tioner appeared to be possessed of means, including the capital invested in his business, to the amount of about £8000, and that he had an income apart from his business of about £230 per annum; and that Mrs Stewart appeared to have no means other than her allowance from the petitioner.

There was no evidence as to what the petitioner's means or income was at the date of the decree for aliment.

Argued for the petitioner—The Court has always given a little less than one-fourth of the husband's income, and in the present case £85, the sum given in *Lang's* case, would be enough—*Lang* v. *Lang*, October 27, 1868, 7 Macph. 24 Lord (Justice-Clerk Patton, 25); *Wotherspoon* v. *Wotherspoon*, October 30, 1869, 8 Macph. 81; *M'Millan* v. *M'Millan*, July 20, 1871, 9 Macph. 1067. [Lord President—Is there no evidence of a change of circumstances? A husband is only entitled to have the aliment restricted if there is a change in his circumstances since the date when the aliment was fixed.] Our information is that the petitioner has had to change his entire style of living. He offers to take his two daughters to live with him, and if they were suing for aliment that would be a sufficient answer to their claim. If the respondent wishes to keep them, the Court cannot take that into account in determining the present question. [Lord President—We must either assume that the daughters are to remain with their mother, or we must enter into the merits, to see whether the circumstances of the case justify them in refusing to live with their father.]

Argued for the respondent—The only question is as to the amount of aliment which should be allowed to the respondent. The petitioner avers a material change in his circumstances since the aliment was fixed in the action of separation. But the report of the accountant does not even suggest such a change. Therefore, in the absence of any evidence to prove a change of circumstances, the aliment should remain the same as was formerly fixed by the petitioner himself. No doubt there is this change—that whereas formerly the petitioner was content that his two daughters should remain with their mother he now desires that they should reside with him. They, however, wish to remain with their mother, and she should receive aliment for them at the rate of £25 per annum for each—*Symington* v. *Symington*, March 20, 1874, 1 R. 871. The whole aliment which should be awarded to the respondent ought to be £150 at least. It is said that the rule is to give one-fourth of the husband's income as aliment. There is, however, no fixed rule, and the amount of aliment will depend on the circumstances of the husband and the source of his income.—The cases of *Lang*, *Wotherspoon*, *M'Millan*, *supra cit.*—*Williamson* v. *Williamson*, Jan. 27, 1860, 22 D. 599; *Jameson* v. *Jameson*, Feb. 20, 1886, 23 S.L.R. 402; *Graham* v. *Graham*, July 19, 1878, 5 R. 1093; *Hay* v. *Hay*, Feb. 24, 1882, 9 R. 667.

At advising—

Lord President—The peculiarity of this case is that the husband a little more than three years ago consented that his wife's income should be £250 per annum, and if he has not succeeded in proving that his present income is less than at that time, he must abide by the former arrangement. At the same time we are bound to give effect to the report of Mr Moore, which seems to establish that the petitioner's income at present is £430. In these circumstances I think I may say the opinion of the Court is that the amount of aliment should be reduced to £150 per annum—the reduction to take place from Martinmas 1887.

Lords Mure and Adam concurred.

Lord Shand was absent from illness.

The Court pronounced this interlocutor:—

"Restrict the aliment to be paid by the petitioner to his said wife to £150 per annum as from and after Martinmas 1887: Find the respondent entitled to expenses, and remit," &c.

Counsel for the Petitioner—Comrie Thomson—W. G. Miller. Agents—Dove & Lockhart, S.S.C.

Counsel for the Respondent—Ure. Agents—Crombie, Bell, & Bannerman, W.S.

Tuesday, December 6.

SECOND DIVISION.

[Lord Fraser, Ordinary.

KENNEDY *v.* CREYK.

Reparation—Sale of Sheep on Farm Pledged for Rent—Illegal Warrant—Oppressive Use of Warrant.

The tenant of a farm sub-let the winter grazing for the period from 1st November 1885 to Whitsunday 1886 to two sub-tenants, at the rent of £140, for which a bill was to be granted on 1st January, payable on 1st April. The sub-tenants granted a written obligation to leave 300 sheep on the farm so long as the rent remained unpaid. The bill was dishonoured. On 5th May 1886, the rent remaining unpaid, the tenant presented a petition to the Sheriff for warrant to sell by public roup the sheep stock belonging to the sub-tenants, and apply the proceeds in payment of the rent. The sub-tenants did not enter appearance. The Sheriff on 31st May, in respect the sub-tenants had not entered appearance, granted warrant to the Sheriff-Clerk to sell by public roup as many of the sheep as would pay the rent claimed. The number of sheep sold was 204, and they realised the price of £234. One of the sub-tenants then raised an action against the petitioner to reduce the Sheriff's warrant, and to recover damages, on the ground (1) that the warrant was illegal in respect the petitioner had not obtained any decree for the rent, nor used any diligence on the bill, and (2) that the use of the warrant was oppressive, as the number of sheep sold was more than necessary to pay the rent.

Held (diss. Lord Rutherfurd Clark) (1) that the petitioner had taken a legal and proper

course in applying to the Sheriff for a warrant to sell the sheep, which were on the farm as a pledge for past due rent, and that the warrant granted by the Sheriff was legal; (2) that even if the warrant was illegal, the pursuer was barred, by not appearing before the Sheriff, from afterwards objecting to it; and (3) that the number of sheep to be sold was a matter for the judge of the roup to determine. Action *dismissed* as irrelevant.

This was an action at the instance of John Kennedy, farmer and cattle dealer, Soillerie, Insh, near Kingussie, against Alexander Creyk, surgeon, Dalvey, for the reduction of a warrant or decree pronounced by the Sheriff-Substitute at Elgin, by which warrant was granted to the defender to sell by public roup the sheep stock then belonging to the pursuer and his fellow-tenant William Cameron upon the grazing of Dalvey, which had been sub-let by the defender to the pursuer and Cameron. There was also a conclusion for £1200 damages.

The pursuer averred that the defender was the tacksman of the farm of Dalvey, and that he had sub-let the winter grazings to the pursuer and William Cameron for the period from 1st November 1885 to Whitsunday 1886, at the rent of £140, payable by bill at three months after date, from 1st January 1886—"(Cond. 3) . . . An agreement was entered into between the defender on the one hand, and the pursuer and the said William Cameron on the other, which was dated 30th December 1885, whereby the pursuer and the said William Cameron agreed to leave on Dalvey farm and grazing, so long as the rent of £140 remained unpaid, 300 head of sheep at least against the said rent. (Cond. 4) On said 30th December 1885 the pursuer and the said William Cameron granted to the defender a bill for £140, dated 1st January 1886, payable three months after date, in payment of the said rent of £140." This bill was dishonoured. "(Cond. 5) In April 1886 the defender applied for and obtained an interdict in the Sheriff-Court at Elgin against the pursuer and the said William Cameron, whereby the pursuer and the said William Cameron were interdicted from removing their sheep from the said farm and grazing so as to reduce the number below 300 head until they should pay the rent of £140 to the defender. (Cond. 6) On 5th May 1886 the defender presented a petition in the Sheriff-Court at Elgin at his instance against the pursuer and the said William Cameron, which prayed the Court to grant warrant to the said defender, at the sight of such person as the Court might think proper, to sell by public roup the sheep stock then or lately belonging to the pursuer and the said William Cameron, and then upon the farm and grazing of Dalvey aforesaid, and lands adjoining the same, and after deducting the expenses of process and sale to apply the proceeds in payment of the sum of £140, being the rent for the grazing of the said farm and lands due by the pursuer and the said William Cameron to the defender." The pursuer was duly cited, but did not enter appearance. "Accordingly, on or about 13th May 1886, the said Sheriff-Substitute, on the motion of present defender, and in respect the pursuer and the said William Cameron had not entered appearance, granted warrant to Mr William Fleming, Sheriff-Clerk Depute, Grantown, to sell by public roup as many of the sheep mentioned in said petition as would satisfy and pay the rent claimed and the expenses of process and sale, and appointed the said sale to take place at the Market Green, Grantown, on Monday, 31st May, at twelve noon, after advertisement of the same. (Cond. 7) The only grounds upon which the said petition was presented were that the pursuer and the said William Cameron were sub-tenants of the said grazing under the defender, and that they had made the said agreement to leave 300 sheep on the said farm and grazing so long as the rent of £140 remained unpaid, and that the said rent was past due and had not been paid. (Cond. 8) The warrant of sale granted on the said petition was wholly illegal and contrary to law. The defender had not obtained any decree against the pursuer and the said William Cameron for the said rent of £140, and he had not protested or used any diligence on the bill granted to him for the said rent of £140. The said warrant was not in accordance with any form of diligence known to the law."

The defender proceeded to carry the warrant of sale into effect on or about 31st May 1886, and drove the whole sheep found on the grazing to Grantown to be sold. There were 204 sheep, some of which belonged to the pursuer and William Cameron, and others to Peter Kennedy, James Fullerton, Alexander Cameron, and Roderick M'Gregor, persons who had an arrangement with the sub-tenants for grazing their sheep on the lands. The whole of the sheep were sold for £234, the judge of the roup having refused to entertain a higher bid made on behalf of the pursuer.

The pursuer averred—"(Cond. 15) The sheep illegally and wrongfully sold by the defender as aforesaid were of the value of £350 or thereby. The said sheep which belonged respectively to the said Peter Kennedy, James Fullerton, Alexander Cameron, and Roderick M'Gregor were of the value of £195 or thereby, and the said several parties hold the pursuer liable for the value of their sheep. After deducting from the said sum of £350 the sum of £140 due to the defender for rent, there remains a balance of £210, which represents the amount of loss sustained by the pursuer in the sheep alone. The compensation due by the defender to the pursuer for the injury done by the said illegal and wrongful proceedings to his business, reputation, and credit amounts to at least the sum of £1000."

The pursuer pleaded—"(1) The said warrant of sale, and whole grounds and warrants thereof, being illegal, the pursuer is entitled to decree of reduction as craved."

The defender pleaded—"(1) The pursuer's averments are irrelevant. (4) The pursuer is barred by acquiescence and by his actings from maintaining the illegality of the said proceedings."

On 7th July 1887 the Lord Ordinary (Fraser) issued this interlocutor:—"Finds that the pursuer's averments are irrelevant; and further, that he is barred by his own actings from insisting in the illegality of the proceedings complained of: Therefore dismisses the action, and decerns: Finds the defender entitled to expenses, &c.

"*Opinion.*—The pursuer of this action, along with William Cameron, a sheep-dealer at New-

tonmore, became sub-tacksman under the defender of the winter grazings of the farm of Dalvey and lands adjoining, from 1st November 1885 to Whitsunday 1886, at the rent of £140, payable by bill at three months after date from 1st January 1886. This bill of £140 was duly granted, and became payable on 1st April 1886, and was then dishonoured.

"On 30th December 1885 an agreement was entered into between the defender on the one hand, and the pursuer and William Cameron on the other, whereby it was agreed that the pursuer and Cameron should keep on the farm and grazing (so long as the rent of £140 remained unpaid) 300 head of sheep at least against the rent,

"The bill for £140 being dishonoured the defender on the 5th of May 1886 presented a petition to the Sheriff against the pursuer and Cameron, praying for warrant, at the sight of a person to be named by the Court, 'to sell by public roup the sheep stock now or lately belonging to the defenders, and presently upon the farm and grazing of Dalvey aforesaid, and lands adjoining the same, and after deducting the expenses of process and sale to apply the proceeds in payment of the sum of £140, being the rent for the grazing of the said farm and lands due by the defenders to the pursuer, and payable on 1st April 1886, the pursuer consigning the balance, if any, remaining after satisfying said claims in the hands of the Clerk of Court, to await the further orders of Court.' This petition was duly served upon the pursuer of the present action and upon Cameron. No appearance was entered by either of these persons, and the Sheriff-Substitute on the 13th of May 1886, 'on the motion of the pursuer, in respect the defenders have not entered appearance, holds them as confessed, and grants warrant to' the Sheriff-Clerk Depute at Grantown 'to sell by public roup as many of the sheep mentioned in the petition as will satisfy and pay the rent claimed, and the expenses of process and sale,' and an order was made for advertisement in the newspapers and by handbills. The sale took place on the 31st of May 1886. The pursuer's period of possession of the grazings had by this time expired, and the sheep had been left upon the farm. The pursuer attended the sale, and an agent of his, Donald M'Dougall, took part in the bidding on behalf of the pursuer. When M'Dougall had ceased to bid, the pursuer himself continued the bidding, which, however, was not accepted by the Sheriff-Clerk Depute, who was conducting the sale, and ultimately the sheep were knocked down to Peter M'Donald, a cattle-dealer in Grantown, at the price of £234.

"It is now said that the whole of these proceedings were illegal, in respect that the defender had not obtained a decree against the pursuer for payment of the rent, and had not proceeded to carry out diligence by way of poinding. The Lord Ordinary is of opinion that the objection to the proceedings is not well founded, and that decree of reduction of the warrant of the Sheriff-Substitute cannot be granted. The sheep were upon the farm as a pledge for the payment of the rent. The debt was constituted by the bill which was overdue at the time when the sale took place. The pursuer's right of possession of the grazings had terminated, and the sheep were in the defender's possession at that time. As the sheep required at once to be attended to, it was a very proper course to apply to the Sheriff for a warrant to sell them.

"The pursuer is moreover barred from stating any objection to the course which was adopted. He lay bye and entered no appearance, and stated no objection to the granting of the warrant. After advertisements were sent out intimating that the sale would take place, no step was adopted by him in the way of preventing it, either by getting the warrant recalled or otherwise. Nay, further, he attended at the roup, and was himself a bidder, without any protest against the carrying out of the warrant, except stating that some of the sheep that were offered for sale did not belong to him but to other persons named. If this were the case the owners of these sheep may have their remedy against the defender. It is therefore in vain in these circumstances to insist in an action of reduction at the instance of a party who has so conducted himself."

The pursuer reclaimed, and argued—The granting of the warrant was illegal. Before Creyk applied to the Sheriff for a warrant to sell the sheep he ought to have got a decree against Kennedy, and carried out his diligence, but he did not do so. Even if the warrant was legally granted, it was illegally and oppressively carried out. The way in which the sheep were sold was improper; the whole number were put up in one lot, and knocked down at the price of £234, when they were really worth £350. The proper way would have been for the judge to have had an estimate made of the number of sheep which when sold would bring the necessary sum to pay the debt and expenses, but by the system of selling all the sheep a sum exceeding the necessary amount by £90 had been obtained—*Le Conte* v. *Douglas & Richardson*, December 1, 1880, 8 R. 175; *Robertson* v. *Galbraith*, July 16, 1857, 19 D. 1016; *M'Kinnon* v. *Hamilton*, June 21, 1866, 4 Macph. 852.

The respondent argued—It was admitted that the pursuer was to leave a certain number of sheep upon the farm in security of the rent. A bill was given for the rent; this was dishonoured, and whenever the pursuer's time of occupation of the farm came to an end at Whitsunday, Kennedy was entitled to have the sheep upon the farm, whether they belonged to the subtenants or not, seized and sold to pay his rent. It was not necessary to have a completed diligence for this. As regarded the question of oppression, the defender had nothing to do with that, as the matter was entirely under the management of the judge of the roup. But Kennedy had never made any appearance in the process to enable him to object. The pursuer's averments were irrelevant, as the Lord Ordinary had found.

At advising—

Lord Justice-Clerk—The only question of any difficulty in this case is as to the number of sheep sold—that is, whether there was an oppressive use of the interlocutor ordering the sale? Was there oppression in respect of the sale of more

sheep than was necessary to pay the debt on which the judgment was obtained? I am not satisfied that there was anything irregular or unusual in the proceeding. But beyond that, I think that the judge of the roup had a part to perform. He was the person at whose discretion the proceedings referred to were to be carried on. I cannot see anything to justify the imputation that he exceeded the limits of that discretion. There is one matter which has not been cleared up—and which indeed there has been no attempt to clear up—namely, how far the sheep sent to this farm in implement of the pursuer's obligation belonged to him or to other people. He had sent sheep there for winter grazing. That is what is said. Whether that is so or not we hardly know. The presumption is that they belonged to the pursuer. So far as that is concerned, however, no reasonable objection has been stated. Now, that these sheep produced more money than was necessary to pay the debt seems quite true, but we do not know how far that result was contributed to by the fact that they were put up in a lot, and so perhaps brought more than if they had been sold in any other way. But however that may be, that was a matter which was essentially a proper one for the judge of the roup to determine. I am not inclined to interfere with the Lord Ordinary's judgment on that head. I think the tenant has brought this misfortune upon himself by not appearing before the Sheriff at the stage when the warrant was granted, and delaying till the last moment to make his voice heard at all. As I have said, I am not disposed to interfere.

Lord Young—I am of the same opinion. I think the decision of the Lord Ordinary is according to the truth and justice of the case, and it has certainly not been impeached in point of law to my satisfaction. The facts of the case are in a very narrow compass indeed. The defender is tenant of a farm the winter grazing of which he let to the pursuer. We do not need to refer to Cameron, his associate. The tenant of the farm let the winter grazing of it to the pursuer for the sum of £140, which was to be payable on the 1st of April. A bill was to be granted for it on the 1st of January, payable on the 1st of April, and in security that the payment for this grazing would be met the pursuer undertook by a written obligation, sufficient in my judgment for the purpose, to leave 300 sheep on the pursuer's farm. The bill was dishonoured when it fell due on the 1st of April. The rent continued unpaid on the 5th of May, and the pursuer then proceeded to take steps for realising the security which he had obtained. The debt was past due, and the sheep were on his farm under a written obligation by the owner who had had the right of grazing for the winter not to remove them. In my opinion he took the proper course, although I do not think it necessary to decide that question. I say I think he took the proper course in simply treating the sheep as a pledge for the past due rent or debt—as a pledge put upon his farm, which could not be removed therefrom by the owner without a breach of his written obligation. I think that he adopted a legal course as well as a proper one in applying to the Sheriff for a simple warrant to turn the subject of the pledge into money and so pay the debt. That at least was not a lawless proceeding. He applied to a court of justice to do justice in the matter, and called upon his adversary to appear to object to the course he was pursuing if he had any objection to offer. His adversary, the pursuer, had no objection, and accordingly did not appear. The Sheriff thereupon, proceeding according to the ordinary rules and practice of the Sheriff Court, held the non-appearing defender as confessed—that is, as consenting to the remedy against him being granted—the remedy which was asked. The remedy was granted in the usual way, and with the usual precautions. There is not the least pretence for saying that there was anything lawless in the matter. The interlocutor is in these words—"On the motion of the pursuer, in respect that the defenders have not entered appearance, holds them as confessed, and grants warrant to the Sheriff-Clerk Depute at Grantown to sell by public roup as many of the sheep mentioned in the petition as will satisfy and pay the rent claimed, and the expenses of process and sale;" and there followed the usual order for advertisement, and so on. The Sheriff therefore takes all proper precautions to see that justice is done. He directed that the result should be reported to him. The Sheriff-Clerk Depute at Grantown proceeded to execute the order of the Sheriff, and in the absence of any specific statement to the contrary, I must assume that it was all regularly done. He sold as many sheep as he thought proper to pay the debt and the expenses. I assume that he acted judiciously in the matter. It was all committed to his judgment. He sold what would at first sight have appeared to me to be an extra large number, but I am not so much the judge of that as he is. The Sheriff, I repeat, committed the matter to him, and it was his duty to report; and after that stage this very pursuer entered appearance in the process to discuss the matter of expenses. He did not then complain to the Sheriff that the Sheriff-Clerk Depute at Grantown had acted irregularly and oppressively in executing the order, he being the party responsible. He executed the order and conducted the sale, and if any party had a complaint to make against him, or what he had done, this process was the proper place to make it, and the Sheriff was the judge to whom the complaint should have been made. But there was nothing of the kind suggested; there was merely a question, which the Sheriff decides, as to the expenses of the sale. He orders the Sheriff-Clerk Depute to consign the amount he received on executing the order, and the debt and the expenses are ordered to be paid, as they are ascertained, in the presence of this pursuer, for by that time he had entered appearance.

When all that is terminated he comes here with an action asking us to set aside the whole proceedings as lawless. He says it was beyond the power of the Sheriff to order the sale of the sheep, as they were on the farm as a pledge, especially since the winter grazings did not terminate until Whitsunday, and that therefore they were in his own possession when this summary and perfectly sensible-looking remedy could be lawfully resorted to. I think he cannot be heard to say that now. A party must attend to his interests in the ordinary manner, and if he objects to what

is being asked being done when the Sheriff of the county is applied to to give a remedy, he must appear and state his objection. If it were necessary to decide it, I should be prepared to decide that it was a perfectly lawful and competent proceeding. But even if it were not so, I should hold that the time for objecting to it, and for suggesting that a poinding or proper diligence in regular form should have been carried out, had gone by. Therefore as far as the alleged illegality is concerned, I am for sustaining the proceedings as perfectly legal. And I cannot entertain as a ground for reduction, or for an action of damages, an impeachment of the conduct of the Sheriff-Clerk at Grantown, in selling what has turned out to be too many of the sheep to implement the order. If he conducted himself with impropriety, the Sheriff was the proper tribunal to apply to for any rectification or remedy, and not this Court in such an action as the present.

For these reasons I am of opinion that the reclaiming-note ought to be refused, and the judgment affirmed, and with expenses.

Lord Craighill concurred.

Lord Rutherfurd Clark—I daresay the judgment the Court is about to pronounce will be the most merciful one for the parties, as it will save them a jury trial, by which one may say both parties would perhaps suffer a loss. But I must say I am not satisfied with the judgment of the Lord Ordinary, nor am I satisfied with the reasons which have been stated for affirming that judgment.

The first question is, whether there was a legal warrant for the sale of the sheep? The sheep are said to have been a security for the rent, and to have been on the farm as security for the rent, and so I think they were, but till the 15th of May—I take, as I am bound to do, the averments of the pursuer—he was in possession of the grazings, the lease continuing up to that time. The sheep were thus in the possession of the pursuer. They were not in the possession of the defender. They were not in his possession in any legal sense. The defender might have prevented the sheep from being removed, because the pursuer had undertaken to allow the sheep to remain on the farm. But although he might thus have prevented the removal of the sheep, they were not in any sense in his possession during the time the pursuer was himself the tenant of the farm.

I further think that it is impossible to hold that these sheep were pledged according to the law of Scotland with the defender, because in order to constitute a pledge it is plain that there must be possession, and possession on the part of the defender I think there was none. Of course if the sheep were pledged to the defender he might in the usual way have applied to the Sheriff for a warrant to sell the pledge, but it was only on the footing that they were pledged that he could take that course, and if they were not pledged I see no justification whatever for that application to the Sheriff, which is simply one for a warrant of sale—an application to sell the property of another while it is in the hands of that other person. It is a perfectly new idea to me that that should be considered a legal proceeding.

What other course was open to the defender I really do not need to consider. All I have to decide upon is, whether the proceeding here was legal, and I confess I cannot bring my mind to hold that it was. It seems to me, therefore, that the present judgment, with the greatest respect to my brethren, is wrong. I think the application made by the defender, and the interlocutor of the Sheriff following upon that application, were both illegal, and that there was no legal warrant for the sale. I do not think that the fact that the pursuer did not make any appearance in that process makes the warrant legal. It would no doubt have been better that he should have appeared in the process and objected, but I cannot go the length of saying that procedure which I think to be quite illegal is made legal or unobjectionable by the fact that the defender in the process—that is, the pursuer in this action—did not think it necessary to appear.

Well, that being so, I think the pursuer is entitled to redress in this action.

But I am further inclined to think that even supposing I was wrong in holding the warrant to be illegal, he is entitled to an issue on the other ground which has been stated at the bar, namely, that according to the allegations of the pursuer it has been executed in a very oppressive way. The warrant was to sell as many sheep as would pay the rent and cover the expense of the sale, and nothing else. Now, sheep were sold to the extent of, I think, £67 beyond what was necessary for that purpose. I do not say whether that could be justified or not. But *prima facie* it was unjustifiable, and I think the defender ought to be put to justify it if he can. I cannot hold that that was a fair and reasonable execution of the order of the Sheriff in the absence of justification. Therefore I hold the pursuer as *prima facie* entitled to have the question put to the proper tribunal. Until that tribunal determines the question, I cannot hold that the remedy he now seeks is irrelevant.

It has been suggested that the pursuer has lost his remedy by not having stated his objection in time, since he did not bring it under the notice of the Sheriff when the sale was reported by the Sheriff-Clerk. Again I fail to see what the pursuer could have done, or what he could have said to the Sheriff. The wrong of which he complains was done. It was impossible to undo the sale. He never could have brought under the notice of the Sheriff the improper execution of the warrant that had been granted, except so as to produce some censure on the part of the Sheriff upon what the Sheriff-Clerk had done. He is not asking that here. He is asking damages for illegal use of the warrant, and the Sheriff on the report of the sale would not have considered any such question.

I am sorry to differ on this matter, but the questions are not unimportant, and I express the opinion which I cannot but form on the argument. And although I would have been forced if I had been sitting alone to have sent the case to trial, possibly on both grounds, I end my remarks as I began them, by saying that probably on the whole the most merciful course has been followed by your Lordships.

The Court adhered.

Counsel for the Reclaimer—Asher, Q.C.—Ure. Agents—Gill & Pringle, W.S.

Counsel for the Respondent—Guthrie. Agents—Boyd, Jameson, & Kelly, W.S.

Tuesday, December 6.

FIRST DIVISION.

[Lord M'Laren, Ordinary.

LOGAN *v.* LEADBETTER AND LOWSON.

Arbitration—Objections to Decree—Valuation by Man of Skill—Proof Incompetent.

A reduction was brought of a decree-arbitral pronounced in a submission to two farmers, as men of skill, to value the waygoing crop of an outgoing tenant, on the ground that no proof had been led as to the claims of the respective parties, and that only one of the arbiters had seen the crop after it had been cut, and so was unable to judge of its value. *Held* that as the submission was for the purpose of valuation by men of skill, proof would have been incompetent, and that as it was implied that both the arbiters inspected the crop before it was cut, the averment that only one of the arbiters inspected the crop after it was cut was irrelevant. Action *dismissed.*

A submission was entered into between John Logan, outgoing tenant of the farm of Legerwood, Berwickshire, John Lowson junior, residing at Beechhill, Forfar, proprietor of the farm, and Hugh Macpherson Leadbetter, Westerhouse, Gillsland Road, Edinburgh, incoming tenant of the farm, dated 11th, 13th, and 14th May 1886, in regard to, *inter alia*, the value of the waygoing crop upon the farm. The arbiters chosen were Thomas Henderson, farmer, Darlingfield, by Kelso, and John Thompson, farmer, Baillieknowe, near Kelso. They on 20th May 1886 appointed Robert Kay, auctioneer, as their oversman.

Notes of the arbiters' award were issued on 14th September 1886 and 29th April 1887, the latter of which are alone important. The arbiters found, *inter alia*, that the value of the waygoing crop was £1068, 3s. 4d., and a relative statement was appended showing how this was arrived at. The parties were allowed four days after receipt of a copy of the notes to lodge objections.

On 10th May 1887 Mr Logan wrote to the arbiters to reconsider their decision. The arbiters having considered this letter, along with the oversman, by a finding dated 18th May 1887 altered the previous award to the extent of giving Mr Logan £16, being the amount of 10 acres of crop which had been understated. *Quoad ultra* they confirmed the previous award.

On 3d June 1887 objections to the award, as regarded the value put on the waygoing crop, were put in by Mr Logan's agent. These objections may be classed under three heads, viz.—(1) That the deduction for bad weather was too high; (2) that the prices allowed for oats and barley were too low; and (3) that the working expenses were too high. The arbiters were craved to allow Mr Logan a proof in support of these objections.

The arbiters fixed a meeting for 10th June 1887 to consider the motion contained in the objections for Mr Logan. Mr Logan's agent wrote that owing to a prior engagement he could not attend the meeting. He asked, however, that if proof was not to be allowed the meeting should be postponed for a week, so that he could support his motion for a proof by argument. The arbiters and oversman held their meeting on 10th June 1887. The minute of meeting bore, *inter alia*—"The arbiters, after consulting the oversman, who has been present at all their meetings, resolved to refuse Mr Logan's motion for proof, on the ground that they already know from their own experience the whole facts that could be submitted, and that it is therefore unnecessary."

The decree-arbitral was pronounced on 17th June 1887, embodying the findings previously referred to.

The present action of reduction was raised on 1st July 1887 by Mr Logan against Mr Leadbetter, and Mr Lowson junior, for his interest, to reduce and set aside the decree-arbitral so far as regarded the valuation of the waygoing crop.

The pursuer averred—"(Cond. 8) During the whole proceedings of the reference no written claims for the parties were given in or ordered, and parties were not heard. No proof was led as to their respective claims. The inspection made by the arbiters was not such as could enable them to ascertain and fix fairly and accurately the value of the crops. Only one of the arbiters saw the crops after being cut, and the other was therefore wholly unable to judge of their value, or of the amount of deduction that should be made."

The defender stated in answer—"(Ans. 8) Admitted that no claims were lodged, and explained that in regard to the waygoing crop no claims were necessary, as the only question was what sum the defender was to pay to the pursuer for said crop, and the submission stated this specifically. Further, in respect that the submission was merely a reference for valuation of waygoing crop to skilled farmers belonging to the district, neither proof nor hearing of parties was necessary or intended. In accordance with usual practice in such cases, the arbiters inspected the crop when nearly ready for the sickle, with a view to ascertain the probable number of bushels per acre which each field of grain would in their opinion yield, and that at a second meeting after harvest, applying their own experience of the effect of the weather during harvesting, and knowledge of the state of the markets, and of other circumstances affecting the value, they fixed the price which in their opinion the crop was worth to the waygoing tenant. They were accompanied by the oversman, but as they did not differ in opinion his assistance was not called in, except as mentioned in answer 11 (*i.e.*, as stated in the minute of 10th June 1887, *supra*). *Quoad ultra* denied."

The pursuer pleaded—"(1) The proceedings in