Friday, June 22.

Before the Lord Chancellor (Herschell) and Lords Watson, Morris, and Shand.)

BLACK *v.* CLAY.

(*Ante*, p. 42, and 21 R. 41.)

Landlord and Tenant--Lease--Agricultural Holdings (Scotland) Act 1883 (46 *and* 47 *Vict. cap.* 62), *sec.* 7—*Compensation for Unexhausted Improvements — Notice — Determination of Tenancy.*

Section 2 of the Agricultural Holdings (Scotland) Act 1883 (46 and 47 Vict. c. 62) confers on a tenant of agricultural or pastoral lands, "on quitting his holding at the determination of a tenancy," the right to obtain from his landlord compensation for certain improvements. Section 7 provides that a tenant shall not be entitled to compensation under the Act "unless four months at least before the determination of the tenancy" he gives notice in writing to the landlord of his intention to make a claim for compensation under the Act.

The lease of a farm bore to be for nineteen years from and after the entry of the tenant, which was declared to be to the houses, grass, and fallow land at 26th May 1860, to the arable land in corn crop at the separation of the crop of the same year from the ground, and to the barns, barnyard, and two cot-houses at Whitsunday 1861. The lease was continued by tacit relocation until May 1891, when the landlord obtained decree against the tenant ordaining him to remove from the houses (with the exceptions after mentioned), grass, and fallow land at Whitsunday 1892, from the arable land at the separation of the crop of the same year from the ground, and from the barns, barnyard, and two cot-houses at Whitsunday 1893. The tenant quitted possession of the houses (with the exception of the barns, barnyard, and two cot-houses), and also of the grass and fallow lands at Whitsunday 1892. On 4th June 1892 the tenant sent the landlord a notice of claim for compensation under the Agricultural Holdings Act.

Held (*aff.* the decision of the First Division) that there were three terms of removal in regard to different portions of the subjects let, and that a notice four months before the separation of the crop after Whitsunday 1892 was valid.

Doubted by Lord Watson whether, in view of the terms of section 35, the bare possession of a barn, barnyard, and cot-houses unconnected with any land, pastoral or agricultural, is possession of a "holding" recognised by the Act.

Wight v. *Earl of Hopetoun*, 4 Macq. 729, *distinguished.*

This case is reported *ante*, p. 42, and 21 R. 41.

Black appealed.

At delivering judgment—

Lord Chancellor (Herschell)—My Lords, the question raised by this appeal is, whether the respondent is disentitled to compensation under the Agricultural Holdings (Scotland) Act 1883 by reason of his not having "four months before the termination of the tenancy given notice to the landlord of his intention to make a claim for compensation under that Act, as required by the provisions of section 7."

The lease under which the respondent held commenced in 1860, and was for a term of nineteen years, but it has since been extended by tacit relocation. By the lease the lessors set and in tack and assedation let to the lessees all and whole the farm and lands of Winfield for the space of nineteen years, "from and after the entry of the said John Clay, which, notwithstanding the date or dates hereof, is hereby declared to be to the houses (with the exceptions after mentioned), grass, and fallow land on the 26th day of May 1860, to the arable land in corn crop at the separation of the crop of the same year from the ground, and to the barns and barnyard and two cot-houses, at Whitsunday 1861, from these periods respectively to be possessed by the said John Clay and his foresaids during the space above written."

It will be observed that the term runs from the entry of the tenant, which as to part of the farm is to be on 26th May 1860; as to other part, on the separation of the crop; and as to the residue of the subjects comprised in the letting, on 26th May 1861; and that these several subjects are to be possessed by the tenant during the space of nineteen years "from these periods respectively." At what period did the tenancy determine under these circumstances within the meaning of the section to which I have referred?

It was contended for the appellant that it determined at Whitsunday 1892 when the tenant ceased to hold the grass and fallow lands, and that his subsequent possession of the arable land was not a possession as tenant, but only a privilege accorded to one whose tenancy was already at an end. In support of that contention, reliance was placed on the opinions expressed in this House in the case of *Wight* v. *The Earl of Hopetoun*, 4 Macq. 729. In that case (where the terms of the lease so far as regards the grass and arable lands were very similar to the present) the tenant was entitled to a new term on giving to the landlord notice that he required it "at least twelve months before the expiry of the above term of nineteen years." No more was determined in that case than that the notice given was ineffectual, inasmuch as it was not given twelve months before the term had expired as to a part of the lands held. But there is no doubt that opinions were expressed by noble and learned Lords,

especially by Lord Westbury, which give some colour to the contention urged in the present case. That noble and learned Lord said (page 731)—"According to the common law or custom of Scotland, if a lease be granted to a new tenant of a farm, partly of arable and partly of meadow or pasture land, for a term of years to commence from Whitsunday, such tenant is entitled to enter on the grass or meadow land immediately on the commencement of the tack; but the outgoing tenant is entitled to continue in possession of such arable lands as are sown until the separation of the crop from the ground. Still, the lease commences, and the term of years runs and is computed in law from Whitsunday both as to grass and arable, although the common law or custom allows the outgoing tenant to reap and carry away off-going crop, and gives him a limited right of entry and occupation for that purpose."

My Lords, I own I have some little difficulty in reconciling the opinion thus expressed with the language used in the lease then under consideration. But in the present case it appears to me to be impossible to adopt the construction contended for. The barns and barnyards and two cot-houses are to be possessed for nineteen years from the Whitsunday subsequent to the entry on the grass lands. It is not pretended that any such right as this exists "according to the common law or custom of Scotland," which was the foundation of Lord Westbury's opinion, that in the case of the arable lands no tenancy existed, but a mere permissive possession when the term as to the grass lands had come to an end. It appears to me impossible to avoid the conclusion that as to the barns, barnyards, and cot-houses a tenancy is created a year later and terminates a year later than the tenancy of the grass lands, and if there be a separate ish as to these, how can the lease be construed otherwise than as creating a tenancy in the arable lands, which is to continue until the "separation of the crop" after the Whitsunday. The words of the demise are the same with regard to all three subjects, which are to be possessed for the space of nineteen years from the periods named "respectively."

For these reasons, my Lords, I cannot but come to the conclusion that the contention that under the lease there was to be one ish, and that as from the Whitsunday when the tenancy of the grass lands came to an end cannot be supported.

That seems to me to be sufficient to dispose of the appeal. The appellant in his pleadings rests his case upon the ground that the requisite notice was not given four months before that date. It is true that before the Lord Ordinary the appellant contended that the actual date when the crop was separated must be ascertained, but it may be doubted whether this was open to him upon the pleadings, and any such point was abandoned in the Inner House.

My Lords, it is not necessary to determine whether when the ish as to the arable land is to be "the separation of the crop," that is to be regarded as synonymous with the Martinmas term, so that the notice would be in time if given four months before "Martinmas," or whether, in the case of the present lease, the notice would be in time if given before the ish as to the barns, barnyards, and cot-houses when the tenancy came completely to an end. I understand that my noble and learned friend Lord Watson is of opinion that the former is the correct view. There is an obvious convenience in such a conclusion, and I do not desire to be understood as expressing any dissent from it.

I do not feel pressed by the difficulty suggested in argument with regard to the period prior to which a notice must be given under section 28 of the Act in order that the lease may not be renewed. It may well be that, having regard to the object in view, the prescribed notice under that section must be given prior to the first ish, where several are provided for by the lease. It does not follow that where there is more than one ish the notice required by section 7 must be so given.

I think therefore that the interlocutor appealed from should be affirmed, and the appeal dismissed with costs.

LORD WATSON—My Lords, the appellant, who is proprietor of the farm of Winfield in the county of Berwick, in May 1891 obtained a decree ordaining the respondent to remove from the houses (with the exception after mentioned), grass, and fallow land, at the term of Whitsunday 1892, from the arable land at the separation of the crop of the same year from the ground, and from the barns and barnyard and two cot-houses at Whitsunday 1893. The respondent was tenant under a lease which commenced in 1860. The original term of the lease was for nineteen years, but it was extended for thirteen years beyond that period by tacit relocation. The decree of removing was in conformity with the stipulations of the lease in regard to entry and ish. The farm was thereby let "for the space of nineteen years from and after the entry of the said John Clay, which, notwithstanding the date or dates hereof, is declared to be to the houses (with the exceptions after mentioned), grass, and fallow lands on the 26th day of May in the year 1860, to the arable land in corn crop at the separation of the crop of the same year from the ground, and to the barns and barnyard and two cot-houses at Whitsunday 1861, from these periods respectively, to be possessed by the said John Clay and his foresaids during the space above written." It is, in my opinion, material to notice that the three portions of the entire farm, for which different times of entry are assigned are each of them set "in tack and assedation," and are to be possessed by the tenant for the full period of nineteen years from and after their respective dates of entry.

Section 2 of the Agricultural Holdings (Scotland) Act 1883 (46 and 47 Vict. cap. 62), confers upon a tenant of agricultural or pastoral lands, "on quitting his holding at the determination of a tenancy," the right to obtain from his landlord compensation for certain improvements. It is provided by section 7 that a tenant shall not be entitled to compensation under the Act unless "four months at least before the determination of the tenancy he gives notice to the landlord in writing of his intention to make a claim."

The respondent quitted possession of the houses (with the exceptions of the barns, barnyard, and two cot-houses), and also of the grass and fallow lands, at the term of Whitsunday 1892. He thereafter on the 6th day of June 1892 gave the appellant notice of a claim for improvements under the provisions of the Act of 1883, which notice was followed by an application to the Sheriff for the appointment of a referee in terms of section 2 of the Agricultural Holdings (Scotland) Act 1889 (52 and 53 Vict. cap. 20). The appellant then instituted the present process of suspension and interdict before the Court of Session in order to restrain all further procedure towards the assessment of compensation, upon the ground that the notice served upon him did not comply with the requirements of the 7th section of the Act of 1883.

The Lord Ordinary (Low) refused the interdict, and his decision was unanimously affirmed by the learned Judges of the First Division. In the Outer House the appellant maintained that the actual date at which the last of the respondent's crop of 1892 was separated from the ground constituted the determination of his tenancy within the meaning of the statute, and he contends that a proof ought to be allowed for the purpose of fixing that date. The Lord Ordinary held that such inquiry was unnecessary, being of opinion that the term of Martinmas must be taken as the ish for the arable lands under crop in the year 1892. His Lordship said—"I think that an ish at the separation of the crop is practically a Martinmas ish. The rent of a farm is due for the crop and possession of each year separately, and the term of Martinmas is regarded as the end of one crop year and the beginning of another. It is assumed on the one hand that the crop will be secured by Martinmas, and on the other hand the tenant has up to Martinmas to secure the crop. No doubt if the crop is secured before Martinmas the incoming tenant could not be refused access to the land for the purpose of ploughing, but the outgoing tenant is entitled to exercise his discretion as to the most suitable time for gathering the harvest. And accordingly it is not uncommon that the ish and entry of arable land is made 'at the separation of the crop or Martinmas,' the two terms being used as synonymous."

When the case went to the Inner House the appellant adopted a new line of argument. He there maintained that the possession had by the respondent after Whitsunday 1892 for the purpose of reaping and ingathering his crop did not constitute tenancy, but merely amounted to a privilege accorded to a tenant by the common law, which was not altered in legal character by its introduction into the lease in the form of a stipulation. That was also the chief, if not the only, argument submitted for the appellant at your Lordships' bar, and it was mainly rested upon the decision of this House in *Wight* v. *Earl of Hopetoun*, 4 Macq. 729. In that case the lease expired as to houses and grass at Whitsunday, and as to arable land under crop at its separation, the landlord being under an obligation to grant a new term upon a notice by the tenant demanding renewal "at least twelve months before the expiry of the above term of nineteen years." The only question was, whether the specific term of nineteen years, which the contracting parties had in view, was to run from the Whitsunday of entry to the Whitsunday of ish as to houses and grass, or from the later date of entry to the arable lands till the time of the tenant leaving them. It was held by the House, affirming the judgment of the Court of Session, that Whitsunday was the term which the parties contemplated for the expiry of the nineteen years, and that the tenant having failed to give notice twelve months before that term, was not in a position to demand a renewal of his lease.

I cannot regard the decision in *Wight* v. *Earl of Hopetoun* as establishing the principle contended for by the appellant, which appeared to me to be this, that no words of demise will be sufficient to create a tenancy of arable lands under crop after houses and grass lands are surrendered to the landlord so long as the demise is made for the sole purpose of enabling an outgoing tenant to tend his crop and reap it at maturity. The proposition is, to my mind, not altogether intelligible, because the quality of the possession had by an outgoing tenant of land under crop after he has flitted from houses and grass lands at Whitsunday, differs, so far as I am aware, in no single particular from the possession of lands under crop which he had enjoyed during the previous years of the lease, which was admitted to be possession under his tenancy. No such general question was really involved in the decision of *Wight* v. *Earl of Hopetoun*. That it was not the intention of the noble and learned Lords who gave judgment in that case to negative the possibility of a double ish, one for houses and grass and another for land under crop, appears from the judgment of Lord Wensleydale, who said (4 Macq. 738)—"If it is a lease with a double termination, one for the houses and grass lands, and another for the arable, I am clearly of opinion that the majority of the Judges have come to the right conclusion."

The leading judgment in this case was in the First Division delivered by Lord M'Laren. The Lord President concurred in the views expressed by his Lordship and

in the additional observations which were made by Lord Kinnear. Lord M'Laren was of the same opinion with the Lord Ordinary in regard to the proper construction of the time indicated in the lease as the separation of the way-going crop from the ground. Upon that point his Lordship observed—"The reason why the expression 'separation of the crop' is used in the clauses relating to entry and removal is that the incoming tenant may have access to each field as soon as its crop has been ingathered, and shall not be liable to be kept out of possession by a troublesome outgoing tenant in the assertion of a theoretical right to retain possession until Martinmas. But this construction is quite consistent with Martinmas being the autumnal term wherever it is necessary that something to be done in fulfilment of the lease should be referred to a definite day—payment of rent being a clear case in point. I have therefore no difficulty in holding that where notice has to be given four months before the autumnal term, the term of Martinmas is the time from which the period of four months is to be reckoned."

I entertain little doubt that the contract embodied in the lease before us makes effectual provision for three terms of entry and three terms of ish in regard to different portions of the subjects let, and that until the arrival of each term of ish a proper right of tenancy exists with respect to such part of the subjects let as the tenant is bound to quit possession of at that term. I am also of opinion with the learned Judges of both Courts below, and for substantially the same reasons, that in cases like the present the expression "separation of the crop" ought to be read as signifying the term of Martinmas. I venture to think that whether tested by reference to their popular meaning or to their legal effect, "separation of the crop" and "the Martinmas term" are equivalent expressions when they occur in a Scotch lease. When the arable ish is Martinmas the outgoing tenant could not prevent his successor from ploughing before that term land from which his crop had been removed, nor, in the case of a late harvest, could his successor prevent him from reaping his crop after the term. And, in my opinion, whichever of these expressions be used in the lease, it must be taken to mean the actual term of Martinmas in all cases where the contractual rights of landlord or tenant are made to depend upon their giving a previous notice. Upon any other interpretation many conditions to be performed after Whitsunday, at a time previous to and dependent upon the date of the tenant's removal from lands under crop, would become inextricable.

Assuming the right construction of the lease to be that which I have indicated, the question still remains, which of the three periods of ish ought to be regarded for the purposes of this appeal as the determination of the respondent's tenancy within the meaning of sections 2 and 7 of the Act?

The definition which the Act gives of the expression "determination of tenancy" is not definitive for all purposes. It is defined (section 43) as meaning "the determination of a lease by reason of effluxion of time or any other cause." That explanation affords no aid in ascertaining whether the *punctum temporis* from which the time for giving a notice to be calculated *retro* is the first, the second, or the last term of removal. That is a question which, in my opinion, must be decided according to the nature and object of the notice, and I can detect no inconsistency in holding that, in one section of the Act requiring notice, the beginning of removal and that in another the final removal of the tenant may be contemplated.

In this case I have come to the conclusion that the "determination of a tenancy," as that expression occurs in sections 2 and 7 of the statute, refers to the time when the tenant finally gives up possession of the subjects which in the statute are described as his "holding." Section 2 is framed upon the assumption that his quittance of his holding and the determination of his tenancy are to be in point of time coincident. A holding which entitles the tenant to the benefit of its provisions must, according to section 35 of the Act, be "either wholly agricultural or wholly pastoral, or in part agricultural and as to the residue pastoral." The respondent's holding, in so far as it consisted of lands in crop after Whitsunday 1892, was agricultural, and that is, in my opinion, sufficient for the disposal of this appeal. But I entertain serious doubts whether after his removal in the autumn of 1892 the respondent remained in possession of any holding within the meaning of the Act. I do not think that the bare possession of a barn, barnyard, and two cot-houses, unconnected with any land either pastoral or agricultural, is possession of a holding recognised by the Act. That view of its provisions does not appear to me to be in the least inconsistent with the main object of the Act, which obviously was to confer certain benefits upon an outgoing tenant. He can have no practical difficulty in intimating his claim of compensation for improvements four months before Martinmas. To postpone that intimation until four months before the following Whitsunday, when he cedes possession of subjects neither agricultural nor pastoral, and not required for any purpose connected with lands agricultural or pastoral, would, in my opinion, be unnecessary, and would suspend for six months his right to recover moneys which he had previously expended for the benefit of his landlord or successor in the tenancy. Not only so, but in so far as concerns the bulk of the statutory improvements specified in part 3 of the schedule, to which the consent of the landlord is not required, it would be difficult if not impossible for the landlord to check or for an arbiter to assess satisfactorily the amount of the tenant's claim if the time for giving notice were extended to the 15th January following the tenant's removal from lands under crop.

For these reasons I am of opinion that the interlocutors appealed from ought to affirmed with costs.

My noble and learned friend Lord Shand, who heard the argument in this appeal, is unable to be present to-day, but his Lordship has requested me to state that the opinions which I have expressed have been carefully considered by him, and have his entire concurrence.

LORD MORRIS—My Lords, I have had an opportunity of reading the reasons which have been assigned by my noble and friend Lord Watson for his judgment, and I desire to express my entire concurrence.

The House affirmed the decision of the First Division and dismissed the appeal with costs.

Counsel for the Appellant—Lord Advocate (J. B. Balfour, Q.C.)—Salvesen. Agents—Adam Burn & Son, for H. & H. Tod, W.S.

Counsel for the Respondent—Asher, Q.C.—J. J. Cook—Mark Napier. Agents—Andrew, Wood, & Company, for Pringle, Dallas, & Company, W.S.

Monday, July 30.

(Before the Lord Chancellor (Herschell), and Lords Watson, Shand, and Ashbourne.)

EDINBURGH STREET TRAMWAYS COMPANY *v.* LORD PROVOST AND MAGISTRATES OF EDINBURGH.

[Heard and decided along with *The London Street Tramways Co.* v. *The London County Council.*]

(*Ante*, p. 598, and 21 R. 688).

Tramway—Sale to Local Authority—Terms of Purchase—Valuation of Tramway—Tramways Act 1870 (33 *and* 34 *Vict. cap.* 78), *sec.* 43—*Edinburgh Street Tramways Act* (34 *and* 35 *Vict. cap.* 78), *sec.* 43.

By the 43rd section of the Tramways Act 1870 it is provided that where the promoters of a tramway in a district are not the local authority, the local authority may, after the expiry of twenty-one years from the time when such promoters were empowered to construct such tramway, require the promoters to sell to them their undertaking, or so much of the same as is within such district, "upon terms of paying the then value (exclusive of any allowance for past or future profits of the undertaking, or any compensation for compulsory sale, or other consideration whatsoever) of the tramway, and all lands buildings, works, material, and plant of the promoters suitable to and used by them for the purposes of their undertaking within such district," such value in the case of difference to be determined by a referee nominated by the Board of Trade.

The Edinburgh Local Authority gave notice under the foregoing section to purchase the Edinburgh Street Tramways undertaking.

Held (*aff.* the decision of the First Division—Lord Ashbourne *diss.*) that the then value of the "tramway" meant the then value of the "tramway lines;" that in valuing the tramway lines the referee was not entitled to take into account the present profits or rental value of the undertaking; and that the proper value to be put upon the tramway lines was the cost of construction at the date of the sale less depreciation, the referee being entitled, in estimating such cost, to take into account the fact that the tramways were successfully constructed and in complete working order.

This case is reported *ante*, p. 598, and 21 R. 688.

The Edinburgh Street Tramways Company appealed.

At delivering judgment—

LORD CHANCELLOR (HERSCHELL)—My Lords, the appellant company was formed under the provisions of a private Act of Parliament in the year 1871. This Act incorporated part 2 and part 3 of the Tramways Act 1870. Section 43 of that Act entitled the respondents, within six months after the expiration of a period of 21 years from the time when the appellants were empowered to construct the tramway, by notice in writing to require the appellants to sell their undertaking. They accordingly, on 12th August 1892, gave notice to the appellants that, in exercise of their rights under that section, they would purchase the appellants' undertaking within the city of Edinburgh. The appellants and respondents having differed as to the price to be paid, the Board of Trade appointed Mr Henry Tennant, of York, as referee, to fix what the price should be. In the narrative of the award or decree-arbitral which he made, Mr Tennant stated that in his opinion, after careful consideration of the terms of section 43 of the Tramways Act 1870, in valuing the tramways he was not entitled to take into account the present profits or rental value of the undertaking, but that the proper value of the tramways to be determined by him, according to his construction of the statute, was such sum as it would cost to construct and establish the same under deduction of a proper sum in respect of depreciation for their present condition, and that in estimating such cost he was entitled to take into account the fact that the tramways were then successfully constructed and in complete working condition.

The present conjoined actions were thereupon raised by the appellants against the respondents for the purpose of reducing Mr Tennant's award or decree-arbitral, upon the ground that his view of section 43 of the Tramways Act 1870 was erroneous, and for declarator that he ought, under that section, to have fixed the value to be paid by the respondents for the tramways