Wednesday, May 26.

FIRST DIVISION.

HUNTER *v.* MILBURN.

Arbitration—Building Contract—Competency of Ordinary Action. A building contract contained a clause of reference. Disputes having arisen, the builder proposed to go before the referee, but the house-owner declined, whereupon the builder brought an action for the balance of the contract price. Action *held* competent, but consideration superseded to enable the parties to go to the referee.

The pursuer contracted for the mason-work of a house about to be erected for the defender, the contract containing a clause whereby it was provided "that in all matters of dispute relating to the carrying out of the several works to the full intent and meaning of the plans and specifications already required, or which shall from time to time be required and prepared by the said John Henderson, shall be referred to the said John Henderson, and that his decision shall be final and binding on all the aforesaid parties." Henderson was the defender's architect.

The pursuer now sued the defender for the balance of the contract price.

The Sheriff-substitute (CAMPBELL) pronounced this interlocutor:—"Finds that the present action is brought to recover payment of a certain sum of money as 'the balance due on the agreed on and ascertained price of estimate, and other mason work, executed by the pursuer' for the defender: Finds that the pursuer has failed to set forth on record any relative averments instructing that the alleged price has either been agreed on or ascertained: But finds, on the contrary, that it appears from the pursuer's revised condescendence that the work in question was done under a contract or agreement, containing a clause of reference of all disputes between the parties to a Mr John Henderson, but that the pursuer has not submitted his claim for the said balance, or under the said contract or agreement, to the said arbiter, although he pleads that the clause of reference, and any award which may be pronounced by the arbiter under the same, are binding and conclusive between the parties: Therefore finds that the present action as laid cannot be maintained by the pursuer, and dismisses the same and decerns: Finds the defender entitled to expenses," &c.

The Sheriff (DAVIDSON) adhered.

The pursuer appealed.

CLARK and BALFOUR for appellant.

SHAND and ORPHOOT for respondent.

At advising—

LORD PRESIDENT—I believe none of us have any doubt that the Sheriff-substitute and Sheriff have gone wrong in dismissing the action. The building contract here contains a clause of reference, and there is no reason for doubting that that is binding on the parties. It occurs in an English contract, but it is not said that there is any peculiarity in that law to prevent it from being as binding as if it had occurred in a Scotch deed. I think the pursuer proceeded correctly in terms of the contract when he called on the defender, if he objected to the work, to go before the arbiter and have the dispute determined. It is not denied that the pursuer took that course, and that the defender refused to go before the arbiter. In these circumstances, I think the pursuer was entitled to bring this action; and, having brought it, it must be observed that the defender does not plead that the action is excluded by the clause of reference, and yet the Sheriff-substitute and Sheriff have dismissed the action as if the defender had pleaded, and was entitled to plead, that it was excluded. It is plain that these interlocutors cannot stand. The next question is, How is the case to be disposed of? Nothing was said by the defender to create any doubt in my mind as to this reference being a binding reference of all disputes between the parties relating to the carrying out of the work; and, that being so, Henderson, the referee, is the proper person to settle the dispute on its merits. I do not think the subsistence of the reference, and the necessity of it going on its merits to Henderson, affects the validity of this action in this Court, and the practical course which I suggest is, that, after recalling this interlocutor, we should supersede consideration of the action for some time for the purpose of allowing the parties to bring the disputes before the referee.

LORD DEAS—This is an action by a builder for payment of the balance due on a building contract, on the allegation that his work has been properly performed. The defender maintains that in various respects the house is not properly constructed. The builder says there is a clause of reference as to that. The answer to that is a declinature of the reference, and a plea that the clause of reference has no application. The first question is, What was the builder to do? It is said that he should have gone to the referee. I don't think so. His proper course was this action. The other party not only declined the reference, but pleaded that it was inapplicable. The builder was quite right in the course he has taken. The defender is not entitled, by declining to go into the reference, to defeat the pursuer's *jus quæsitum* to have the disputes set right by the referee. The result is, that we must give an opportunity to the pursuer to go before the referee and state the dispute which has arisen; and, if the defender refuses to go, the referee will dispose of the matter without him, and then we will consider whether or not to give effect to that award. I think the clause of reference is clearly expressed so as to cover the disputes which have arisen.

LORDS ARDMILLAN and KINLOCH concurred.

Agents for Appellant—G. & H. Cairns, W.S.

Agent for Respondent—H. Buchan, S.S.C.

Wednesday, May 26.

WALKER *v.* MARSHALL.

Landlord and Tenant—Incoming Tenant—Value of Fallow. Where a landlord who had been in personal occupation of a farm let it to a tenant, *held* that the landlord was in the same position as an ordinary out-going tenant, entitled to claim from the in-coming tenant the value of fallow, manure, and seed, of which the in-coming tenant reaps the benefit.

The respondent is proprietor of the lands of Machan, in the parish of Dalserf and county of Lanark. For some years he had these lands in his natural possession, cultivating them himself as tenant. In 1866 he had prepared 12 acres for seed for a crop of wheat for 1867, 11 acres and 1 rood being summer fallow, and the remainder being in

potatoes. He put manure and lime on the lands, and in September and October 1866 he sowed seed wheat. Shortly thereafter the appellant, Walker, offered to lease the lands, the offer containing this clause:—"And that I take the fences as they are, and to leave the fences in good order and the mill in going order at the end of the lease, also the farm as it now stands in its present state." Marshall accepted the offer, and Walker entered into possession at Martinmas 1866. Marshall now sued Walker for £210, 17s. 2d., "being the value of lime, manure, seed, and labour, expended by the pursuer in the cultivation of 12 acres and 3 roods of land, forming part of the lands of Machan, in the parish of Dalserf, for crop 1867, being the defender's first crop thereof as tenant under the pursuer, on a lease for 19 years as from Martinmas 1866, conform to account hereto annexed, the whole produce of which expenditure will be reaped by the defender, he having become tenant and entered into possession of the said lands when the pursuer had newly expended and applied the said lime, manure, seed, and labour thereon." He alleged "the usage and custom of agriculturists is universal in the neighbourhood, that an ingoing tenant is liable in payment of summer fallow and lime, manure, seed, and labour applied thereto in the year previous to his entry, and of which the ingoing tenant reaps the whole and sole benefit."

After a proof, and a report by a practical farmer as to the amount of liability, the Sheriff-substitute (VEITCH) decerned against the tenant.

The Sheriff (BELL) adhered, adding this note:—"The Sheriff has had considerable difficulty with this case, which involves a question of some nicety, and of general importance. It seemed to be conceded on the part of the defender that, had he been dealing with an outgoing tenant instead of with the owner of the land, the rule laid down by Professor Bell (Principles, sec. 1263) would have been applicable, viz., that as the incoming tenant is *lucratus* by the fallow left by the outgoing tenant, the latter is in equity entitled to the value of the outlay of which the former reaps the benefit, and this independently of express stipulation. But the defender contends that the same principle does not apply where the question is between a landlord who had previously farmed the land himself and a party who comes in as a tenant under a nineteen years' lease. In such a case the landlord, it is argued, must be presumed to have inserted in the lease the whole conditions on which he lets the land, and has no right to make a demand beyond these conditions. By the interlocutor of 9th November 1867, a proof was allowed before farther answer of the pursuer's averment (Cond. art. 7), that the usage and custom of agriculturists is universal in the neighbourhood, that an ingoing tenant is liable in payment of such summer fallow and lime, manure, and labour applied thereto in the year previous to his entry, and of which the ingoing tenant reaps the whole and sole benefit. The result of the proof adduced, as has been found by the Sheriff-substitute, is to establish the entire accuracy of this averment, as between tenant and tenant. It is true that only one or two instances were known to the witnesses where the party ceding possession was the landlord himself, but as far as these instances went they confirmed the general custom, and bore out the opinion which the witnesses expressed, as agriculturists, that there was no solid room for distinction between the cases. The witness Andrew Smith, factor for the Earl of Home, and who has had large experience, depones—'I know that the practice of the country is, that the incoming tenant pays the outgoing one for charges like the present. It is a general understood agreement, and is not put into the leases. The outgoing tenant has the claim against the landlord, not against the incoming tenant. It is usually settled between the tenants themselves without coming to the landlord. The fact of the landlord being in the natural possession of the land does not alter the rule in any case; at least, that I ever knew. I have had such cases in my experience.' In like manner James Allan, a farmer of long standing, depones—'I have no doubt that it makes no difference when the landlord is in the natural possession of the land, and that the incoming tenant would in that case be equally bound to pay him.' There is a great deal of similar testimony, and none which materially contradicts it. The defender, however, urges that his bargain with the pursuer is contained in the missives Nos. 8/1 and 8/2, that the annual rent payable by him is thus definitely fixed, and that to hold him liable to the present demand would be tantamount to making a serious addition to that rent. The answer to this seems to be, that the irregular missives referred to, which were entered into before possession of the farm was given at Martinmas 1866, fix only the annual rent payable for the ordinary use of the land as an agricultural subject, and do not in any way exclude the future adjustment of a claim for manure, lime, seed, and labour supplied by the pursuer according to the ordinary rule of cultivation *tanquam bonus vir*, and appropriated by the defender, no doubt with the pursuer's consent, but without being bestowed as a gift. Mr Hunter, in his work on the Law of Landlord and Tenant (vol. ii, page 473), states the established rule of law to be as follows:—'Practical agriculturists consider summer fallow as an important part of good cultivation on clay soils, but as leaving ground in fallow causes loss to the outgoing tenant and gain to the incoming, it is equitable that the former should be recompensed. A claim made by an outgoing against an incoming tenant for the value of fallow ground left by him was sustained on the report of agriculturists. The right was held to exist independently of stipulation, and the *ratio* was that, as the outgoing tenant would have been entitled to take another crop instead of leaving fallow, an equivalent was exigible. This decision (*Purves*, 3d Sept. 1822) has been deemed to have fixed the law.' At the conclusion of the missive offer No. 8/1, the defender undertakes to leave at the end of the lease 'the farm as it now stands in its present state,' but the Sheriff agrees with the Sheriff-substitute in thinking that these words cannot be construed as importing an obligation that there shall be then the same amount of fallow with the same value of labour and material expended upon it as were given over at Martinmas 1866. They seem rather to mean that there shall be no alteration or deterioration at the ish of the lease, in the general character of the farm. The witnesses, Andrew Smith and James Holmes, concur in deponing—'There is no custom in this district of the incoming tenant getting fallow, &c., free, and leaving them in the same way to the next tenant at the end of his lease;' and the witness James Allan, after reading the missive, depones—'I don't think the terms of it would make any difference in the general rule of the district.' The case of *Alexander*, January 22,

1847, which was much founded on by the defender, was in some respects a very special case, though that does not sufficiently appear from the rubric, and, even as it stood, was not a unanimous decision. One element which weighed with several of the Judges was, that all the parties interested, including the incoming tenant, had entered into a submission, in which it had been found that the landlord was bound to pay the outgoing tenant the expense of cultivating the summer fallow, and that, the question being thus settled, the landlord was not entitled to prevail in an action of relief against the incoming tenant, who had been absolved in the submission. In addition to this, the lease, which was full, regular, and complete, had been executed sometime *after* possession had been taken, and after the claim by the outgoing tenant had been made; and it was held by, at least, one or two of the majority, who altered the judgment of the Lord Ordinary and the Sheriff, that such a lease, by specifying the rent and all the other prestations, and failing to contain any stipulation for payment of the summer fallowing, barred the claim. Lord Medwyn, however, who was in the minority, considered that the matter of the summer fallow did not enter into the lease at all, not being in the contemplation of the parties at the time, and that it was still open for adjudication as a separate and independent question. If that could be maintained in *Alexander's* case, much more can it be so here, where no possession had been taken when the loose and informal missives were executed, and when, for aught that appears, parties had nothing more in view than adjusting the price to be paid for the use of the bare land. The defender subsequently got in addition the manure, lime, seed, and cultivation, none of which he could have claimed from the pursuer in virtue of the missives, and by appropriating the same to himself he saved the outlay which they would have cost him. Can it be fairly held that, although his contract never mentions them, he was nevertheless entitled to get all these things into the bargain? The lease of an urban tenement does not include the furniture which may be in the house, unless specially stipulated for; and in like manner, the lease of an agricultural subject does not include materials necessary for the cultivation of the land, or the seed out of which the tenant is to get his crop, unless such furnishings be expressly undertaken by the lessor."

Walker appealed.

Solicitor-General (YOUNG, Q.C.) and SHAND for appellant.

CLARK and GEBBIE for respondent.

At advising—

The LORD PRESIDENT said the question was important, for while there was a fixed rule as to such a question between an outgoing and an incoming tenant, there had been no case applying the rule to the case of a landlord who was in personal occupation giving a lease to a tenant. The rule was undoubted, that the outgoing tenant was entitled to claim the value of the land left fallow. That was the rule in the ordinary case. There was generally no such obligation in the lease, and yet the claim was daily recognised, and had been so for upwards of half a century. How, then, stood the present case? The landlord was himself in occupation of the crop up to 1866. When he made up his mind to let his farm from Martinmas 1866, he had a part of his farm in fallow. He sowed that down with wheat, giving it all the requisite manure, and to that extent he had made this part of his farm more valuable to the man who was to come into possession at Martinmas than if he had taken a crop. He had, in fact, postponed taking a crop from 1866 to 1867 for the benefit of the land, so as to enable a different person to benefit. In these circumstances he made this lease, and the question was, What was the true meaning of the parties? It appeared to him that the landlord was exactly in the position of an outgoing tenant. He thus had a double character,—of proprietor on the one hand, and of farmer and culivator of the land on the other, and he was going to give up the latter character. Missives of lease were entered into, and the only specialty in them is the clause, "also the farm as it now stands in its present state." It was clear that the meaning of that was, that the tenant was to leave the farm in its existing condition at the end of the lease. In other respects the lease was very general, and there was no provision as to the mode of cultivation, or of what usually entered into a formal contract of lease, leaving the parties therefore very much, except in the essentials of the contract, to the common law. Now, if the principles of the common law had never been applied in the case of an outgoing landlord and an incoming tenant, they were clearly applicable in equity, and there was nothing to prevent the Court from applying them, unless the parties meant otherwise. He thought, on considering the evidence, that it was intended that the rights of the parties should be regulated in the ordinary way in which such rights are regulated at common law. The result of the opposite view would be very startling, for there was not merely the value of the fallow, and a vast expenditure of money in raising this wheat, which put a great deal of money into the pockets of the tenant for which he had given nothing, but it gave him manure, not unexhausted in the ordinary sense of the term, that is, where the outgoing tenant has only got part of the benefit, but unexhausted in the sense that the outgoing tenant gets no benefit from it at all. That was so inconsistent with equitable principles that, unless the Court were bound so to hold, they would not be induced to do so. He had, therefore, no difficulty in agreeing with the interlocutor of the Sheriff-Principal.

The other Judges concurred.

Agent for Appellant—A. Morison, S.S.C.

Agent for Respondent—M. M'Gregor, S.S.C.

Thursday, May 27.

CALLANDER AND OTHERS, PETITIONERS.

Tutors-Nominate—Authority to Borrow—Nobile officium—*Competency.* In a petition by tutors-nominate for authority to borrow, the proper course is for the Lord Ordinary to remit for inquiry in the usual way for the purpose of ascertaining whether the prayer of the petition ought to granted.

This was a petition by the tutors-nominate of Henry Callander, heir of entail in possession of Prestonhall and others, for authority to borrow money. The father of the pupil died in 1865. His estates being, it was alleged, insufficient to pay his debts, there was risk, after his death, of the furniture of the mansion-house, and of the crop and stocking of the home farm, being seized and sold by creditors, to the injury of the pupil's estate.