Wednesday, December 14.

SECOND DIVISION.

[Sheriff of Perthshire.

DEWAR *v.* AINSLIE.

Agreement—Parole Agreement—Consent—Evidence.

The parties to a case in a Sheriff Court met to consider terms of settlement, certain heads of agreement were written by one of the agents, but the memorandum was not signed, as the agent who wrote it advised that signature be postponed until the completion of a formal minute of agreement. In the course of the adjustment of the formal deed, the defender proposed to insert conditions not included in the memorandum; the pursuer rejected these proposals and resumed proceedings. The defender lodged a condescendence of *res noviter* alleging settlement of the case. In a proof the pursuer deponed—"I gave my assent to the propositions in the memorandum as it stood then. I consented to a settlement as it stands here." The other persons present at the meeting deponed that the parties agreed to the terms proposed, and that a formal deed embracing them should be adjusted for signature. *Held* that it was proved by the parole evidence that the parties had agreed to an arrangement by which the case was to be taken out of Court.

Landlord and Tenant—Lease—Assignees Excluded—Whether Trustee for Creditors an Assignee.

The lease of a shop excluded asignees and sub-tenants, legal or conventional, except such as were approved by the landlord, and the tenant was bound "regularly to keep the premises open and to carry on the business" of a grocer therein in a lawful and proper manner. The tenant's affairs became embarrassed, and he disponed to a trustee for behoof of his creditors his whole estate, with power to sell, and also to carry on his business for such time as he considered necessary. The tenant left the town, and his place was taken by the trustee, who carried on the business. The landlord sought to eject the trustee from the shop and the tenant from his tenancy, on the ground that the trustee was an assignee excluded by the lease, which was accordingly forfeited.

Opinion (*per* Lord Young) that the trustee was not an assignee in the sense of the lease.

Opinion (*per* Lord Rutherfurd Clark) that a trustee in such circumstances would be in possession as assignee, and could not maintain such possession against the landlord.

Question whether the landlord could reasonably insist upon the tenant's personal attendance at the shop.

By lease dated 17th October 1888 John Dewar, draper in Perth, let certain premises situated at 36 High Street, Perth, to James Alexander, grocer, from the date thereof to Whitsunday 1889, and for five years thereafter. The lease bound Alexander to carry on in the premises the business of a grocer and wine and spirit merchant, and for no other purpose. It contained the following clause—"But excluding assignees and sub-tenants, legal or conventional, except such as may be approved by the first party," viz., the lessor, . . . "Declaring always, as it is hereby expressly stipulated and declared, that the said subjects are so let to be used and occupied allenarly for carrying on therein the business of grocer and wine and spirit merchant, and the second party and his foresaids shall accordingly be bound, as they hereby bind and oblige themselves, regularly to keep the said premises open, and to carry on the said business therein. . . . And the second party hereby agrees and binds and obliges himself and his foresaids to carry on in the premises hereby let the foresaid business of grocer and wine and spirit merchant in a lawful and proper manner, and to use and employ the said premises for no other business or purpose whatever."

In September 1891 Alexander found himself in difficulties, and granted a trust-deed for behoof of creditors, whereby he did "assign, dispone, convey, and make over to and in favour of James Ainslie, wine merchant, Leith, . . . all and whole the heritable and moveable, and real and personal estates, and property of every description presently belonging to me," with power to said trustee "to sell and also to carry on any business formerly carried on by me for such time as he thinks necessary, and generally to do everything regarding said trust-estate which I could have done before granting hereof."

Alexander then went to reside and carry on business in Leith.

Ainslie entered into possession of the shop in High Street, Perth, and carried on business there for more than two months without any objection being made by the landlord.

In December 1891 Dewar's agent, Mr James C. Dow, wrote to Ainslie's agent—"It is over nine weeks since Mr Alexander left the shop and town, and the business has, we assume, been carried on by his trustee under the trust-deed for behoof of his creditors. . . . Mr Dewar of course does not recognise the trustee in any way, and he directs me to remind you that assignees, legal or conventional, are excluded by the lease as tenants, so that the lease has been forfeited. He is resolved that the present state of matters shall no longer continue, and his interests as landlord are daily suffering. He instructs me to ask that the trustee now formally give up the shop, hand him the key, and clear out of the premises, so that he may let the place to a new tenant."

In February 1892 Dewar brought an action of removing in the Sheriff Court at Perth against Ainslie. Alexander was afterwards sisted as a defender.

The pursuer pleaded—"The lease of the shop in question, excluding assignees and sub-tenants, legal or conventional, except those approved of by the pursuer, the defender, whose only title to possess said shop can be that of an assignee under the trust-deed in his favour, and being therefore excluded by the lease, decree of ejection should pass against him as craved."

The defender pleaded—"(3) There having been no breach of the terms of the lease granted in favour of James Alexander, the present action is uncalled for, and the same ought to be dismissed with expenses."

Upon 24th March 1892 the Sheriff-Substitute (GRAHAME) allowed both parties a proof of their respective averments.

Upon 28th June 1892 the defender lodged a minute, in which it was stated "that the case has been settled by the parties, and that the pursuer is therefore not entitled to proceed any further in it, and craves proof of the fact of the settlement. The terms of the settlement are as follows—'Mr Ainslie proposes that the business be advertised for sale (apply to himself and apply to Mr Dewar), Mr Dewar to select his own tenant, and the sum offered for tenant's fixtures and goodwill to be divided, half to Mr Dewar and half to Mr Ainslie; the stock to be taken by the incoming tenant at mutual valuation, and possession to be given immediately: Cases to be withdrawn, each side bearing its own costs: Proportion of rent from Whity. (15 May) to entry of new tenant to be paid by trustee." In answer the pursuer denied that the case had been settled as stated in the minute.

A condescendence of *res noviter* was lodged by the defender, in which he stated that the agreement set forth in the minute was come to upon 24th May 1892 at a meeting between the parties, at which their agents were also present

The pursuer answered—"Explained that pursuer's agent Mr James C. Dow, solicitor, as arranged, sent a draft minute of agreement, giving effect in detailed form to said heads of proposed agreement, for revisal to defender Ainslie's agent, who returned it with alterations which were not agreed to by the pursuer, who maintained that said alterations were not in terms of proposed settlement, and had been objected to all along by him. The pursuer then broke off negotiations, no settlement of the present action being effected, no deed being signed, and the parties being at hopeless variance with each other."

The defender pleaded—"(2) The arrangement above narrated having been deliberately made by the parties for a settlement of the present action, the pursuer is not entitled to resile from the new arrangement, and the defenders are entitled to have the action withdrawn or dismissed, neither party being found entitled to expenses up to the date of new arrangement."

The pursuer pleaded—"(2) The settlement founded upon not being embodied in a probative writ or completed document, and being informal, is not binding upon pursuer, and is not a settlement of the present action. (3) No settlement of the present action having been come to in respect of said agreement, the condescendence of *res noviter* should be dismissed, with expenses."

A proof was allowed.

The pursuer, Dewar, deponed—"On the 24th or 25th May I had a meeting in Mr Dow's office, when there were present, Mr Ainslie, Mr Dempster (Ainslie's agent), Mr Honey, Mr Dow, and myself. I had a conversation regarding the case with the view to a settlement, after a little. (Shown memorandum No. 27 of process)—Mr Dow (the pursuer's agent) wrote this as a proposition by Mr Ainslie embodying a settlement of the disputes. It was written by Mr Dow on behalf of Mr Ainslie as a proposition made by him. It was read over at the meeting. I asked for a little delay for its consideration, and an adjourned meeting of the same party was fixed for two hours later. I met the same parties, with the exception of Mr Honey. I gave my assent to the proposition in No. 27 as it stood there. I do not consent to a settlement as it now stands. I consented to a settlement as it stands here at the second meeting on that day, but I don't do so now. *Cross.*—I said that I would agree to the condition of this memorandum only as the basis of a settlement. I did not for a moment consider this memorandum as a settlement itself. At the meeting Mr Ainslie distinctly asked that the memorandum should be signed, and Mr Dow objected to its being signed. Subsequently at a quarter to four o'clock the proposal to sign was made. Mr Dow said there must be a formal agreement drawn up, and there was no objection, so far as I can recollect. Mr Dow afterwards submitted to me a draft agreement between myself and Mr Ainslie, No. 28 of process. This draft, as written out by Mr Dow, embodied to my mind the terms of settlement. I instructed Mr Dow to send it to Messrs R. & J. Robertson & Dempster, and he sent it. He got back the draft from them, and came and submitted it to me with certain alterations. From a perusal of these alterations, I objected to them in the whole."

Mr Dow deponed—"The object of that meeting (24th May) was to arrange a settlement of the matters in dispute between the parties. With that object I sent for Mr Dewar to meet Mr Ainslie. There was some discussion about a proposition made by Mr Ainslie, and he, or one of them, asked me to put it in writing to see how it looked. (Shown No. 27)—I did so, and it was then read over. Mr Dewar said he wished a little time to consult his friends as to Mr Ainslie's suggestion as contained in the writing, perhaps either then or at a subsequent meeting. Mr Dewar returned before four o'clock and met Mr Ainslie and Mr Dempster. He then indicated that the proposal would be accepted, that he agreed in principle to what Mr Ainslie suggested, and that the case would be taken out of Court on that

footing. I perhaps must explain that there was a suggestion by somebody to sign it, but I would not allow that. I said you must put it into practical shape. They all acquiesced. They were so satisfied they were prepared to sign it as a settlement, but I would not allow it—I do not say because it was informal, but it required an agreement to carry it out. If an agreement had been written out carrying out the principles there laid down, I believe the action would have been settled. *Cross.*—At that meeting Mr Ainslie asked Mr Dewar if he had any terms to offer for a settlement. There was a lot of conversation, and a basis of settlement was practically arrived at in the end. Mr Ainslie asked me to put those conditions in the form of a memorandum. (Shown No. 27 of process) —This is one of what I wrote. I think it was Mr Ainslie that suggested that the memorandum should be signed. It may have been Mr Dewar, but I rather think it was Mr Ainslie. I recommended that it should not be signed. I said I would write out a draft agreement, and send it to Mr Dempster on behalf of Mr Ainslie."

Ainslie, the defender, deponed — "Mr Dow asked me if he would put it down, and I agreed. After being taken down in writing, it was read over, and I said it was what I meant. Mr Dewar was asked if he agreed, and he got time to consider it till four o'clock. He came back in an hour. I did so, and Mr Dempster came back and saw Mr Dewar and Mr Dow, who said Mr Dewar will consider this and will agree to it. We were not five minutes in the office, and instructions were then given for the draft agreement to be drawn up. I asked Mr Dow for a copy of the memorandum, and he gave it to me. That memorandum contained a proposition on my part to settle the action, and it was agreed to by Mr Dewar after consideration."

Upon 27th September 1892 the Sheriff-Substitute found "that the settlement as alleged to have been agreed on by the parties on the 24th day of May 1892 in terms of the memorandum, No. 27 of process, is proved; further, that the defender declares his willingness to abide by the conditions of the said agreement, and to have a formal deed of settlement adjusted in terms thereof: Finds that the pursuer is not entitled to resile from the said agreement of settlement, and that both parties are bound thereby." He therefore dismissed the action.

"*Note.*— . . . The circumstance that the terms of the agreement had not been reduced to a formal deed did not imply in either party a right to resile from the agreement under the memorandum, and assuming that in the course of the adjustment of the formal deed the defender proposed to insert conditions inconsistent with or not embraced in the terms of the memorandum, the pursuer did not thereby become entitled to resile from the original agreement. The defender still declares his adherence to his obligations under the memorandum, and his willingness to have a formal deed adjusted in terms thereof. To the fulfilment of these conditions it appears to me that both parties are still bound, and that the case must therefore be considered as settled, and the defender be held entitled to have it dismissed." . . .

The pursuer appealed to the Sheriff (JAMESON), who upon 18th October 1892 found, *inter alia*—"(2) That on said 24th of May there was not a *consensus in idem placitum* with regard to an essential element in any agreement for the settlement of the present action, viz., the selection of a new tenant for the premises in question, the pursuer's understanding being that he should have the absolute choice of a new tenant, and the defender's understanding being that the pursuer should only have a choice in the case of there being two equally good men offering the same price for the fittings and stock; (3) That when the parties came to adjust a minute of agreement the defender's agents made alterations thereon giving effect to the aforesaid understanding on the part of the defender, at all events to the effect of limiting the pursuer's absolute choice of a tenant, and that the pursuer thereupon broke off the negotiations: Finds, in point of law, that there is no concluded contract between the parties for the settlement of this action, and that the pursuer was entitled to break off negotiations, and is now entitled to have the present action proceeded with," &c., and remitted the cause to the Sheriff-Substitute for further procedure.

Upon 5th November the Sheriff-Substitute found "that the said assignation to the defender Ainslie of Alexander's lease not having been granted with the pursuer's approval, as required under the lease, and the pursuer's acquiescence in Ainslie's possession of the premises for the purpose of winding-up the estate not having been such as to imply his approval of him as tenant under the lease, and which in the absence of such approval cannot be held to have been assigned, the defender Ainslie has no title in a question with the pursuer to the tenancy and occupation of the premises in question: Finds further, that the defender Alexander, by the assignation of his lease, having given up the tenancy and possession of the premises in question to the defender Ainslie, he is to be held as having abandoned his rights of tenancy under the lease, and is not entitled to object to the pursuer obtaining the warrant of ejection against the defender Ainslie, which he now asks: Therefore grants summary warrant of ejection against the defender as craved, &c.

"*Note.*—In holding that the defender Ainslie is not entitled to retain the tenancy of the premises which were originally let by the pursuer to the defender Alexander, I have given effect to the view expressed by the learned Sheriff-Principal in the note to his interlocutor dated 18th October last.

"The exclusion in Alexander's lease of the power to assign without the landlord's approval of the assignation is quite clear, and Alexander, in granting the assignation of the tenancy of the premises in question to the defender Ainslie was going beyond

his powers. Under the lease no right of tenancy could be carried by assignation without the pursuer's approval, which it is not alleged he then gave. It is no doubt admitted by him that he consented to the defender Ainslie taking possession of the premises and carrying on the business there for behoof of Alexander's creditors; but this did not imply any consent to the assignation of the tenant's right under the lease, and not having consented to the assignation thereof, he is entitled to refuse Ainslie the right of a tenant under the lease. The permission given to Ainslie to occupy the premises for the purpose of Alexander's estate being realised was voluntary, and does not entitle Ainslie to retain possession now that that permission has been withdrawn. Ainslie, not being a tenant, is just in the position of a squatter, and the pursuer is entitled to eject him. As regards Alexander, I think that he cannot be held to have now any real interest under the lease, the tenancy and possession of the premises in question having been assigned by him to Ainslie for the purpose of realising and winding-up the insolvent's estate. For that purpose the premises have been occupied for upwards of a year by Ainslie, and though under the trust-deed it cannot be held that the rights of Alexander, as tenant under the lease, were legally assigned, he must, I think, under the circumstances be held in a question with his landlord to have abandoned the tenancy, and therefore not now to have any interest entitling him to object to the ejection of Ainslie from the shop and premises in question."

The defender Ainslie appealed, and argued —Upon the evidence there was a concluded bargain between the parties to put an end to the case in the Sheriff Court upon the terms agreed to in the memorandum. It was not necessary that this memorandum should be put into the form of a deed for it to have the effect of settling the case so that the pursuer could not resile on the ground that it was not a completed agreement. There is no doubt *locus pœnitentiæ* if the bargain is not complete, but it is a matter of construction in the circumstances of each case whether there is a final agreement, and if *locus pœnitentiæ* is here sought for, it must be on the ground that the memorandum was not signed at the time it was drawn up because it was desired to suspend the engagement; that was not the intention. A signed and tested deed was not necessary—Bell's Prins. sec. 25. Nor could the pursuer resile on the ground that there was not *consensus in idem placitum*, because the difficulty referred to by him was merely a case of dispute about the meaning of the words of the agreement, and that was not sufficient—*Powell* v. *Smith*, April 26, 1872, L.R., 14 Eq. 85; Pollock on Contracts, p. 430. This memorandum, although it was in writing, could be proved to have been accepted by parole evidence—*Thomson* v. *Fraser*, October 30, 1868, 7 Macph. 39; *Love* v. *Marshall*, June 12, 1872, 10 Macph. 795. Upon the merits of the case, the landlord was not entitled to turn out Ainslie. He was not an assignee, but merely a manager for the bankrupt's creditors. It was admitted that bankruptcy did not bring the lease to an end; the bankrupt was therefore entitled to put in a manager although he could not assign the lease—Bell's Comm. i. 76, and case quoted in note, *Durham & Henderson* v. *Livingstone*, 1773, M. 15,238; Rankine on Leases, 529, 530; *Dobie* v. *Marquis of Lothian*, March 2, 1864, 2 Macph. 788. The tenant had not left the country; he was in Leith, and could come back to Perth if required.

The respondent argued—A binding settlement was not entered into, and the pursuer was entitled to resile from the conditions stated in the memorandum. It was plain from Mr Dow's evidence that he would not allow his client to sign until the matter was put into a practical shape. There was therefore a suspensive condition imported into the memorandum, and as that suspensive condition was never carried out by the defender the pursuer was not bound. In the second place, the pursuer was entitled to resile because there was not *consensus in idem placitum*. One of the most important conditions in the compromise was that the landlord should have the choice of a tenant, but it appeared that each party took a different view of that section's meaning, so that they were not agreed on what they were really arranging. The pursuer was entitled to remove Ainslie because he was an assignee in the sense of the lease, and not merely a manager for the tenant. It was a covert assignation when the tenant had really left the district, and that was not allowed under such a lease as the one here—*Munro* v. *Miller*, December 11, 1811, F.C.; *Watson* v. *Douglas*, December 13, 1811, F.C.; *Assignees of Sydserf* v. *Todd*, March 8, 1814, F.C.; *Lyon* v. *Irvine*, February 13, 1874, 1 R. 512; *Hatten & Clay* v. *M'Luckie*, December 21, 1865, 4 Macph. 263. One thing was decisive on the question whether Ainslie was a manager or an assignee, that he was bound to account for his actings to the creditors as well as to the bankrupt.

At advising—

LORD JUSTICE-CLERK—It appears to me that the real question in this case, and the only one we have to decide, is, whether or not as a matter of fact the parties in this case—Mr Ainslie and Mr Dewar—came to an arrangement at a meeting they had upon 24th May 1892, by which they agreed to settle the case then in litigation between them, and following upon that, whether the fact that that agreement had been so made is proved so that the Court can give effect to it?

If we can hold that the parties really came to an agreement at that meeting to settle the case, then we are not left in doubt as to the terms upon which the parties agreed to settle, because we have them set down in a memorandum drawn up at the time as being the terms upon which the parties had agreed.

I have considered the proof and the whole case, and the result of my consideration is, that I have come to the conclusion that it has been proved that the parties—the pursuer and defender in the case—came to an agreement at that meeting upon 24th May to compromise the case, and that the terms upon which they agreed to compromise are those which are set forth in the memorandum written by the pursuer's agent at that meeting. I think they were agreed at that meeting, and that anything that happened later was occasioned by the action of Mr Dow, and his desire to have the terms of the agreement put into a more formal document than the memorandum he had written upon that occasion.

It is true that this document is neither holograph or tested, but I do not think that is of importance. It is proved by the parole testimony in the case to have been a record of what was actually agreed to at the meeting between the parties as the terms upon which the case was to be taken out of Court. There was stated at the bar no doubt a difficulty which arose between the parties as to the interpretation of some of the conditions inserted in the memorandum as the conditions of settlement, but it must be left to the parties themselves to settle what is the true interpretation to put upon these words, and if the parties cannot settle, then the Court must endeavour to settle it for them as well as possible, probably with the aid of a man of business, having regard to the terms of the memorandum of the agreement which was made at the time.

LORD YOUNG—After consideration of this case, I am not very willing and am not quite prepared to put the decision of this case upon the matter of fact that it is proved that the parties came to an agreement for settlement of the case upon 24th May 1892, although I think it is proved that the parties did meet upon that day, and came to an arrangement, the terms of which are expressed in the memorandum prepared by Mr Dow. I have a difficulty about it.

I think that this agreement is entirely parole. I do not think it is one whit the less a parole agreement because certain heads of agreement were jotted down upon paper. One of the parties has an objection to some of these heads, and the other party denies that there is any objection to them. The document is not signed by the parties; it is only partially agreed to by the parties; it has to be explained by parole evidence; the whole transaction is only a parole agreement, which has to be proved by parole evidence.

My difficulty is, whether an agreement which is constituted entirely by word of mouth may not be resiled from so long as matters are entire; whether either party may not resile when there has been no *rei interventus;* where nothing has happened, so that the one party may say that he has suffered injury from the other party resiling. If, however, it had been necessary for the decision of the case to consider that case, I should not have been prepared to dissent upon the ground I have stated, because I think it has been proved by the parole evidence in this case that the parties met upon the 24th May 1892, and agreed to an arrangement by which the case was to be taken out of Court.

As I indicated, however, in the course of the discussion, I am of opinion that this action is unfounded upon its merits, and that it ought to be dismissed and the pursuer found liable in costs.

The facts of the case lie in a narrow compass. In September 1891 the tenant of a grocer and wine and spirit merchant shop in Perth got into embarrassed circumstances. He had a lease of this shop originally for five years, and at the time of his embarrassments it had some three years to run. He then executed a voluntary trust-deed for behoof of his creditors, and he assigned to his trustee all the estate that he had, with power to realise and sell his estate in such manner as he thought expedient. He also gave authority to his trustee to carry on the business formerly carried on by himself for behoof of himself and his creditors. Now, it was admitted that it was inconvenient for him to attend to this shop in Perth personally, that it was according to his duty, and to rightly carrying out the stipulations in the lease, to give authority to someone to carry on the business for him. Well, that was just what he did, because it is the same thing to give authority to someone to carry it on for him and his creditors, as their interest is the same.

I have looked at the lease, which contains a great many obligations upon the tenant. There is not only an obligation upon the tenant, his heirs, executors, and assignees, &c., to pay the rent for the shop regularly, but he is also obliged to carry on the business in a certain manner; there is an obligation on him not to leave the shop vacant, and not to carry on any other business, and he is also bound to carry on the business until the end of the lease.

I put the case during the discussion, supposing that through any bodily or mental ailment the tenant was not able to be personally at the shop, could he not have put someone else in to carry on the business—was it not his duty to his landlord to supply a manager? It was admitted that he could do so. When he fell into embarrassed circumstances, and it became necessary for him to hand over all his estate for behoof of his creditors to a trustee, could there be a more proper thing for him to do than to give authority to the trustee to carry on this business for behoof of himself and his creditors? If he had had a son he could have put him in, or if his wife had been a business woman he could have put her in as manager, and that would have had no effect upon the case—the business would have been carried on as provided for by the lease. But then he gives authority to his trustee for behoof of his creditors to carry on the business, and it is said that he is an assignee under the terms of the trust-deed, and that he cannot act, although the landlord admits that under the

lease the tenant cannot grant an assignation of the lease to anyone, and therefore the landlord asks authority to turn him out of the shop. In my opinion the trustee was a most proper person to be entrusted with the duty of carrying on this business.

I have stated that in my opinion the tenant was entitled to do as he did, but if it is the pursuer's contention that the tenant must personally attend to the business, what does the tenant say when he is called into the case. Here is his averment—"The defender is now willing, if required, to take personal possession and management of the said shop, and carry on the said business." That, then, is his position. What does the landlord say to that? His reply is found in the correspondence—"Mr Dewar, of course, does not recognise the trustee in any way, and he directs me to remind you that assignees, legal or conventional, are excluded by the lease as tenants, so that the lease has been forfeited. He is resolved that the present state of matters shall no longer continue, and his interests as landlord are daily suffering. He has instructed me to ask that the trustee now formally give up the shop, hand him the key, and clear out the premises so that he may let the place to a new tenant." All these statements by the landlord are upon the footing that the tenant by getting into bankruptcy and granting a voluntary trust-deed, and appointing the trustee as manager of the business, had forfeited the lease, and therefore that the trustee and all the stock in the shop should be put out, so that he may take possession.

I do not think that that is a rational position. There is no question of assignee or sub-tenant, there is nobody here pretending to be an assignee or sub-tenant, there is only the trustee who says that he is merely managing this business for the tenant and his creditors. Nevertheless it is in these circumstances that the landlord asks for and obtains a warrant to eject the tenant from this shop upon the ground that he has forfeited his lease, as the Sheriff-Substitute has found in his interlocutor of 5th November 1892, not following his opinion, as I gather, but in carrying out the decree of the Sheriff-Principal upon 18th October.

I do not enter into the question which might arise at common law whether it would be a reasonable thing for the landlord of this shop to insist upon the tenant being personally at the shop to carry on the business; it is not the same as an agricultural subject. The question is not now before us, and if it was I should be inclined to hold that the tenant was not bound to give his personal attention to the shop; but if it should be decided to the contrary the tenant says he is quite willing to come, so that the landlord can make no objection on that account. The Sheriff-Substitute has held that the lease is at an end, and has granted the prayer of the petition. I am of opinion that the tenant by his actings did not put an end to the lease, so that that interlocutor must be recalled. Therefore I am of opinion, and with clearness, that the pursuer is wrong upon the merits of the cause, and upon that ground agree in your Lordship's judgment.

LORD RUTHERFURD CLARK—I think that there was an agreement between the parties, and that we ought to give effect to it.

With regard to the matters referred to by Lord Young I wish to express no definite opinion. We have had no proof. But the facts as stated by the trustee himself lead me to think that he was in possession as assignee. If so, he could not in my opinion have maintained his possession as against the landlord. If the tenant had been in possession the landlord could not object.

LORD TRAYNER concurred.

The Court pronounced this interlocutor:—

"Find in fact and in law in terms of the findings in fact and in law in the interlocutor of the Sheriff-Substitute of 27th September 1892: Recal all the interlocutors in the cause pronounced subsequent to the said interlocutor: Of new dismiss the action," &c.

Counsel for Appellant—C. S. Dickson—Salvesen. Agents—Beveridge, Sutherland, & Smith, S.S.C.

Counsel for Respondent—M'Kechnie—G. Stewart. Agent—James D. Turnbull, S.S.C.

Thursday, December 15.

SECOND DIVISION.

[Dean of Guild Court, Glasgow.

SANDEMAN AND OTHERS (SANDEMAN'S TRUSTEES) *v.* BROWN AND OTHERS.

Property and Contract—Ground-Annual—Building Restrictions—Contravention.

A contract of ground-annual of building lots in a crescent declared that the disponers should not feu or sell any part of their ground for the erection of buildings of a style or class inferior to those to be erected on the lots. The disponers conveyed another part of their ground under burden of the whole conditions contained in the contract of ground-annual, and under the further declaration that the disponees should not be entitled to erect or carry on upon the same certain specified works, "or any other works or occupation which should be considered nauseous or injurious" by the disponers and their successors or the adjoining proprietors, and although the same should not be legally deemed a nuisance.

In a question with certain proprietors of dwelling-houses in the crescent, *held* that the disponees of the second portion of ground were not entitled to