the option reserved by the estate regulations to put an end to the lease as on 8th February. He maintains that the lease not having run its natural course, but having been irritated between terms, and forfeited, owing to the tenant's delinquency, the obligations, which would have attached had the lease continued to the contemplated ish, have disappeared. The ex-tenant on the other hand contends (or it is contended for behoof of his creditors) that whether the lease has run its natural course or been prematurely forfeited, he is entitled to have his sheep-stock taken over at valuation at whatever time the tenancy actually terminated, and irrespective of the fulfilment of his obligations, any sums due by him being first deducted from the price to be paid by the landlord.

"The question is one of importance, and there are considerations of substantial hardship on both sides. If the tenant has to remove or realise his stock in the market, there will certainly be less for him or his creditors than if they are taken over on the ground, acclimatisation to the soil being a substantial element of value; on the other hand, the taking over of a substantial sheep-stock is a heavy burden on a landlord, one that he has undertaken on the understanding that for a definite period of years he was to receive a regular income from the farm, that he was not liable to have to meet it before a fixed date, and certainly not on the footing of receiving deferred payment of the sums due to him for the use of his lands out of his own money, expended at possibly an excessive valuation for sheep, which he may or may not wish to possess. I have closely examined the lease and the estate regulations, with a view to ascertaining whether they express that it was in the contemplation of parties that this obligation should exist in the event of premature termination of the lease by forfeiture. The expression in the lease is, 'at my awaygoing.' The regulations being expressly incorporated with the lease, this must, I think, be read as equivalent to the phrase in the regulations which binds the incoming tenant to take the regular sheep-stock 'at the expiry of the lease.' The irritancy clause empowers the landlord on occurrence of the events specified to 'put an end to the lease,' describes the effect of the exercise of this power as 'such forfeiture,' and declares that the dispatch of the intimation 'shall have the effect *ipso facto* of bringing the lease to an end as at that date.' This is all without prejudice to the claim for implement of any of the obligations of the lease 'up to the date of such forfeiture.' Nothing is said as to obligations subsisting after forfeiture, and the natural conclusion is that the ordinary result of forfeiture follows, that the lease is dead, and that (to use the words of Lord President Inglis in *Bidoulac* v. *Sinclair's Trustees*, 17 R. 144, 27 S.L.R. 93) as regards anything subsequent in date, parties are *hinc inde* free for the future from the obligations contained in the contract. I am therefore of opinion that by 'expiry of the lease' is meant its natural termination, with all its prestations fulfilled.

"This view is in accordance with the ordinary relations of landlord and tenant at common law.

"The main rights conferred by the contract of lease are that of the tenant to the possession of the farm, and that of the landlord to the termly payment of rent. The other provisions as to improvements, awaygoing crop, &c., are subsidiary and auxiliary to these. Irritancy or forfeiture just remits the parties to their ordinary rights of property. The landlord is entitled to get back his farm, the tenant keeps his property, the stock. The provisions as to sheep-stock in the case of sheep farms seem to me analogous to those relating to improvements in leases of arable farms. Now, it is significant that in the Hypothec Abolition Act 1880 and the Agricultural Holdings Act 1883 the Legislature found it necessary to expressly enact that in removals under these Acts (the process of removal being accelerated) the tenant should have the rights of an outgoing tenant. The reason is obvious—that at common law a tenant removed for default could not claim the rights of an outgoing tenant, these being founded upon contract, and the tenant having failed to fulfil his part of the contract being disentitled from enforcing the stipulations in his favour of the contract he had broken—*Smith* v. *Harrison's Trustees* (1893), 21 R. 330, 31 S.L.R. 245; *M'Bryde* v. *Hamilton* (1875), 2 R. 775, 12 S.L.R. 550 (statement of general principle); *Walker* v. *M'Knight* (1886), 13 R. 599, 23 S.L.R. 408 (no claim for meliorations, lease being prematurely brought to an end by tenant's sequestration); *Craig's Trustee* v. *Malcolm* (1900), 2 F. 541, 37 S.L.R. 398 (Lord Ordinary's opinion).

"The argument that because the defender gave notice of forfeiture under the clause in the regulations providing for conventional irritancy, and not by independent proceedings under the general provisions of the law, he is bound still to carry out the sheep-stock provision, is fallacious. It results in the adjective 'conventional' eating up the substantive 'irritancy,' and omits to recognise that the defender is really exercising his original right of property, and not a right which would have

no existence but for the lease. To this exercise the tenant has disentitled himself to object, and the action taken is not a proceeding upon a continuing provision of the lease, but a destruction and revocation of the lease altogether. There being therefore no subsisting obligation to take over the sheep-stock, and no arbitration under the lease, the application is incompetent, and falls to be dismissed."

The pursuer appealed to the Court of Session, and argued—The defender had invoked the lease when he nominated an arbiter. The pursuer's rights at waygoing emerged as at the date when the defender put an end to the lease; the provision as to *ipso facto* termination of the lease did not exclude those rights, and no penalty attached to the irritancy beyond that necessarily involved in the termination of the tenancy — *Pendreigh's Trustees* v. *Dewar*, July 19, 1871, 9 Macph. 1037, 8 S.L.R. 671. The cases referred to by the Sheriff had no application.

Argued for the respondent—The defender's obligation to take over the sheep stock was not prestable until the natural expiry of the lease; termination by irritancy was not the natural expiry of the lease—*Pendreigh's Trustees* v. *Dewar*, 9 Macph., Lord President at p. 1041. That case was special. The view that the irritancy had extinguished the pursuer's rights at waygoing was emphasised by the provisions of the Hypothec Abolition (Scotland) Act 1880 and the Agricultural Holdings (Scotland) Act 1883, referred to by the Sheriff. Counsel for the respondent also referred to the following authorities—*Hannan* v. *Henderson*, December 16, 1879, 7 R. 380, 17 S.L.R. 236; *Stewart* v. *Watson*, July 20, 1864, 2 Macph. 1414; *Morton* v. *Montgomerie*, February 22, 1822, 1 S. 344; *Walker*, v. *M'Knights*, February 24, 1886, 13 R. 599, 23 S.L.R. 408.

At advising—

LORD JUSTICE-CLERK—The pursuer, who was a tenant of the defender, having come into embarrassed circumstances, and being in arrear of rent for several terms, gave notice to bring the lease to an end at a time of break stipulated for in the lease. The landlord thereupon, founding upon the irritancy clause in the lease, brought the lease to an end in February instead of at Whitsunday according to the notice applicable to the break.

In these circumstances the tenant and his trustee in bankruptcy called upon the landlord to name an arbiter to act for him in the valuation of the sheep-stock, and an arbiter was appointed by him. When the arbiters for the parties met, the arbiter for the landlord refused to concur in appointing an oversman, and the landlord declined to go on with the arbitration. Accordingly, the tenant and his trustee applied to the Sheriff to appoint an oversman, and the Sheriff-Substitute, without prejudice to any of the contentions in law of the landlord, appointed an oversman so that the valuation of the stock might proceed.

We have now to consider an appeal from the judgment of the Sheriff, who has recalled the Sheriff-Substitute's interlocutor and has sustained the third plea-in-law for the landlord, which is in effect—"The pursuer having forfeited his rights under the said lease as condescended on, the defender is not bound to take over the sheep-stock on said farm."

I am unable to agree with the Sheriff. A lease is brought to an end by the irritancy put in force by the landlord. But it by no means follows that stipulations made in the lease regarding matters agreed upon in the agreement for the lease are necessarily rendered null and void by the irritancy, and least of all as regards matters to be dealt with as a consequence of the lease being at an end. The lease is stopped. It has come to a termination earlier in time than its natural ish, but I cannot assent to the proposition that stipulations and agreements in the lease as to what is to be done when it comes to a conclusion are to be set aside as being null. Such a doctrine might be most unjust to landlords as well as tenants, and might lead to most substantial injustice. Had there been no authority on this question I should have been prepared to repel the landlord's third plea. But I think there is very distinct authority on the question. And I think it unnecessary to refer to any other than the case of *Pendreigh's Trustees*, in which the landlord, who had put the lease to an end on the ground of irritancy, was held liable to pay a sum of money in respect of certain works which under the lease had been executed by the tenant. In this case, as in all sheep-farm leases, the tenant on becoming tenant had to take and pay for the existing stock, and it was a stipulation in his favour that he should have the corresponding right on his lease coming to an end to have the stock taken over. That is a right which it would be most inequitable to deprive him of. The landlord could enforce it if he saw it was to be his advantage to do so. I can see no ground for holding that by taking advantage of an irritancy he can shut out the tenant from the benefit of a stipulation which is made in such leases to prevent serious deterioration of the value of the farm stock under the conditions of hill farming. It seems to me to be a much stronger case than that of *Pendreigh* for applying the rule which was applied there.

I am therefore in favour of recalling the Sheriff's interlocutor and remitting the case back for further procedure.

LORD YOUNG—I concur.

LORD TRAYNER—I think the judgment of the Sheriff should be recalled. When the respondent put an end to the lease, as he was entitled to do, he only did so to the effect of terminating the relation of landlord and tenant between himself and the appellant. Thereafter there could arise no right or obligation on either side from the relationship. But the obligation which the appellant seeks now to enforce was not one that arose at or after

the termination of the lease; it existed from the very beginning of the lease although only prestable at the termination of it. I regard the case of *Pendreigh's Trustee* as quite in point. In that case the obligation was for a money payment, while here it is an obligation *ad factum præstandum*. But the quality of the obligation makes no difference on the right to enforce it. The contention of the respondent that the termination of the lease operated its extinction as if it never had existed is not tenable, and it was so held in the case I have referred to, where the terms of the lease gave more ground for the contention than can be found in the lease before us.

LORD MONCREIFF—In this petition the appellants, the tenant and the trustee on his sequestrated estates, pray the Court to name an oversman to act in case of arbiters named by themselves and the landlord "differing in opinion in valuing the sheep stock on the farms of Fernochs and Achnamaddy, Lochawe, in the county of Argyll, to be taken over by the defender as proprietor from the pursuer as outgoing tenant . . . all in terms of the lease of said farm between the defender and the pursuer, dated 2nd March and 13th August both in the year 1897." That is the only conclusion or prayer. I may observe in passing that no claim is made in this process on the footing that the landlord was *lucratus*. On that question we have no means of judging, and are not asked to decide. The prayer is framed on the assumption that the landlord's obligation to take over the stock subsists.

The case depends upon the construction of a conventional irritancy contained in the 25th article of Articles and Conditions of Lease of the said farm, which is incorporated by reference in the lease, and is as follows:—"In the event of the rent stipulated not being fully paid to the proprietor or his factor within three months after the same becomes due in any year, or in the event of the tenant becoming bankrupt, or being sequestrated, or executing a trust-deed for behoof of his creditors, or subletting or assigning without consent of the proprietor, or harbouring poachers, or being convicted of poaching, it shall be in the option of the proprietor on any of said events occurring to put an end to the lease without prejudice to his claim for past due or current rent, or for implement of any of the obligations of the lease up to the date of such forfeiture, or for damages in respect of failure to implement any of the obligations."

The question arises in this way. The tenant being more than five terms' rent in arrear the landlord availed himself of his power to put an end to the lease, and did so by notice terminating the lease dated 8th February 1902, which was duly intimated to the tenant on the same day. Notwithstanding that the lease was thus legally terminated before its natural conclusion, the appellants maintain that the landlord's obligation under the lease to take over the sheep stock on the farm "at the expiry of the lease" still subsists. The landlord, on the other hand, maintains that as that obligation was not prestable until the natural expiry of the lease (either at the ish or at one of the breaks) it fell upon the lease being terminated under the irritant clause. The Sheriff has sustained the landlord's defence, and I am of opinion that the judgment is right.

A conventional irritancy will always be enforced by the Court according to its terms and tenour. The Court will always step in to prevent gross abuse or oppression, but no such case arises here. Now this clause is entirely in the landlord's favour, and the scheme of the clause is to enable him in any of the events named to put an end to the lease "without prejudice to his claim for past-due or current rent, or for implement of any of the obligations of the lease *up to the date of such forfeiture*, or for damages in respect of failure to implement any of the obligations."

Thus, while the landlord is entitled to enforce the tenant's obligations which have arisen before forfeiture, or claim damages, the rights and obligations of both parties, *hinc inde*, under the lease for the unexpired period are swept away. On the one hand the tenant is not bound for payment of rent beyond 8th February 1902, and accordingly in the notice terminating the lease it is stated—"Whereas the rent due and payable by the said Peter Stewart in respect of said farm from the term of Martinmas 1899 to this date (8th February 1902) is unpaid," &c. On the other hand, in my opinion, the landlord is no longer under obligation to take over the tenant's stock, just as, if the interest of parties had been reversed, the tenant would not have been bound to hand over his stock to the landlord or an incoming tenant.

The landlord's obligation to take over the stock is one to be performed "at the expiry of the lease;" that in my opinion is at the natural expiry of the lease. Those words were so interpreted in *Pendreigh's Trustees* v. *Dewar*, 9 Macph. 1037. The Lord President says (p. 1040) — "The termination of this lease at the option of the landlord is not the expiry of the lease. The expiry of a lease in ordinary language means its termination by the effluxion of time. The expiry of a nineteen years' lease is the expiry of that period. And so when the lease is brought, as here, to an abrupt termination we speak of the unexpired term of the lease." Now, the tenant's contention is that although the lease was terminated in consequence of his own breach of contract the landlord was bound as at 8th February 1902 to take over the stock. It so happened there was a break in the lease in May 1902, only three months ahead; but the question would have been the same if the landlord, as he was entitled to do, had irritated the lease two years before. It is said that the lease was terminated by the landlord. No doubt he did so, and that was his right. But I do not think that he was thereby exposed to the dilemma of either keep-

ing on an impecunious tenant or taking over the stock at a loss to himself. One purpose of the irritant clause as I read it was to save him from such a position.

Neither does it seem to me that there is anything necessarily harsh or unreasonable in such an exercise of his rights. While it may be convenient that a landlord should take over the tenant's stock at the natural termination of the lease, it may not be easy for him to find another tenant, or convenient for him to take over the stock himself when the lease is prematurely terminated through the fault of the tenant.

There may be stipulations in a lease so independent of legal or conventional irritancies that they may be held to subsist notwithstanding forfeiture and premature termination of the lease. *Pendreigh's* case presents a good illustration. The tenant was taken bound at the beginning of the lease to lay out £200, to be repaid by the landlord at the expiry of the lease, with interest at 1½ per cent. per annum from date of outlay. He did so, but 9 years after the commencement of the lease it was terminated (the landlord exercising his option) owing to the tenant's bankruptcy. The tenant's trustee sued the landlord for repayment of the £200 with past-due interest in so far as unpaid. It clearly appears from the opinions of the Judges that they regarded the £200 expended by the tenant as an ordinary loan to the landlord. The Lord President says (p. 1041)—"The question is whether such a debt is extinguished by operation of the clause which brings the lease to a premature end. That cannot have been intended. The plain meaning of the contract is that this sum being advanced by the tenant the landlord becomes his debtor, the period of payment being postponed."

Lord Ardmillan says (p. 1042)—"The obligation of the landlord . . . is quite distinct and separate from the other stipulations. . . . I consider this advance to be truly a loan by the tenant to his landlord."

Lord Deas says (p. 1041)—"There might have been difficulty but for the stipulation of interest. But that stipulation makes it clear, I think, that the sum is truly a loan by the tenant to the landlord," and Lord Kinloch says (p. 1043)—"This is not, I think, one of those prestations on the part of the landlord which are held not demandable unless the tenant fulfils all his obligations down to the natural expiry of the lease. It was a special debt contracted for a special purpose."

But the obligation to take over stock is an ordinary stipulation in grazing leases intended to take effect and only suitable at the natural termination of the lease and awaygoing of the tenant. It is supposed to be for the mutual convenience of landlord and tenant, although usually I understand that it is by no means to the advantage of the landlord, upon whom the loss ultimately falls owing to over-valuation. But it would be inequitable to enforce it when the lease has been prematurely terminated through the fault of the tenant and when a new tenant is not available.

I should add that in my opinion the fact that express statutory provisions were thought necessary in the case of removals under the Hypothec Abolition Act 1880 and the Agricultural Holdings Act 1883 to the effect that the tenant should in the event of removal have the rights of an outgoing tenant, are not unimportant.

On these grounds I am for dismissing the appeal.

The Court sustained the appeal, affirmed the interlocutor of the Sheriff-Substitute, and remitted to the Sheriff to proceed.

Counsel for the Pursuers and Appellants—Campbell, K.C.—Graham Stewart. Agents—Gill & Pringle, S.S.C.

Counsel for the Defender and Respondent — Wilson, K.C. — Scott Brown. Agents—Davidson & Syme, W.S.

Thursday, January 15.

SECOND DIVISION.

[Sheriff Court at Glasgow.

ANDERSON *v.* WILLIAM BAIRD & COMPANY, LIMITED.

Master and Servant—Workmen's Compensation Act 1897 (60 *and* 61 *Vict. cap.* 37), *First and Second Schedules — Injured Workman Refusing to Undergo Surgical Operation — Nominal Reparation Awarded*

A workman whose thumb had been amputated as the result of an injury received in the course of his employment, and who was entitled to compensation under the Workmen's Compensation Act 1897, refused to undergo a surgical operation which would in all probability have removed the sensitiveness of the injured part and have enabled him to earn the same wages as before the accident, or at least to earn more wages than he was able to do before the operation. This operation was a simple one not attended with serious risk, and was such as a reasonable man not claiming compensation or damages would for his own advantage and comfort have elected to undergo. The workman had already undergone two operations, which had failed to remove the pain which incapacitated him for his former work.

On these facts the arbitrator found in law that the workman was precluded from insisting further in his application for compensation under the Act.

The Court *held* that in the circumstances of this case the workman's refusal to submit to the operation proposed disentitled him to a continuance of substantial compensation, and *recalled in hoc statu* the decision of the arbitrator, and of consent of the employers *remitted* to him to allow the workman 1d. weekly until