

of their bodies. Each heir-male took undoubtedly by devolution by law, the deed having specified the class of heirs and left the law to devolve the estate within that class. Walter M'Culloch, the heir-male just dead, so took by devolution of law. Had he left a son, that son would have taken by devolution by law, and would have been the successor of Walter in the line of heirs-male of David M'Culloch.

Now, however, Mrs Jameson M'Culloch takes, not because she is heir-male, but on the contrary, because there are no more heirs-male. Neither does she claim, because it is a legal consequence of the destination to heirs-male that she should now take. On the contrary, she points to the deed of Edward, the entailor, which, now that the law has executed his commission to devolve the estate down the line of heirs-male, steps in and starts a fresh line of succession.

To my thinking the case is just the same as if the heirs-female now called had been the heirs-female of some stranger, who and whose heirs-male had never yet taken at all. Suppose that, instead of going back to David and giving to his heirs-female, the entailor had called the heirs-female of some son, or relation, or stranger not hitherto named in the deed—the heirs-female let us say of some Mark M'Culloch—they surely would take by disposition. The argument would be merely the extension of *Saltoun's* case from a man named to the heirs (or a particular class of heirs) of a man named. I cannot see how it can make any difference that the new class of heirs are the heirs-female of a man whose heirs-male have been exhausted. In the one case, as in the other, you have to go back to the deed for a fresh start, instead of letting the law work out the line first started.

I am for adhering.

LORD ADAM concurred.

LORD KINNEAR—I am entirely of the same opinion, for the same reasons. The rule laid down in the case of *Lord Saltoun* is that, where a successor derives his title by descent, the person through whom he claims as his ancestor is by a reasonable construction of the Act his predecessor, but when the lands are taken, not by descent from the person last vest and seised in them, but by operation of the deed, by a person who is his heir-general, or heir of any particular class through the last possessor, then the settlor must be the predecessor.

Therefore, agreeing with everything your Lordship has said, I do not think it necessary to add any further observations.

LORD M'LAREN was absent.

The Court adhered.

Counsel for the Pursuer—Sol.-Gen. Shaw—A. J. Young. Agent—P. J. Hamilton Grierson, Solicitor of Inland Revenue.

Counsel for the Defender—Graham-Murray, Q.C.—Crole. Agents—Boyd, Jameson, & Kelly, W.S.

Saturday, February 2.

## FIRST DIVISION.

### WATSONS v. ROBERTSON AND OTHERS.

*Process—Nobile Officium—Petition to Compel Arbitrator to Proceed—Competency.*

Held that a summary petition craving the Court to ordain arbiters to issue an award was not an appropriate form of procedure in a case where the questions to be decided were of some complexity and involved disputed facts.

By a mineral lease dated 19th May 1893, Messrs John Watson and Thomas William Watson leased from Lord Belhaven and Stenton a coal-field on his estate, with entry at Whitsunday 1893. It was provided that the tenants should be entitled to give up the lease at Martinmas 1893 on giving a month's notice, and that the landlord should be entitled at its termination to take over certain plant and machinery at a valuation to be made by two men of skill to be mutually chosen by the parties as arbiters, or by an oversman to be named in case the arbiters should differ. Lord Belhaven and Stenton died upon 6th September 1893, and Mr Ralph Dundas, C.S., Edinburgh, was appointed judicial factor *ad interim* on his estates. The lessees gave up their lease at Martinmas 1893, and the judicial factor intimated to them that he was prepared to take over in terms of the lease—(1) The whole machinery and fittings at Nether Johnstone pit, (2) the whole machinery and fittings at Over Johnstone pit, (3) certain machinery and fittings at No. 10 pit, and (4) houses and buildings on the said lands belonging to the lessees.

In accordance with this intimation a deed of submission was entered into on the 6th December 1893, whereby the lessees nominated David Rankine, and the judicial factor nominated William Robertson, as arbiters for the purpose of valuing the machinery, plant, &c., in accordance with the terms of the lease. The arbiters appointed John Stedman Dixon as oversman. The arbiters met on the ground on the 8th December 1893 and at other dates, and mutually agreed on the valuation of all the plant and machinery except that in No. 10 pit. They did not, however, issue any award.

On 16th November 1894 the lessees, Messrs John and Thomas Watson, presented a petition to the Court of Session craving the Court "to ordain the said William Robertson to join with the said David Rankine within such short time as your Lordships may fix, in making and issuing as arbiters aforesaid an award under the said reference fixing the value of the subject particularly set forth in said deed of submission, or otherwise in the event of the said William Robertson and David Rankine differing in opinion as to said value within such time, to ordain the said William Robertson to

join with the said David Rankine . . . in executing a minute of devolution devolving the said submission upon the said James Stedman Dixon, the oversman." . . .

The petitioners narrated the facts as stated above, and averred that they had repeatedly urged that progress should be made, and that an interim award should be issued giving effect to the valuations already agreed to. They maintained that the delay was due to the action of Mr Robertson, who "acting corruptly and in collusion with the judicial factor and his agents . . . has obstructed and continues to obstruct the progress of the submission," and that their own arbiter was willing both to issue an interim award and to proceed to exhaust the reference. They averred that Mr Robertson's reason for obstruction was to assist the judicial factor in actions which he was raising against them with reference to the condition of No. 10 pit.

The respondents, William Robertson and the judicial factor, lodged answers. They averred that owing to the negligence of the petitioners the pumping machinery in No. 10 pit had broken down, and that in consequence the pit had become flooded to the depth of 45 feet; that in consequence of this the judicial factor had refused to take over the pit, and that when the accumulated water had been pumped out it was found that great damage had been sustained. That the judicial factor had raised an action against the petitioners, and that the pit was not yet in working order, as the petitioners had been bound to leave it by the terms of the lease, and could not be taken over. They admitted that Mr Robertson declined to make a valuation of the machinery in No. 10 pit, or to issue an interim award, but averred that, if a breakdown occurred in No. 10 pit before it was put into working condition and taken over by the landlord, the water would flood some of the other pits and seriously damage the plant there, and that it was impossible therefore even to give an interim award with regard to them. They further averred that Mr Rankine—as they had lately discovered—was disqualified from acting as arbiter, having since his appointment continued to act as the adviser of the petitioners.

They maintained—“(1) That the petition is unprecedented and incompetent. (2) That it is in any view premature.”

Argued for petitioners—This was both a competent and expedient form of procedure. (1) The fact that the question might be determined by an Outer House action did not preclude the Court from exercising its *nobile officium* and deciding by summary petition. In the case of *Forbes v. Underwood*, January 22, 1886, 13 R. 465, the Lord President (p. 468) contemplated that the Court would proceed by the exercise of its *nobile officium*, and not merely by the ordinary course of procedure. This inferred a procedure by summary petition, not by ordinary action in the Outer House. If the case required clearing up by an ordinary action, then that was the right course of procedure—

*Dowie and Others v. Hagart*, July 19, 1894, 21 R. 1052; but here there was no question of private right, or of a wrong determination by an arbiter into which it would be necessary to examine. There was simply a refusal on the part of the arbiter to determine, so the Court might order him to proceed without going into any question of private right. In case of his refusal to obey the order of the Court, it was not necessary to punish him by imprisonment, for the alternative conclusion of the prayer was for devolution to the oversman, which there was sufficient difference of opinion between the arbiters to justify—*Sinclair v. Fraser*, July 19, 1887, 11 R. 1139. (2) It was expedient to settle the matter summarily, for the reference would expire in a year from its commencement, and certainly would do so before an ordinary action were concluded. The value of the plant, &c., which was in the respondents' possession was deteriorating all this time.

Argued for respondents—(1) The petition was incompetent. The form of procedure was quite a new one, the ordinary method being by an action in the Outer House—*Bell on Arbitration*, p. 203; *Sinclair v. Fraser and Forbes v. Underwood*, *supra*; *Marshall v. Edinburgh and Glasgow Railway Company*, March 26, 1853, 15 D. 603. The *nobile officium* of the Court should be applied only where no other remedies existed, or where the strictness of the law must be tempered with equity. The *onus* of showing that this was a case for the *nobile officium* of the Court lay on the petitioners, and they had failed to do so. The case did not fall within those suitable for the exercise of the Court's *nobile officium*—*Stair*, iv. 3, 1; *Bankton*, iv. 7, 24; *Mackay's Manual*, p. 82. (2) The petition was inexpedient, for the real merits of all the questions in dispute could not be raised in this procedure. It was not a case where matters could not wait, for all the plant in a condition to be valued had already been valued. It would be an inequitable form of proceeding, for the respondents would have no chance of raising a counter-claim to any interim award, and if any accident occurred in No. 10 pit, the machinery in the other pits might only be worth its break-up value. The alternative proposed, *viz.*, devolution on the oversman, would not be an appropriate course for the differences between the arbiters were not on the merits of the case, but merely on the time of issuing the award.

At advising—

LORD PRESIDENT—In considering this case, it is in the first place plain that, in face of the respondents' statements on record, we could not *de plano* grant the prayer of the petition. That prayer is to ordain Mr Robertson, who is one of the two arbiters, to join with the other arbiter, within such short time as the Court may fix, in making and issuing an award under the reference, fixing the value of the subjects set forth in the submission. Now, it cannot be said to be a universal and absolute

rule that arbiters must forthwith issue their award. It is a matter of discretion and of circumstances what procedure they shall adopt, and when they shall proceed. There is in the present case apparently a somewhat complicated problem before the arbiters, and one of them considers that the existing circumstances of the pits and machinery render it impossible for the time duly to carry out the valuation, and that the work should be deferred till those conditions have ceased. Whether this view be correct depends upon a variety of circumstances; and on the determination of disputed facts. The case is further complicated by an averment in the answers that Mr Rankine is disqualified from acting as arbiter.

Now, I do not think that a summary petition is an appropriate proceeding for deciding such questions. To say so is not the same as saying, and I do not say, that a summary petition to compel arbiters to proceed in a submission is on the face of it and necessarily an incompetent proceeding. It may quite well be that when some specific duty is plainly and immediately incumbent on an arbiter, the Court may be asked by summary petition to order him to do it, and the mere fact that an ordinary action would lie for the same purpose would not necessarily exclude the competency of the application. But the appropriateness of such a petition depends not merely on its prayer, but on the nature of the question, or set of questions, which has got to be solved, and this is to be ascertained by reference to the answers as well as to the petition. Of course no respondent by merely setting up some defence, and especially some defence of apparent complexity, will be able to elude the application of a summary remedy if otherwise appropriate; the court must consider *prima facie* the quality of the defence and the genuineness of the dispute. On an examination of the record here I think that there are questions to try of some complexity and involving disputed facts, and that a petition is therefore an inappropriate proceeding.

LORD ADAM and LORD M'LAREN concurred.

LORD KINNEAR—I agree. But I desire to add that in my opinion there is enough in the proceedings before us to show that the course taken by the arbiter, Mr Robertson, in declining to meet his co-arbiter and to hear parties on the question of procedure was not a proper one. I am far from saying that the arbiters were bound to issue an award. For the reasons your Lordship has stated I think that question is not properly before us. But the arbiters were rightly advised by the clerk to the reference that if they were not prepared to issue an interim award they were bound to hear parties' agents or counsel on the question of delay. I do not think it doubtful that this was sound advice. The arbiters should have met to hear parties and considered the motion to proceed. For one arbiter is not entitled to decide any

question for himself without consulting his co-arbiter. They are bound to hear parties and deliberate together, so that they may endeavour to reach a just conclusion in which both may agree, and if they fail to agree after such deliberation, the parties, as well as the arbiters themselves, should have an opportunity of considering whether their difference is such as to necessitate a devolution. I do not understand your Lordships to hold that if the petition had merely required the arbiters to meet and hear the parties, and to proceed as should be just, the objection which must be sustained to the petition as it is presented would have been equally applicable.

The Court refused the petition.

Counsel for the Petitioners—H. Johnston—Dewar. Agents—Simpson & Marwick, W.S.

Counsel for the Respondents—Lord Advocate (Balfour, Q.C.)—Dundas. Agents—Dundas & Wilson, C.S.

Wednesday, February 13.

## FIRST DIVISION.

[Lord Stormonth Darling,  
Ordinary.]

### CRAWFORD v. PATON.

*Process—Proof or Jury Trial—Lease—Repair of Farm Buildings—Action for Breach of Contract.*

A tenant raised an action of damages against his landlord for alleged breach of contract in failing to keep certain farm buildings in repair.

Held that the case of *Johnstone v. Hughan*, May 22, 1894, 21 R. 777, did not lay down any general rule that all cases of breach of contract must go to a jury, but that it was within the discretion of the Court in each case to decide as to the appropriate mode of proof.

Observed (by Lord M'Laren) that the case of *Johnstone* was distinguishable from the present, inasmuch as it was an appeal for jury trial from a Sheriff Court.

Thomas Crawford, farmer, Craighend, Slamannan, brought an action of damages against his landlord James Paton, Esquire, of Avonhill, for breach of contract, on the ground that he had failed to implement the obligations of the lease with respect to the upkeep of the farm buildings and the introduction of a proper water supply.

Upon 16th January 1895 the Lord Ordinary (STORMONTH DARLING) closed the record and appointed issues to be lodged.

The defender reclaimed, and argued—The case should be tried by a judge without a jury. The Lord Ordinary had ordered issues without exercising his own discretion in the matter, on the ground that