

the lands of Hillhead as now possessed by him were a different set of lands of Hillhead from the lands of Hillhead of which Miss Brown had acknowledged the superiority to be the superiority of the Earl of Loudoun, he was entitled to succeed, yet the *onus* was upon him to do so; and inasmuch as he has frankly admitted that he is not in a position to show that there were any other lands of Hillhead which were held from another superior, then I am afraid if he cannot do that the pursuer has made out his case upon undoubted identity of description.

The case comes to be as simple as this. Miss Brown, holding the lands of Hillhead as possessed by William M'Kay, acknowledges in 1832 or 1814 that they are held from the Earl of Loudoun, and the prescriptive period goes on and finishes under that condition; then Miss Brown disposes a part and portion of the lands of Hillhead as possessed by the same M'Kay. That is identity unless you can show something else, and the only way in which it seems to me the defender could have prevailed in this case would have been to have shown us affirmatively that there were other lands of Hillhead which were held *de facto* from another superior. Then the question would have been, Were the lands in question the lands of Hillhead held from the Earl of Loudoun, or were they the lands of Hillhead held from the other superior. But when all he can do is to suggest that there may have been other lands which were held from another superior, and to fortify that suggestion by a more or less critical examination of the parcels of land which were supposed to make up the lands of Hillhead, he does not seem to me to do enough.

The thing can be tested in another way. I do not say this solves the case, but I ask myself, supposing that disposition had been in the old form instead of the abbreviated form allowed by the Act of 1874, and supposing the holding therein specified to have been an *a me* holding, to whom would the disponent have gone? I see no trace that he could have gone to anybody except the Earl of Loudoun, and he certainly could have got a perfectly good charter from him. It is not really suggested that there is anyone else he could have got a charter from. I think that is really the position at this present moment, and therefore I think, entirely concurring as I do with the Lord Ordinary in his reasons, that I find myself able to get at the same result by a somewhat shorter road.

LORD KINNEAR—I agree both in the Lord Ordinary's judgment and also in the additional grounds for reaching the same result which your Lordship has explained.

LORD PEARSON—I also agree.

LORD M'LAREN was absent.

The Court adhered.

Counsel for Pursuer (Respondent)—
M'Clure, K.C.—Constable, K.C.—Maitland.
Agents—Blair & Cadell, W.S.

Counsel for Defender (Reclaimer)—
Hunter, K.C.—Munro. Agents—Macpherson
& Mackay, S.S.C.

Thursday, March 18.

SECOND DIVISION.

[Lord Johnston, Ordinary.]

MACDONALD (CHALMERS' TRUSTEE)
v. MILNE (DICK'S TRUSTEE).

*Lease—Lease of Farm—Clause Providing
that Lease shall become Null on Tenant's
Bankruptcy—Sequestration of Tenant—
Right to Crop Sown by Tenant.*

The lease of a farm for nineteen years from Martinmas 1906 provided as follows:—"And further, it is hereby provided and agreed that in case the tenant shall during the currency of this lease become bankrupt . . . this tack shall, in the option of the proprietors, become absolutely void and null, and that without any declarator or other proceeding at law whatever, and it shall not be in the tenant's power, without the proprietor's consent, to continue any longer in possession of or carry on and manage the said farm and others for his own or his creditors' behoof, and the proprietors shall be entitled to re-enter and resume possession of the said farm, or to re-let the same in like manner as if this lease had come to its natural termination." The tenant was sequestrated on 28th April 1908, and the landlord, founding on the above clause, obtained decree of removal on 24th April 1908.

Held, in an action of suspension and interdict by the landlord against the tenant's trustee, that the tenant's common law right to the crop sown by him was excluded by the terms of the lease, and that he was not entitled to any part of the corn and grass crop of 1908, though it had been sown before his bankruptcy.

William Kid Macdonald, sole acting trustee under the trust-disposition and settlement of the late John Inglis Chalmers of Aldbar, Forfarshire, raised an action of suspension and interdict against John Milne, trustee on the sequestrated estate of Stewart Dick, farmer, Broomknowe, near Brechin.

The following narrative is taken from the opinion (*infra*) of the Lord Ordinary (JOHNSTON)—"In 1906 the trustees of the late John Inglis Chalmers, of Aldbar, let to Stewart Dick the farm of Broomknowe for nineteen years, from Martinmas 1906, at a rent of £235, payable at Lammas 1907 and Candlemas 1908, for crop and year 1907, and so forth thereafter, except that the last term's rent was payable at the Martinmas of removal.

"The parts of the lease which are material are—The farm was to be cultivated upon the most approved rules of good husbandry on a seven-year shift; the whole straw and

turnips grown on the farm were to be consumed thereon by the tenant's cattle, and the whole manure made on the farm to be applied to the land, with the exception of the last or waygoing crop; the tenant was to be entitled to dispose of the whole of the waygoing crop on the ground before it was reaped or to reap the same himself, with the option to the proprietor or incoming tenant of taking at valuation anything up to one-half of both grain and straw; the tenant was bound to leave the turnips of the waygoing crop in the ground to be paid for at valuation on the footing of being consumed upon the farm; the valuation of the grain and straw was to be made in the second week of August and of the turnips in the first week of November; if the proprietor or incoming tenant did not exercise the option of taking the crop, the tenant was to be entitled to dispose of the whole waygoing crop of corn and fodder as he might think fit; manure and unconsumed straw left on the farm made previously to 15th May of the waygoing year was to be the landlord's without payment, and the manure made after that date on payment of one-half its value; the whole of said valuation prices were to be paid or allowed for at the term of Martinmas, being the term of removal, but 'in no case shall the tenant, or anyone in his right, be entitled to claim payment of any of the said valuation prices until all rents due or payable under this lease, and all obligations prestable by the tenant to the proprietors, shall have been fully implemented or secured.'

"With regard to the waygoing, it was particularly 'declared' that the proprietors or incoming tenant shall be entitled to 'enter into possession of each field of the farm hereby let whenever the last crop under the lease shall have been led in, and shall likewise have right to the necessary accommodation at the steading for his men and horses, and the tenant hereby agrees to allow the proprietors or incoming tenant to sow, free of charge, grass seeds with any part of the last year's corn crop under this lease, which grass seeds the outgoing tenant shall harrow and roll in, in proper season, free of charge for the labour or privilege.' Should the tenant sow out the grass seeds of the last crop himself, he was to be entitled to payment for the seeds. And the tenant was not to be entitled to pasture the stubble of the last crop laid down with grass seeds, but bound carefully to preserve the young grass.

"The reason why I have somewhat carefully examined the lease, particularly as it bears upon the waygoing, is that I think a careful consideration of the waygoing provisions is necessary for the construction of the clause to which I shall immediately advert, on which the question raised in the present suspension turns. That provision is as follows:—". . . [The provision is quoted *supra*, in rubric.] . . ."

"Stewart Dick, the tenant, was sequestrated under the Bankruptcy Statutes on 20th April 1908, on which day the respondent John Milne, auctioneer, Brechin, was

appointed interim factor on the sequestrated estate, and he was elected trustee in the sequestration on 1st May and confirmed on 6th May 1908. At the same time William Kid Macdonald, who had become the sole acting trustee in the late Mr Chalmers' trust, had raised proceedings in the Sheriff Court to have it found that an irritancy of the lease had been incurred, and that the lease had become null and void, and to have the said Stewart Dick ordained to remove from the farm, and for warrant for ejection. Decree in this action was obtained on 24th April 1908, while Milne was interim factor and before he had been appointed trustee. It is disputed whether he was verbally informed of the decree at the meeting of creditors on 1st May when he was elected, but he admits that it was intimated to him on 5th May, the day before he was confirmed. The steps of process in the removing were—It was presented on 22nd April. On the following day the tenant, Stewart Dick, accepted service, dispensed with the *induciae*, and consented to decree, and on the 24th decree was pronounced in respect of the consent. He was charged on the decree of removing on 5th May. Disregarding this decree, Milne endeavoured to enter on the farm and to proceed to prepare the ground for green crop and generally to carry on the agricultural operations of crop and year 1908, and to prevent the landlord taking possession and carrying on the cultivation. Accordingly Mr Macdonald, as trustee foresaid, brought this suspension, presented on 6th May 1908, to have the respondent Milne interdicted from (1) entering on the farm of Broomknowe; (2) performing any agricultural operations thereon, and particularly preparing or planting a green crop; and (3) interfering with the complainer or his servants in their performance of agricultural operations on the said farm.

"The *species facti* thus are—(1) Sequestration was awarded as of date 20th April 1908, there having been necessarily prior notour bankruptcy. (2) Decree of removing of the tenant was granted on 24th April on a petition presented on 22nd April. (3) Prior to the sequestration the grain crop of 1908 had been sown, but in that district it is doubtful whether it had braided. It certainly could have done no more. (4) Potatoes had not been planted nor turnips sown, though certain work in the way of preparation of the ground had presumably been done. (5) The grass seeds sown out with crop 1907 were coming on for the hay crop of 1908, making the first year's grass of year 1908 on the farm. Grass seeds had not been sown out with the grain crop of 1908. (6) There were breaks of second and third year's grass on the farm. (7) The rent for crop and year 1907, being due at Lammass 1907 and Candlemas 1908, had been paid; the rent for the crop and year 1908 was at the date of Dick's sequestration in no part due."

The respondent pleaded—" (2) In respect that the respondent as trustee on the said sequestrated estate is entitled and bound to

take possession of, preserve and realise, the assets belonging to the said sequestrated estate upon the said farm, the note should be refused. (3) In respect that the whole industrial crop and produce of the said farm for the year current at the date of the sequestration of the said Stewart Dick is part of the said sequestrated estate, and that the respondent as trustee on the said sequestrated estate is entitled and bound to enter on the said farm for the purpose of sowing and reaping the same, and for all purposes incidental thereto, the note should be refused. (4) In respect that the crop for which the ground was prepared by the bankrupt prior to his sequestration is part of the said sequestrated estate, and that the respondent as trustee on the said sequestrated estate is entitled and bound to enter on the said farm for the purpose of sowing and reaping the same, and for all purposes incidental thereto, the note should be refused. (5) In respect that the crop sown by the bankrupt prior to his sequestration is part of the said sequestrated estate, and that the respondent as trustee on the said sequestrated estate is entitled and bound to enter on the said farm for the purpose of preserving and reaping the same, and for all purposes incidental thereto, the note should be refused."

On 15th January 1909 the Lord Ordinary pronounced the following interlocutor:— "Finds in law that on a sound construction of the said lease the respondent had no such right as claimed by him, but that on the bankruptcy of the said Stewart Dick, or in any view, on the decree of the Sheriff declaring the irritancy consequent thereon and removing the bankrupt, the said lease became absolutely void and null; that the bankrupt and those in his right had no longer right to possess or carry on and manage the said farm for his or his creditors' benefit, and that the complainer was entitled to re-enter and resume possession of the same as if the lease no longer existed from and after the date of the said irritancy: Finds that the respondent as trustee aforesaid had by his act and warrant vesting him therein right to remove from the farm and realise any moveable property of the bankrupt which he might find on the farm at the date of the sequestration, but nothing else: Finds that neither the said corn crop, hay crop, second and third years' grass, potato crop, and turnip crop, nor any of them, were at the date of his sequestration moveable property of the bankrupt and as such vested in the respondent, and that the common law right or privilege of the tenant to follow and reap the corn and hay crops which he had sown after he had ceased to have right to occupy the lands under the lease, was one which could be excluded by convention, and was so excluded, in event of the tenant's bankruptcy, by the terms of the lease to the effect of binding not only himself but the trustees for his creditors: Therefore repels the second, third, fourth and fifth pleas-in-law for the respondent, and sustains the reasons of suspension. . . ."

Opinion.—[After the narrative supra]— "The trustee's demands are on the footing that he is entitled to the whole benefit of the lease for crop and year 1908—that is, to the grain crop sown, to the hay crop growing, to the second and third years' grass, and to plant the turnip and potato crops, and to win the same, and therefore to remain in full agricultural possession for crop and year 1908 as if Martinmas 1908 was the ish of the lease, and then to go out with all the advantages of a waygoing under the lease, but under no obligation to do more than give a ranking for the rent. I cannot help thinking that the complainer would, assuming Mr Milne a solvent party, have been well advised to let him have his way and adopt the lease. But he has preferred to stand on his right under the lease, has irritated it by reason of the tenant's bankruptcy, removed the tenant, and, as assignees legal and voluntary are excluded, declines to recognise Mr Milne.

"The first consideration is, what was the intention of the parties in entering into the lease? I can have no doubt that it was their intention that on legal bankruptcy, which does not necessarily involve sequestration, and certainly on sequestration, the lease was in the option of the landlord to become void and null; that the tenant was to have no further right of possession under the lease, or of carrying on the farm as an agricultural operation either for his own or for his creditors' behoof, and that the landlord was to be entitled to immediate re-entry 'in like manner as if the lease had come to its natural termination.' I am not concerned with the fact, made much of by the respondent on record, that he was appointed, or rather that his appointment dates back two days before the Sheriff Court process of removing in which the irritancy was *pro forma* declared, was raised. It was, in my opinion, the legal bankruptcy of the tenant, not his sequestration, which in the option of the landlord irritated the lease. But if it was only sequestration which did so, the relative dates of sequestration and of decree of irritancy and removing are immaterial.

"The contention of the respondent is practically to translate 'in like manner as if the lease had come to its natural termination' into, as if the year in which the bankruptcy and irritancy occurred was the last year of the lease, or as if the lease was going to come to its natural termination at Martinmas 1908. What the lease clearly means is as if the lease to the full effect of termination had already come to its natural termination. I have read attentively the decision of the Second Division of the Court in the case of *Moncreiff v. Hay*, 5 D. 249, and though the terminology of the lease was different I cannot find any substantial point of distinction between it and the present case. There is one consideration specially noticed by Lord Moncreiff which I think applies with even greater force here. If the lease is null and void as from a certain date neither party can found on it. The landlord's claim for rent is thus at an end. For the rent of crop and year 1908 he

can neither claim a preference nor a ranking. Yet the tenant in the person of the trustee claims the full benefit of the tenant's side of the lease.

"There can be no doubt that the respondent's general contention is untenable. But as a narrower line of defence he maintains that at least he is entitled, if not to continue possession, at least to re-enter for the purpose of reaping the hay crop sown out in 1907 and to mature in the summer of 1908, and to reap and carry away the corn crop of 1908, straw as well as grain, for I do not think that he admits, and probably consistently with his argument cannot admit, that he is bound as regards his dealing even with that crop by the waygoing clause of the lease. This minor contention, though it is far short of the major sweeping claim, yet prevents the above clause in the lease taking its full effect.

"From the terms of the Inner House interlocutors of 5th June 1908 I am led to infer that their Lordships were at least *prima facie* in favour of the respondent on a material part of his contention, as their Lordships exclude the corn crop from the interim interdict granted by Lord Guthrie, though, for some reason which I do not follow, it is left to include the hay crop. It is therefore with hesitation that I give effect to my own opinion. But the question before the Court was merely one of interim interdict, and I do not think that I am absolved by an Inner House judgment on that question, which may have proceeded on practical considerations and is not explained by reasoned opinions, from dealing with the whole case as it is now presented to me on a passed note. I feel the more bound to do so that the same question arose in the case of *Moncreiff v. Hay, supra*. In the present case, *inter alia*, a corn crop which at 20th April had barely been sown is in dispute as at that date. In *Moncreiff v. Hay* a wheat crop which had been sown in October, and at best had just braided at Martinmas, was in dispute as at Martinmas. The two crops were *in pari casu*, yet in *Moncreiff v. Hay* the Court held that the landlord's right of re-entry to the whole farm was not affected by the fact of the existence of this potential crop.

"It is necessary, therefore, either to depart from or distinguish the decision in *Moncreiff v. Hay, supra*. I have no right to do the former, and I see no ground for the latter. The contention of the trustee is based on the brocard *messis sementem sequitur*, and his argument that the crop was therefore the property of the tenant, and as such vested in him by the vesting clause of the Bankruptcy Act. And on this, his minor line of defence, he demands to be allowed to realise this asset as he would a stack of corn already in the barnyard.

"It is true that at the date of *Moncreiff v. Hay, supra*, viz., 1842, the present Bankruptcy Act was not in force. But the then Act contained a vesting clause, and I cannot imagine that the point was omitted by the distinguished counsel for the trustee,

afterwards Lord President Colonsay and Lord Deas, or by the learned Judges then on the bench of the Second Division. Nor do I think that the more express right to resume the lands, to be found in the lease in *Moncreiff v. Hay, supra*—viz., 'in the state they may then be in without any claim or demand being competent to the tenant or his creditors—really affects the question.

"But I am pressed, as a counter authority on this point, with the case of *M'Gavin v. Sturrock*, 18 R. 576, where the point in dispute was, whether a trustee in bankruptcy had by his action adopted a lease. The tenant's bankruptcy in August 1890 brought the lease to an end at Martinmas of that year. The hay crop had been secured. The corn crop was secured within three weeks after sequestration. The potato crop was ingathered before Martinmas, and the turnip crop was mature at Martinmas, though still, with a small exception, in the ground. The circumstances were therefore very different. At the ish of the lease, viz., Martinmas, the crops, other than the turnip crop, were not only separable but separated. They were not merely constructively moveable, but actually moveable property of the bankrupt estate. The turnip crop was in a different position; but how far this difference was under the notice of the Court does not appear. As a direct authority the case does not determine the present, but it is incontrovertible that the *ratio decidendi* was that crops in the position in which his trustee found *Sturrock's* were the property of the tenant.

"I cannot reconcile it to myself that 'property' is used in this and in other authorities in the full sense of the term. A prospective crop after sowing may have such attributes that to most effects it may be the equivalent of property, but I do not think that it is property of the tenant. If it is so, it must be so from the day it is sown. There is no particular point in its germination when it becomes what it was not before. Yet it is not pointable in the braid (*Elder v. Allen*, 11 S. 902), but pointable in the ear (*Ballantine v. Watson*, 1709, M. 10,526). The true position I think to be that, labour having been expended, seed provided or bought, it has in equity become customary (*Fleming v. Macdonald*, 22 D. 1025, per Lord Justice-Clerk Inglis at p. 1030; *Earl of Hopetoun*, 1 Macph. 1097), and therefore part of the common law, to allow the executor of the deceased or the creditor of the bankrupt to follow the sowing and reap the crop, as a privilege, which has so much the practical effect of property that it has come to be regarded and spoken of as property, though strictly it is not property. I venture respectively to refer to what Lord Cairns says in *Brand's* case, 3 R. (H.L.), at page 20, regarding the law of tenant's fixtures. He points out that there are two general rules a correct appreciation of which is necessary to a correct conception of the law of tenant's fixtures—one is, that whatever is fixed to the freehold of land becomes part of the

freehold. The other is, that what has once become part of the freehold cannot be severed by a limited owner, whether for life or for years. These, his Lordship says, are two rules, not one by way of exception to the other, but two rules standing consistently together. An exception has been made not to the first, but to the second. An exception has been established to the irremovability of things fixed to freeholds for the purpose of trade. 'Under that exception a tenant who has fixed to the inheritance things for the purpose of trade has a certain power of severance and removal during the tenancy.' But, as I conceive his Lordship's meaning, he has such power not by reason of his retention of a property in such fixtures, but of the exception to the second rule which enables him to remove, and so to resume the property of that which he has not retained the property. I think that the same chain of reasoning applies to the agricultural crop. Whensown it becomes *pars soli* and naturally irremovable, but the right to sow implies the right to separate or reap, not as an exception to Lord Cairns' first rule, but to the second, and equity extends that exception to the executor and to the creditors. It is exercised by the creditors through the trustee, not because of property strictly so termed vesting in him, but by virtue of the exception enabling him to exercise the privilege for their behoof. The result is tantamount to property, and may popularly be called property, but it is not property. Hence, if the right to the growing crop is not strictly a right of property, it is not as property carried to the trustee in bankruptcy, and I agree with Lord Kyllachy in *M'Gavin v. Sturrock*, *supra*, where, referring to the maxim *messis sementem sequitur*, he says—'I know no authority for holding that the operation of that maxim may not be conventionally qualified, I mean by stipulation in the lease.' And in the present case I think it is so qualified.

"I should not have ventured to give expression to this opinion, seeing the repeated reference by learned judges to growing crops as property, did it not enable me not merely to follow, as I conceive I am bound to do, but to accept the decision in the case of *Moncreiff v. Hay*, *supra*."

The respondent reclaimed, and argued—According to the ordinary rule of law expressed in the maxim *messis sementem sequitur* the tenant was entitled to the crop he had sown, and to enter on the land for the purpose of ingathering it—*Ersk. Inst. ii, 1, 26*. The crop was the moveable property of the tenant from the time when it was sown—*Ersk. Inst. ii, 2, 4*; *Somervell v. Stirling*, 1627, M. 5074; *M'Gavin v. Sturrock's Trustee*, February 2, 1891, 18 R. 576, 28 S.L.R. 414. It was none the less moveable though it could not be pointed till it was in the ear—*Elders v. Allen*, July 5, 1833, 11 S. 902. Property might be moveable though it could be attached by adjudication—*Royal Bank of Scotland v. Fairholm*, 1770, M. voce "Adjudication," App. No. 3; *Sinclair v. Staples, &c.*, 22 D. 600;

Ersk. Inst. ii, 12, 48; *Stair, iii, 2, 48*, *More's Notes*, p. 299. The crop therefore being moveable property of the bankrupt at the date of his sequestration vested in the reclaimer as trustee—*Bankruptcy Act 1856* (19 and 20 Vict. c. 79), sec. 102—and he was entitled to enter on the lands for the purpose of ingathering it. The lease did not take away the tenant's right to the crop he had sown. If the lease could still be founded on to the effect of regulating the right of the parties after its termination, the reclaimer was in virtue of its terms in the same position as an outgoing tenant at the natural termination—*Lyon & Co. v. Irvine*, February 13, 1874, 1 R. 512, 11 S.L.R. 249. That was the obvious meaning of the clause under which the lease had been brought to an end. If there was any ambiguity, the lease must be construed in favour of the operation of the ordinary rules of landlord and tenant. In any event, the tenant could not deprive himself of his common law rights to the prejudice of his creditors and for the benefit of the landlord. The construction of the clause contended for by the complainer could not receive effect, because it involved a security over moveables without possession—*M'Gavin v. Sturrock's Trustee*, *cit.* The case of *Moncreiff v. Hay*, December 6, 1842, 5 D. 249, was distinguishable, and in any event was open to question, as it really gave effect to a security over moveables without possession.

Argued for the complainer (respondent)—It was not disputed that at common law a tenant was entitled to the crop he had sown, and that he might enter on the land for the purpose of reaping it. The sole question was whether that common law rule had been excluded by the terms of the lease, as could competently be done—*Moncreiff v. Hay*; *M'Gavin v. Sturrock's Trustee*, *per* Lord Kyllachy (Ordinary); *Lyon &c v. Irvine*, *cit.* Though the lease had come to end, the rights of the parties to it were regulated by its terms—*Moncreiff v. Hay*, *cit.* The terms of the irritancy clause here clearly excluded the tenant's common law right. The tenant could not ingather the crop he had sown without being in possession and so violating the stipulation in the lease. The concluding words of the clause in question were not inconsistent with the rest of it, they only provided that on the tenant's bankruptcy the relation of landlord and tenant was to determine absolutely. The construction contended for by the reclaimer could not be sustained, because it was impracticable that a tenant whose tenancy ceased between the terms was to have the same rights as an ordinary way-going tenant at the natural termination.

At advising—

LORD LOW—The complainer in this note of suspension and interdict is the sole acting trustee under the trust-disposition and settlement of the deceased Mr Chalmers of Aldbar, and the respondent is the trustee on the sequestrated estate of Stewart Dick, who was tenant of Broomknowe, one of

the farms on the Aldbar estate, under a lease for nineteen years from Martinmas 1906, which was granted to him by the complainer and another gentleman who was then also one of Mr Chalmers' trustees.

Dick became bankrupt on 20th April 1908, and in terms of the lease his tenancy then came to an end, and the question which we have to determine is whether Dick or his trustee was entitled to the corn crop of 1908 which had been sown prior to the date of the bankruptcy, and the hay crop of the first year's grass?

The answer to that question depends upon the construction of the clause in the lease which provides for the event of the tenant's bankruptcy.

The clause is in the following terms:—
[His Lordship read the clause, quoted supra, in rubric.]

That is an unusually stringent clause, but the reclamer (the respondent in the suspension) maintained that it did not deprive the tenant of his right to the crops in the ground when the bankruptcy occurred.

The general rule of law is that he who sows a crop is entitled to reap it, but that right may be modified or taken away altogether by contract between the landlord and the tenant. The complainer argued that the declaration in the clause to the effect that in the event of his bankruptcy the tenant should no longer have power to possess the farm, and that the proprietor should be entitled to re-enter and resume possession thereof, was quite distinct and unambiguous, and was inconsistent with the claim that the tenant was nevertheless entitled to retain possession of the land under crop until it was ingathered.

The argument of the reclamer on the other hand was to the following effect—The right which a tenant had in a crop which he had sown was a right of property and formed part of his moveable estate. That was laid down by Mr Erskine, who said (Inst. ii, 2, 4) that annual fruits which require yearly seed and industry, as wheat, barley, &c., are not deemed *partes soli*, but "are accounted moveable even before separation, from the moment they are sown or planted." That being so, it was argued the tenant had as much right to enter the lands after the termination of his tenancy, for the purpose of ingathering his crops, as he admittedly had for the purpose of removing cattle or implements belonging to him. The clause in the lease did not deprive him of that right, but merely stipulated that in the event of his bankruptcy neither he nor his creditors should continue to carry on and manage the farm. The sole object of the clause was to protect the proprietor against that contingency, and not at all to penalise the tenant by depriving him of anything upon the farm which was his property.

I confess that I was much impressed by that argument, but upon consideration I am satisfied that it cannot be sustained. I agree with the view expressed by the Lord Ordinary that a tenant's right to reap a crop which he has sown is not properly a

right of property. The crop until separation is not the moveable property of the tenant, and I do not think that Mr Erskine intended to affirm that it was so. The crop is *pars soli*, but the law recognises the right of the tenant who has sown it to separate it from the soil, unless he has contracted not to do so. Now the right to reap the crop involves the possession of the land upon which the crop is sown until it is reaped. It is plain that no one else can have any possession whatever of that land until the crop is reaped, and the tenant's right is not merely to enter the land when the crop is ripe for the purpose of reaping it, but to attend to it during its growth, and to perform any agricultural operations which may be necessary. It seems to me that such possession by the tenant after bankruptcy would be contrary to the stipulation in the clause "that it shall not be in the tenant's power to continue any longer in possession of or carry on and manage the said farm and others . . . and the proprietor shall be entitled to re-enter and resume possession of the said farm or to re-let the same." These words are distinct and unambiguous, and their natural meaning is that after bankruptcy the tenant shall have no right to possess any part of the farm, and that the proprietor shall be entitled to resume possession of, or re-let, the whole farm.

After the words which I have quoted, however, the clause concludes with certain words which are not altogether free from ambiguity. These words are—"In like manner as if this lease had come to its natural termination."

Now I read the words "natural termination" as meaning the termination of the lease by the expiry of the period for which the lands were let, as distinguished from the case of the lease being brought to an end during the currency of that period. The right of the proprietor, therefore, to resume possession is, as I read the words, to be exactly the same in the event of the tenant's bankruptcy as it would have been if the lease had run its course and come to an end by the expiration of the period for which the lands were let. I cannot read the words as meaning anything else, but if that be their meaning it is necessary, in order to ascertain what their effect is, to go to the lease and see what would have been the rights of landlord and tenant respectively at the stipulated time.

I therefore turn to the lease, and I find that at the Martinmas term, when the duration of the lease expires, the tenant's right of possession comes wholly to an end, and the landlord or incoming tenant is entitled to take possession of the whole subjects without exception or reservation. Thus the tenant is taken bound to leave the turnips of the last crop in the ground, he being paid therefor at a valuation which is to be made in or before the first week in November, and it is also provided that the landlord or incoming tenant shall be entitled to enter into possession of each field of the farm whenever the last crop shall have been led in, and shall likewise

have right to the necessary accommodation at the steading for his men and horses. It would be difficult to frame conditions better fitted to secure that when the stipulated termination of the lease arrived the possession of the outgoing tenant should be absolutely at an end.

The result is that the concluding words of the clause are in no way inconsistent with, nor do they modify, those which precede them. On the contrary, they show that the declaration that the tenant is not, and that the proprietor is, to be entitled to possession of the farm after the tenant's bankruptcy is to be read literally and according to the natural signification of the language used.

Accordingly I am of opinion that the conclusion at which the Lord Ordinary has arrived is right.

LORD ARDWALL—The facts of this case are very clearly set forth in the Lord Ordinary's interlocutor, and it is unnecessary to recapitulate them. The decision of the question between the parties depends upon the effect to be given to the clause of the lease which is quoted at the commencement of the Lord Ordinary's interlocutor.

I agree with the Lord Ordinary's interlocutor and opinion and have little to add. Clauses such as that under discussion are of frequent occurrence in agricultural leases, and numerous samples of them are given in the first volume of the Juridical Styles, and specimens are also given in Professor Rankine's work upon Leases, second edition, p. 489 *et seq.*

It being the common law, as is pointed out by the Lord Ordinary, that neither the insolvency of a tenant nor his notour bankruptcy, nor sequestration, nor *cessio*, nor the granting of a trust deed for creditors, gives the landlord a right to annul the lease, these clauses were introduced in order to enable proprietors to get rid of insolvent tenants or their trustees, and such clauses may be commended on grounds of public policy, as it is certainly not for the benefit of the country at large that farms should be carried on by such persons. They have frequently been under the notice of the Court and have been recognised as perfectly legal. The case of *Lindsay v. Hogg*, 17 D. 788, may be referred to as an instance of this clause being recognised. At the same time there are hardly any cases where questions have been raised as to the respective rights of landlords on the one hand, and insolvent tenants or their trustees on the other, with regard to growing crops. It appears to me that the stipulations in the lease to the effect that in the event of the tenant's bankruptcy and in the option of the landlord (1) the lease is to become null and void; (2) the tenant is to be excluded from the possession and management of the farm either for his own or for his creditors' behoof; and (3) the proprietor is to be entitled to resume possession of the farm and to re-let the same—amount to this, that on the declaration of the option by the landlord, the tenant or those representing him cease

to have any rights in or to the farm, or to any crops growing thereon, at whatever stage the same may be. I attach little importance to the last part of the clause, "as if this lease had come to its natural termination." I think this is an unnecessary clause and intended to be exegetical of the clause which immediately precedes it, and means nothing more than that the landlord is to have the same right to re-let the farm as if, instead of having been cut short, the lease had gone on to its natural termination.

I agree with the observation of the Lord Ordinary regarding the mutual effect of the irritancy of the lease being declared, so that neither the landlord can claim rent on the one side nor the tenant nor his trustee claim the usual benefits of an outgoing tenant on the other. I also express my concurrence with the Lord Ordinary's remarks on the cases of *Moncreiff v. Hay*, 5 D. 249, and *M'Gavin v. Sturrock*, 18 R. 576.

The respondent will be entitled to remove the stock and implements on the farm which were the property of the bankrupt tenant, but with regard to growing crops these are *partes solæ*, and if by the terms of the contract between the parties all right which the tenant had in or to the soil is now null and void, it appears to me that he cannot claim any growing crop in virtue either of the rule of law embodied in the brocard *messis sementem sequitur* (which I may remark is a rule primarily applicable to the rights of *bona fide* possessors and not to those of defaulting tenants), nor can he claim them in respect of any custom or usage in favour of outgoing tenants.

I am accordingly of opinion that the interlocutor of the Lord Ordinary ought to be adhered to.

LORD DUNDAS—I am of the same opinion. We have here no dispute about the general law as to the respective rights and obligations of a landlord and an outgoing tenant at the expiry of a lease, or the ordinary meaning and application of the maxim *messis sementem sequitur*. The question turns entirely upon the proper construction to be put upon a somewhat peculiar, and very stringently expressed clause in this lease which is fully quoted in stat. 2 upon the record. It is not doubtful that the common law of the land relating to these matters may be varied or ousted by pactional stipulation; and what we have to decide is how far the common law has, by the terms of the lease before us, been effectually altered. The clause in question, apart from its last thirteen words, is perfectly plain and unambiguous; and if they were disregarded I think there could be no doubt that the landlord's contention is right. These last words, however, formed the subject of much argument by counsel for the parties; but I have come to be satisfied that their true and proper meaning is that which has been explained by my brother Lord Low; and that they are, therefore, absolutely consistent with the rest of the clause, and indeed conclude the

matter in the landlord's favour. Even if his Lordship's construction of the words in question were not adopted, it would, I think, be in any view impossible to read them as overriding and contradicting the plain language which precedes them.

We were referred to some reported decisions; but one does not derive much help from them, because, as I have already said, the case turns upon the true construction of the particular clause in question. Thus *Moncreiff v. Hay* (1842, 5 D. 249), founded upon by the Lord Ordinary, is no doubt an illustration of a pactional alteration or exclusion of the common law; but the language of the lease there under consideration was, though similar to, not identical with that of the lease now before us. Again, the case of *Lyon v. Irvine* (1874, 1 R. 512), upon which the reclaimer's counsel relied, seems to have no application here. The landlord, Mr Forbes Irvine, failed upon a technical but fatal point (arising from the form of procedure he had adopted), which was thus tersely stated by the Lord President—"The regulations" (*i.e.*, the regulations of the estate of Drum) "do not permit of instant removing, and this decree is for instant removing." The technical flaw in Mr Irvine's original application was incurable by this Court, and he failed accordingly.

It occurs to me to add, with reference to part of the arguments of counsel, that in a case of this kind, while considerations of alleged hardship arising to one or other of the parties may be relevant in construing ambiguous phrases in a lease, they can be of no importance, and are indeed incompetent, if the Court holds the language of the document to be fairly capable of only one construction. This view has been often judicially enunciated—for example, in the case of *Moncreiff v. Hay*, above referred to.

The LORD JUSTICE CLERK concurred.

The Court adhered.

Counsel for the Complainer (Respondent)
— M'Clure, K.C. — Hon. W. Watson.
Agents—Lindsay, Howe, & Company, W.S.

Counsel for the Respondent (Reclaimer)
— Constable, K.C. — Hamilton. Agents—
Sharpe & Young, W.S.

Thursday, March 18.

SECOND DIVISION.

(SINGLE BILLS.)

WHITE v. ROTHESAY TRAMWAYS COMPANY, LIMITED.

Process—Appeal from Sheriff Court—
Failure to Box Prints—Motion to Repono
—A. S., 10th March 1870, sec. 3 (1) and (3).

In an appeal from the Sheriff Court, the appellant having failed to box the prints until the day after the expiry of the fourteen days allowed by the Act of Sederunt of 10th March 1870, sec. 3 (1), moved, under sec. 3(3), to be reponed, and explained that the failure to lodge

the prints timeously was due to a change of agency, and that the Edinburgh agent, first instructed by the pursuer's local agent, had returned the case without having taken any steps, when it was too late to instruct another Edinburgh agent and to get the papers printed and boxed in time. The Court reponed the appellant on payment of two guineas of expenses.

The Act of Sederunt of 10th March 1870 enacts, section 3—" (1) The appellant shall during session, within fourteen days after the process has been received by the Clerk of Court, print and box the note of appeal, record, interlocutors, and proof, if any . . . And if the appellant shall fail, within the said period of fourteen days, to print and box . . . the papers required as aforesaid, he shall be held to have abandoned his appeal, and shall not be entitled to insist therein except upon being reponed as hereinafter provided. . . . (3) It shall be lawful for the appellant within eight days after the appeal has been held to be abandoned as aforesaid, to move the Court . . . to repono him to the effect of entitling him to insist in the appeal, which motion shall not be granted by the Court . . . except upon cause shown, and upon such conditions as to printing and payment of expenses to the respondent or otherwise as to the Court . . . shall seem just."

The pursuer in an action of damages in the Sheriff Court at Rothesay appealed against an interlocutor of the Sheriff-Substitute there (MARTIN) assoilzieing the defenders. The process was received on 2nd March 1909, but the papers were not printed and boxed till the 17th March. The appellant moved in the Single Bills to be reponed, and explained that the pursuer's local agent had instructed an Edinburgh agent in the appeal, who took none of the steps required, and then returned the case at such a time as made it impossible for the local agent to instruct another Edinburgh agent and get the papers printed and boxed within the time allowed. He argued that these facts constituted cause shown within the meaning of the Act of Sederunt, and cited *Greig v. Sutherland*, November 3, 1880, 8 R. 41, 18 S.L.R. 39; *Boyd, Gilmour, & Company v. Glasgow and South-Western Railway Company*, November 16, 1888, 16 R. 104, 26 S.L.R. 84; *Donald v. Irvine*, March 17, 1904, 6 F. 612, 41 S.L.R. 420; *Nisbet v. Corrance*, July 15, 1905, 13 S.L.T. 287.

The respondent argued that the excuse offered was insufficient, and cited *Taylor v. Macilwain*, October 18, 1900, 3 F. 1, 38 S.L.R. 1; *Bennie v. Cross & Company*, March 8, 1904, 6 F. 538, 41 S.L.R. 381.

The Court reponed the appellant on payment of two guineas of expenses.

Counsel for the Pursuer (Appellant)—
Forbes. Agent—Andrew Gordon, Solicitor.

Counsel for the Defenders (Respondents)
—Munro. Agents—St Clair Swanson &
Manson, W.S.