

the defender for pasturage after the date of the charter cannot be viewed as connected with the charter, which neither conveys the privilege nor provides for the exaction of the rent.

It does indeed appear anomalous, as well as unfortunate, that the parties who have the most regular title, and the only title of perpetual endurance, to the building lots, should be found to have the weakest defence against the conclusion for removal from their possession of the privilege of pasturage. But so it is. The title on which they rest is in its terms exclusive of the privilege which they seek to defend, while the leaseholders enjoy it under the express words of their leases.

Accordingly, the result of my opinion is that, except in regard to the feuars represented by M'Callum, the Lord Ordinary's interlocutor should be altered; that both classes of tenants—those holding long leases and those standing on entries in the rentals—should be assolizied; but that the pursuer is entitled to decree in terms of the conclusions of the action, as restricted, against John M'Callum and those whom he is held to represent.

The Lord President was not in office when the case was argued.

In adjusting the interlocutor, a question arose as to whether the defenders were entitled to claim the privilege of grass for horses; but they put in a minute giving it up, and the following interlocutor was pronounced:—

“*Edinburgh, 20th March 1867.*—The Lords having advised the reclaiming note for John M'Callum and others, No. 385 of process, with the minute for the pursuer, No. 387 of process, and minutes for John M'Callum and others, defenders, Nos. 388 and 389 of process, and heard counsel for the parties, Recal the interlocutor of the Lord Ordinary submitted to review: Find that the conclusions for removing the defenders from the lands and others libelled have been departed from by the pursuer: Find that none of the defenders make any claim to horse grazing on the lands libelled or any part thereof, either permanently or for a term of years, and therefore Find and Declare in terms of the declaratory conclusions of the summons so far as horse grazing is concerned: Find that the following defenders, who hold or are interested in feu-rights of certain portions of the lands libelled, have not established any right, either permanent or for a term of years, to graze their cows upon the lands libelled, or any part thereof—viz., the defenders John M'Callum, Malcolm M'Kinnon, the Rev. Duncan M'Farlane (so far as regards the lot of ground described in statement five of the revised defences, No. 176 of process), Archibald M'Neill, Donald M'Donald, Duncan M'Call, Lachlan M'Callum, Hugh M'Millan, (whose revised defences are included in No. 176 of process), and Margaret M'Lean or Wilson, John Wilson, Alex. M'Lean, Hector Campbell, and John M'Lean, whose revised defences are No. 331 of process, and therefore to that extent and effect Find and Declare, so far as these particular defenders are concerned, in terms of the declaratory conclusions of the libel, and to the extent and effect to which decree of declarator has been pronounced as aforesaid, prohibit, interdict, and discharge the defenders as concluded for in the libel; and as regards the whole other defenders, Find that they have established the right claimed by them to a cow's grass on the Muir Lawn referred to in the record forming part of the lands libelled, subject to the effect of the orders or regulations of 22d and 30th November 1792, founded on by the pursuer, so far

as regards those of the defenders whose rights were obtained subsequent to these dates, and assolizie the said whole other defenders from the conclusions of the libel except as regards the horse grazing herein otherwise above disposed of, and decern: Find the defenders who are assolizied as aforesaid entitled to expenses, and remit the account thereof, when lodged, to the Auditor of Court to tax the same and report, and *quoad ultra* Find no expenses due to either party, and decern.

“JOHN INGLIS, I.P.D.”

Agent for Pursuer—James Dalgleish, W.S.
Agents for Defenders—David Curror, S.S.C.,
and J. Y. Pullar, S.S.C.

BROATCH v. JENKINS (*ante*, p. 121).

Fraudulent Misrepresentation—New Trial. New trial granted, on the ground that a verdict was not supported by evidence.

This case was tried on the 18th and 19th December last, before Lord Barcaple and a jury, under the following issue, viz.:—

“Whether the defender, David Jenkins, by fraudulent misrepresentation as to the number and extent of the accounts, and amount of the balance, claimed by him from the defender, James Rankine, induced the pursuer to become a party to the minute of reference No. 29 of process as cautioner for the said James Rankine?”

The jury, by a majority of 9 to 3, found for the pursuer.

BURNET, for the defender, moved for a rule, which was granted.

MACDONALD, for the pursuer, showed cause.

PATTISON replied.

The Court (Lord Deas dissenting) made the rule absolute, on condition of the defender paying the expenses of the first trial. The majority were of opinion that, assuming every word of the pursuer's testimony, it did not establish what he had undertaken to prove. There was therefore no evidence to support the verdict.

Agent for Pursuer—Robert Johnstone.

Agent for Defender—James Somerville, S.S.C.

Friday, March 15.

FIRST DIVISION.

COLVIN v. DIXON.

Reparation—Breach of Contract—Unilateral Obligation—Iron Warrant—Master and Servant—Usage—Relevancy. An action of damages for non-implementation of an obligation to deliver iron granted by the manager of an ironmaster for his employer, dismissed as irrelevant, in respect—(1) the record did not exclude the possibility of the obligation being gratuitous; (2) it did not contain any averment that the manager had any authority to bind his employer in a gratuitous obligation, which he could not do without special authority or usage, which in this case was not averred with sufficient specification; (3) it did not aver any contract betwixt the pursuer and defenders of which the obligation was executorial; and (4) it did not aver delivery of the obligation by the defenders to the pursuer, and did not specify the character in which the pursuer sued upon it.

This is an action at the instance of William Colvin, iron merchant in Glasgow, against the