disprove his case. The first is perhaps doubtful, but the second is distinctly and directly against him. Everything apparently claimed here, except the windows and doors, is necessary for the stability of the roof. But, says the petitioner, even though what is claimed here is necessary for the support of the roof, yet wooden supports only are mentioned as reserved in the agreement; and I am entitled to take away iron work even if I endanger the stability of the roof. That, I think would be a most unjust and inequitable construction of the clause in the agreement regulating this question. Then, as to the doors and windows, so far as they are outside doors and windows, and these, I believe, are all that are left to claim, I am of opinion that the petitioner is wrong here too. They are parts of the outside walls, and the building would not be complete as a shell without them. The petitioner was therefore as much out and out wrong in this second action as he was right in the previous one. I do not, therefore, quite agree with the Sheriff, when, after finding "that no other articles are specifically condescended on in this action as claimed by the pursuer, and that he has failed to prove that the defenders are unlawfully detaining any other articles which now belong to him,"—in which finding he is right; he yet proceeds to find, "however, that the foresaid articles in Mr Lamb's premises are the pursuer's, and authorises the said John Lamb to deliver them up to the pursuer on being paid whatever store rent may be due thereon, reserving to the pursuer his claim against the defenders for repayment of said store rent in as far as the same is advanced by him: *Quoad ultra,* sustains the defences and dismisses the action: Finds no expenses due to or by either party, in respect that, although the pursuer has been partially successful, he has been also to a considerable extent unsuccessful, and there has been an unnecessary *cumulatio actionum* by him, seeing that the insertion of a conclusion for delivery in the original action of interdict would have obviated any occasion for this action, and decerns." That last finding and warrant are *ultra petita,* and fall therefore to be recalled, and the defences should simply be sustained without any *quoad ultra.* There follows, of necessity, also an alteration in the finding of expenses; as the partial success upon which the Sheriff founds in giving no expenses to either party depends upon a mistake upon his part.

I am of opinion, therefore, that the parties are entitled to their expenses in the actions in which they have been respectively successful; the petitioner in the first, the defender in the second.

Lord Deas—If we were to go directly by the proof, it would be very difficult to extricate the rights of either party. We must take the question according to the plain intention of parties. They looked upon the building as one to be taken down. We must construe the agreement as one of that kind, and not affecting a house to be inhabited. In the first action I agree with your Lordship that the petitioner was entirely in the right. In the question of the second action, however, I am not so clear. It was brought for the delivery of certain articles, different from those which were the subject of the first action. If the Sheriff has made a mistake in the warrant of delivery which he granted, I confess it is a mistake which I would have made too. As to the outside windows and doors, I think the question is a very narrow one, and depends entirely upon the construction which is put upon the agreement. If it was the intention to keep up the house, I would answer it in one way, if it was not, in another. Then again, as to the iron pillars, I do not see it at all clearly brought out in the proof that they were necessary for the stability of the roof. I therefore find it very difficult to decide the question of this second action either one way or another, though on the whole I must agree with your Lordship.

Lords Ardmillan and Kinloch concurred.

Agents for Respondents and Appellants—Murray Beith & Murray, W.S.

Agents for Petitioner and Respondent—

Friday, November 25.

SECOND DIVISION.

COLVIN *v.* DUNBAR.

Lease—Minute of Reference—Penalty—Miscropping. Circumstances in which *held* that a minute of reference in a lease was valid, though the award was not probative; and that the tenant was not liable in the penalties in the lease for miscropping, in consequence of his not having left a certain field in grass at the renunciation of his lease, in respect that there had been no miscropping,—reserving to the landlord his right to sue for damages for breach of agreement.

This action arose in the following circumstances:—By agreement dated 4th February 1859, the defender, Sir George Dunbar, let to Mrs Colvin and Andrew Colvin the farm of Shorelands for nineteen years. In the agreement there was a stipulation in these terms:—"The tenant must at all times cultivate the lands according to the most approved rules of good husbandry. The proprietor will leave it, however, to the tenant until the last five years of his lease, to choose whatever rotation of cropping he may consider best, provided he does not plough up any of the brae grass, and that he has each year of his lease at least one-sixth of the whole lands in green crop properly manured, two-sixths in properly laid down sown grass, and that he never take more than two white or corn crops in succession out of any portion of the lands. But during the last five years of the lease, the tenant must engage and bind himself to labour the fields on a seven crop shift, and in all respects, as to fields and the crop on each field, precisely as shown on a plan of the farm indicating the rotation at entry; and in particular, he must have three grass fields, two of which, along with the brae grass, shall be left at his removal for pasture to the proprietor or incoming tenant, one of the fields to be so left to be that field in which the houses are situated. And it is expressly stipulated, that should the tenant infringe any of the preceding stipulations as to cropping, he shall be bound to pay an additional rent of £5 sterling per acre for each acre which he may so miscrop, which additional rent shall be payable along with and in addition to his first half-yearly payment which may next become due, and this yearly and termly during the remainder of his lease, and over and above performance of the stipulated rotation, to which the lands must be restored as soon as practicable." The tenants possessed under this lease until having got into difficulties, in 1864, they granted

a trust-disposition in favour of Mr Miller, Wick. Thereafter, on 21st November 1864, an agreement was entered into between the parties, whereby Sir George agreed to accept a renunciation of the lease, as at the term of Whitsunday 1865, upon certain conditions. *Inter alia*, Sir George agreed to make payment to the trustee at Whitsunday 1865 of the value of the threshing-mill on the farm, as the same should be valued by two persons mutually chosen, with power to them to choose an oversman if required. There was a provision in the agreement to the effect that the farm should be left in the same rotation as if the lease had naturally expired; and, in particular, that there should be left two grass fields along with the brae grass for pasture to the proprietor or incoming tenant. The pursuer alleged that on 16th June 1865 a minute of reference was entered into between Mr Kenneth Fraser, as factor for Sir George, and the trustee, for the purpose of valuing the threshing-mill to Messrs Kidd & Shearer, and that these gentlemen, having accepted the reference, issued an award finding the value of the threshing-mill to be £112.

They also valued certain fittings about the steading at £19, 18s. 11d., and the pursuers alleged that these were left on the farm and taken over by the defender at that price. In these circumstances they brought the present action for these two sums.

The defence was a denial of the validity of the reference, which it was argued Mr Fraser had no authority to enter into, and also that the award was not probative; and further, that a field of 28 acres, which, under the agreement, was to be left in grass to the incoming tenant, had been tilled; and that for this miscropping the pursuers were liable in the penalty of £5 per acre, amounting in all to a greater sum than that sued for, which was accordingly extinguished. After an interlocutor allowing proof, the Lord Ordinary (GIFFORD) pronounced this interlocutor and note:—

"*Edinburgh*, 28*th July* 1870.—The Lord Ordinary having heard parties' procurators, and having considered the record, proof, productions, and whole process, Repels the defences, and decerns; and ordains the defender to make payment to the pursuers (*first*) of the sum of £112 sterling; (*second*) of the sum of £19, 18s. and 11d. sterling, with interest on the said two sums at the rate of 5 per cent. per annum, from 15th May 1865 until payment, and decerns."

"It follows that the pursuers have established their claim for the whole sums concluded for in the action. The only other question is the defender's claim of compensation in respect of penal or additional rent, of the nature of pactional rent, for miscropping a field of about twenty-eight acres, called the steading-field. The pactional extra rent claimed by the defender from the pursuers for miscropping this field is £140, and this over and above the full rent of the farm, which it is admitted has been paid. If the extra pactional rent of £140 for miscropping is due, it will more than extinguish the sums sued for by, and now found due to, the pursuers.

"This counter-claim for pactional rent for miscropping raises the most difficult question in the case, and gave rise to much discussion. It was first maintained by the pursuers that compensation could not be pleaded, but that a counter-action was necessary, the statute 1592 only admitting compensation by way of exception *de liquido in liquidum*. As the claim, however, arises under the same agreement as that on which the pursuers' claims are founded, the Lord Ordinary could not refuse to entertain the plea, and thus it became necessary to consider the claim on its merits.

"There is great difficulty in construing the agreement of 14th and 21st November 1864 as to the state in which the farm was to be left when the actual circumstances in which the agreement was entered into are taken into view. On the whole, however, the Lord Ordinary has, with some hesitation, come to be of opinion that the defender's claim for pactional rent for the miscropping cannot be sustained.

"(1) In the first place, there was, strictly speaking, no miscropping at all. If the lease had gone on, and not been terminated by the renunciation of 1864, no claim for miscropping could possibly have been made. By the original conditions of let of 4th February 1859, the tenants were allowed, provided they followed the rules of good husbandry, to choose whatever course of rotation they pleased until the last five years of their lease, during which five years they were taken bound to cultivate on the seven-shift rotation. As the lease was for nineteen years from Whitsunday 1859, and as it was renounced as at Whitsunday 1865, the agreement as to rotation as to the last five years of the lease never came into force, and thus at the time of renunciation the tenants were not bound to any particular shift, but merely to cultivate by the rules of good husbandry.

"Now, it is not proved that, according to the rules of good husbandry, the tenant did anything wrong to the steading-field, being the field in question. On the contrary, it seems to be completely established that the tenant treated that field quite right and properly, and that up to the moment when the renunciation took place no fault whatever could be found with the tenants regarding the management of that field. The field was originally in grass, but it is proved that in 1862 the grass got fogged, and it became necessary to plough it up. If this had not been done it would have become utterly useless. Having been ploughed up in 1863, a white crop was taken, and in 1864 a crop of turnips, a sufficiency of manure being employed. In 1865, the year of the renunciation, it was half bere and half oats, grass seeds being sown down with this crop in the usual way, which grass Sir George got on the separation of crop 1865. This treatment of the field was perfectly unexceptionable, and the defender admitted that if the lease had gone on there could have been no claim for miscropping.

"If this be so, it is very difficult to hold that penal or pactional rent for miscropping can be due because of the renunciation, if it would not have been due otherwise. In short, to found a claim for penal rent, which is always unfavourable, it is thought that the miscropping must be established, and that nothing short of miscropping will do. The Lord Ordinary will immediately consider whether there may not be a different kind of claim under the minute of renunciation. He is at present dealing with the only claim put forward by the defender, a claim for pactional rent of a penal character founded on miscropping. It seems a complete answer to such claim to show that there was no miscropping.

"(2) In the next place, it seems established that Sir George himself assented to the treatment of

the field in question. This is expressly sworn to by Mr Andrew Colvin; and although Sir George had no recollection of having given the consent alleged, his memory was evidently on minor points of detail somewhat defective, as indeed might have been expected, looking to his age and the lapse of time which has occurred.

"But Sir George lived within half a mile of the field. He was frequently going about the farm, and he must have seen that the field was broken up from grass, and that it was first in corn and then in turnips. The rent was also taken without exception down to the end; and if there had been miscropping, the penal or pactional rent was due at the first half-year after the miscropping occurred. No complaint was ever made, and no extra or additional pactional rent was ever demanded. It may be that all this would not bar the claim, if there had been a clear case of miscropping, but it conclusively corroborates the view that there was no miscropping, and could be no claim for extra rent.

"(3) The real difficulty, however, arises from the circumstance that the agreement of renunciation of 14th and 21st November 1864 expressly stipulates that the farm shall be left at Whitsunday 1865 'in the same rotation as if the lease had naturally expired, and, in particular, that there shall be left two grass fields along with the Braegrass for pasture to the proprietor or incoming tenant, one of the fields to be so left to be that field in which the houses are situated,' being the steading-field in question. It is then provided that all this is to be done under the conditions specified in the original conditions of let.

"Now it is proved that at the date of the agreement of renunciation the Steading-field was actually in turnips, not eaten off the ground, and that it was absolutely impossible to leave it in the grass for pasture at the Whitsunday following, so that in its literal reading the agreement of November 1864 stipulates for a physical impossibility. The Lord Ordinary thinks that the fact that the steading-field was in the turnips in November 1864 must be held to have been known to both parties, and that in the light of this fact the terms of the agreement must be subject to a reasonable or equitable contruction.

"(4) But whatever be the reading of the agreement of November 1864, the Lord Ordinary thinks that no claim for penal or pactional rent for miscropping can ever arise under it. It is impossible to read the agreement as a bargain by which the tenants consented not only to pay the full rent (which has been paid and discharged), but to pay £140 more as penal or pactional rent, which at the date of the agreement could not be avoided by any act whatever. It is conceivable that damages might be due for breach of agreement, but the damages would require to be proved, and they certainly would not be liquidated or held liquidated by the pactional rent due for miscropping."

The defender reclaimed.

The DEAN OF FACULTY and NEVAY for him.

MARSHALL and REID in answer.

The Court unanimously adhered.

Agents for Reclaimers—Philip & Laing, S.S.C.

Agents for Respondent—Horne, Horne, & Lyell, W.S.

Saturday, November 26.

FIRST DIVISION.

LOCKHART *v.* CUNNINGHAME.

Reparation—Damages—Pretium Affectionis. Where a subject is sought to be recovered as wrongfully retained, and damages are not specifically sued for, but only the price or value, as an alternative of delivery of the subject itself, *held* not competent to decern for a price so much in excess of the market value as to be tantamount to a fine or to an award of damages. *Held*, on the other hand, that where the circumstances justify the owner in attaching a peculiar value to the subject, the Court are entitled to allow somewhat in excess of the market value, as a *pretium affectionis.*

This was an appeal from the Sheriff-court of Ayrshire, brought by Wm. Lockhart, farmer, Stevenston, against the Sheriff's interlocutors pronounced on a petition against him at the instance of his landlord, Mr Cuninghame of Auchenharvie, craving the Court to ordain the respondent to deliver up to the petitioner a certain chestnut mare, and failing which to pay to the petitioner the sum of £50, as the price or value of the said mare, reserving to the petitioner all claim for loss or damage.

It appeared that the mare had belonged to Colonel M'Call, an intimate friend of the petitioner, and by him had been used as a charger in the Crimea, and was accordingly very much valued by them both. She was given by Colonel M'Call to the petitioner to keep, on condition that she was to be well used, and never to leave the property. In 1867 the respondent, who was a tenant of the petitioner, was in want of a horse for his milk-cart, and the petitioner agreed to let him have the mare on loan, on certain conditions, and among others that she was not to leave the farm, and was to be returned when demanded. The respondent took the mare, and after using her for a short time in his milk-cart, put her to other purposes, and ultimately sold her without the petitioner's knowledge to a doctor in Glasgow. On receiving a visit from Colonel M'Call, the petitioner found out that the mare was missing, and required the respondent to recover possession of her, and return her to him. The respondent failed or refused to do so. And Mr Cuninghame had ultimately to bring this petition before the Sheriff.

The respondent pleaded that he had received the mare as a gift, and denied that the transaction was a loan, or that there were any conditions attached to it. He also denied that she was of the value sued for in the petition.

The Sheriff-Substitute (ANDERSON), after proof was led, decerned in terms of the prayer of the petition.

The Sheriff (NEIL CAMPBELL) adhered on appeal.

The respondent appealed to the Court of Session.

SHAND and BRAND for him.

The SOLICITOR-GENERAL and BURNET, for the petitioner and respondent, were not called upon in reply.

At advising—

LORD PRESIDENT—Except in one particular, I quite agree with the Sheriff's judgment. I only differ from him as to the amount decerned for. I do not think he should have given the full sum for which the petitioner concluded. The evidence