

a great many matters for the general behoof so as to promote the principal object of liquidation, viz., a realisation of the estate without delay and a *pari passu* ranking of the unsecured creditors. It was a legitimate course with this view that in the present instance the creditors by three-fourths of their number should agree that all should abstain from doing diligence, and if the arrangement founded on had been to that limited effect, and distinctly expressed, I see no reason to doubt it would have been effectual, although subject to appeal under section 137 of the statute. But unfortunately the parties attempted to do much more than this, for, as your Lordship has observed, the arrangement was that the rights of parties should be settled on the same footing as if there had been a winding-up by or subject to the supervision of the Court under and in terms of the Companies Act 1862, which was really a resolution to have a winding-up by or under the supervision of the Court in circumstances in which that could not be obtained under the statute. Supposing the agreement were effectual, the result of it as regards creditors doing or seeking to do diligence would be that by the agreement section 87 of the statute would be brought into operation. Now, observe what that section provides, "when an order has been made for winding up a company under this Act—no suit, action, or other proceeding shall be proceeded with or commenced against the Company except with the leave of the Court, and subject to such terms as the Court may impose." The effect of the agreement was not that all the creditors should be bound to refrain from doing diligence, but that creditors could not go on with action or diligence except with the leave of the Court and subject to such conditions as the Court might impose. But where is the jurisdiction of the Court to entertain any application on this subject? The parties cannot by arrangement create such jurisdiction or invoke the aid of the Court except by complying with those provisions of the statute which prescribe the circumstances and the manner in which the Court may interfere. The parties might, I think, have attained their object by an arrangement to the effect simply that the creditors should all refrain from diligence, although that might have been varied on cause shown on appeal, but the arrangement in the terms attempted fails because it aimed at too much.

I think the objection of the respondents to the competency of the application is not well founded. The distinction between this case and *Sdeuard* is, that this application is presented under a separate and distinct branch of the 138th section, by which the Lord Ordinary on the Bills in vacation of the Court of Session is enabled "to determine any question arising in the matter of a winding-up." This application raises a question directly in the matter of a winding-up, the question, namely, whether the whole creditors were or were not bound by the arrangement founded on accordingly. I hold that the application is competent, but for the reasons which have been explained I think it must be refused.

The Court therefore *refused* the prayer of the petition.

Counsel for Petitioners—Balfour—Rankine. Agents—Maclachlan & Rodger, W.S.

Counsel for Respondents—Moncrieff—Macintosh. Agents—Waddell & M'Intosh, W.S.

Saturday, June 8.

SECOND DIVISION.

[Lord Adam, Ordinary.]

BARR V. COCHRANE.

Lease—Seller and Purchaser of Agricultural Subjects Let on Lease—Liability of Former when called upon by Latter to make Repairs stipulated in Lease, where Money Payment made by him to Tenants in lieu thereof.

The purchaser of an estate has no title to insist on the seller fulfilling specific obligations to make repairs which he was bound to execute by his lease to the tenant, the seller having come to an agreement with the tenant by which he was relieved from all such claims in consideration of a sum of money.

The proprietor of an estate bound himself to the tenant in the lease of a farm to put the buildings, &c., on the farm into good condition, the tenants binding themselves to leave them so at the end of the lease. Before doing this, but after the tenants had taken possession, he sold the estate. A claim having been intimated to the purchaser by the tenants, the seller bound himself to the purchaser "to execute all repairs, &c., which he was bound to execute by his lease, . . . and to relieve you as purchaser of all claims at the instance of the tenants." The seller thereupon entered into an agreement with the tenants that they should relieve him from all claims competent to them in consideration of a sum of money. *Held (aff. Lord Adam, Ordinary—diss. Lord Ormidale)* that the tenants being the only creditors in the obligation, the purchaser could not insist on the seller doing the work stipulated for.

By lease, dated 20th May and 23d June 1874, the defender in this action, Mr Cochrane, let to Messrs Inch & Mark the farms of Camilty and Crosswoodburn, with entry at the term of Whitsunday 1874. These farms were part of the estate of Harburn, of which Mr Cochrane was then the proprietor. The lease contained the following clause—"And further, as the said James Cochrane has agreed to put, as at the said term of Whitsunday 1874, the said dwelling-houses and offices on the said farms, as well as the bridges and the private roads therein and the fences on the same, including the march wall at Middle Crosswood, into good and sufficient tenantable condition, the said John Inch and Robert Mark bind and oblige themselves and their foresaids to keep and maintain the same, with the exception of the black ditch fence after-mentioned, in the like good and sufficient tenantable condition at their removal from the premises." Mr Cochrane sold the estate, including these farms, to the pursuer in this case, Mr Barr, at Whitsunday 1875.

The obligations undertaken by Mr Cochrane to the tenants Messrs Inch & Mark, viz., to put the houses and fences into good and tenantable condition, had not been implemented by him at the time of the sale of the estate to Mr Barr. Messrs Inch & Mark intimated to Mr Barr's agent, by letter dated 15th May 1875, their intention to retain the rents till the necessary

repairs were executed, unless he would give them a guarantee that the work would be executed forthwith in terms of the lease. This claim on the part of Messrs Inch & Mark Mr Barr's agent, by letter on the same date, communicated to Mr Cochrane's agent, with an intimation that he looked to Mr Cochrane to relieve him of the tenants' claims.

With reference to this letter, Mr Cochrane, on the same date, wrote a letter in the following terms:—"With reference to the within letter, I hereby oblige myself to execute all repairs on the houses and fences on the farms of Camilty and Crosswoodburn which I am bound to execute by lease with Messrs John Inch and Robert Mark, the tenants thereof, dated 20th May and 22d June 1874, and to relieve you, as purchaser of Harburn, of all claims at the instance of the tenants thereanent."

There was this postscript to a letter dated 22d June 1875 from Barr to Cochrane "It is not me, but Inch and Mark, you must satisfy with repairs and fencing."

In place, however, of executing the repairs himself, Mr Cochrane entered into an agreement with the tenants Messrs Inch and Mark, who, for a payment of £221 sterling, discharged him of all claims competent to them in respect of the non-implementation by him of the obligation under the lease, and freed and relieved him from implementation thereof. The discharge was dated 15th November 1875.

In this state of matters this action was brought by Mr Barr against Mr Cochrane to have him ordained to put the houses and fences on the farms in question in good and tenantable condition in implement of the conditions in the lease and the letter of 15th May 1875, quoted above, and failing that to have him ordained to pay the expenses which might be incurred by the pursuer in so doing.

The defender pleaded, *inter alia*—" (1) On a sound construction of the lease and holograph letter founded on by the pursuer, and of the pursuer's letter to the defender of 22d June 1875, the defender was not bound to do more than satisfy the tenants with repairs and fencing; and he having done so, the pursuer has no title or interest to sue the present action."

The Lord Ordinary (ADAM) pronounced an interlocutor in which he assailed the defender. His Lordship added the following note:—

"*Note.*—[*After stating the facts*]—The Lord Ordinary is of opinion that Mr Cochrane is right. If the matter had rested on the lease alone, the Lord Ordinary does not think the case would have been attended with much difficulty. The obligations for non-implementation of which the action is brought were all stipulations in favour of the tenants, which they only had a title to enforce. The Lord Ordinary thinks that all the purchaser could demand from the seller was a discharge by the tenants of any claims they might have in respect of these obligations. The Lord Ordinary does not see that the purchaser has any right or title to enforce claims which the tenants have discharged, on the ground that it would have been more for his advantage had the tenants insisted on specific implement of them in place of discharging them.

"The further question, however, arises under Mr Cochrane's letter of 15th May 1875. A new and substantive obligation was not undertaken by him to Mr Barr to execute the repairs in question irrespective of any question with the tenants. The Lord Ordinary does not think so. He thinks that the letter truly contains an acknowledgment by Mr Cochrane of his liability for the repairs in a question with the tenants, and an obligation to relieve Mr Barr of all claims at their instance thereanent.

"The claims advanced by the tenants, and Mr Cochrane's liability to keep the purchaser free from them, were the questions at issue between the parties at the time, and with reference to which the letter was written. The meaning of the parties was, that Mr Cochrane should acknowledge his obligations under the lease, but not that he should extend or vary them. This, indeed, seems to have been the view of Mr Barr himself, because in a postscript of a letter by him to Mr Cochrane, dated 22d June 1877, he says:—"It is not me, but Inch & Mark, you must satisfy with repairs and fencing." And accordingly the defender has satisfied them as to the repairs and fencing by the payment of £221 sterling."

The pursuer reclaimed, and argued—If the discharge founded on had been granted before the sale it would have been conclusive, but after the sale the buyer was an interested party, and a discharge by the tenants would not free the seller from a claim at the purchaser's instance—Hunter on Landlord and Tenant, ii. 237-9. [*Per curiam* But the tenants were liable to leave the subjects in good repair.] There was the risk of insolvency of the tenants, and it might be said that the putting in good repair by the landlord was a condition precedent to the leaving in good repair by the tenant. Besides, in the letter quoted the seller specially bound himself to the purchaser to make the repairs.

Authority—*M'Gillivray's Executors v. Masson*, July 18, 1857, 19 D. 1099.

Argued for respondent—The only *jus crediti* was in the tenants; they had discharged it, and none now existed against the seller. The letter founded on by the pursuer was only one of a correspondence, and read in the light of the correspondence all it did was to relieve the purchaser from the tenant's claim against him.

At advising—

LORD JUSTICE-CLERK—In this case the claim on the part of Barr, the pursuer, is to have implemented certain obligations undertaken by the defender Cochrane to Messrs Inch & Mark. Messrs Inch & Mark were tenants of the defender in the farms of Camilty and Crosswoodburn, and the obligations undertaken by the latter were in substance to put the dwelling-house and offices of the farm, as well as the fences, &c., in good tenantable condition. The tenants, on the other hand, bound themselves to keep and leave them in that condition at the end of the lease.

The estate is sold during the currency of the lease to Mr Barr, who takes possession of it, and now says that in respect that Mr Cochrane undertook to put the houses, &c., in good condition, he has under the lease a right to insist on his doing so; he also says that, apart from the obligation in the lease, in which he maintains he

has a vested interest, Mr Cochrane undertook to himself personally to make these repairs in the letter dated 15th May 1875.

The answer which the defender makes to this is—(1) That the only right which the new proprietor could claim is a right of relief from the obligations incurred by his author. The new proprietor could never become the creditor in this obligation, as the tenants to whom the obligation was undertaken were the only possible creditors, but his taking up the estate exposed him to a claim by the tenants, he having a right of relief against his author. (2) That he has settled with the tenants, and that there is no claim at their instance.

First, then, the only claim Barr had was one of relief, and the only creditors in the obligation were the tenants. Of course the after obligation on the tenants to leave the houses, &c., in good repair is as much an obligation to the purchaser as to the original proprietor, but this is of no account.

Now, Mr Cochrane, the defender, says the tenants have made a demand on me to fulfil an obligation which I admit I have not fulfilled.

The first intimation of this claim is in a letter from Mr Inch stating that the conditions of the lease had not been implemented, and that he must withhold the rent until the repairs were made, or a guarantee given that they would be made. On that Mr Barr's agent wrote to the seller's agent stating the import of the above letter, and further requesting that as Mr Cochrane must relieve Mr Barr of any conditions which ought to have been implemented at the commencement of the lease, an obligation by Mr Cochrane should be sent that the houses, &c., would be put in good repair. Mr Cochrane in reply wrote the letter of 15th May. He then entered into an agreement with the tenants, who for payment of a sum of money discharged him of all claims competent to them in respect of his obligations under the lease.

Now, as it stands, this seems to be an absolute and conclusive answer to the pursuer. But then it is said, over and above that, although that might have been the case if there had been nothing else but the lease, Mr Cochrane undertook a new obligation in that letter. Now unquestionably part of that letter at first sight may read like an obligation to Mr Barr, apart from the tenants, to make the repairs; but taking the whole of the letter together I have come to the conclusion that all he undertook to bind himself to was his obligation under the lease and nothing else. If the letter had stood by itself there might have been more difficulty, but it is only one of a correspondence, and from it we find that not only was this what Mr Cochrane intended, but it is what was evidently the understanding of all the parties, because we find Mr Barr on 22d June writing to Mr Cochrane—“It is not me, but Inch and Mark, you must satisfy with repairs and fencing.” He does satisfy them in the most reasonable way by a payment of money, and in my opinion nothing more can be demanded of him.

We are not called upon to say upon what relations the present proprietor and the tenants stand with each other, and whether the former can force them to make the necessary repairs;

but I am clear that as the tenants were the creditors in the obligation upon which this action is founded, they alone were entitled to discharge it, and therefore the pursuer has no title whatsoever to enforce it. I think the Lord Ordinary's interlocutor should be affirmed.

LORD ORMDALE—I regret to feel myself obliged to differ from your Lordship in this case. It appears to me that the Lord Ordinary in assollzieing Mr Cochrane, the defender in this case, must have proceeded on the assumption that the pursuer, as landlord of the farm, had no right or interest apart from the tenants Messrs Inch and Mark in the obligation regarding houses and fences in the lease in question; and that accordingly, because the tenants have in respect of a sum of money paid to them by Mr Cochrane proposed to discharge that obligation, it must be held as entirely satisfied and implemented, not only as regards the tenants but also as regards the pursuer Mr Barr.

This, in my opinion, is a fallacious view of the rights and interests of the pursuer, and indeed is tantamount to ignoring them altogether.

The lease granted by the defender Mr Cochrane about a year before the pursuer purchased the property contains this clause—[*Reads ut supra*]. It is obvious that in that clause there are mutual obligations—an obligation by the landlord in favour of the tenants to put the dwelling-houses and offices, as well as the bridges, private roads, and fences in good and sufficient tenantable condition, and an obligation by the tenants in favour of the landlord, to keep the houses, bridges, roads, and fences in like good and sufficient repair during the lease, and leave them in that condition at the end of it. It is also obvious that the one obligation is a counter part of the other, or, to represent it differently, that until the landlord's obligation should be implemented the tenants' obligation could not arise or be enforced against them.

It is also clear that while the landlord's obligation ought, according to its terms, to have been implemented by Mr Cochrane about a year before the pursuer Mr Barr came into his place as purchaser of the property, the latter will, if the obligation is not implemented, lose entirely all benefit which it is calculated and was intended to afford him at the end of the lease. And I take it to be indisputable that, supposing the obligation was carried into execution according to its natural meaning, a very substantial benefit would necessarily arise to the pursuer, inasmuch as his property would be thereby improved and enhanced in value to the extent of at least £221, the sum which Mr Cochrane has paid the tenants in satisfaction of their claim. Nor do I think that it can be disputed that the pursuer, as the purchaser of the estate from Mr Cochrane, is now in his right and place as regards the prospective benefit or advantage derivable at the end, if not also during the existence of the lease, from due implement of the obligations referred to, and I think it must also be assumed that the purchase of the property was made by Mr Barr in the belief and reliance that such implement would be made. That the pursuer has thought it unnecessary to make in the record any particular statement to this effect was not unnatural, seeing that he had obtained from the

defender the direct and express obligation of 15th May 1875, specially founded on by him as a ground of action. It is true that the letter of 15th May 1875 is an answer to one from the pursuer's agent of same date—but that does not alter or affect the terms of the defender's obligation, and neither does the letter of 22d June 1875. And it is of no consequence whether there were more letters or not, for the defender expressly stated at the debate that he did not require their production, but asked for judgment on the case as it stood.

But the direct and express obligation of 15th May 1875 has been treated by the Lord Ordinary as nothing more than an undertaking on the part of the defender to satisfy the tenants, and as he has done so by paying them £221, the Lord Ordinary has thought that no claim can be made against him by the pursuer. I am unable to adopt this view, which I cannot help thinking is quite inadmissible, regard being had to the terms of the defender's obligation, and the pursuer's rights and interests thence arising. It must be observed, (1) that the obligation is not addressed to the tenants but to the pursuer alone; (2) that the pursuer, and not the tenants, is the creditor therein; (3) that the obligation undertaken by the defender to the pursuer is not to satisfy the tenants by paying them a sum of money, but "to execute all repairs on the houses and fences at the farms of Camilty and Crosswoodburn which I (the defender) am bound to execute by the lease with Messrs John Inch and Robert Mark;" and (4) that to satisfy the tenants by paying them a sum of money does not in any reasonable or fair view of the matter give satisfaction to the pursuer for his claim, which, as has been shown, is not nominal or fictitious, but real and substantial for, had the stipulated meliorations been carried out and executed by the defender, the pursuer's estate would to the extent of their value—£221 on the defender's own showing—have been enriched, but the giving of that sum to the tenants may never be made available in any such way, or in any way whatever to the pursuer or his estate. The defender has not taken the tenants bound to lay out the money he paid them in repairing the houses, fences, roads, and bridges on the farm, and whether the pursuer could compel them to do so is to say the least doubtful. But it is enough for the pursuer to say—and I think he is well entitled to say—that he is not obliged to embark in a litigation with the tenants on the subject. He is not expressly referred to in the transaction at all, and they, in respect of the payment to them of the £221, granted the discharge produced, which was taken from them by the defender without the consent or privity even of the pursuer. The pursuers' remedy is therefore against the defender, who again may have his relief against the tenants. This, I apprehend, is the true, if not the only, course that could be safely resorted to, looking at the obligation in question and whole relative circumstances,

I have, hitherto dealt with the case and the pursuers' rights against the defender under the obligation of 15th May 1875, which, for the reasons I have stated, is sufficient of itself in my opinion to entitle the pursuer to judgment. But supposing that there had been no such special obligation, I apprehend the claim of the pursuer

as against the defender would have been the same, and if I am right in this the claim of the pursuer under the obligation becomes all the clearer. The general rule that the purchaser of an estate, or in other words, a singular successor like the pursuer, comes into the place of his predecessor in all leases existing at the date of his purchase, and is entitled to all the future rents and other benefits of such leases, and liable in all the obligations prestable against the landlord subsequent to the date of his entry, is I apprehend undoubted, and if so it is obvious that the seller—that is, the defender Cochrane in the present instance—was entitled to all the rents and benefits, and liable in all the landlord's obligations under such leases as became due and prestable prior to the date of the sale and entry of the pursuer's purchaser. It therefore follows that the meliorations in question having been prestable against the defender Cochrane prior to the sale of the property to the pursuer, he was bound to execute them, and, proceeding on the assumption that such was his liability, he granted the special obligation in question to the pursuer. In place, however, of implementing that obligation, he has behind the back of the pursuer, and without his concurrence or privity, entered into a transaction with the tenants whereby he says it has been satisfied and discharged. But this is not so. He and the tenants might before the purchase and entry of the pursuer have agreed to any modification of the lease they pleased or even to discharge it altogether. But from the moment of the pursuer's purchase and entry to the property the defender had no right, whether with or without the concurrence of the tenants, to interfere with the lease to the effect of discharging or altering its clauses and stipulations or any of them.

I am therefore, in the circumstances, and for the reasons I have now stated, of opinion that the Lord Ordinary's interlocutor ought to be recalled and decree pronounced in favour of the pursuer in terms of the defender's obligation of 15th May 1875, as concluded for in the summons.

LORD GIFFORD—Although this case is not without some nicety, the opinion which I have formed is in accordance with that of your Lordship in the chair, and with that of the Lord Ordinary.

I think it is of importance to consider the case in the first place altogether apart from the correspondence which took place between the parties on and after 15th May 1875, being the date of the purchaser's entry, in order to determine what would have been the rights of parties under the lease to Messrs Inch & Mark and under the disposition of sale to Mr Barr, the pursuer. I shall then consider whether any new or additional obligation to the pursuer was undertaken by the defender under the correspondence in question.

By the lease of 20th May and 23d June 1874 the defender Mr Cochrane let the farms in question to Messrs Inch & Mark for seven years, renewable in a certain event for other three years on certain conditions. There were reciprocal obligations between the lessor and the lessees, and one of the obligations undertaken by the lessor was to put the houses and fences into good and sufficient tenable condition as at Whitsunday 1874, the date of the tenants' entry; the tenants, on the other hand, being bound to keep

and maintain the same "in the like good and sufficient tenable condition" during the lease, and to leave them so at their removal. Now, I am of opinion that the landlord's obligation to put the houses and fences in repair was a personal obligation undertaken by Mr Cochrane to Messrs Inch & Mark, his tenants. Mr Cochrane was the sole debtor in that obligation, and Messrs Inch and Mark were the sole creditors, and it is impossible to dispute that if both parties so chose Mr Cochrane might have fulfilled his obligation either in *forma specifica* by actually causing the necessary repairs to be made, or, if the tenants agreed thereto, by making payment to the tenants of an agreed-on sum, in consideration of which the tenants consented to make the repairs themselves, or to hold them as having been duly executed by the landlord. In either case the landlord's obligation would be discharged, and the tenants' obligation to keep the fences in repair and to leave them so would remain in full force.

Accordingly, it was not, and could not be, disputed that if at any time before the sale of the estate to Mr Barr, Mr Cochrane had paid to Messrs Inch & Mark the sum of £221 or any other sum, and the tenants had accepted the same as in full of the landlord's obligation to put the houses and fences in repair, the purchaser of the estate, Mr Barr, would have had nothing to say. He would have had no concern whatever with the arrangement, and that whether the houses and fences were actually put into repair or not.

Now, does it make any difference that before the landlord and tenants had made any arrangement as to the repairs—I mean before it had been fixed whether Mr Cochrane should actually make the repairs or whether he should pay the tenants a sum in lieu thereof—the estate happened to be sold to Mr Barr. In the sale to Mr Barr there was no reference whatever to this matter. Mr Barr purchased the estate exactly as it stood, having seen, or being held to have seen, its actual condition. He made no special stipulation as to houses and fences; he has simply the rights of a purchaser and nothing more. I think that this sale had no effect whatever on the obligation which the seller was under to Messrs Inch & Mark to put the houses and fences into repair. That obligation stood exactly as it did before. Messrs Inch and Mark were no parties to the sale, and they were entitled to insist against Mr Cochrane in the same way as if no sale had taken place either for specific implement of his obligation to repair or to accept of an agreed-on sum as in full of the obligation. It would make no difference whether the sum was arranged and paid before or after Mr Barr's entry as purchaser.

Accordingly, had there been no correspondence on the subject, and leaving the correspondence in the meantime out of view, I have come to be quite clearly of opinion that Mr Barr, the purchaser, after his entry as such could not have objected to Mr Cochrane and Messrs Inch & Mark making the bargain they actually did—that is, he could not have objected to Messrs Inch & Mark accepting £221—and in consideration thereof discharging Mr Cochrane's obligation to put the houses and fences in repair. Mr Barr never was the creditor in the obligation in question; he never had any right to enforce it. The sole creditors were Messrs Inch & Mark, and they

never assigned their right either to Mr Barr or to anyone else. Messrs Inch & Mark remained notwithstanding the sale the sole *domini* and masters in the obligation, which they might enforce or discharge just as they pleased. No doubt Mr Barr became purchaser of the estate, and as such and in virtue of his disposition he became vested with the landlord's rights under the lease, and entitled to enforce them against the tenants. The disposition is an assignation to the landlord's rights in current leases, but Mr Barr never became vested with the tenants' rights under these leases. He obtained no right and no assignation from the tenants, and the sale could not deprive the tenants of any right which they had anterior thereto, and in particular—to take the case in hand—the sale could not deprive them of the right which they undoubtedly had to accept a sum of money in lieu and in full of specific performance. I hold therefore that after the sale to Mr Barr, in exactly the same way as before the sale, Messrs Inch & Mark were entitled to accept from Mr Cochrane of a sum of money in lieu and in full of actual repairs, and thereupon to discharge Mr Cochrane of his obligation—an obligation in which they were the sole creditors. I think Messrs Inch & Mark were entitled to do this at any time during their lease, and that Mr Barr as purchaser had no right to interpose or prevent them. Mr Barr never got in any shape or form any of the rights of Messrs Inch & Mark.

Nor is there in this the slightest hardship, or even appearance of hardship, to the purchaser. What he got in virtue of his purchase is the landlord's rights under the lease, and these rights are precisely the same whether the tenants insist against Mr Cochrane for specific implement of his obligation or accept of a sum in lieu thereof. In either case Mr Barr as purchaser can insist against the tenants to keep and maintain as well as to leave the houses and fences in good and tenable condition, and that whether the tenants have got the actual repairs or only a sum in lieu thereof, so that the purchaser's rights are not affected in the slightest degree. The tenants' obligations to the purchaser are the same whatever bargain they may make with Mr Cochrane.

There is indeed one case in which the purchaser has an interest to insist that Mr Cochrane's obligation shall be in some way discharged, for as the lease is a mutual contract the tenants would be entitled to plead even against a singular successor that they were not bound to him unless the counter obligations of the lease were fulfilled, and thus, indirectly, if Mr Cochrane failed to give the repairs either specifically or by a sum of money, the tenants might by retention or otherwise make good the obligation against the purchaser, and this, as we shall see immediately, is what actually arose. But apart from this, and so long as the purchaser was not required to do anything, I think he had neither right nor interest to inquire whether Mr Cochrane's obligation to the tenants was performed specifically or by payment of an estimated sum. That was a matter solely between Mr Cochrane and Messrs Inch & Mark, with which Mr Barr could not interfere.

Holding the matter to be clear then upon the lease and disposition, and at common law, I next inquire whether the correspondence makes any

difference—whether it has imposed any new obligation upon Mr Cochrane or given any new right to Mr Barr which he had not before. Now, although the correspondence is in somewhat peculiar terms, I think it makes no difference on the case. We have not the whole correspondence, but both parties have asked us to decide the case upon what is printed, and if anything is left doubtful, the party on whom the *onus* lies must take the risk of it.

I cannot read that correspondence as changing the nature of the obligation in the lease either as making it incompetent to discharge the obligation by estimating the repairs in money, which is a very usual and convenient arrangement, or by introducing a new and independent creditor who would be entitled to prevent Inch and Mark from accepting a sum of money and executing the repairs themselves, which was undoubtedly their right under the lease. The creation of a new obligation is against every presumption—so is the introduction of a new creditor without the consent and against the will of the sole original creditor. Such an alteration of the rights of parties would be utterly unreasonable, and would be perfectly gratuitous. Certainly Mr Cochrane was not bound to come under any new obligation, or to hamper himself by creating two creditors, who might never agree, instead of one. It cannot be presumed that he did so, and looking at the letter in the light of the circumstances I cannot give it any such effect. But all difficulty seems to be removed by the terms of Mr Barr's own letter of 22d June 1875, which shows that he himself did not consider that Mr Cochrane's obligation under the lease had been in any way altered, either as to its nature or as to the creditor therein, by the letter of 15th May. Mr Barr tells Mr Cochrane that he cannot interfere between Mr Cochrane and his former tenants Messrs Inch & Mark, and in an emphatic postscript, as if to put an end to all further discussion, he says—"It is not me, but Inch & Mark, you must satisfy with repairs and fencing."

Well, then, Mr Cochrane has satisfied Messrs Inch & Mark, and has been absolutely discharged by them. It is not pretended that Messrs Inch & Mark can make any claim on the purchaser, either by retention or otherwise. They are bound to him by the lease, because they have got the repairs or their value. It is impossible to maintain that Mr Cochrane might have satisfied Inch & Mark by giving them a few stobs and rails, of the sufficiency of which they were to be sole judges, and yet could not satisfy them by paying them £221, they undertaking as they do to discharge Cochrane and fulfil all his obligations in his place. And still less do I think it possible to hold that Mr Cochrane, after paying £221, being the value of the repairs to the tenants, his sole creditors, is bound nevertheless to make the repairs at the purchaser's sight, just as if he had not been discharged, or, it may be, to pay the same sum over again to the purchaser. I think the purchaser never was creditor in the obligation, and has no right to enforce his present demand.

The Court adhered.

Counsel for Pursuer (Reclaimer)—Guthrie Smith—Strachan. Agent—Alexander Gordon, S.S.C.

Counsel for Defender (Respondent)—Trayner—Begg. Agents—Lindsay, Paterson, & Co., W.S.,

Saturday, June 8.

SECOND DIVISION.

[Sheriff of Perthshire.

MENZIES *v.* HIGHLAND RAILWAY COY.

Railway—Reparation—Liability of Railway Company in Damages for Expulsion of a Passenger without a Proper Ticket, but in bona fide—Railways Clauses Consolidation (Scotland) Act 1845, secs. 96 and 97—Notice—Stat. 8 and 9 Vict. cap. 33.

A railway passenger on a Friday afternoon took a first-class return ticket from A to P, the ticket having on its face "Saturday fare." The passenger noticing this, made inquiries, and was informed by the company's stationmaster at A that the ticket was available, according to the account of the latter, for all trains on Saturday and Monday; according to the passenger's account, by all mail-trains. There was no train to A on Sunday, A being a station on a branch line, but trains stopped at a junction about twelve miles off. The ticket was not available on Sunday, regulations to that effect being posted up in the station at A, though *ex facie* of the ticket there was no intimation of that fact. On Sunday morning the passenger took his seat in a carriage at P; being asked to show his ticket, he did so at once, when he was told that it was not available, and that he must get another. This he refused to do, stating that the ticket was sufficient, and that he had been told so by the stationmaster at A. Being again told that he must get another ticket, or that he would be taken out of the carriage, he still refused, and accordingly was removed from the carriage by the officials, but with no undue violence. After the train started he hired a post-chaise and drove in it to the junction named above.

In an action of damages, and for payment of the expenses incurred in the hire, at his instance against the company, held (*per* Lords Ormisdale and Gifford) that the company were not liable in damages in respect—(1) that the ticket was not available on Sunday, and that this was sufficiently intimated to the passenger by the words "Saturday fare" and the posters in the station; and (2) that therefore the passenger was in the position of having no ticket, and notwithstanding that he had no fraudulent intent the company were entitled to expel him from the carriage, under the 96th and 97th sections of the Railways Clauses Consolidation (Scotland) Act 1845; and (*per* Lord Justice-Clerk) that the passenger, having been informed at Perth by the company's servants that he was wrongfully in the carriage, should have at once yielded, and trusted to his after remedy.

Railway—Railways Clauses Consolidation (Scotland) Act 1845, secs. 96 and 97.

Opinion (per Lord Justice-Clerk) that the