The Sheriff-Substitute (BARCLAY), after a careful and exhaustive analysis of the evidence, found that the facts proved did not fix upon the captain of the "Agnus Campbell" liability for damage in consequence of the length of the voyage, and consequent loss of market, and deterioration of cargo.

The Sheriff (TAIT) adhered.

The pursuer appealed to the First Division of the Court of Session.

WATSON and ASHER for the appellant.

GORDON, D.-F., and BALFOUR, for the respondent.

At advising—

LORD PRESIDENT—The charter-party is dated 16th December 1868, at Dundee. It stipulates "That the said ship being tight, staunch, and strong, and every way fitted for the voyage, shall with all convenient speed, sail and proceed to Balmerino, or as near thereunto as she may safely get, and there load," &c.; "and being so loaded, shall therewith proceed to London," &c. I think that there can be no doubt, on reading this, that the intention of the parties was that the vessel should go to Balmerino in such a condition that she could at once perform the contemplated voyage. The tackle and stores should therefore have all been on board before she left Dundee. In point of fact the vessel did not go to Balmerino till the lapse of such a time as should have enabled the captain to lay in such stores, &c, as he thought necessary; but he did not do so, and the vessel left Dundee without compasses, without bread, and without part of the tackle. Now, if it had been otherwise, if she had left Dundee with her proper complement of stores on board, she would have been ready to sail with the first tide after her cargo was shipped at Balmerino. She did not sail with that tide, and the reason why she did not appears to me by no means clear. The captain says he could not sail without a pilot. He sent for one, but the pilot refused to come, as he considered it too calm, and was afraid the ship might run aground. The pilot himself, indeed, does not give this evidence, and it is a remarkable thing that he was not called as a witness, but we are given to understand that this was the state of the case. We farther see that there were some very awkward proceedings going on upon that first night amongst the crew. If the captain was not drunk, he was not far from it; his son, the mate, was in the same state; they fell to quarreling, and the mate deserted the vessel. I do not say that all this, taken together, is sufficient to convict the captain of undue and unwarrantable delay, but I cannot help saying that the case starts very unfavourably for the master, and this must weigh with us in dealing with what follows. His failure to start by the first tide on the morning of the 1st January imposed upon him a very stringent obligation to get out of the river upon the earliest opportunity. From this point, therefore, we must examine his conduct very strictly. His pilot comes upon the 1st January, and carries him by the afternoon tide as far as Wormet Bay, and then leaves him. Here he lay at anchor till the 4th January, when he proceeded down as far as Dundee Roads, on the opposite side of the river, when he again cast anchor. Now what was this change of side for. Evidently to lay in the requisite stores which were not yet on board. This at once accounts for much of the delay that occurred, and which would have occurred whatever the weather had been. This, taken in connection with what took place upon 1st January, shows that he was not desirous of putting to sea then, that he was not in fact in a condition to put to sea, and up to the 6th or 7th of January he was culpably wasting time, partly from his unreadiness, and partly from other causes. From the 7th to the 20th of January I am willing to take it for granted that he was really wind-bound. But I ask, whether, at any rate on the 4th, 5th, or 6th, he was not guilty of unwarrantable delay in not setting sail, taking into consideration the fact that he should have been in readiness, and the conduct of these first ten days. The evidence about the weather may be a little conflicting, but on the whole it is in favour of the supposition that a vessel such as the "Agnes Campbell," could have sailed on any one of these days, and I consider that the previous conduct of the Captain had laid upon him the paramount obligation of sailing then if it was possible. It was attempted to be made out that the other vessels mentioned in the evidence as having put to sea at that time were only bound for Shields, and other north of England ports, but I do not see that that affects the question; it was a great object for the master of this ship to get so far on his way at any rate, and if they set sail, so should he. I have therefore arrived at the conclusion, that on not sailing upon the 4th, 5th, or 6th of January the master was guilty of gross negligence and undue delay, and am therefore for altering the Sheriff's interlocutor. In arriving at this conclusion I do not at all undervalue the evidence led in support of the character and seamanship of the master; on the contrary, I quite subscribe to what the Sheriff-Substitute says on that subject, and on the whole matter have received much assistance from the elaborate and careful interlocutors of the Sheriffs. It is a question of opinion on consideration of evidence, and it is only in the ultimate conclusion that I differ from them.

LORDS DEAS, ARDMILLAN and KINLOCH concurred.

The Court accordingly sustained the appeal and recalled the Sheriff's judgment, and gave decree for damages in terms of the joint minute of parties.

Agents for the Appellant—Hill, Reid, & Drummond, W.S.

Agent for the Respondent—Alex. Morison, S.S.C.

Tuesday, November 1.

SECOND DIVISION.

CROMBIE AND BISSET *v.* CRABBS.

Tenant—Lease—Valuation—Market Value. A tenant was bound under his lease "to pay the price of the grass seeds sown with the waygoing crop, and also to pay the outgoing tenant for turnips and dung at a valuation to be made by two valuators to be mutually chosen by the parties, or, in case of difference between the valuators, then by an oversman. The incoming tenant is to leave turnips and dung at the end of his lease to be paid for in like manner by the next succeeding tenant." *Held* that the outgoing tenant was entitled under this clause to receive from the incoming tenant the *market* value of the turnips left on the ground, as fixed by the valuators.

This was an appeal from the Sheriff-court of Kincardineshire in an action at the instance of the trustees of the late Henry Erskine, farmer, Pittarrow, against Mr Crombie of Thornton, proprietor,

and Hugh Bisset, tenant, of the said farm. The late Mr Erskine held the said farm under a minute of agreement of lease granted to him in 1849 by Mr Crombie of Thornton. "By the said minute of agreement of lease of Pittarrow the tenant was bound, *inter alia*, 'to pay the price of the grass seeds sown with the waygoing crop, and also to pay the outgoing tenant for turnips and dung at a valuation to be made by two valuators to be mutually chosen by the parties, or, in case of difference between the valuators, then by an oversman or umpire to be named by the valuators. . . *Third*, The incoming tenant is to leave turnips and dung at the end of his lease, to be paid for in like manner by the next succeeding tenant. . . . *Fifth*, The tenant is to farm in a proper husbandmanlike manner . . . and he must consume upon the farm the whole of the straw and fodder that shall be raised thereon, excepting the fodder of the nineteenth crop.'"

Mr Erskine accordingly possessed under this lease until his death in 1859, when his trustees, the foresaid pursuers, entered into possession of the farm. The lease expired at Martinmas 1868, when the defender Hugh Bisset became tenant of the farm.

In consequence of a dispute between the outgoing and incoming tenants as to the principle upon which the turnips left upon the farm were to be valued, a reference was entered into between them, whereby they were to be valued upon two principles—*First*, For what they were worth for removal from the farm; and *secondly*, For what they were worth for consumption on the farm. The valuators having accepted the reference, fixed the value of the turnips for removal at £762, 16s., and their value, if to be consumed on the farm, at a lesser sum. The outgoing tenants accordingly brought the present action for the larger sum, under deduction of what had been paid to account. They pleaded: "(1) The pursuers, as outgoing tenants of the farm of Mains of Pittarrow, being bound by the minute of lease under which the farm was held, to leave the turnips belonging to them on the farm at the end of the lease, to be paid for at valuation, are entitled to the full market value, or value for removal of the said turnips, and the defenders are conjunctly and severally liable therefor. (2) The late Mr Erskine, the pursuers' author in the said farm, having at his entry thereto paid the full market value, or value for removal of the turnips then on the farm, the pursuers are now entitled in like manner to the full market value, or value for removal of the turnips on the farm at their removal from it, and the defenders are conjunctly and severally liable therefor. (3) The turnips sued for having been the absolute property of the pursuers, subject only to the condition that they were to be left at valuation, and the pursuers being in no way benefitted by their consumption on the farm, they are entitled to the full market value thereof."

The defender pleaded: "(1) The pursuers being bound by their author's lease to leave turnips, and not to remove them, are not entitled to valuation as for removal. (2) It being contrary to the law and practice of the county to value turnips left like those in question on any other footing than for consumption on the farm, the defenders are entitled to absolvitor."

The Sheriff-Substitute (DOVE WILSON) pronounced the following interlocutor:—

"*Stonehaven, 11th May* 1870.—Having heard parties' procurators on the record—Repels the defences, and decerns against the defenders for the sum of £762, 16s. sterling, with interest thereon at the rate of 5 per centum per annum from the 22d day of November 1868 till payment; but under deduction always of the sum of £537, 4s. 6d. sterling paid to account, with interest thereon at the rate of 2 per centum per annum from the said 22d day of November to the 5th day of February 1869, and at the rate of 5 per centum per annum thereafter: Finds the pursuers entitled to expenses, of which allows an account to be given in, and when lodged, remits the same to the auditor of Court to tax and report.

"*Note.*—The pursuers are trustees, who, as such, were tenants of the farms of Pittarrow and Mill of Conveth, under leases which expired at Martinmas 1868. The defenders are the landlord and incoming tenant of the farms.

"1. At the expiry of the leases there was a considerable quantity of turnips on Pittarrow, and a small quantity at Conveth, and in terms of these leases these turnips fell to be delivered over at valuation by the outgoing tenants to the landlord or incoming tenant. The parties differed as to the principle on which the valuation should be made, the pursuers claiming to have the turnip crop valued at what it was worth for removal from the farm, and the defenders claiming to have it valued at what it is worth for consumption on the farm. Accordingly a reference was entered into by which the valuators were asked to value the turnips on both principles, leaving the question in dispute between the parties to be afterwards determined. The valuators entered on their duty, and fixed the value of the turnips on both principles. The arbiters' award, so far as it goes, is not questioned by either party to the present action, and both parties have concurred in presenting, as the question to be determined in the action, the question as to the principle on which the valuation is to be taken.

"Had it not been for the terms of the minute of reference, the Sheriff-Substitute would have been inclined to hold that the point here in dispute was one which the lessees had left for the arbiters to settle; but seeing that the parties agreed to reserve the question, and that the arbiters have determined everything that the minute of reference submitted to them, the cause cannot be returned to them on the ground that their award is incomplete; and the parties, by agreeing to an incomplete reference, seem to have precluded themselves from asking a reference of new. In this action, accordingly, neither party has pleaded that the question in dispute should be settled by arbitration, but both have treated it as one proper to be settled in a litigation.

"The clauses of the lease of Pittarrow, about the meaning of which the parties differ, are in the following terms:—'*Second*, The tenant is to pay the price of the grass seeds sown with the waygoing crop, and also to pay the outgoing tenant for turnips and dung at a valuation to be made by two valuators to be mutually chosen by the parties, or, in case of difference between the valuators, then by an oversman or umpire to be named by the valuators. *Third*, The incoming tenant is to leave turnips and dung at the end of his lease to be paid for in like manner by the next succeeding tenant.' 'The clauses in the Mill of Conveth lease are—*Second*, Mr Erskine to take the whole of the crops, as well as the corn and fodder, as the turnip and

other green crop of the year 1851, and likewise the dung, at a valuation to be made by two persons to be named, the one by Messrs Burnett, and the other by Mr Erskine, or, in case of difference between the valuators, then by an umpire or oversman to be named by the valuators. Mr Erskine is also to pay the price of the grass seeds sown with the waygoing crop. *Third*, Mr Erskine to leave turnips and dung at the end of his lease to be paid for by valuation in like manner by the next succeeding tenant.'

"2. Taking the stipulations of the lease by themselves, the Sheriff-Substitute does not conceive that there is room for doubt as to their meaning. In the absence of any reason to the contrary, a stipulation to leave turnips or anything else belonging to one person, to be taken and paid for by another at a valuation, means that the article is to be valued at what it will bring when freely sold in the market. The seller, in the absence of any stipulation to the contrary, is entitled to the full value of the article, and the way to ascertain the full value is to ascertain what it would bring if sold unconditionally in the market. It is the price which a buyer, bound to nothing beyond payment, would be willing to give, which the seller is entitled to receive. In the present case it is not disputed that what is called the removal price is the price on an unconditional sale. The lower price, that for consumption on the farm, is the price got for the articles when sold under the condition that the buyer is to be bound to consume them on the farm. Is there anything in the clauses that have been quoted to bind the seller to accept the lower value? It is a mere confusion of ideas to say that the condition binding the seller to leave the turnips is also a condition to leave them at an inferior price. All that the buyer has bargained for is that the articles should be left to him at a valuation, and it would be adding a most material stipulation to that bargain to say that they were to be left to the buyer at a lower price than that which others would be willing to give for them. The Sheriff-Substitute does not enter into the reasons for the difference between the valuations as for removal and as for consumption. The parties do not give the same explanation of the reasons, but it is clear that there must be some advantage to the farm from the stipulation that the turnips are to be consumed on it, and to make the pursuers accept the lower price here would be to make them take the price got upon a conditional sale without giving them the benefits of the condition; but the reasons for the difference are immaterial. It is quite enough that the price for removal is the price got for the turnips when they are sold without conditions, and that the price for consumption on the farm is the price got when the turnips are sold fettered by a condition as to what is to be done with them. Now, it is clearly the former which is the value of the turnips to the seller, and also to the buyer, when nothing to the contrary is stipulated. In the present case the buyers are getting the full value of the turnips, because they get them perfectly unconditionally, and, in so far as the sellers were concerned, are (or were) free to sell them at once for the highest value they would bring. From the accounts in process it appears that the effect of the clauses in the leases, if interpreted as the defenders wish, would simply have been to give them for £537 goods which, as soon as they got them, they could, if they so pleased, have sold for £762. It seems to the Sheriff-Substitute plain that this is not their natural meaning. If anything more were wanted to show that the meaning which the defenders give is not the natural one, it is supplied by the fact that other articles which have not two values in the way that turnips have, are included in the same clauses, and are appointed to be valued in the same way.

"The case of *Scott* v. *Ritchie*, 2d Dec. 1869, seems a direct authority for the construction which the Sheriff-Substitute thinks the leases must have.

"3. It remains to be seen whether there are any reasons why the clauses of the lease should not have their natural meaning. Four reasons will be found stated on the record, although one of them (the last) has not been made the subject of a plea in law.

"(1) The defenders allege that it is the universal custom in Kincardineshire, and particularly on certain estates, for the turnip crop to be valued on the principle which they maintain to be the right one; and they argue that the lease must be interpreted according to the custom. The Sheriff-Substitute does not think that a custom such as is here alleged can be admitted to control the terms of the contract. Had the terms of the contract been doubtful in themselves, the matter might have been different; but holding the terms to be clear, the averment comes only to this, that the arbiters employed in a particular district, and those for whom they acted, have been in the habit of misapprehending them, and of thus benefiting the incoming tenants at the expense of the outgoing. It is surely too much to say that this misapprehension is to be perpetuated in the district, and that because certain arbiters and others have misunderstood the matter, everybody else in the neighbourhood is to continue to misunderstand it. Had the defender been able to allege a general custom extending over Scotland, a difficult question would have arisen whether even that could have been recognised as controlling the clauses in question; but it would introduce an element of confusion and uncertainty into contracts which would be intolerable if their clear meaning was to be held open to controversy on the ground of local and limited customs.

"(2) The defenders farther maintain that the pursuers are bound by the custom of valuation which they allege, because their author (the late Mr Erskine) got the benefit of it when he entered his farms. With regard to that larger portion of the turnips which was on Pittarrow, the defenders do not make their averment very distinctly, but they make it distinctly with reference to the small portion on Conveth, and for the purposes of argument it may be taken as having been so made generally. The argument stated plainly is, that because the pursuers' author profited by the misreading of a lease to get something from the tenants whom he succeeded which he had no right to get, the pursuers should in turn leave something in the same way to their successors. The conclusion is wrong. If the late Mr Erskine got anything from his predecessors in the farm which he had no business to get, that may be a reason why his heirs should pay something back to their heirs, but it is no reason why he should pay anything to persons who had no concern with the transaction between them. This argument cannot be rested on those terms of the lease which say that the turnips at leaving are to be paid for 'in like manner' with those got at entry, because that refers simply to their being taken by valuation.

"(3) The defenders have a plea founded on the time at which the pursuers were bound to leave the farms. They maintain that, because the turnips were not ripe at Martinmas, when the pursuers' time for holding the land expired, the full value of the turnips should not be paid. The Sheriff-Substitute does not think this plea calls for much consideration. If the pursuers have right to a crop of turnips at all, they have right to a ripe one.

"(4) The last of the defenders' reasons for saying that the terms of the lease should be interpreted on the view that they maintain to be the true one, is, that one of them (Bisset), on the faith that the terms would be so interpreted, gave the pursuers more than he would otherwise have given for the way-going grain crop. The particulars of this objection are not fully stated, but it seems that the price of the grain crop was fixed also by valuation, and the arbiters there must have gone far indeed out of their way if they gave Mr Bisset a bad bargain of the grain because they expected that he would afterwards get a good bargain of the turnips. The matter, however, is irrelevant, as the two bargains had no necessary connection.

"On the whole matter, the Sheriff-Substitute has therefore felt himself obliged to come to the conclusion that whether the terms of the lease, or the circumstances which the defenders say are relevant to control these terms, be considered, the construction adopted by the pursuers is the sound and legal construction."

The defenders appealed to the Court of Session.

WATSON for them.

The DEAN of FACULTY and MILLAR, Q.C., were not called on.

The Court unanimously dismissed the appeal, on the ground that the pursuers were entitled under the lease to the market value of the turnips.

Agent for Pursuers—Alex. Crombie Jun., W.S.

Agent for Defenders—William Officer, S.S.C.

Tuesday, November 1.

TEMPLETON *v.* GLASGOW & SOUTH WESTERN RAILWAY CO

Assessment—Railway—Erroneous Payment—Police and Improvement Act, 1850—*Lands Valuation Acts*, 1854 *and* 1867. *Held* (1) the line of railway within a town which has adopted the Police Improvement Act 1850 is, under the word "premises," liable to be assessed for the purposes of the Act; (2) as the Lands Valuation Acts of 1854 and 1867 do not impose the liability, but only provide machinery for fixing the amount, the collector of police rates was entitled till then to compute the valuation; and (3) erroneous payment by the railway company to the county did not relieve it of its liability to the burgh assessment.

By 13 and 14 Vict. c. 33, it is provided that after certain formalities any populous place may constitute itself a burgh in the sense of the Act, and appoint commissioners who shall have power to "assess all occupiers of premises within the burgh." The town of Maybole adopted this Act in 1857, and the respondents having become occupants of the Maybole and Girvan Railway in August 1865, were assessed by the commissioners on their station and line of railway so far as within the burgh. Payment not having been made, the collector of police rates raised an action in the Sheriff-court of Ayrshire concluding for payment of the assessments imposed during each of the preceding three years. The railway pleaded in defence that "The Act 13 and 14 Vict., cap. 33, *founded on*, gave power to assess "premises" only, and the railway not coming under that term, as explained in the interpretation clause of that Act (§ 2), the Commissioners of Police for the burgh of Maybole had no power to impose an assessment on the defenders' railway. Even assuming that railway property was assessable under the Act, it could only be in the way pointed out by the Act 17 and 18 Vict., cap. 91 (the Valuation Act), which ordains all railways to be valued by a railway assessor, and there being no valuation by him of the defenders' property within the burgh of Maybole, the assessment on this ground also was illegal. As they had already paid all the assessments in the county for which they were liable in terms of the valuation roll, they could not again be charged on the same subjects within the burgh of Maybole, which, if it had any claim for such assessment, was bound to recover it by arrangement with the county." The collector urged that the word premises must be held to include a railway. By section 2 of the Act it is declared that the word "premises" and the word "lands" shall include all "lands, springs, rights of servitude, dwelling-houses, shops, warehouses, vaults, cellars, stables, breweries, manufactories, mills, and other houses and buildings, and yards and places." By 17 and 18 Vict., cap. 91, sec. 20, a special assessor of railways and canals is authorised to be appointed in order to the making up valuation of lands and heritages in Scotland belonging to or leased by railway or canal companies, and forming part of the undertakings of such companies. And by section 21, the assessor, with a view to making up the roll, is authorised to inquire into and fix the yearly rent or value of all lands and heritages in Scotland belonging to or leased by each railway and canal company, and forming part of its undertaking, and to make up a valuation-roll applicable to all railway and canal companies having lands and heritages as aforesaid, in which valuation-roll is to be set forth, in columns, the yearly rent and value, in terms of the Act, of the whole lands and heritages in Scotland belonging to or leased by each railway and canal company, and forming part of its undertaking, the names of the several parishes, counties, and burghs through which the line of such railway or canal company runs, or in which its lands or heritages, or any part thereof, are situated; the lineal measurement of its entire line, and the portion of such lineal measurement situated in each such parish, county, and burgh; and also the yearly rent or value, in terms of the Act, ascertained in manner therein mentioned, of the portion in each parish, county, and burgh in Scotland, of the lands and heritages belonging to or leased by each railway and canal company, and forming part of its undertaking. By section 33 it is enacted, that "where in any county, burgh, or town, any county municipal, parochial, or other public assessment, or any assessment rate or tax under any Act of Parliament, is authorised to be imposed or made upon or according to the real rent of lands and heritages, the yearly rent or value of such lands and heritages as appearing from the valuation-roll in force for the time under this Act (viz., the said Act of 17 and 18 Vict., c. 91) in such county, burgh, or town shall, from and after the establish-