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

the said submission and reference having been irregular, and the arbiters having acted in a wrongful and unjust manner, the said decreet-arbitral ought to be reduced. (2) In respect that the matters referred to the arbiters required investigation, and that they wrongfully and unjustly decided thereon without evidence tendered by the pursuer, the said decreet-arbitral ought to be reduced, or at least ought to be reduced in so far as it relates to the value allowed for the said waygoing crop."

The defender pleaded—"(1) The statements of the pursuer are not relevant to sustain the conclusions of the summons. (2) The reference in question having been expressly to men of skill to make a valuation, they were not bound to allow the parties to lead evidence, and particularly to lead evidence on the points mentioned by the pursuer in his objections of 3d June 1887, nor were they bound to hear parties, and their procedure has therefore been competent and regular, and their award is valid."

On 8th November 1887 the Lord Ordinary (M'Laren) allowed the parties a proof of their averments.

The defender reclaimed, and argued—There was no relevant averment to go to proof at all, because the reference was simply to men of skill to value the crop. Objections were given in and considered by the arbiters, and that was quite as much hearing as was necessary. It was intended by the parties to the submission that the arbiters, being resident in the neighbourhood, should themselves examine the crop—*Nivison* v. *Howat*, Nov. 22, 1883, 11 R. 182; *Wm. Dixon* (*Limited*) v. *Jones, Heard, & Ingram*, March 19, 1884, 11 R. 739.

Argued for the pursuer and respondent—It was conceded that the pursuer could only maintain the Lord Ordinary's interlocutor to the extent of being allowed a proof that only one of the arbiters saw the crop after it was cut. Both the arbiters should have inspected the crop after it had been cut. One of the arbiters did not make the inspection of the crop which he was bound to do before he could form an opinion as to its value. All that was decided in *Nivison's* case, *supra cit.*, was, that an award would not be set aside on the mere ground of irregularity.

At advising—

Lord President—This is a very clear case indeed, especially since the objections have been limited to the 8th article of the condescendence. There were various matters submitted to the arbiters, but objection is taken only as to the part of the award relating to the value of the waygoing crop. That part of the submission is simply a valuation, and where two men of skill are appointed to value a subject, it is not only not necessary to take evidence, but it is incompetent. The matter submitted to them is, as I have said, the value of a certain subject, and it is so submitted because they have the necessary skill themselves to enable them to decide it. What the arbiters did was done quite formally and properly. They gave in great detail the results of their opinions on the various matters submitted, and they put a price and value on the different subjects. They issued their award in the form of notes. They heard objections to these notes, reconsidered the matter, and adhered to their former opinion, particularly with reference to the value of the waygoing crop.

Now, what are the objections taken? They appear in the 8th article of the condescendence—"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." Now as to the want of proof, I think a proof would have been perfectly superfluous, if not altogether incompetent. So this article is reduced to this averment—"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." Now, assuming this is true, what is the result? Of course it is implied that both the arbiters saw and inspected the crop as it stood, and I know no time more important for such an inspection. But it was thought that an inspection should have been made after the cropping in order to ascertain its state then; then, I think, the visit of one of the arbiters was quite sufficient for that purpose. In short, this objection appears to me of the most flimsy character.

I am for recalling the interlocutor and for dismissing the action.

Lord Mure concurred.

Lord Adam—I concur with your Lordships. This was not a case of a reference of any disputed question between the parties. That being so, it was not competent to lead evidence, because it was the duty of the arbiters to go and see, and apply their own knowledge. I do not think that it could be better expressed than the arbiters do in the minute of 10th June 1887. The pursuer at the close of his objections had craved a proof. That was the only demand. In disposing of these objections the arbiters, in the minute I am referring to, say—"The arbiters, after consulting the oversman, who has been 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." That is exactly putting the refusal on the right ground, viz., that they themselves were to apply their own knowledge to the subject. The only objection now stated is at the end of the 8th article of the condescendence. Now, this being a reduction, I think that that averment implies that the arbiters did everything that was necessary to enable them to form an opinion as to the value of the crop before it was cut. As to the statement that one of the arbiters did not see the crop after it was cut, I agree with your Lordships that an award cannot be set aside on any such ground, even assuming it was the fact.

Lord Shand was absent from illness.

The Court pronounced this interlocutor:—

". . . Recal the said interlocutor: Repel the reasons of reduction as irrelevant: Dis-

miss the action accordingly, and decern: Find the defender entitled to expenses," &c.

Counsel for the Defender (Reclaimer)—D.-F. Mackintosh—H. Johnston. Agents—Lindsay, Howe, & Company, W.S.

Counsel for the Pursuer (Respondent)—Balfour, Q.C.—A. J. Young. Agent—John Macmillan, S.S.C.

Wednesday, December 7.

SECOND DIVISION.

[Sheriff of the Lothians.

DENHOLM & COMPANY *v.* HALMOE AND ANOTHER.

Shipping Law — Bill of Lading — Authority of Master—Evidence—Foreign Law.

In an action at the instance of the owners of a Danish ship against the indorsees of a bill of lading for freight claimed under a charter-party signed by the master, as acting for the owners, at a Russian port for a voyage from that port to Scotland, the defenders sought to retain from the amount of the freight the value of the difference between the cargo specified in the bill of lading and the cargo actually delivered to them. They maintained that either the Danish law, being the law of the flag, or the Russian law, the *lex loci contractus*, were the laws which applied to the case, and that by these laws a clean bill of lading signed by the master was conclusive evidence that the amount specified was actually shipped as in a question between the owners and an onerous indorsee. The bill of lading, after stating that a certain quantity of cargo had been shipped, provided that the cargo should be delivered to the consignee or his assigns, "he or they paying freight for the said goods at the rate of 24/, say twenty-four shilgs. Br. stg., pr. delivered standard of 165 cubic feet Engl." *Held* (1) that the law of Scotland was the law applicable to the case by which evidence was admissible as to the amount actually shipped, and that the owners were therefore not bound by the terms of the bill of lading; (2) on the evidence, that the statement in the bill of lading as to the quantity of cargo shipped was inaccurate, no more having been shipped than was delivered; and (3) that the defenders, being onerous indorsees only to the extent of the goods actually shipped, were not entitled to claim more than the quantity of cargo shipped, and were therefore liable for the amount of the freight sued for.

This was an action in the Sheriff Court at Linlithgow at the instance of Caroline Halmoe, Marstal, Denmark, and Albert Hansen Petersen, Marstal, registered owners of the schooner "Immanuel," of Marstal, and their mandatories, against Denholm & Company, shipbrokers, Bo'ness, for the sum of £42, 14s. 6d., as the balance of freight alleged to be due under a charter-party entered into at Riga on 11th September 1886 between Albert Hansen Petersen, master and part owner of the "Immanuel," acting on behalf of the pursuers, and Gustav Schmidt & Company, merchants there.

By this charter-party it was agreed that the ship, then at the port of Riga, should proceed to Poderaa Bight, and there load a full and complete cargo of pit-props, and being so loaded should proceed to any good and safe port in the Firth of Forth to which the charterers might direct on her arrival at Leith Roads; the freight stipulated to be paid for the cargo was to be paid at the rate of £1, 4s. for "each St Petersburg standard pit-props of 165 English cubic feet taken on board in frames measured longside of the ship;" in addition to the freight it was stipulated by the charter-party that £2 was to be paid as a gratuity to the master, and that five working days were to be allowed for discharging the cargo.

The "Immanuel" proceeded to Poderaa Bight, and there loaded a cargo of pit-props. The bill of lading granted by Albert Hansen Petersen in favour of Schmidt & Company was in these terms—"Shipped by the grace of God, in good order and well-conditioned, by Gustav Schmidt & Company, in and upon the good ship called the S. 'Immanuel,' whereof is master for this present voyage A. Pedersen, and now riding at anchor in the port of Riga, and bound for orders at Leith Roads, 8481, say eight thousand four hundred and eighty-one pieces white wood props, per specification on the other side hereof, on deck, 1921 pieces being marked and numbered as in the margin, and are to be delivered in the like good order and well conditioned at the aforesaid port of a good and safe port of Firth of Forth for orders at Leith Roads (dangers and accidents of the seas, rivers, and navigation of whatever nature or kind they are soever excepted), unto order or to their assigns, he or they paying freight for the said goods at the rate of 24/, say twenty-four shilgs. Br. stg., pr. delivered standard of 165 cubic feet Engl., piled on land and measured in frames by the official Custom-house measurer, ship paying sixpence per frm. of 165 cubic feet, and all other conditions as pr. charter-party with primage and average accustomed."

The facts of the case were thus stated by the Sheriff in his interlocutor of 31st May 1887—Finds . . . "(5) that in the bill of lading dated Riga, 20th September 1886, granted by the said Albert Hansen Petersen in favour of Messrs Gustav Schmidt & Company, the quantity of pit-props shipped on board the 'Immanuel' is incorrectly stated to amount to 59 standards; (6) that the said ship on arriving at Leith Roads was ordered to proceed to Borrowstounness, where she arrived on Saturday the 23d day of October 1886; (7) that previous to the arrival of the said ship at Borrowstounness the defenders had entered into negotiations with Messrs J. F. Napier & Company, timber merchants, Sunderland, for the purchase of her cargo as per bill of lading; (8) that these negotiations were not completed when the ship arrived at Borrowstounness; (9) that the ship was ready to discharge her cargo on Monday the 25th of October 1886; (10) that Johann Anderson, the agent at Borrowstounness of Messrs J. F. Napier & Company, had on Friday the 29th day of October 1886 received