Tuesday, January 23.

SECOND DIVISION.

[Sheriff of Ayrshire.

COUNTESS OF STAIR *v.* WILLISON.

Landlord and Tenant—Lease—Deviation from Stipulations of Lease—Miscropping—Rules of Good Husbandry—Right of Landlord to Interdict.

A tenant held a farm under a nineteen years' lease, the conditions of which implied a six shift rotation of cropping and obliged him to cultivate according to the rules of good husbandry. It was in particular stipulated that not more than one-sixth of the land under a course of tillage should be broken up from lea in any one year. During several years preceding the last year of his lease the tenant had, with the landlord's knowledge, broken up from lea less land than he was entitled to break up, but for the crop of the last year of his tenancy he proposed to break up from lea land amounting to two-sixths in all of the amount of arable land. *Held* that although what the tenant proposed to do was not shown to be contrary to the rules of good husbandry, and would have the tendency of bringing back the farm to the six shift rotation, from which with the landlord's acquiescence he had departed, and although it was proved that the landlord would in no way be prejudiced thereby, the landlord was entitled, in respect of the provisions of the lease, to interdict him from breaking up more than one-sixth of arable land.

The Countess of Stair, with consent of her husband the Earl of Stair, presented a petition in the Sheriff Court at Ayr to interdict James Paterson Willison, tenant of the farm of Maxwelston, on her property of Bargany, in Ayrshire, from ploughing or breaking up any of the fields or lands then in lea upon the farm of Maxwelston, including the field on said farm commonly known as "Old Maxwelston Field." The defender held the farm on a nineteen years' lease from Martinmas and Whitsunday 1863–4 from the Duc and Duchesse de Coigny, the pursuer's immediate ancestress. By article 8 of the conditions of lease contained in missives of set between the Duc and Duchesse de Coigny and the defender, it was stipulated that the tenant should "labour, crop, and manure in all respects agreeably to the rules of good husbandry, and without prejudice to the generality of this clause it is hereby stipulated that not more than one-sixth of the land under a course of tillage shall be broken up for crop from lea in any one year, that not less than one-half of the said arable lands shall be yearly in sown hay and pasture grass, and that of the land that may be in tillage in any one year not less than one-third shall be in summer fallow or drilled green crop, thoroughly wrought and cleaned in proper season, and manured at the rate of not less than 40 square yards of dung and 30 bushels of bones or 5 cwt. of guano to each acre, of which drilled green crop at least two-thirds shall be turnips, mangold-wurzel, or carrots; and no two crops of white corn shall follow one another in succession, and all land laid to grass shall be sown with at least 8 lbs. of good red and white clover seeds and 2 bushels of good perennial ryegrass seeds to each acre, and that with the first crop after fallow or green crop, the hay not to be cut above once, and the land thereafter to rest at least two years in pasture grass. The tenant shall go regularly through the whole arable land in the above rotation, always breaking up the longest rested lea."

The farm consisted partly of arable land and partly of hill pasture. The arable land extended to about 320 acres. The defender's lease would thus leave him entitled to break up from lea about 53 acres in each year. Since his entry to the farm he had recognised and treated about 300 acres as arable and subject to a course of tillage, and had broken up from lea less than one-sixth of the arable land which he was entitled to break up had he followed a six shift rotation, which is white crop from lea, green crop after this white crop, white crop sown down after this green crop, then hay, then two years' pasture. In 1877, 1878, and 1879 only 25 acres were broken up for crop from lea, and in 1880 and 1881 no lea was broken up for crop. For crop 1882 he ploughed up from lea a piece of land consisting of two fields containing together about 75 acres. Of this, as well as of the defender's previous management of the farm, the pursuer was aware, and made no objection. The defender then intimated to the pursuer's factor that he intended at once to break up another field called the "Old Maxwelston Field," containing about 26 acres, which would then have made as much ground broken up from lea as would amount to two-sixths of the whole arable land. The manner of cultivation proposed by him was thus described by the Sheriff-Substitute in his remit to Mr Hope, to be immediately referred to, "breaking up one-sixth of the arable land from lea for green crop, in addition to the one-sixth broken up from lea for white crop, two-thirds of the green crop being turnip, mangold-wurzel, or carrot as stipulated in the lease."

Thereupon the pursuer presented the present petition for interdict.

She pleaded—"(1) The defender having agreed to cultivate the arable portion of the farm in question under a rotation of not less than six years, and not to break up from lea more than one-sixth of such arable lands in any one year, and no distinction being made in the lease between white crop and green crop as regards the fixed extent to be broken in any one year from lea, the defender is not now entitled to break up more than the lands already broken up by him, and the pursuers are entitled to interdict as craved, with expenses."

The defender pleaded—"(1) The defender not having broken up, or purposed breaking up, any ground from lea beyond what he has right by his lease to do, is entitled to decree of absolvitor, with expenses. (2) The defender having in the cultivation of said farm, by the consent or acquiescence of the pursuers, been allowed to leave unbroken from lea a larger portion of the arable land than what is stipulated for in the lease (which non-breaking from lea was equally if not more advantageous and beneficial to the proprietor or any incoming tenant), is not now in any way barred from breaking up such land from

lea as he is by his lease fully empowered to break up, and is therefore entitled to absolvitor, with expenses. (3) The defender by his proposed cropping is acting in accordance with the rules of good husbandry, will leave the land under tillage in a suitable state for the proprietor or incoming tenant continuing the rotation and system of cultivation provided by the lease, is thus acting in terms of his lease, and is therefore entitled to absolvitor, with expenses."

The Sheriff-Substitute (ORR PATERSON) remitted to Mr Hope, Duddingston, to report (1) the extent of the arable land; (2) the extent of arable land already broken up this year (1882) from lea; (3) whether the mode of cropping proposed by the defender (above described) would be prejudicial to the proprietor either in the event of the farm being again cropped or being kept in pasture; (4) whether in view of the conditions of the lease as to the quantity to be broken up from lea in each year, and seeing that the tenant has not during the past years of the lease broken up the maximum quantity allowed by the lease, the landlord would be prejudiced by his breaking up an additional one-sixth of the arable land as proposed in this the last year of the lease instead of his strictly adhering all along to the terms of the lease.

Mr Hope reported— . . . "The arable land was pointed out to me, the extent of which, from the measurements I have since received, is about 320 acres, and of this I find nearly 82 acres have been ploughed.

"I do not think what is proposed by the defender, namely, to break up one-sixth of the arable land from lea for green crop, in addition to the one-sixth broken up from lea for white crop, will be prejudicial to the interests of the pursuer, seeing that the one-sixth for green crop has to be manured in a sufficient manner, as provided for in the lease. I am quite sure that this sixth will be in a better state for a white crop than it would have been after lea.

"In view of the conditions of the lease as to the quantity to be broken up in each year from lea, and seeing that the tenant has not been breaking up the maximum quantity allowed by the lease, I do not consider that the interests of the landlord have suffered on account of the conditions of the lease not having been adhered to all along."

He afterwards made another report as follows:—"In the foregoing report I thought I had put the matter very plain that I did not consider the landlord would suffer in the least by what was proposed by the tenant, namely, to plough up in this his last year one-sixth for oats and one-sixth for green crop, seeing that the one-sixth for green crop had to be very sufficiently manured, as prescribed by the lease.

"In regard to the last part of my report, I kept fully in view the proposal as to the two-sixths being broken up. In fact I think the landlord will be benefited by what is proposed."

Thereafter the Sheriff-Substitute pronounced an interlocutor, by which, after findings in fact to the effect already narrated, he found in law that "in respect of the express stipulations in the conditions of lease 'that not more than one-sixth of the land under a course of tillage shall be broken up for crop from lea in any one year,' the defender is not entitled in this year to break up from lea two-sixths of the arable land as proposed, or any quantity in addition to that already broken up, and that the pursuer is entitled to the interdict craved: Therefore interdicts in terms of the prayer of the petition," &c.

"*Note.*—The provisions of the conditions of lease permit and contemplate (if they do not prescribe) that the arable land shall be cultivated under what is known in this district as the six-shift rotation. Under that rotation one-sixth of the arable land (53⅓ acres) would fall to be broken up from lea in each year, and would be in white crop the first year, in summer fallow or green crop the second, in white crop sown out with clover and ryegrass seeds the third, in hay the fourth, and in pasture the fifth and sixth.

"And the effect of this system of cultivation, if applied to the whole arable land would be (after it came into full operation) to throw the arable land (320 acres) into the following condition—one-sixth (53⅓ acres) in white crop from lea, one-sixth in summer fallow or green crop after white crop from lea, one-sixth in white crop sown out with clover and rye-grass seeds after summer fallow or green crop, one sixth in hay, one-sixth in pasture of the first year, and one-sixth in pasture of the second year.

"In consequence of the tenant's having abstained in previous years from breaking up the maximum quantity of lea allowed by the lease to be broken up in each year, the condition of the arable land in 1881 was as follows—about 25 acres were in white crop sown out with clover and rye-grass seeds, about 25 in hay, about 235 in pasture, and about 35 in meadow for mowing.

"The pursuer's factor admits that he was aware that the tenant was not breaking up the maximum quantity of lea allowed by the lease in each year, and that these 35 acres of the arable land had been kept and cut as a meadow since 1873. Parties being at issue as to whether the defender's proposal in this year to break up from lea and put under green crop an additional sixth to the sixth broken up for white crop would be prejudicial to the landlord, a remit was made to Mr Hope of Duddingston to report—[*his Lordship here narrated the terms of the remit to Mr Hope, and of his report, both above quoted*].

"Assuming this report to be correct, and holding it as conclusive in this action, as the Sheriff-Substitute must do, he would in construing the lease, if the lease had been open to either construction, have rejected the construction that the tenant, by abstaining in any one year from breaking up from lea the quantity which he was entitled to break up, forfeited the right to till the proportion of land so left in lea during the whole course of the six years' rotation, and would have adopted the construction which would have allowed the tenant to bring the lea so left over into rotation, provided his doing so would be in no way prejudicial to the landlord. If it appeared from the lease that the parties in inserting the provision in question, 'that not more than one-sixth of the land under a course of tillage shall be broken up for crop from lea in any one year,' had only in contemplation the full exercise by the tenant of his right of breaking up in each year, and that this provision was intended to be merely ancillary and supplementary to the pro-

vision for the protection of the landlord, 'that not less than one-half of the said arable lands shall be yearly in sown hay and pasture grass,' it might have been regarded as not applicable to the land in its present state as to tillage, or at least the landlord by his acquiescence in the land having been brought into its existing state might have been held barred from enforcing it.

"But it is thought that the lease will not admit of this construction.

"Although it may have been mainly in the contemplation of parties that the whole arable land should be put under tillage—and this stipulation may have been primarily intended to apply to that case—still its own wording, '*not more* than one sixth,' and the wording of the other conditions, 'that *not less* than one half of the said arable lands shall be yearly in sown hay and pasture grass,' and 'the land' after hay 'to rest *at least* two years in pasture grass,' seem to imply that parties had also in view the contingency that the tenant might not in each year break up the maximum quantity from lea.

"If that be so, and the stipulation is applicable in the present state of the farm as to tillage, its language is not ambiguous or capable of any construction but one, and that construction the Sheriff-Substitute must give effect to.

"It is incompetent to allow supposed considerations of equity to supersede plain and express stipulation, or to make the enforcement of the terms agreed on between landlord and tenant dependent on the opinion of third parties as to their being beneficial or prejudicial to the landlord.

"The Court has no option but to enforce the bargain which the parties themselves have made."

On appeal the Sheriff (N. C. Campbell) adhered.

The defender appealed to the Court of Session.

At advising—

Lord Justice-Clerk—In considering this case I do not disguise that my inclination—if I am entitled to have one—would have been to find ground for liberating the tenant from this application for interdict, because we have a full report from Mr Hope, who is clearly of opinion that the landlord would suffer nothing from the alleged deviation from the stipulations of the lease. But I think that element ought not to weigh in such a case.

The question in the case relates to the construction of a lease. I am clearly of opinion that the terms of this lease prohibit the operations proposed to be carried out by the tenant; although the effect of the alleged change would be to bring the whole farm into the six shift rotation, yet that change itself is not in accordance with it. The tenant has explained very distinctly what it is necessary to attain in regard to breaking up the lea in order to bring the land back into the six shift rotation. He says in his evidence—"I suppose the difference between a five-shift and six rotation is this, that in the five-shift you may break up a fifth of the arable land from lea, while in a six-shift you can only break up a sixth." Now, as he proposes to break up more than one-sixth of the lea, that is to admit that he is not acting in accordance with the terms of his contract. Turning to the contract itself I find there is no difference in its terms between arable land and land under tillage—[*reads from stipulations in article* 8 *quoted above*]. And then comes the other clause—"The tenant shall go regularly through the whole arable land in the above rotation, always breaking up the longest rested lea." Now, it is quite clear that what the tenant here has proposed to do—that is to say, to break up 100 instead of 50 acres of lea—is not in terms of that clause, and therefore I think the landlord is entitled to interdict him.

Lord Young—I am of the same opinion, though I cannot say the case is a clear one. I think, however, the article containing the conditions of lease is capable of the construction which the Sheriff has put upon it, and that that construction is a reasonable one—that is to say, that not more than one-sixth of the arable land shall be broken up from lea in any one year. If the appellant has not made out to the satisfaction of the Sheriff that what he proposes to do is in conformity with the terms of his lease, it is not in our way to interfere with his decision.

Lord Craighill—I am of the same opinion. I felt at one time considerable hesitation, but I am now clear that to interfere with the judgment which has been pronounced by the Sheriff-Substitute and affirmed by the Sheriff would not be advisable. They are familiar with all that was presented to them in the course of the case, and they are also familiar with the practice of farming which prevails in the district. They are thus best able to appreciate the force of the expressions used in the lease. The result of the whole matter is that I do not feel warranted in coming to the conclusion that the judgment which has been pronounced in the Court below is wrong, and so I think the landlord should have his interdict.

Lord Rutherfurd Clark—I am also of the same opinion. We are told by high authority that what the tenant here proposes to do would not be injurious to the landlord. I was therefore anxious to find if it was permitted by the terms of his lease, but I am unable so to read the lease. I think the tenant is not entitled to adopt a course of cropping which is not in conformity with the six-years-shift, and that what he now proposes is not so in conformity, and consequently I think the interdict should stand.

The Court pronounced this interlocutor—

> "Find in fact that by the conditions of lease of the Farm of Maxwelston entered into between the pursuers and defender it is stipulated that not more than one-sixth of the land under a course of tillage shall be broken up for crop in any one year: Find in law that the defender is not entitled in this year to break up from lea two-sixths of the arable land, nor any quantity in excess of what has already been broken up: Therefore dismiss the appeal, affirm the judgments of the Sheriff-Substitute and of the Sheriff appealed against," &c.

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