*Saturday, June 9.*

## SECOND DIVISION.

[Lord Young, Ordinary

### DUNCAN AND OTHERS *v.* LINDSAY, *et e con.*

*Process—Reclaiming Note—Exclusion of Review.*

Terms of joint minute—agreeing that in cross actions between sellers and purchasers the question of interest and expenses should be disposed of by the Lord Ordinary (the whole other questions in the case having been settled)—*held* not to exclude review of Lord Ordinary's judgment.

These were conjoined cross actions, the first, at the instance of the sellers, for payment of the agreed on price of certain heritable subjects with interest; and the second, at the instance of the purchasers, for implement of the contract of sale contained in a minute of sale dated 8th and 11th September 1875, with a further conclusion for damages for non-implement. The dispute of parties arose from the fact that the seller had failed at the agreed on date of settlement to discharge certain bonds affecting the subjects sold. After the record had been closed, but before any order for proof, it was stated in a joint minute for the parties "that they had arranged as to the settlement of the price of the subjects in question, and the delivery of the deeds, and that the only questions remaining were as to the rate of interest payable by the said James Cochrane Lindsay, and the expenses of process; and the parties agreed to these questions being disposed of by the Lord Ordinary on the correspondence in process and the following facts," &c.

Upon this joint minute the Lord Ordinary pronounced an interlocutor disposing of the questions of interest and expenses.

Against this interlocutor Lindsay, the purchaser, reclaimed.

The sellers objected to the competency of the reclaiming-note, and argued—There was here a reference to the Lord Ordinary of the only matters remaining in issue between the parties. This was confirmed by the correspondence of parties. On 14th March 1877 the seller's agent wrote to the purchaser's agent—"I accordingly enclose the draft of the minute, which you can be good enough to revise and return to me to-night or to-morrow, so that we may finally get the case taken out of Court on Saturday." The purchaser's agent replied on the following day,—"If we cannot agree as to the question of interest, the principal sum may be settled, leaving this question, as well as the expenses, to be settled by Lord Young."

The reclaimer in answer referred to *Robertson, Petitioner*, July 18, 1876, 3 Rettie, 104.

At advising—

Lord Justice Clerk—It is matter of regret that the parties did not express themselves more clearly in giving effect to what was a most natural and reasonable arrangement. But I think that the language of the joint minute is not sufficiently distinct to exclude the right of review in ordinary course. The language is ambiguous, and I am not satisfied that in a matter of this kind we ought to proceed on the correspondence, which certainly favours the idea of review being excluded.

Lord Ormidale—When nothing remained to be settled except interest and expenses, it was most natural that parties should agree that these questions should be finally disposed of by the Lord Ordinary. I think they did so agree, for, although there might be some doubt of this on the joint-minute, the expressions used in the letters, which have been read without objection, leave no doubt on my mind that the parties intended that the matter should go no further.

Lord Gifford—I concur with your Lordship in the chair. This process is in dependence before a Lord Ordinary, and the parties most reasonably arrange some questions and also the materials for deciding the questions which remain. It was natural that they should accept the decision of the Lord Ordinary as final, but an agreement to that effect must be expressed. It is an important agreement to exclude the ordinary right of review, and to make the judge an arbiter who has a "sacred right to commit injustice." I do not think the joint-minute clearly expresses an agreement to that effect, and I do not think its terms can be controlled or amplified by the correspondence of parties. There are cases in which even the use of the word "finally" has been held not to exclude the right of appeal from the Sheriff-Courts.

Objection to competency of reclaiming-note repelled.

Counsel for Reclaimer — Asher — Strachan. Agent—Alex. Gordon, S.S.C.

Counsel for Respondent — Balfour — Mackintosh. Agent—Alex. Morison, S.S.C.

*Tuesday, June 12.*

## SECOND DIVISION.

[Sheriff of Banffshire.

### STEUART *v.* STEPHEN.

*Interdict—Trespass—Landlord and Tenant.*

Where a person, who did not aver any legal right, was in the habit of taking a short cut to a railway station across lands in the occupation of an agricultural tenant, and without objection on the tenant's part, interdict at the proprietor's instance *refused.*

This was an appeal from the Sheriff Court of Banffshire, in a petition at the instance of Steuart of Auchlunkart against Stephen, a shoemaker, residing at Deanshaugh, craving interdict against the respondent from trespassing on a piece of land lying between the Boat-of-Bridge Road and the Mulben Station of the Highland Railway Company. The land was occupied by Hay, the agricultural tenant of the petitioner. The respondent occupied certain land and houses on the further side of the said road from the railway

station. The petitioner averred that for the last nineteen years the respondent and his family had been in the habit of trespassing on the land between the road and the railway station, chiefly with the view of getting a short cut from the houses to the station; and that there was thus a danger of a right-of-way being established from the station across the agricultural land to the houses beyond the road. The only specific act of trespass mentioned was of date 15th September 1875. The respondent explained that he and his family had occasionally crossed the land in question, but only when it was in grass, and that without objection on the part of the tenant; and that the entering on the land of date 15th September 1875 was on the authority of the tenant, for the purpose of protecting the corn from stray cattle.

The petitioner pleaded that he was entitled to sue for interdict without the consent of the agricultural tenant; and that the respondent was not entitled, without the petitioner's consent, to enter on the land in question.

The respondent pleaded that the petitioner had no title to sue, because the land was in the exclusive occupancy of his tenant, who was not a party to the proceedings, and that as he had not entered the land without the consent, or in opposition to the wishes of, the tenant, the interdict ought to be refused.

The Sheriff-Substitute refused the interdict.

The petitioner appealed.

Authorities cited for him—Taylor on Landlord and Tenant, ed. 1873, secs. 775, 784; *Copland* v. *Maxwell*, Nov. 20, 1868, 7 Macph. 142, and Feb. 28, 1871, Law Rep. 2 Sc. and Div. App. 103; *Breadalbane* v. *Campbell*, Feb. 12, 1851, 13 D. 647, Stair, ii. 4, 36, Erskine, ii. 9, 4.

The respondent was not called on.

At advising—

Lord Ormidale—There is here a bare allegation of trespass, but the land is not in the petitioner's possession, and it is not said that any injury to the subject has occurred, nor that the tenant in possession objects. I am of opinion that such an averment does not amount to a legal trespass. The tenant has a right of exclusive possession and absolute use (Bell's Prin. sec. 1224), but he is entitled to allow others to pass over the land.

Lord Gifford—This is a purely possessory question, in the discretion of the Sheriff. If a legal wrong was seriously threatened, it was his duty to grant interdict; but here the respondent claimed no legal right, but explained that what he did was done upon sufferance, and was confined to the period when the land was in grass. The alarm of the petitioner about a prescriptive right of ish and entry being reared up against him is quite unfounded. In dismissing this petition on the ground of sufferance, we are as distinctly interrupting prescription as if we had granted interdict, for which there seems to be no sufficient ground.

Lord Justice-Clerk—I concur. No abstract question of the rights of landlord and tenant is raised by this case. The only question is, whether the respondent is to be interdicted from taking a short cut to the railway station, which he now and then takes, apparently without objection on the part of the tenant? I do not say that if the station were near a populous village, and a case of habitual trespass were alleged, the landlord might not sue, altogether apart from the consent of the tenant.

Appeal dismissed.

Counsel for Appellant—R. V. Campbell. Agents—Maitland & Lyon, W.S.

Counsel for Respondent—Balfour—M'Kechnie. Agent—Thomas Carmichael, S.S.C.

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*Tuesday, June 12.*

## SECOND DIVISION.

[Lord Rutherfurd Clark, Ordinary.

### GLASS *v.* HAIG & COMPANY.

*Partnership—Contract—Construction.*

A contract of copartnership, the object of which was to work certain minerals under a lease, provided that in the event of bankruptcy of either of the two partners, his interest should be ascertained, but that he should have no claim for the prospective value of the lease. One of the partners having become bankrupt — *Held* that the bankrupt partner was entitled to have the machinery and plant valued as for a going concern, but was not entitled to make a claim for the value of pit-sinkings.

This was an action brought by Glass, formerly a partner of the firm of John Haig & Company, against the said firm and against Haig, the sole remaining partner, for a count and reckoning as to the affairs of the Company at 29th May 1873, when it was dissolved by the bankruptcy of the pursuer, who was at the date of this action reinvested in his estate. The said company had been formed for the purpose of working a seam of limestone and fireclay on the estate of Nellfield under a lease acquired by the firm. A claim was made by the pursuer to have certain machinery and plant valued, and also the pit-sinkings in use at the time of the dissolution. The claim was resisted on the ground that the machinery and plant should be valued as for a winding up, and not as for a going business, and that the claim for the value of the pit-sinkings was a claim for prospective value, which was excluded by the following clause of the contract of copartnership:—"*Sixth*, In the event of the bankruptcy of either party, the partnership shall be dissolved, and the lease shall be the property of the solvent partner; the balance belonging to the bankrupt shall be ascertained; and the solvent partner shall give bills for the amount, by equal instalments at six, twelve, and eighteen months. Neither the bankrupt nor his creditors shall have any claim to the prospective value of the lease."

The Lord Ordinary pronounced the following interlocutor:—

"*Edinburgh*, 11*th January* 1877.—The Lord Ordinary having considered the cause, Finds that the defender is bound to account for the machinery