

A discussion followed as to whether the case ought, in point of form, to be remitted back to the Lord Ordinary. Finally, of consent, the Court disallowed the issue; found that there was no completed contract of lease; and therefore assoilzied the defenders, with expenses.

Agents for pursuer—H. & H. Tod, W.S.

Agents for defenders—Mackenzie & Kermack, W.S.

Friday, November 22.

WALLACE v. WINGATE AND BRUCE.

*Landlord and Tenant—Lease of Minerals—Joint-Tenant—Assignee—Consent—Contract.* A, a tenant in a mineral lease, which excluded assignees and sub-tenants, formed a copartnership with B, and arrangements were set on foot for obtaining the consent of the landlord to B being assumed as a joint-tenant under the lease. In an action by the landlord against A and B as joint-tenants, *held*, on the facts of the case, that there was never any concluded agreement between the parties sufficient to infer liability against B as joint-tenant.

In October 1860 the pursuer, Mr Wallace of Auchinvoile, let, on a fifteen years' lease, to the defender Walter Wingate, a seam of coal in his lands of Easter Shirva, in the county of Dumbarton. The lease secluded assignees and sub-tenants. In January 1862, Mr G. C. Bruce, C.E., entered into a contract of copartnership with Mr Wingate as coalmasters at Shirva and elsewhere. It was proposed that Bruce should become joint-tenant with Wingate in the colliery. To this the landlord's consent was necessary. Various correspondence passed between the parties. Towards the end of May there was prepared a draft minute of agreement between Bruce and Wingate, which narrated the lease to Wingate and bore that "the parties hereto some time ago agreed to enter, and have entered into, a copartnership in the trade or business of coalmasters, and that from and during the space yet to run of the said agreement of lease, to be carried on under the firm of Walter Wingate and Company; and, therefore, the said Walter Wingate hereby acknowledges and declares that the fore-said missive or agreement of lease is granted to him, and stands in his person in trust only, for the joint use and benefit of himself and the said George Cadell Bruce; . . . it being understood that the said firm of Walter Wingate & Company, and the partners thereof, shall be bound to free and relieve me, the said Walter Wingate, not only of the whole arrears of tack-duty," &c.

The pursuer brought an action of declarator and damages against the defenders, alleging that this draft was signed by both defenders in token of their approval, and that a suggestion was made by them, and agreed to, that the pursuer should become a party to the deed in evidence of his consent; that he became a party to the minute; and that the minute was extended and was signed by the pursuer and defenders in May or June 1862. The pursuer alleged, farther, that the defender Bruce had in many ways conducted himself as joint-tenant of the colliery. The object of the action was to make Bruce liable conjunctly and severally with the other defender in rent or lordship under the lease, and in damages for desertion of the works.

Decree in absence was taken against Wingate.

Bruce pleaded non-liability, on the ground that the draft-minute libelled on had never been executed by him, and that he had never been assumed as joint-tenant.

A proof was taken, and the correspondence between the parties was produced. Thereafter, the Lord Ordinary (JERVISWOODE) pronounced an interlocutor in which he found "as matter of fact, 1st, That by missive of agreement between the pursuer and Walter Wingate, who is called as a defender in this action, and which missive is dated 6th and 8th October 1860, the pursuer let, for the term of fifteen years, with certain breaks in favour of the tenant, to the said Walter Wingate and his heirs, that seam of coal then worked by William Duns-mure in the pursuer's lands of Easter Shirva, secluding assignees and sub-tenants: 2d, That in or about the month of January 1862, a copartnership was formed between the said Walter Wingate and the other defender, George Cadell Bruce, in relation to the trade or business of coalmasters, which copartnership was to subsist for and during the endurance of the lease above mentioned: 3d, That on application by the said Walter Wingate, and after certain inquiries regarding the position of the defender, the pursuer agreed, on or about the 20th January 1862, to assume the defender Bruce as joint-tenant with Mr Wingate in the lease of the coal above mentioned; and, on or about the 21st January foresaid, the defender (in terms of his letter of that date, No. 9 of process) stated that he would be glad to enter into a lease as soon as was convenient for the pursuer to get a regular lease prepared: 4th, That thereafter a meeting took place, towards the end of January 1862, in the office of Messrs Fisher & Watt, writers in Glasgow, and then the ordinary agents of the pursuer, at which the pursuer and defender and Mr Wingate were present, and on which occasion the defender Bruce requested the said Messrs Fisher and Watt to propose a draft-minute of agreement which, as then contemplated, was to be signed by the pursuer in testimony of his approval, and under which the said Walter Wingate was to acknowledge and declare that the missive of lease above referred to was granted to him and stood in his person in trust only for the joint use and behoof of himself and the defender Bruce: 5th, That thereafter a draft-minute was prepared by the said Messrs Fisher and Watt, and by the first transmitted to the pursuer, who personally returned it; and that the said draft was thereafter handed by Mr Fisher to the defender Wingate, who took possession of it for the purpose, as he stated, of submitting it to an agent on his behalf: 6th, That the said draft was thereafter handed by Mr Wingate, or sent by Mr Fisher, to the defender Bruce, who thereafter, and on or about the 27th January of the said year (1862), personally returned the same to Mr Fisher: 7th, That the said draft-minute when so returned bore the addition of the signatures of "George C. Bruce" and "Walter Wingate," opposite to the title and on the margin thereof the words "by whom" (as referring to the pursuer) "these presents are also signed in testimony of his approval thereof:" 8th, That the said draft-minute, when so returned, did not bear the words "but without prejudice to the legal rights," which now appear therein, and which words were added by Mr Fisher, acting on behalf of the pursuer, in the absence and without the knowledge or approval on the part of the defender Bruce: 9th, That Mr Fisher

having had said minute of agreement extended, including therein the words added as aforesaid, transmitted the same on 28th May aforesaid to the pursuer for the purpose, as stated in the letter—of which No. 11 of process is a copy—of its being signed by the pursuer, the defender, and Mr Wingate: 10<sup>th</sup>, That the said agreement was signed by the pursuer and by Mr Wingate, but was not signed by the defender Bruce: and 11<sup>th</sup>, That the pursuer has failed to prove that the defender approved of the draft-minute of agreement referred to on record, as the same was ultimately framed and extended, or that the defender ever subscribed or executed the same; and, with reference to the foregoing findings, sustains the plea in law stated on record on the part of the defender, and in respect hereof assolvies him from the conclusions of the summons, and decerns; Finds the defender entitled to his expenses," &c.

The pursuer reclaimed.

GIFFORD and BALFOUR for him.

DEAN OF FACULTY (MONCREIFF) and LANCASTER in reply.

**LORD DEAS**—In this case it appears that in 1860 Mr Wallace let a seam of coal in his lands of Easter Shirva to Mr Wingate and his heirs, for a period of fifteen years. Mr Wingate formed a copartnership with a Mr Dennistoun, and it appears that for some time the copartnership was carried on substantially for the benefit of that firm, and that without any alteration in the lease. It was then proposed that Mr Bruce, the defender, should take the place of Dennistoun, and that a copartnership should be formed between him and Wingate, and that the colliery should be carried on for behoof of that copartnership. A good deal of correspondence on that subject passed between Bruce and Wingate, at the outset of which what was pointed at seems to have been a joint-tenancy, and then there was a proposition by Bruce that he and Dennistoun should take the colliery, and that Wingate should be left out. The result was that Dennistoun was left out and Wingate remained. A great deal of the correspondence is previous to the retirement of Dennistoun, and, therefore, has not much to do with the matter; we must look chiefly to the correspondence after that time. There does not seem to have been any disinclination on the part of Wingate to make Bruce a partner, in so far as he had power to do so, nor any disinclination on the part of Bruce to become joint-tenant; but nothing of that sort could be done, the lease could not be assigned nor sub-let without, consent of the landlord, for by the lease assignees and sub-tenants were excluded. The object of exclusion of sub-tenants is not to preserve to the landlord the responsibility of his principal tenant, but rather that the landlord may have the full benefit of that personal predilection which is of great importance in leases, and especially in a lease of mines and minerals. The landlord may let them to an individual who has not great capital if he has confidence in his skill and care, and he may refuse to let them to another person if he has not, for the obvious reason that the sub-tenant may, from want of skill and care, destroy the mine, so as to ruin himself, the principal tenant, and the landlord. It is quite true that a tenant may work his mines through other parties employed by him, and in that way the personal predilection of the landlord may to some extent be defeated indirectly. But that is different from a principal tenant devolving the whole matter on a sub-tenant. The consequence

here is that Wingate could neither assign nor sub-let without the consent of the landlord, when he wanted to make Mr Bruce his partner. There were two ways in which this might be done. There might be an agreement between Wingate and Bruce, that although Wingate was tenant he was to hold for himself and Bruce, or he might hold for the company of Wingate & Bruce. But that could not affect the landlord. Even then it was desirable to have the consent of the landlord, to prevent any misunderstanding on the subject of sub-tenancy. Accordingly it was understood that the consent of the landlord was to be obtained, and there was a good deal of negotiation between them and the landlord in reference to that. But I don't find that, up to the date of the draft-minute in 1862, there was any understanding between them and the landlord binding on either party; and, on the contrary, there were proposals to make material alterations on the lease. The landlord wanted some additional advantages. The whole details and nature of the lease were unfixed up to that time at all events. When parties are negotiating in this way, the transaction requires to be embodied in a final and formal deed, and the parties are not bound till that is done. When that is done it supersedes all previous negotiations. Now on 14th May Wingate writes the pursuer Wallace, "before getting the lease ready, I would like you to write for Bruce, to see and get him to take the one-half of the work, so that we would be both equal . . . I wrote Mr Bruce about it myself, and he appears to be just upon the swing." And on 28th May Bruce writes to Wingate, "I am most anxious that you should be able to get out by the 10th June, but to do this you must get your agent to send me in your proposal embodied in an agreement, which I will lose no time in revising and returning to you as soon as possible;" so that at that date there was nothing fixed. The only thing said to fix matters is a draft agreement, said to be signed in the end of May 1862. If you read that document without the words put by the landlord's agent on the margin, it is nothing but an agreement between Wingate and Bruce, to this effect, [*reads from minute.*] That was an assignation to Wingate & Bruce, or to Wingate & Company, a company which might change its partners, and such an assignation could have no effect without the consent of the landlord. Did the landlord consent to that assignation to relieve Wingate as an individual, and take the company of Wingate & Co. as tenants, Wingate being no longer his tenant, except as a partner of the company who might take in other partners? That is a proposal the landlord would require to look well to. Is there evidence of Wallace agreeing to that? On the contrary, the draft is prepared on the footing of his being no party to it at all. It doesn't appear that this was to be a final and formal deed, and it could not be so. We don't know what conditions the landlord would insist on having. Is that draft to be taken as a consent by the landlord that the lease shall be assigned to a company? Even if that were its nature, it is not a final and formal deed, to which the landlord would become a party. There are two reasons why I think the Lord Ordinary is right; *First*, This is not a deed on the face of it; and *Second*, Be the effect of this what it may, it never was agreed to by the other parties. It never appeared that Bruce agreed to the reservation of the landlord's legal rights. The consent of all the parties was necessary before it was binding on any. On the ground that this was an incomplete negoti-

ation, I am for adhering to the interlocutor of the Lord Ordinary.

The other Judges concurred.

Adhere.

Agents for pursuer—Hill, Reid, & Drummond,

• W.S.

Agents for defenders—Lindsay & Paterson, W.S.

Friday, November 22.

#### HEWAT v. GRANT AND OTHERS.

*Trust—Vesting—Fee—Liferent.* Terms of trust-deed under which held that the right to the fee and rents of certain estates had vested in a pupil, although he was not to obtain a conveyance until he attained majority.

This was an action of declarator, count, and reckoning, raised by Richard Hewat, solicitor, Castle-Douglas, factor *loco tutoris* to James Welsh, only son of the late James Welsh junior, lately residing at Meikle Furth-head, in the parish of Urr and stewardry of Kirkcudbright, against the testamentary trustees of the late James M'Michan, Meikle Furth-head.

Mr M'Michan died in 1836. By trust-disposition and settlement, dated 1831, he conveyed his whole estate, heritable and moveable, to trustees. By the fourth purpose of the trust, the trustees were directed in the event of the death of James Clark, the first party favoured in the deed, "to pay over yearly to James Welsh junior, second lawful son of the said James Welsh, in Meikle Furth-head, on his attaining the age of twenty years complete, upon his own receipt, the free rents and produce of my said three merk lands of Furth-head, lands of Dalmonyside, and lands of Nethergett, under the burden aftermentioned; and, after the decease of the said James Welsh junior, they shall be bound to denude themselves and convey and dispone the same to the lawful heirs of his body, on his or her attaining majority, heritably and irredeemably, by executing in favour of him or her, and his or her heirs and disponees whomsoever, a disposition of the same, containing procuratory of resignation, precept of sasine, assignation to the rents, mails, and duties, writts and evidents, and clause of absolute warrandice herein contained, and all other usual and necessary clauses; and failing the said James Welsh junior, without leaving lawful issue of his body, my said trustees and their foresaids shall in like manner be bound and obliged to pay over yearly to James Muirhead, lawful son of the said John Muirhead of Logan, on his attaining the said age of twenty years complete, during all the years of his life, upon his own receipt, the free rents and produce of the said lands of Furth-head, Dalmonyside, and Nethergett; and after his decease, to denude themselves and dispone and convey the same to the lawful heirs of his the said James Muirhead's body, on his or her attaining majority, heritably and irredeemably, by executing in favour of him or her, and his or her heirs and disponees whomsoever, a similar disposition thereof; and failing the said James Muirhead without leaving lawful issue of his body, my said trustees and their foresaids shall in like manner be bound and obliged to pay over yearly to James Hannay, eldest lawful son of the said David Hannay of Auchenfranco, on his attaining the said age of twenty years complete, during all the days of his life, upon his own receipt, the free

rents and produce of the said lands of Furth-head, Dalmonyside, and Nethergett; and after his the said James Hannay's decease, to denude themselves and dispone and convey the same to the lawful heirs of his body on his or her attaining majority, heritably and irredeemably, by executing in favour of him or her, and his or her heirs and disponees whomsoever, a similar disposition thereof; and failing the said James Hannay, without leaving lawful issue of his body, my said trustees and their foresaids shall be bound in like manner to pay over yearly to William Lidderdale, eldest lawful son of the said James Lidderdale, writer in Castle-Douglas, on his attaining the said age of twenty years complete, during all the years of his life, on his own receipt, the free rents and produce of the said lands of Furth-head, Dalmonyside, and Nethergett; and after his decease, to denude themselves and dispone and convey the same to the lawful heirs of his body, on his or her attaining majority, heritably and irredeemably, by executing in favour of him or her, and his or her heirs and disponees whomsoever, a similar disposition thereof; whom all failing, my said trustees and their foresaids shall be bound to convey the same to my own nearest heirs whomsoever; declaring, that on the succession opening to the heirs of the said James Clark, or to the heirs of any of the other persons before-named, in the order above mentioned, in case such heirs are females, the eldest heir female, and the descendants of her body shall always exclude heirs-portioners, and succeed without division through the whole course of succession; and further declaring, that the said James Clark and the other persons above named, in their order foresaid, shall have it in their option either to draw the rents and produce of the said lands of Furth-head, Dalmonyside, and Nethergett through the hands of my said trustees or to enter to the natural possession and occupation of the same with the pertinents on their attaining the foresaid age of twenty years complete, and in the event of their making choice of the latter alternative, my said trustees and their foresaids shall be bound to give them possession accordingly: Declaring, that the foresaid lands of Furth-head, Dalmonyside, and Nethergett shall be burdened with a free yearly annuity of £10 stg. to John M'Michan, presently residing at Meikle Furth-head, son of my deceased brother Thomas M'Michan, during all the years of his life, for alimentary purposes only and to the exclusion of his debts and deeds, payable at two terms in the year, Whitsunday and Martinmas, by equal portions, beginning the first term's payment at the first of these terms that shall happen after my death; but which annuity shall not be upliftable by the said John M'Michan, but shall be applied by my said trustees and their foresaids for his use and benefit at such times, and in such portions, as they may consider best; and declaring, that the overplus of the rents and produce of the said lands of Furth-head, Dalmonyside, and Nethergett shall, during the minority of the person entitled to receive the same in terms of the foregoing destination, be accumulated by my said trustees, and be payable to such person on his attaining the said age of twenty years complete."

James Clark survived the truster, but died without issue. James Welsh junior survived James Clark and enjoyed the liferent provision in his favour. He died in February 1863, leaving a son, James Welsh, and a daughter, both in pupilarity. James Welsh's factor *loco tutoris* now sought declarator