

Tuesday, July 13.

FIRST DIVISION.

[Sheriff Court at Perth.

STEWART v. WILLIAMSON.

Lease—Arbitration—Agricultural Holdings (Scotland) Act 1908 (8 Edw. VII, cap. 64), sec. 11 (1)—Arbitration and Valuation—Sheep-stock—Abrogation of Reference in Lease and Substitution of Reference in Statute.

The Agricultural Holdings (Scotland) Act 1908, section 11 (1), enacts—"All questions which under this Act or under the lease are referred to arbitration shall, whether the matter to which the arbitration relates arose before or after the passing of this Act, be determined, notwithstanding any agreement under the lease or otherwise providing for a different method of arbitration, by a single arbiter in accordance with the provisions set out in the second schedule to this Act."

A lease of a sheep farm for five years expiring at Whitsunday 1909, provided that at the expiry of the lease "the tenant shall leave the sheep stock on the farm to the proprietors or incoming tenant according to the valuation of men mutually chosen with power to name an oversman."

Held that the Act applied, and that a single arbiter fell to be appointed.

The Agricultural Holdings (Scotland) Act 1908 (8 Edw. VII, cap. 64), section 11 (1), is quoted *supra in rubric*.

On 7th May 1909 John Stewart, farmer, Fordie, near Crieff, raised in the Sheriff Court at Perth, against Colonel D. R. Williamson of Lawers, the proprietor of his farm, an action with regard to the sheep stock on the farm. The pursuer, whose lease expired at Whitsunday 1909, craved the Court "to ordain defender to appoint an arbiter who shall, along with an arbiter to be named by pursuer, determine the sum to be paid to the pursuer by the defender as the value of the said sheep stock, with power to the arbiters to name an oversman; and in the event of the defender failing, within such period as the Court shall appoint, to concur in entering into such reference, as adjusted if necessary by the Court, to appoint two arbiters for the purpose and with the powers above specified."

The clause in the pursuer's lease dealing with the sheep stock at the expiry of the lease is given *supra in rubric*.

The defender pleaded—"The application is incompetent, in respect that the provision in the lease as to arbitration has been superseded by the said Act," *i.e.*, the Agricultural Holdings (Scotland) Act 1908, "and the application should therefore be dismissed, with expenses to the defender."

A condescendence and answers having been lodged, parties were heard thereon, and thereafter, on 24th May 1909, the Sheriff-Substitute (SYM) found that it was

incumbent under the contract of lease for the defender to nominate a person of skill to value, along with a person to be nominated by the pursuer, the sheep stock on the farm, and appointed the defender to intimate his nomination by or before Thursday 27th May 1909, under certification that failing his doing so a nomination would be made by the Court.

Note.—"It is necessary to look at the reality of these matters whatever words may be employed. In this case the words of the contract do not raise so great a difficulty as in some cases, but whatever the words, the substance must be considered. This is a case of a reference to a valuation to avoid disputes. It is not a reference of a judicial kind to a person to act in a judicial way to determine a dispute. The distinction is a well-settled one. Two men of skill are to find the value of a subject which it is agreed is to be transferred.

"It is not wonderful that at first sight anyone might think clause 11 of the Agricultural Holdings Act 1908 applies. But the question is, is it an arbitration? It is thought that the answer is negative. But it must be admitted that the Act itself in one section speaks of an 'arbitration' which seems to be rather a 'valuation,' see section 20.

"The Sheriff-Substitute was referred to, and has consulted, the Arbitration Act 1894; the Agricultural Holdings Act 1906; Bell's Pr. s. 391; *Kennedy* Jan. 20, 1819, F.C.; *Smith*, 5 D. 749; *Nivison*, 11 R. 182; *Robertson*, 12 R. 419 (at 426); *Logan*, 15 R. 115; also *M'Nair*, 17 D. 445; *Hopper* 1867, 2 Q.B. 367; *in re Dawdy*, 1885, 15 Q.B.D. 426; *in re Cairns Wilson*, 18 Q.B.D. 7."

The defender appealed, and argued—An agreement to refer the value of sheep stock to arbitration was an agreement to refer to arbitration within the meaning of the Agricultural Holdings (Scotland) Act 1908 (8 Edw. VII, cap. 64). There was no foundation for the Sheriff's distinction between arbiter and valuator. The scheme of the Act was to refer all questions between landlord and tenant to arbitration, sections 6 (1), 11, 20 (5). The provision as to fixtures in the latter section was *in pari casu* with the valuation of sheep stock. The express use of the word 'arbiter' was not necessary. In the Agricultural Holdings (Scotland) Act 1883 (46 and 47 Vict. cap. 62), section 68 and following sections, the word used was 'referee.' The text writers included these subdivisions under 'arbiter'—Bell's Prin. 391; *Logan v. Leadbetter*, December 6, 1887, 15 R. 115, 25 S.L.R. 110. In England the distinction had been drawn, but for other purposes—*In re Dawdy*, 15 Q.B.D. 426; *in re Cairns Wilson and Greene*, 18 Q.B.D. 7; Common Law Procedure Act 1854 (17 and 18 Vict. cap. 125), section 17. In that country it was impossible to oust the jurisdiction of the Court by arbitration. Hence it was essential to know whether the question was one of arbitration or pure appraisal.

Argued for the pursuer (respondent)—The question was whether the contract between

the parties was to be held as superseded by the statute. It was not lightly to be presumed that the Legislature intended to overturn private contracts unless *per expressum*. Hence the terminology of section 11 must be strictly construed. There was here no material for arbitration in the sense of leading evidence. Both in the text books and in the authorities a distinction had been drawn between arbitration and valuation—*Kennedy*, January 20, 1819, F.C., *per* Lord Glenlee; *Nivison v. Howat*, November 16, 1883, 11 R. 182, 21 S.L.R. 104; *Robertson v. Boyd & Winans*, January 9, 1885, 12 R. 419, 22 S.L.R. 331, *per* Lord Young. There was a distinction between the two, both in character and purpose. The intention of the Legislature was only to oust private contract where the question was distinctly called arbitration.—*Collins v. Collins*, 1858, 26 Bevan 306, *per* Lord Romilly at p. 311.

LORD PRESIDENT—The question in this case is a very short one. By a lease between the appellant and respondent the latter took a sheep farm, and by one of the stipulations he bound and obliged himself at the expiry of the lease “to leave the sheep stock on the farm to the proprietors or incoming tenant according to the valuation of men mutually chosen with power to name an oversman.” Now there is no question that if nothing else had happened it would have been the duty of each party at the end of the lease to proceed as stipulated therein. But then in the interval the Agricultural Holdings (Scotland) Act 1908 was passed. Section 11 of that Act provides—“ . . . [quotes section *v. sup.* in rubric] . . . ” The whole point in this case is whether that section applies abrogating the provision in the lease, and making it necessary to appoint a single arbiter. I think the language is perfectly clear and applies in terms to this case. The matter here is a matter referred to arbitration even although in the lease the actual word arbiter is not used. “Men mutually chosen with power to name an oversman” is the expression actually employed; and the use of the word “oversman” is quite sufficient to show that an arbitration was intended. The Sheriff-Substitute says the section does not apply because he says there is a distinction between “valuation” and “dispute.” This distinction has been drawn, but for other purposes, and decisions on the question whether a case did or did not fall under the English Common Law Procedure Act of 1854 cannot be authoritative in regard to the interpretation of an Act of Parliament dealing with Scottish Agriculture in 1908. Taking the words in their ordinary meaning I have not the least doubt that they apply. If you had asked one of the parties how the sheep stock was to be valued at the end of the lease his answer almost certainly would have been “By arbitration.” The term is daily applied to proceedings where the only matter to be inquired into is valuation. A common illustration is to be found in the Lands Clauses Act where the proceedings are

described as an arbitration although the question almost invariably is as to the value of the lands taken. Accordingly as the law now stands a reference is made to one person nominated by the Board of Agriculture notwithstanding any agreement between the parties to a lease nominating other persons. I think, therefore, that the Sheriff-Substitute's interlocutor is wrong and must be recalled and the petition dismissed.

LORD KINNEAR—I agree with your Lordship. I assent to the observation of the learned Sheriff-Substitute that an arbitration implies that there is a difference between the parties which is to be decided, but whether the question between the appellant and the respondent is to be determined by an arbiter under the Act or by two men of skill as provided in the lease, it is certain that a difference has arisen. I agree with all that your Lordship has said as to the meaning of arbitration. It is of no consequence whether two persons are in controversy as to liability to pay or as to the amount to be paid. In either case there is a dispute which must be settled in one way or another, and if the parties agree that it is to be settled not by the ordinary courts of law but by a private tribunal of their own selection, that is an agreement for arbitration.

The main argument urged by the respondent's counsel was that when two parties had agreed as to the method by which a particular question was to be decided it was not to be assumed that Parliament intended to substitute for that method some other method which Parliament might think wiser. It may be that we are not to proceed upon that or any other assumption, but what Parliament expresses in plain language that we must give effect to. I think that the Act applies, and therefore that the Sheriff-Substitute's interlocutor must be recalled.

LORD PEARSON concurred.

LORD M'LAREN was not present.

The Court recalled the Sheriff-Substitute's interlocutor, and dismissed the petition.

Counsel for Pursuer (Respondent) —
Craigie, K.C. — Macmillan. Agents —
Connell & Campbell, S.S.C.

Counsel for Defender (Appellant) —
Macphail—Hon. Wm. Watson. Agents—
Hamilton, Kinneair, & Beatson, W.S.