COURT OF SESSION.

Thursday, March 13.

SECOND DIVISION.

[Lord Ormidale, Ordinary.

FLETCHER *v.* ROBERTSON.

Arbitration — Lease — Waygoing — Valuation of Sheep Stock — Jurisdiction of Arbiter — Bona Fide Sheep Stock — Reduction of Award—Personal Bar.

A reference was made to arbiters to determine the amount payable by a landlord to his tenant in respect of "the whole of the sheep stock bred and on the farm" belonging to the tenant, "the sheep stock delivered to be the *bona fide* stock of the farm." The landlord took over the sheep stock on the farm at the Whitsunday term, and proceeded to deal with it as if it were his own, selling part of it. The valuation of the oversman was not made till November, and the award was not issued till January of the following year. The landlord subsequently brought an action of reduction of the decree-arbitral in which he averred that the stock so handed over and valued was not the *bona fide* stock of the farm, in respect that though it remained about the same in number, the proportion of ewes to wedders in it had been changed from about two to one to about ten to one, which was much in excess of what the farm could carry over a whole season, and that in including it in his valuation the arbiter had acted *ultra fines compromissi*. *Held* that the pursuer having full knowledge of the nature of the stock that was tendered to him, and having accepted the stock and dealt with it as if it was his own, was barred from objecting to the award of the oversman.

Arbitration—Lease—Valuation of Sheep Stock—Canon of Valuation—Market Prices—Acclimatisation Value.

A reference was made to arbiters to determine the amount payable by a landlord to his tenant in respect of the value of the *bona fide* sheep stock of the farm, the value "to be determined by the average of the prices at which sheep of the same ages and quality may have been sold at Inverness July market and the Falkirk August and September trysts of the current year." At the date of the valuation the Falkirk trysts had ceased but the Inverness market remained. The oversman having issued his award, the landlord brought an action of reduction thereof, in which he averred that the arbiter had not determined the valuation by the market price, but had taken into consideration a factor for which no provision was made, viz., acclimatisation value. *Held* that the pursuer was entitled to a proof of these averments.

James Douglas Fletcher of Pitmain, Inverness-shire, *pursuer*, brought an action against Donald Robertson, farmer, Kerrow, Kingussie, on the estate of Pitmain, and Robert Macdiarmid, farmer, Corries, Loch Awe, *defenders*, in which he sought reduction of an award in a decree-arbitral pronounced by the second-named defender as oversman in a reference between the pursuer and the first-named defender with regard to the value of the sheep stock to be taken over by the pursuer from the first named defender's farm at the expiry of his tenancy. Defences were lodged by Mr Robertson.

The following *narrative of the facts* of the case is taken from the opinion of the Lord Ordinary (ORMIDALE):—"Mr Fletcher of Rosehaugh purchased the estate of Pitmain, which includes the farm of Kerrow, from Mr Baillie of Dochfour at Whitsunday 1913. Under the minute of sale he undertook to relieve Mr Baillie of 'the obligations contained in the leases to take over from the outgoing tenants at the expiry thereof sheep stock, crop, dung, and others.' The farm of Kerrow, which is situated near Kingussie, in the county of Inverness, consists chiefly of hill grazings, and had been let to Mr Donald Robertson on a nineteen years' lease, with entry at Whitsunday 1906, and with breaks at 1911, 1916, and 1921. At his entry Mr Robertson took over the sheep stock which belonged to the previous tenant at valuation, in accordance with the obligation to that effect contained in his lease. That obligation is quoted at length in condescendence 4 of the action subsequently raised by Mr Fletcher. It contains, *inter alia*, the following clause—'It being understood that the stock so to be given and taken shall *bona fide* be the stock of the farm, and declaring also that as the said Donald Robertson hereby binds himself and his foresaids to take over said sheep stock at his ingoing as aforesaid, he or they shall in like manner at his or their outgo be relieved of said *bona fide* sheep stock by the proprietor or incoming tenant at the valuation of two persons of skill mutually chosen as aforesaid, or by an oversman appointed as aforesaid, said arbiters or oversman in determining the value of said sheep stock having regard to the prices at which sheep of the same ages and quality may have been sold at Inverness July market and the Falkirk August and September Trysts of the year of outgo.' Mr Fletcher having given notice to Mr Robertson to quit at Whitsunday 1916, he removed from the farm at that term, and a minute of agreement, submission, and reference was entered into for the purpose of ascertaining the value of the sheep stock and others to be taken over by Mr Fletcher in terms of the lease. The minute proceeds on the recital that Mr Robertson is entitled under his lease to be paid for 'the whole of the sheep stock bred and on the farm belonging to the first party, the sheep stock delivered to be the *bona fide* stock of the farm, and the value thereof to be determined by the average of the prices at which sheep of the same ages and quality may have been sold at Inverness July market and the Falkirk

August and September trysts of the current year.' Two farmers are then appointed arbiters and valuators, with the usual powers to them to name an oversman in the event of their differing in opinion, 'and with power to the said arbiters and valuators or their said oversman to ascertain and determine what sums are payable by' Mr Fletcher to Mr Robertson 'in respect of . . . (*sixth*) the *bona fide* sheep stock of the farm. . . .' The minute was executed on the 26th and 29th May 1916. On or about the latter day the arbiters and oversman visited and inspected the crops, fences, &c., and saw the sheep counted over to Mr Fletcher's servants. Under a power conferred on them by the minute of submission the arbiters instructed a payment of £2500 to be made to Mr Robertson on account of the price of the sheep. This payment was duly made. Thereafter the arbiters, having failed to agree, devolved the whole reference upon Mr Macdiarmid, farmer, Gollanfield, Inverness-shire, the oversman appointed by them. On 23rd January 1917 Mr Macdiarmid issued his award. By it he found, *inter alia*, 'the price or value and sum payable' by Mr Fletcher to Mr Robertson 'for the sheep stock bred and on the farm, and the *bona fide* stock of the farm, and delivered to' Mr Fletcher 'to be £4170, 2s. 1d.' On 16th June 1917 Mr Fletcher brought the present action against Mr Robertson and Mr Macdiarmid to have the award of the latter reduced *in toto*, or, alternatively, in so far as it fixes the price payable by the pursuer to Mr Robertson for and in respect of the sheep stock."

The pursuer set forth, *inter alia*, two grounds of reduction, which he stated in the following pleas-in-law—"4. The finding as to the prices of sheep stock having been pronounced without regard to the average prices at the markets named in the lease, the same ought to be reduced. 5. The sheep stock presented by the first-named defender for valuation not being the *bona fide* sheep stock of the farm, the finding complained of was *ultra vires* of the oversman, and the award should be reduced as concluded for."

On 8th January 1918 the Lord Ordinary dismissed the action. In his opinion he reached the conclusion as regards the ground of reduction stated in the pursuer's fourth plea-in-law that the pursuer's averments with reference thereto were irrelevant, and as regards the ground of reduction stated in the pursuer's fifth plea-in-law that the question was duly submitted to the oversman and was finally decided by him. The pursuer reclaimed.

At the hearing in the Inner House the pursuer amended his record, which was subsequently reprinted.

In the record as amended the parties averred, *inter alia*—"(Cond. 7) The sheep stock presented by the first-named defender for valuation at his outgoing in 1916, although not greatly different in number from the stock delivered to him at his entry to the farm in 1906, was entirely different therefrom in character. When the first-named defender entered the farm the stock was substantially divided between a ewe stock and a wedder stock in the proportion of roughly two to one. At his waygoing in 1916 the number of ewes and ewe hoggs had increased by over 300, and the number of wedders had diminished by more than 350, and the proportion of females to males was at the waygoing about ten to one. . . . The said stock was much in excess of what the farm could carry over a whole season. (Cond. 8) When the sheep stock on the farm was handed over to the pursuer's servants on 28th May 1916 the fact of the conversion by the first-named defender of the sheep stock to what was practically a ewe stock . . . had not been ascertained by and was not known to the pursuer. When the pursuer ascertained the change made upon the stock he intimated to the first-named defender that he took exception to the nature of the stock handed over in respect that it or part of it did not form the *bona fide* stock of the farm in the sense of the lease. The explanation in answer that prior to the valuation the pursuer's factor was well aware that the stock was principally a ewe stock is denied. (*Ans.* 8) Denied. Explained that prior to the pursuer's taking over the stock the pursuer's factor was well aware that the stock was principally a ewe stock, and that no objection was stated by the pursuer to the nature of the stock until several months after the handing over of the same to him. The pursuer has followed the same system of farming as that adopted by the defender. . . . (Cond. 10) The reference proceeded before the said oversman, and upon 23rd January 1917 he issued the pretended final award which is under reduction. In the said award the second-named defender found the sum payable by the pursuer to the first-named defender for the *bona fide* stock of the farm to be the sum of £4170, 2s. 1d. sterling, as specified in the schedule thereto annexed. The stock so valued by the oversman included the whole stock handed over to the pursuer. In finding that the whole sheep stock delivered to the pursuer was *bona fide* stock of the farm the said oversman was in error, and in including in his valuation sheep stock which was not the *bona fide* stock of the farm he acted *ultra fines compromissi*. (*Ans.* 10) Admitted that the reference proceeded before the oversman, that upon 23rd January 1917 he issued his final award, which is referred to for its terms, and that the stock valued was the whole stock taken over by the pursuer. *Quoad ultra* denied. Explained that the pursuer took over as in pursuance of the lease the whole sheep stock and retained and used or disposed of it as being his own property. Further, he took no steps to interdict the arbiters and oversman from proceeding with the arbitration, or to raise an action of declarator to determine what was the *bona fide* sheep stock which he was bound to take over at prices to be fixed by valuation under the lease. . . . (Cond. 11) Further in his said award the oversman disregarded the basis and method of valuation prescribed by the submission. It is believed and averred that he made no inquiry with regard to the prices realised for sheep stock of a similar quality at the Inverness July markets, and that in fixing the value of the sheep stock

he paid no regard to such prices or to any market prices. In any case the values fixed by him were not in terms of the submission determined by such prices. On the contrary, he included in his valuation a substantial allowance for acclimatisation value. In so failing to take market prices as determining his valuation, or otherwise in so disregarding market prices, and also in so making an allowance for acclimatisation value, the oversman acted contrary to the submission, and his award is *ultra fines compromissi*. (Cond. 12) . . . The expense of keeping the sheep stock between the date of delivery on 28th May 1916 and the term of Martinmas 1916 was borne entirely by the pursuer, who in order to reduce the number of stock on the farm to what it would reasonably carry all the year round caused the following stock from it to be sold at Macdonald, Fraser, & Company's mart at Kingussie on or about 26th August 1916:—126 ewes, 98 do., 50 gimmers, 96 do., 60 wedders. In addition to the above clearance the pursuer removed a considerable number of the ewes to farms on his estate of Rosehaugh in Ross-shire."

The following pleas-in-law were substituted for those above quoted:—"4. The oversman having disregarded the basis of market price prescribed by the submission for the valuation of the sheep stock, *et separatim* having unwarrantably included an allowance for acclimatisation value, the award is *ultra fines compromissi*, and ought to be reduced. 5. The oversman having included in his valuation stock which was not the *bona fide* sheep stock of the farm, the award is *ultra fines compromissi*, and should be reduced as concluded for."

The defender *pleaded, inter alia*—"1. The pursuer is barred by his actings from maintaining that the sheep stock was not such as he was bound to take over under the lease. 2. The averments of the pursuer being irrelevant and insufficient to support the conclusions of the summons, the action should be dismissed. 3. The award not being *ultra vires* of the oversman or *ultra fines compromissi*, the pursuer is not entitled to reduction thereof. 4. The whole proceedings in the arbitration having been regular and legal, the defenders should be assoilzied."

Argued for the pursuer and reclaimer—All that was remitted to the arbiter was to value the *bona fide* stock of the farm, and the pursuer was entitled to prove *prout de jure* what the *bona fide* stock was. The arbiter was the final judge of the amount of compensation, but he was not the final judge of what the subject of compensation was—*Alexander* v. *Bridge of Allan Water Company*, 1869, 7 Macph. 492. The landlord in terms of the lease was not bound to take over more than the average amount of stock that the farm could carry through the year—*Duke of Argyll* v. *MacArthur's Trustees*, 1889, 17 R. 135, 27 S.L.R. 87. The tenant had no right to alter the system of the farm till the end of the lease, and the landlord's factor's knowledge of any alteration could not bar him from his rights. Though delivery was given at Whitsunday the valuation was not made till Martinmas, and the landlord could not do anything till then. It might be difficult to apply the principle of valuation required to stock no longer in existence, but it was not impossible. The oversman was still available for the purpose and could not be regarded as *functus*—*Miller & Son* v. *Oliver & Boyd*, 1903, 6 F. 77, 41 S.L.R. 26.

Argued for the defender and respondent—The pursuer had accepted the sheep without protest, and was barred, after they had been taken over and some sold, from raising objections to what was patent to him from the first, that they were not the sheep which he averred he was bound to take over. He did not aver fraud or any latent ground of objection. It was only when he discovered that the prices were higher than he expected that he sought to reduce the award, and that after the situation had been entirely altered. *Restitutio in integrum* had now become impossible—*Boyd & Forrest* v. *Glasgow and South-Western Railway Company*, 1915 S.C. (H.L.) 20, *per* Lord Atkinson at p. 29, 52 S.L.R. 205. In any event there was no relevant averment that the sheep were not the *bona fide* sheep stock of the farm.

LORD JUSTICE-CLERK—This case has had a somewhat long career before us. The Lord Ordinary's interlocutor, which was originally reclaimed against, was pronounced on 8th January 1918; the reclaiming note was partly heard before us, and the pursuer was then allowed to amend his record. The result of his proposed amendments was that the record was very seriously altered, the compearing defender was allowed to answer, and we ultimately ordered the pursuer to reprint the new record. We put the case out for further hearing, and that has now been completed.

There are only two questions before us. The first relates to what is called the *bona fide* stock on the farm, the second to the method of valuation which the arbiter adopted, and to his having taken acclimatisation value into account in making his valuation. With regard to the first of these questions I am of opinion that the pursuer has not even now stated relevant averments, and I am more clearly of opinion that even if he had he is barred or excluded from raising his present contention by what has taken place as to the stock.

The pursuer is proprietor of the farm of Kerrow, which is part of the estate of Pitmain, and was bought from Mr Baillie of Dochfour, with entry at Whitsunday 1913. The defender Mr Robertson was the tenant of the farm on a nineteen years' lease. His tenancy began in 1906, but there were breaks in the lease. One of them occurred at Whitsunday 1916, and Mr Fletcher, the proprietor, who by that time had been three years in possession of the estate, thought that he ought to take advantage of the break in 1916, and accordingly he gave intimation to Mr Robertson that he would then resume possession of the farm, and he did so. By that time the sheep stock, so far as it had been sent away for wintering, had been returned to the farm, and the pursuer took possession of it, though it did not fall to be paid for until Martinmas 1916.

A deed of submission dated in May 1916 was entered into, under which arbiters and an oversman were appointed to value the sheep stock. The pursuer makes certain allegations as to the quality of the stock, in view of the provision in the deed of submission that what was to be valued was the *bona fide* sheep stock on the farm. He says that whereas originally this sheep stock had consisted to a large extent of wedders, in the course of management followed by the defender Robertson during his occupancy of the farm the character of the stock had been changed from a wedder to a ewe stock, or at least from substantially a wedder stock to much more substantially a ewe stock. Whatever its quality, the whole stock was on the ground at Whitsunday, the portion of the stock which had been sent away for wintering having by that time been returned.

The pursuer alleges that at the defender's waygoing in 1916 "the number of ewes and ewe hoggs had increased by over 300, and the number of wedders had diminished by more than 350, and the proportion of females to males was at the waygoing about ten to one," whereas the original stock was substantially, as between ewe stock and wedder stock, in the proportion of two to one. He further avers that the stock was much in excess of what the farm could carry over a whole season. The pursuer's averments in this part of the case are these—"Owing to this manipulation by the defender of the sheep stock on Kerrow and the use he made of that farm as mainly a summer grazing, he was able to increase greatly the number of sheep of the ewe class presented for valuation. A very large proportion of the stock presented had been away from the farm for a period of seven months or more. A large part of the ewe stock had been tupped away from the farm, and some of the ewes had lambed before being brought back to Kerrow to be delivered. The sheep so brought back to Kerrow for the summer grazing were more the product of the low ground in which the pursuer has no interest than the product of Kerrow. In appearance and condition they were entirely different from what they would have been if they had been wintered at Kerrow, and in no sense could they be described as the *bona fide* stock of that farm. To the extent to which the stock exceeded what the farm could reasonably carry over the whole season the arbiters and oversman were not entitled to include them in their award."

The position, therefore, as it seems to me, was that the pursuer at the time he took over the sheep stock—I am inclined to think from the time shortly after he entered into possession of the estate—must have known what the character of the sheep stock was, either by himself personally or by those who were responsible for looking after his affairs there. At any rate his averment is what I have just read, and it must have been quite plain to him long before 16th November, when the valuation of the oversman took place, and indeed long before June 1916, when the interim decree-arbitral, which did not deal with the sheep stock at all, was pronounced, that what he was getting was nothing like a stock which consisted of wedders in the proportion of one wedder to two ewes, but was a stock in which the proportion of females to males was about ten to one. He also frankly admits, as I read his averment, that the appearance and condition of the stock at the time—Whitsunday—was such as to show quite clearly that it had not been wintered at Kerrow, and according to his contention could in no sense be described as the *bona fide* sheep stock of the farm.

But he proceeded to deal with the stock handed over to him as if it had been properly submitted to him for acceptance and had been accepted by him as his own stock. In answer 10 the defender says—"That the pursuer took over, as in pursuance of the lease, the whole sheep stock, and retained and used or disposed of it as being his own property." In his condescendence what the pursuer says is this—"The stock so valued by the oversman included the whole stock handed over to the pursuer." That seems to me exactly to carry out what was intended. He further says—"In finding that the whole sheep stock delivered to the pursuer was *bona fide* stock of the farm, the said oversman was in error, and in including in his valuation sheep stock which was not the *bona fide* stock of the farm he acted *ultra fines compromissi*." Probably this statement was meant to be an averment that the oversman did decide that the stock valued was the *bona fide* stock of the farm, but it does not say so. It is significant that while in various articles of his condescendence the pursuer puts in an answer dealing with the averments of the defender, he does not do so in condescendence 10, but leaves answer 10 without any reply.

It seems to me that the pursuer accepted this stock, dealt with it, sold it, and in every way treated it as if he had received it as part of the stock which he was bound to take over. If he did not accept it as part of the stock he had no right or power to deal with it at all. It was tendered to him as such stock; I think he accepted it as such stock; and it is too late now, after the arbiters and oversman have considered the matter, after a decree-arbitral has been pronounced, and after the stock has been dispersed and sold, to go back upon the question. That would involve a very serious investigation as to the character of this stock and as to whether it could be held to be the *bona fide* sheep stock of the farm in the sense of the lease. I am of opinion on this first point that the pursuer has not made relevant averments. While he says in condescendence 9 that questions arose in the course of the arbitration, he does not say that this question was ever raised before the oversman at all.

On the whole matter I think that the pursuer's averments in this part of the case are wanting in specification and relevancy, but even if they had been specific and relevant enough he has precluded himself from asking for the reduction of the award on that ground. No proof therefore should be allowed on this branch of the case. In reaching this conclusion I do not proceed upon the ground

adopted by the Lord Ordinary in so far as he says that this question was submitted to the oversman and finally decided by him. In my judgment the question was not submitted either to the arbiters or to the oversman and was not dealt with by them. They accepted the position that the stock put before them was the *bona fide* sheep stock of the farm, but I do not think they gave any judgment on that question at all.

On the second question I am of a different opinion from the Lord Ordinary. The case as now presented is different from what it was before the Lord Ordinary, because in what is now condescendence 11 there are two averments which were only hinted at in the original record. These averments read —"In any case the values fixed by him (the oversman) were not in terms of the submission determined by such prices. On the contrary, he included in his valuation a substantial allowance for acclimatisation value." The submission clearly puts the point which was to be decided as being the value of the *bona fide* stock of the farm "to be determined by the average prices at which sheep of the same ages and quality may have been sold at Inverness July market and the Falkirk August and September trysts of the current year." The Falkirk trysts have disappeared, but there still remains the Inverness July market, and the terms of the clause cover that contingency, because what the arbiter is to hold as the determining factor in the valuation is the average prices at which sheep may have been sold in any of these markets, and if one of these markets disappears it simply falls out of the oversman's purview and the average prices are to be obtained from the market that remains. If the Inverness market had also disappeared a difficult question might have been raised, but we are not required to consider it here, for the Inverness market still survives.

The pursuer's allegation is that market price is the sole determining factor of value which the arbiter is bound to follow. He avers that the arbiter did not determine the valuation by that factor, but added an element of valuation for which no provision at all was made, namely, a substantial allowance for acclimatisation value. If acclimatisation value were a factor in fixing the market price—I confess I do not think it could be—it would appear in the market price. If it did not appear in the market price, then in my judgment the arbiter was not entitled to take it into account at all and to make a separate allowance for it.

Therefore, differing from the Lord Ordinary on this part of the case—but differing solely because the record has now been made relevant, as it was not in the Outer House—I think an allowance of proof should be made as regards these averments of the pursuer. The inquiry would be as to what were the prices of stock of the quality and character of the stock which was handed over in 1916 by Mr Robertson to Mr Fletcher so far as these were determined by the market prices at Inverness. Those prices having been ascertained no separate allowance should be given in respect of acclimatisation value. The proof to be allowed would bring out the facts bearing on the averments (1) that the oversman did not determine the value by the average prices at the Inverness July market, and (2) that he allowed a separate amount for acclimatisation value over and above the market prices. Accordingly I move your Lordships to allow a proof upon the second ground of reduction.

LORD DUNDAS—I am entirely of the same opinion. The Lord Justice-Clerk has so fully expressed the views I entertain of this case that it would be a sheer waste of time if I were to endeavour to repeat them in other language.

LORD SALVESEN—I agree on the first point. On the question of the *bona fide* stock I am not prepared to hold that the averments would have been irrelevant, but I am entirely of your Lordship's opinion that the pursuer has by his own actings put himself out of Court on this head. The pursuer having full knowledge of the nature of the stock that was tendered to him, and having taken over that stock and dealt with it as his own without protest, cannot now after the valuation has been made raise the question of whether the stock that was included was all *bona fide* stock.

On the second question I agree in all that your Lordship has said. I would only point out that provision should be made for the contingency that there may not have been market prices at the July market in Inverness which might be fairly comparable. It is conceivable that the oversman might say that no stock of similar quality was disposed of at the July market, and therefore that he was not able to carry out the views of the Court by reference to that limited standard. I agree that if there are two standards prescribed, and one of them has become inapplicable in consequence of the discontinuance of Falkirk trysts, the other if it exists and can be utilised to the full effect will probably regulate the prices which fall to be determined in terms of the lease. But it is also possible that even that standard may fail, and in that view it seems to me that we should leave open the question as to getting the nearest approximation of the standards prescribed by the lease if these have become obsolete or inapplicable from change of circumstances. Apart from making that suggestion I entirely agree with your Lordship in the chair. I think a standard was prescribed to the oversman, and there are relevant averments that he applied a different standard.

LORD GUTHRIE—On the first point I take the same view as Lord Salvesen. I am not clear that there is not a relevant averment apart from the question of bar to the effect that the sheep stock, looking to the previous state of the farm and to other considerations, was not a *bona fide* stock in the sense of the expression in *MacArthur's* case (17 R. 135, 27 S.L.R. 87, and was more than the farm could fairly carry. But it seems to me that the plea of bar on record is well founded, The Lord Ordinary did not require to consider that plea because he

decided the case on other grounds. The pursuer got possession in May, and proceeded without notice, and before he raised this question, to deal with the whole stock as if it were all stock that he was bound to take over. It is hopeless for him in these admitted circumstances to raise the question now. On the other point I agree with your Lordships.

The Court pronounced this interlocutor—

"Recal the interlocutor reclaimed against: Repel the fifth plea-in-law for the pursuer: Remit to the Lord Ordinary to allow to the pursuer a proof of his averments, but limited to the averments made on record as to the actings of the oversman in valuing the stock taken over by pursuer and as to the basis of valuation on which said oversman proceeded, whether he had regard to prices realised at Inverness July market or the Stirling and Perth markets referred to on record for stock of a quality and character similar to the stock taken over, and also whether he included in his valuation a separate allowance for acclimatisation over and above the prices realised at said markets: To allow to the compearing defender a conjunct probation, and to proceed in the cause as accords."

Counsel for the Pursuer (Reclaimer)—Constable, K.C.—D. P. Fleming. Agents—John C. Brodie & Sons, W.S.

Counsel for the Defender—Chree, K.C.—Macgregor Mitchell. Agents—Morton, Smart, Macdonald, & Prosser, W.S.

Friday, March 14.

SECOND DIVISION.

[Lord Ormidale, Ordinary.

GORDON *v.* JOHN LENG & COMPANY, LIMITED.

Process—Reclaiming Note—Competency—Court of Session (Scotland) Act 1868 (31 *and* 32 *Vict. cap.* 100), *sec.* 28.

Held that a reclaiming note against an interlocutor repelling a plea to the relevancy and assigning a diet for the adjustment of issues was competent without the leave of the Lord Ordinary. *Observed* that in cases where one of the parties pleads irrelevancy and the other desires trial by jury the Lord Ordinary ought to have the proposed issues before him at the discussion on the relevancy

Reparation—Slander—Innuendo—Newspaper—Officer—Surrender to the Enemy—Imputation of Failure in Duty as Soldier.

A newspaper published an article which bore to be a narrative of the experiences of a soldier, and which contained a statement, unfounded in fact, that an officer commanding a Highland regiment had ordered his men to throw down their arms in the presence of the enemy and surrender. In an action of damages for slander against the newspaper, the officer averred that any officer who gave his men such an order would fall to be tried by general court-martial in terms of Article 555 of the King's Regulations; that reports had been current for some time past, particularly in the area from which Highland regiments were recruited, with regard to the circumstances of the alleged surrender, reflecting injuriously on the conduct of the troops and the courage and capacity of their officers and especially of the officer in command; that these reports were well known to the defenders as a firm and individually at the date of publication, and that they knew the statements complained of to be false. *Held* (1) that the pursuer was entitled to an issue, and (2) (*dis.* Lord Salvesen) that the issue must set forth an innuendo; and issue approved containing innuendo that the statements complained of falsely and calumniously represented that the pursuer was the officer responsible for the surrender and that he had failed in his duty as a soldier.

Brevet-Colonel William Eagleson Gordon, V.C., Easter Moncreiffe, Bridge of Earn, *pursuer*, brought an action against John Leng & Company, Limited, *defenders*, for payment of £5000 in name of damages for slander. The pursuer founded upon an article in an issue of the *People's Journal*, of which the defenders were proprietors, dated 29th December 1917, which was in the following terms:—

"*Begin To-day these Thrilling Revelations.*

THE MOST DARING MAN IN HATED SENNELAGER.

What I Saw and Did in Hunland.

By Corporal George Mutch,

Gordon Highlanders.

"*A short time ago Corporal Mutch was doing punishment in the cells of Sennelager for his third unsuccessful attempt to escape. At his fourth attempt he succeeded in reaching Holland, and is now safe and sound at his home in Mintlaw, Aberdeenshire. In the following narrative this gallant soldier relates some of the amazing experiences that befell him during his three years in Germany. 'There is no doubt that you are the most daring man in Sennelager,' said the Commandant of that infamous German prison camp to Corporal Mutch when handing him over for trial by Court-Martial for 'insulting' a German sentry. His words were not new to the Gordon Highlander. He had long been recognised by his comrades and captors as the most adventurous spirit in the camp.*

"It's no use fighting any longer, men. It is only a useless sacrifice of life. We'd be better to put down our arms and surrender.'

"That day in September 1914, when Colonel Gordon, of the Gordon Highlanders, gave us the above order, was, I believe, the most eventful of my life, crowded with excitement though it has been during the past three years.