

Friday, May 26.

## SECOND DIVISION.

EDMOND V. REID.

*Landlord and Tenant—Lease—Condition of Residence—Irritancy.* A landlord stipulated in the lease that his tenant should reside personally on the farm. There was no clause of irritancy on failure to comply with that condition.—*Held* that, on the refusal of the tenant to reside, the landlord was entitled to bring the lease to an end.

The pursuer, Francis Edmond of Kingswells, let to the author of the defenders, Mrs Reid and her husband, the farm of Cairdhillock on lease for nineteen years from Whitsunday 1855. This lease contained a condition that the tenants must reside personally on their farm. The defenders had not complied with this condition, and stated that they did not intend in future to comply. The object of the action was to have it declared that the defenders had forfeited all right to the farm.

The Lord Ordinary (MURE) pronounced an interlocutor, in which he found "that the defender Mrs Reid has failed and refuses to obtemper the provisions and conditions of the lease entered into between the pursuer and the late John Low, to which she succeeded on the death of John Low in 1863, by residing personally, with her family, on the farm in question; therefore finds, decerns and declares, that the said defender has forfeited all right to the possession of the said farm, and croft and ground occupied therewith, and that the pursuer is entitled to enter upon the possession of and use the same, all in terms of the second conclusion of the summons: Finds the pursuer entitled to expenses, subject to modification, &c.

"*Note.*—1st, It is not without some hesitation that the Lord Ordinary has come to the conclusion that the pursuer is entitled to have the lease in this case declared forfeited. Because, since the marriage of the defender in the year 1864, down to the date of the present dispute, she appears to have resided constantly with her husband at the farm of Danestown, where they now live, with the knowledge and acquiescence of the pursuer; and in ordinary circumstances,—more especially when it is not alleged that any actual damage has been sustained through non-residence,—this might, it is thought, be held to amount to an abandonment, on the part of the landlord, of his claim to enforce stipulations as to personal residence during the few remaining years of a lease. But as it has been explained by the pursuer that this was done in continuation of an arrangement come to between him and the original tenant, to whom the defender succeeded, to the effect that so long as the defender's mother was personally resident upon the farm in question he would not object to the tenant residing elsewhere, it appears to the Lord Ordinary, now that the arrangement has come to an end by the death of Mrs Low, that the pursuer is not precluded from insisting upon the fulfilment, on the part of the defender, of the condition of the lease as to residence, which seems to have been waived by him in respect only of that arrangement.

"Dealing with the case then, on this footing, the weight of authority is, in the opinion of the Lord Ordinary, with the pursuer. It is not disputed that had there been a clause of forfeiture in the lease, the defender would in the circumstances have had

no good defence against this conclusion of the summons; and it seems to be settled law, where there is a clause in the lease requiring personal residence, that when the tenant goes abroad, though involuntarily, and hands over the cultivation of the farm to his family, who continue to reside there, the lease is void, although there is no clause of irritancy in it.—*Drummond*, 1806, M. App. "Tack," No. 6. In the present case however, the non-residence is not the involuntary act of the defender; and although there has not been an abandonment of the farm by the defender leaving the country, no reason has been assigned for her refusing to fulfil the obligation in the lease, except that she and her husband consider Danestown a more agreeable residence. They are quite free to live at the farm in question if they choose, because it appears from the husband's evidence that there is no clause in the lease of Danestown requiring the tenant to reside there. In these circumstances, the non-fulfilment of the obligation must, it is thought, be held to lead to the same results as in the case of *Drummond*; and it appears to the Lord Ordinary that there is authority for this in the case of *Wallace*, January 31, 1696, 4 B. S., p. 302. For, although there was no actual decision to that effect, it seems to be implied in the course there adopted by the Court, that if the order to reside in terms of the obligation was not obtempered, the charge would be allowed to proceed."

The defender reclaimed.

ADAM, BALFOUR, and J. J. REID, for her, argued,—the failure to comply with the condition of residence does not bring the lease to an end. A lease is a real right, and the ordinary rules of contracts do not apply to it. A special stipulation would be required to irritate a real right. A feuar who violates his feuing plan does not necessarily give rise to an irritancy. Other violations of the tenant would not imply an irritancy, such as failure to pay rent, miscropping, or failure to maintain his fences. E. 2. 6. 45; *Lennox*, M. 7206; *Rozburgh*, 7202; *Hamilton*, 8 D. 308; *Drummond*, M. App. Tack, 6; *Wallace*, Brown's Sup. 302, Hunter's Landlord and Tenant, p. 116.

The Solicitor-General (CLARK), WATSON, and ASHER for the respondent. A lease is really a consensual contract, and if one of the parties fails to perform his own part, he cannot compel the other to perform his. The tenant cannot found upon a contract of lease when he has not fulfilled his part. The quality of real right is merely the statutory right to remain in possession. *Delectus personæ* is essential to a lease, and if residence made a condition, the landlord is entitled on failure to comply to take proceedings to bring the lease to an end. *Dalhousie*, M. 1531; *Watson*, 13 Dec. 1811, F.C.

The Court unanimously were of opinion that the Lord Ordinary was right, and pronounced an interlocutor substantially adhering.

Agents for Pursuer—M'Ewen & Carment, W.S.  
Agent for Defender—James C. Baxter, S.S.C.

Saturday, May 27.

## FIRST DIVISION.

DOBBIE, PETITIONER.

*Arrestment, Loosing of—Bond—Judicial Factor.* A purchaser agreed with the seller of some houses that certain bonds over the property

should continue, but that he should relieve the seller of their payment. Six days before Whitsunday the seller demanded to be relieved of his liability under the bonds, and on a refusal he raised an action of relief, and two days before the term, arrested the rents. The purchaser offered to have a factor appointed to collect the rents, and, after payment of the interest due on the bonds, to allow the balance to be consigned in bank; but the seller refused this offer. The Court loosed the arrestments *simpliciter*, on the ground that the time of using the arrestments was peculiar, that the petitioner had made a reasonable offer, and that the respondent had refused it.

Dobbie bought from Duncanson, in October 1870, certain house property in Glasgow. Under the missives of sale it was stipulated that, "it being understood that there are bonds to the extent of £12,000 sterling over these properties, and which are supposed to remain on the security thereof, I hereby bind and oblige myself to pay you the sum of £4000 sterling, and to free and relieve you of the payment of the said sum of £12,000, making the price, as above stated, £16,000 sterling." About six days before Whitsunday 1871 Duncanson demanded to be relieved forthwith of his liability under the bonds by Dobbie's paying the bondholders, or him, or having himself made, *habili modo*, debtor in the bonds. This being refused, he raised a summons of relief, and, on the dependence of the summons, arrested the half-year's rents in the tenants' hands two days before Whitsunday. The summons was served on Whitsunday. The half-year's rents amounted to about £570, and the interest on the bond and feu-duty to about £320. Dobbie's law agents wrote to Duncanson that, "in order to save loss, we propose that you should concur with us in the appointment of a respectable house-factor to collect the rents falling due at this term; from which rents he should pay the present term's feu-duty and interests, and thereby so far relieve your client of liability under the bond—the balance of the rents to be consigned by him in bank, there to remain as a surrogatum for the sums arrested, subject to the orders of the Court, in all respects in the same way as if the rents had remained in the hands of the tenants." As Duncanson refused to agree to this proposal, Dobbie presented a petition for loosing of the arrestment, and prayed they should be loosed *simpliciter* because of his offer to have a factor appointed, and as none of the bondholders had required payment of the bonds, and the security of Duncanson was therefore unaffected. He also urged that several of the tenants were leaving to avoid paying their rents, and that he was not bound to pay the bonds unless the bondholders demanded payment of Duncanson. He therefore suggested that a judicial factor should be appointed. Duncanson pleaded, that as he was personally liable under the bonds he was entitled to relief—especially as further securities had been effected on the buildings—and that, though consignment was a proper course, the interest and feu-duty should not be deducted. He opposed the appointment of a factor, and urged it was not competent for the Inner House to make such an appointment, no action being actually in dependence, but stated he was willing that the arrestments should be loosed on the petitioner's getting him relieved of

liability under the bonds, or finding caution to a satisfactory amount, or consigning the sum of which relief was sought, with expenses.

SHAND and LORIMER for Dobbie.

BALFOUR and LEES in answer.

At advising—

LORD PRESIDENT—The petitioner's proposal to have a factor appointed appears to me to have been a very reasonable one. It was rejected by the other side, we must therefore be the more careful in considering the grounds upon which the arrestments were used. Mr Duncanson had been possessed of certain house property in Glasgow, which Mr Dobbie was willing to purchase. So they stood at the date of the missives of sale. The property was largely encumbered with debt, and it suited the convenience apparently of both parties that it should be conveyed by the seller, and accepted by the purchaser, without its being first disencumbered of this debt. This is made the subject of a special stipulation in the missives. It is thus made matter of arrangement between the parties that the debt is to remain on the security of the property, by which I understand that the bonds are to remain undischarged, and the purchaser undertakes to relieve the seller of the payment both of principal and interest. But that obligation surely refers to the time when payment is demanded. No doubt it is reasonable, after the transfer of property has been made, and the purchaser has entered into possession, that the seller should say, It is time now to change the personal liability under the bonds, and transfer it from me to you. But if he does propose it, there may be a very serious question raised as to the expenses to be incurred, with which question we have nothing to do. Now I shall not say anything here about the transaction previous to the arrestment of the rents, and should not have said so much, were it not indispensable for the disposal of the question before us, as to whether the arrestments were unreasonable or not. The time at which they were laid on is of importance. It was not till the 13th May, two days before the term, when it was almost certain, and especially in a house property of this nature in Glasgow, to be productive of embarrassment and loss to the persons whose rents were thus arrested. Farther, the diligence was only preceded by four days by any demand for payment, and that not from the parties in right of the bonds. This was a most strange course for Mr Duncanson to take; and, as the case stands, the arrestment must be loosed, and that *simpliciter*. I do not, however, wish to be understood as giving my opinion that they were nimious and oppressive, as that might be prejudging some other questions that may arise between the parties.

The other Judges concurred.

Arrestments *simpliciter* recalled.

Agent for the Petitioner—D. J. Macbrair, S.S.C.

Agents for the Respondent—Ronald & Ritchie, S.S.C.

Saturday, May 27.

SECOND DIVISION.

STEWART v. CLARK.

(Ante, p. 402.)

Reference to Oath. Damages being sought for breach of a parole agreement alleged to have