

Friday, June 8.

SECOND DIVISION.

WINANS v. MACKENZIE.

Lease—Landlord and Tenant—Specific Implement—Obligation to Remove Occupants from Buildings on Subject Leased—Customary Tenure—Cottars.

In a lease of an estate which it was intended that the tenant should convert into a deer forest, it was stipulated that the landlord should by a certain date remove his sheep stock off a certain part of the ground, "and the shepherds and other occupants from the buildings occupied in connection with the ground." After entering upon possession the tenant brought an action to have the landlord ordained to implement the terms of the lease by giving him possession of the buildings on this ground free from the occupation or possession of the landlord's "manager, keeper, servants, and other dependants, and all other occupants." The defender averred that he was willing to remove the shepherds, after such legal warning as, being according to the custom of the district yearly tenants of their employer, they were entitled to, and that he had been unable to warn them to remove sooner in consequence of the actings of the pursuer himself. With regard to the other persons occupying houses on the estate, he averred that they were cottars, each occupying a house and piece of land under a customary tenure peculiar to the district, and were not his dependants or servants, that it was not the intention of parties at the time of the lease that they should be removed, and that he had no right to remove them. *Held (off. judgment of Lord Kinnear)* that, assuming the obligation to remove the cottars to exist, it was not one which could be enforced against the defender by specific implement (especially in an action to which the cottars were not parties) since it was not clear that such implement could be given without breach of the cottars' rights, and that decree *ad factum præstandum* being therefore inappropriate, the pursuer's remedy, if any, must be by way of action of damages.

Opinions that, on a construction of the lease, these persons not "occupying houses in connection with" the farms which were to be cleared, the defender was not, in any view of their right to remain, bound to remove them."

By lease dated 2d and 7th March 1882, James Thompson Mackenzie of Kintail and Glenmuick agreed to let to William Louis Winans "All and Whole the lands and estate of Kintail lying in the parish of Glenshiel and county of Ross, all as presently occupied and possessed by the first party (the landlord) and his tenants, and comprehending the grazing or pasture farms and lands of Morvich and Inchcroe presently in the possession of the first party, and the grazing or pasture farms and lands of Inversheil, Cluanie, and Auchnagart, as presently possessed by the heirs and representatives of the late Donald John Macrae, including the inn at Cluanie and pertinents, as also possessed by them or their sub-tenants, and

generally all arable lands, grazing lands, houses, and other heritages forming parts and portions of the said estate of Kintail, and the whole shootings and fishings, including salmon and other fishings belonging to the said estate, with the sole and exclusive right and privilege to the second party (the tenant) of sporting over the said estate, and shooting and killing deer and game of every description thereon, and also the sole and exclusive right and privilege of fishing for salmon and other fishes in all the lochs and streams forming parts of the said estate, in so far as the said first party has right to the said fishings, with power to the tenant in his option either to continue to use the said farms above specified for grazing and pasture for sheep, cattle, horses, &c., as all except a portion of the arable land is used at present, or to convert the same or any part of the same, along with the remainder of the said estate into a deer forest as he shall think proper, and that for the space or time of twenty-one years from and after the term of Whitsunday Eighteen hundred and eighty-two." With regard to the grazing lands of Inversheil, Cluanie, and Auchnagart, part of the estate, which at the time of the lease were in the possession of the representatives of the deceased Donald John Macrae under a lease between him and Mr Mackenzie which was to terminate at Whitsunday 1893, it was provided that Winans should have right to shoot deer and other game thereon from Whitsunday 1882, but should not have right to the grazings on these lands till 1893, Mr Mackenzie being bound to have these grazings completely cleared of sheep, and all buildings pertaining to the said grazing cleared of their occupants, by 12th August 1893. Mr Mackenzie undertook by the lease, however, to do his best to get Macrae's representatives to agree to cancel their lease, and in order to aid this object Mr Winans agreed in the event of its being done to let the sheep stock remain on these lands till 12th August 1882, and on the rest till 12th August 1883. At whatever term, however, the lease should be given up, Mr Mackenzie undertook as soon as possible to give Mr Winans possession of the lands, and to have them cleared in manner above explained. With regard to Inchcroe and Morvich, which were in Mr Mackenzie's own occupation, it was provided that he should be allowed till 12th [afterwards extended to 15th] August 1882 to remove his stock off the ground, and the shepherds and other occupants from the buildings occupied in connection with this ground. Mr Mackenzie reserved power to resume lands not exceeding in all a certain extent, for the purpose of planting with trees (allowing a proportionate deduction of rent) one part of which planting should be on a portion of the slope east of Loch Duich. The rent payable by Mr Winans as tenant was £1106, 3s. 4d., until the lease expiring in 1893 should fall in, and after that £2256, or if that lease were sooner terminated the increase of rent was in that case to begin at such earlier date on which he obtained possession. He bound himself to relieve the landlord of public and parochial burdens, to exercise his right of shooting so as to leave a good breeding stock at the termination of the lease, to employ a sufficient staff of gamekeepers and watchers, to accept the fences as they stood, and to maintain them.

Negotiations for this lease had commenced between the parties in October 1881, and prior to its signature a lengthy correspondence passed between them concerning its terms and conditions. Mr Winans insisted, *inter alia*, that Mr Mackenzie should bind himself to clear the ground (1) of the shepherds, and (2) certain others who occupied houses or cottages on the lands of Morvich and Inchcroe, by 12th August 1882, afterwards extended to 15th of same month. As regards the shepherds, after a correspondence in which he explained that they were yearly tenants, and had not, in consequence of his having construed a letter of Mr Winans as importing that they were to be retained by him as watchers and keepers, received such notice as would entitle him to remove them at Whitsunday 1882, Mr Mackenzie agreed to remove them by Whitsunday 1883. As regards the cottars, when the lease was still in draft his agents wrote on 25th November 1881 to Mr Winans in the following terms:—“We shall be glad to receive back the draft lease approved of, or with such alterations as you may think necessary. Mr Mackenzie requests us to mention to you that there are at Lochside about half-a-dozen families, living in some small huts, with from a quarter to half an acre of potato ground, for which they pay no rent, and that he is desirous that these people, who are natives of the place, should not be removed. He says that you might find them useful if you required assistance of any kind in connection with the working of the estate. Mr Mackenzie has no desire that strangers should be permitted to come into the place; he merely wishes that the existing families, or their relatives who may succeed them, should not be removed, and he is quite satisfied to leave the matter to your discretion.” After the lease was signed Mr Winans insisted that the lease imposed an obligation on Mr Mackenzie to remove these cottars. Mr Mackenzie wrote to him offering, in consequence of the disagreement which had arisen with regard to the shepherds, to cancel the lease, but this offer was not accepted.

In September 1882 Mr Winans brought this action to have Mr Mackenzie ordained to fulfil the obligations undertaken by him in the lease, “and that by giving the pursuer immediate possession and occupation of the houses and other heritages, forming parts and portions of the estate of Kintail, in the county of Ross, to which the pursuer has right under the said lease, and more particularly by giving the pursuer immediate possession and occupation, free from the occupation or possession of the defender's late or present manager, gamekeeper, shepherds, servants, and other dependants, and all other occupants of buildings and other premises still occupied or possessed by the said manager, gamekeeper, shepherds, or others foresaid upon the farms and lands of Morvich and Inchcroe, part of the said estate of Kintail.”

In his condescendence the pursuer, after having described the subjects let to him by the lease, averred—“(Cond. 3) By the said lease it is also declared, *inter alia*, ‘that as regards Inchcroe and Morvich, at present in possession of the first party (the defender), he shall be allowed till the 12th of August 1882 to remove his stock off the ground, and the shepherds and other occupants from the

buildings occupied in connection with this ground. The pursuer afterwards agreed to extend the period of removal from 12th to 15th August 1882. (Cond. 5) The pursuer entered to the subjects thereby let, so far as the same were available, at the term of Whitsunday last, and has incurred much expense in making them available for the purposes of the lease, but the defender has failed to remove his manager, gamekeeper, shepherds, servants, or dependants and other occupants from (*inter alia*) the buildings and premises upon or in connection with the farms of Inchcroe and Morvich, and to give the pursuer full and free possession of the houses and buildings on these farms, which he was bound to have done on 12th August last in terms of the foregoing provisions of the lease, or at all events on 15th August, to which date the pursuer agreed to extend the term fixed in the lease. The subjects of which the defender has thus failed to give possession form parts of the estate of Kintail shown on the map annexed to the lease. In particular, the subjects occupied by the gamekeepers and the cottars mentioned in the answer form parts of the said estate. It is essential to the proper carrying out of the lease, and to the pursuer's beneficial occupation of the lands as a deer forest, that the said shepherds and other occupants should be removed by the defender, and the pursuer put by the defender into full and immediate possession. Some of said shepherds and other occupants reside in the very heart of the forest, where great damage is done by them and their families and their cattle in trespassing. Their cattle are pastured and they are cutting hay on ground expressly let to the pursuer. Not only is the value of the subjects to the pursuer seriously diminished during the shooting season, but if the said buildings continue to be occupied as at present it will be impossible for the pursuer to utilise much of the low ground most suitable for wintering deer. The pursuer also requires some of the said houses and buildings for the occupation of his own servants and keepers.”

He pleaded—“(1) The defender having entered into a valid contract of lease with the pursuer by the lease libelled on, is bound to fulfil his part thereof; and the defender having failed to do so the pursuer is entitled to decree of implement as concluded for, with expenses. (2) No relevant defence having been stated, the pursuer is entitled to decree.”

The defender stated (Ans. 5) — “Admitted that the pursuers entered into possession of the subjects let, so far as the same were available at the term of Whitsunday last. Denied that the pursuer has been at any expense in making the subjects available for the purposes of the lease. *Quoad ultra* denied, and explanation made as follows:—By the custom of the country the shepherds employed on grazings are yearly tenants of the houses occupied by them. This was well known to the pursuer, who accordingly, in the negotiations preliminary to the settling of the said lease, informed the defender that as he intended converting the subjects into a forest he would arrange to employ the resident shepherds as watchers. Believing that the pursuer would employ the shepherds as watchers, the defender did not insist on a stipulation to that effect being included in the lease, as he otherwise would have

done. After the lease was signed, and in the month of July last, the pursuer changed his mind on this matter, and settled not to employ the said shepherds. It was then out of the power of the defender, as the pursuer well knew, to put the shepherds out of their houses until Whitsunday next. That the defender had not given them notice prior to Whitsunday was entirely owing to the fact that he had been deceived by the pursuer as to his true intentions regarding the said shepherds. The defender, however, will remove all the said shepherds at Whitsunday next. He was also ready and willing to make temporary arrangements by which nearly all of the men would have been removed during the month of August last, but to these arrangements the pursuer would not agree. Further, when the defender found that the pursuer would not abide by (what the defender regarded as) his bargain to employ the shepherds as watchers, the defender offered to cancel the lease altogether, without making any claim for the year's rent then incurred, or for the serious expense and loss he had been put to in clearing the sheep off Morvich, which was in his (the defender's) own possession. This the pursuer also declined to accede to. The defender is still willing to cancel the lease. The correspondence which passed on the subject is produced and referred to. With the exception of the said shepherds (four in number) there are no servants or dependants of the defender upon the ground. The only other occupants of houses to which it is believed reference is made in the condescendence are a few cottars who live in some small cabins by the side of the high road at Loch Duich. It was not the intention of parties that the said cottars should be removed, and the lease contains no stipulation for their removal. The said cottars are not dependants or servants, or ordinary tenants of the defender. They occupy their houses and a small piece of land under a customary tenure peculiar to the Highlands. The defender has no right and has no wish to remove them from their possession, and it was never in the contemplation of parties or within the provisions of the lease that he should attempt to remove them. The land and houses held by them are not and were not at the date of the lease occupied and possessed by the defender or his tenants. The pursuer was well aware of the existence and position of the said cottars. The locality of their houses is such that they do no harm to the usefulness of the estate as a deer forest."

He pleaded—“(1) The statements of the pursuer are irrelevant and insufficient in law to support the conclusions of the summons. (2) The defender having duly implemented the stipulations of the lease, and being ready and willing to implement such stipulations as are still incumbent on him, ought to be assolvied. (4) The defender is under no obligation by the lease to remove the said cottars from their holdings.”

The Lord Ordinary (KINNEAR) dismissed the action.

“*Opinion.*—This is an action for specific implement of the obligations said to have been undertaken by the defender to the pursuer by a lease, dated the 2d and 7th March 1882, and the summons concludes that the defender shall be decerned and ordained to implement and fulfil these obligations, ‘and that by giving the pursuer

immediate possession and occupation of the houses and other heritages to which the pursuer has right under the said lease, and more particularly by giving the pursuer immediate possession and occupation, free from the occupation or possession of the defender's late or present manager, gamekeeper, shepherds, servants, and other dependants, and all other occupants of all buildings and other premises still occupied or possessed by the said manager, gamekeeper, shepherds, or others foresaid, upon the farms and lands of Morvich and Inchcroe, part of the said estate of Kintail.’ The summons has no other conclusion, and it appears from the record and from what was stated at the bar that the sole purpose of the action is to have the defender compelled summarily to remove certain shepherds and cottars who are still in the occupation of houses or cottages. By the lease founded on, which is for twenty-one years from Whitsunday 1882, the defender lets to the pursuer the lands and estate of Kintail, ‘as presently occupied and possessed by’ the defender ‘and his tenants,’ comprehending certain grazing or pasture farms specified, and generally all lands, houses, and other heritages forming parts of the said estate, as shown on a plan annexed to the lease. The tenant is empowered at his option either to continue to use the farms for grazing and pasture or to convert them with the remainder of the estate into a deer-forest; and while the entry to the subjects of lease is to be from and after Whitsunday 1882, there is a stipulation in favour of the defender, that ‘as regards Inchcroe and Morvich, at present in possession of the first party’ (the defender), ‘he shall be allowed till the 12th of August 1882 to remove his stock off the ground, and the shepherds and other occupants from the buildings occupied in connection with this ground.’ The pursuer afterwards agreed to extend the period of removal from 12th to 15th August 1882.

“These being the terms of the lease, the pursuer does not allege that the defender has refused to cede possession of the lands, in so far as these were in his own occupation. On the contrary, his averment is that he is now in possession under the lease; for he says in condescendence 5 that he entered to the subjects let at Whitsunday last, and has incurred much expense in making them available for the purposes of the lease; and then he makes the averment which is the ground of action, that the defender ‘has failed to remove his manager, gamekeeper, shepherds, servants, or dependants, and other occupants from (*inter alia*) the buildings and premises upon or in connection with the farms of Inchcroe and Morvich, and to give the pursuer full and free possession of the houses and buildings on these farms, which he was bound to have done on 12th August last, in terms of the foregoing provisions of the lease, or at all events on 15th August, to which date the pursuer agreed to extend the term fixed in the lease;’ and he proceeds to state two different grounds upon which he maintains that it is essential that certain shepherds and cottars should be removed by the defender, and the pursuer put by the defender into full and immediate possession. With regard to some of the houses it is said that their occupants reside in the heart of the forest, ‘where damage is done by them and their families in trespassing;’ and it is said

that 'the pursuer also requires some of the said houses and buildings for the occupation of his servants and keepers.'

"There is no statement specifying the particular houses which are thus said to be occupied contrary to the conditions of the lease. But it was admitted at the bar that the occupants whose removal is insisted in are of two classes—shepherds who were in the defender's employment before the lease, and cottars. With regard to the shepherds, the defender admits that in terms of the lease he was bound to remove them from the houses occupied by them in connection with the ground before the 15th of August 1882, but he says that they are yearly tenants, that he failed to give them notice so as to enable him to remove them before Whitsunday in consequence of a misunderstanding for which the pursuer is responsible, but that he undertakes to remove them by Whitsunday next. With regard to the cottars, he says that they are not tenants in the sense of the lease, that he has no right to remove them, and that it is not within the true intention of the lease that he should attempt to do so.

"I am of opinion that this is not an appropriate or competent action for trying the questions which are raised by these averments. It may be that as against the defender the pursuer is entitled under his contract to immediate possession of the houses in dispute. But it does not follow that he can enforce that right by decree *ad factum præstandum*. In the recent case of *Graham v. Swan and Others (Mags. of Kirkcaldy)*, (July 26, 1882, 9 R. (H.L.) 91), the Lord Chancellor observes with regard to such decrees—'In Scotland the legal and equitable jurisdictions have always been united, and the natural result of that union is that strict legal rights ought not to be enforced without regard to the discretion which, from the nature of the subject-matter and the interests of all concerned in it, ought to be exercised by a court of equity.' It appears to me that there are sufficient reasons for refusing upon equitable grounds to give the decree for specific implement sought by the pursuer.

"With regard to the shepherds, if there be any question whether they are entitled to continue in possession till Whitsunday, it is a question which cannot be determined in this action, to which they are not parties. But it is manifest that it would be impossible for the defender, admitting that they are yearly tenants from Whitsunday to Whitsunday, to remove them by any process of law between terms and without notice. In so far as they are concerned, therefore, the decree asked would be entirely inoperative. It may be that the defender's failure to give notice earlier is a breach of his contract with the pursuer, and if so the pursuer may have another remedy. But all that can now be done by way of specific implement is to give the notice which the defender undertakes to give, so as to ensure their removal at Whitsunday next.

"The case as to the cottars is in a somewhat different position. The averment as to the peculiar tenure under which they are said to hold is not satisfactory, and if their right were to be defined in this action, the conditions of their occupation must have been stated more specifically. But the defender avers that they are not his dependants or servants or ordinary tenants; that they occupy these houses and a small piece

of land under a customary tenure peculiar to the Highlands; that he has no right and no wish to remove them from their possession; that it was not within the contemplation of parties that he should do so; and that these houses are situated by the side of the high road at Loch Duich, in such a position 'that they do no harm to the usefulness of the estate as a deer forest.' It was further explained at the bar that they and their predecessors have possessed under no written title, but under verbal agreements that they should not be disturbed so long as they continue to perform the conditions upon which they were put in possession. In the face of these averments I am not prepared to determine in this action, to which they are not parties, that they can have no right such as the defender admits, which may be good against him, whether it be good against his successors, or against the pursuer as his tenant or no; and without so determining, it appears to me impossible to give decree in terms of the conclusions of the summons—*first*, because if the defender's statement is correct, that would be a decree for specific implement of an agreement with the pursuer by breach of a prior agreement with others; and *secondly*, because the Court will not give decree *ad factum præstandum* unless it be clear that the thing ordered to be done can be done effectually either by the defender or, failing him, by some one else at the sight of the Court. Now, it is not clear, and in my opinion it cannot be made clear, in this action, to which the cottars are not parties, either that any means to be taken by the defender for removing them would be effectual, or that it would be just and equitable to take proceedings for that purpose. I asked Mr Guthrie how the decree was to be carried out, and he admitted on the one hand that it was not enforceable otherwise than by imprisonment, and on the other that it would not be voluntarily carried into effect except by the defender taking legal proceedings for the eviction of the cottars and carrying these proceedings to a successful issue. The decree which the pursuer asks, therefore, is to compel the defender to institute against persons who are not parties to this action legal proceedings which as regards them would be harsh and unreasonable, and which the defender admits would be contrary to the good faith of the understanding between him and them. No authority was cited in support of the pursuer's demand, and in my opinion it cannot be entertained consistently with the principles on which decrees for specific implement ought to be given.

"If the defender's reading of the contract as to the cottars' houses is wrong, the pursuer is not without remedy. If the defender has bound himself to give him possession of the houses in dispute and to remove the present occupants, he will be answerable in damages for his breach of contract. It may be that the pursuer has other remedies besides. But he is not, in my opinion, entitled to the remedy he seeks in this action."

The pursuer reclaimed, and argued—Unless the defender could show that it was impossible for him to clear the ground of these cottars, the pursuer was entitled to have specific implement of the lease, which imposed on the defender a clear obligation to do so.—Stair, i. 17, 16; Bell's Comm. i. 352; Balfour's Practicks (*vide* Sentence and Execution); "*The Generous*," November 26,

1818, 2 Dodson's Adm. Repts. 322; *The Queen v. The Great Western Railway Co., ex parte Fisher*, April 23, 1853, 1 Ellis & MacArthur's Repts. 774.

The defender replied—This was not a case for specific implement (*vide* Lord President's opinion in *M'Arthur v. Lawson*, July 19, 1877, 4 R. 1134). He had always refused prior to the signature of the lease to remove the cottars, the reason being an obvious one, that he had not the power to do so. He had for that reason been careful to come under no obligation of the kind in the lease.

It was intimated at the bar that the shepherds had been removed from their houses.

At advising—

LORD JUSTICE-CLERK—This case of *Winans* is in many respects of it a very unusual and important one. The leading facts on which it turns are accurately summarised by the Lord Ordinary, and I need not resume them in detail. But one or two of the more salient and important features of the case may repay examination.

The pursuer founds on a tack or lease of certain parts of the estate of Kintail granted to him by the proprietor Mr Mackenzie, dated in March 1882, for a period of twenty-one years. It comprehends a large tract of Highland country, extending to upwards of 25,000 acres, which had for the most part been occupied as arable ground or grazing ground, part having been held under an agricultural lease for nineteen years, terminating in 1893, and part being at the date of the lease in the occupation of the proprietor himself. The rent payable by the pursuer as tenant was £1106, 3s. 4d. until the lease expiring in 1893 should fall in, and after that £2256.

The pursuer as tenant was entitled to use the lands either as arable or grazing ground, or to convert it in part or in whole into a deer forest. The currency of the lease was to be from Whitsunday 1882.

The complaint made by the pursuer in the present action is, that the defender has failed to give him possession of the subjects let to him, and to clear the lands and houses of former occupants, in terms, as it is contended, of the obligations undertaken in the lease, and he has accordingly brought this action for implement of these obligations, and he concludes that the defender ought to be decerned and ordained to implement and fulfil the same, more particularly "by giving the pursuer immediate possession and occupation, free from the occupation or possession of the defender's late or present manager, gamekeeper, servants, shepherds, and other dependants, and all other occupants of all buildings and other premises still occupied or possessed by the said manager, gamekeeper, shepherds, or others foresaid upon the farms and lands of Morvich and Incheroe, part of the said estate of Kintail."

The action, as explained by the Lord Ordinary, substantially embraced in this general enumeration two classes of persons who are said not to have been removed in terms of the lease—First, certain shepherds on the lands; and secondly, certain cottars who had houses and small potato plots on the estate.

I understand—and my opinion proceeds on that assumption—that as far as the shepherds are concerned the conclusions of the summons are now inapplicable, because we were told that they

were to be removed at the term of Whitsunday last, and I suppose they have been removed. My opinion proceeds on that assumption. The question relates entirely to the alleged obligation of the defender under the lease to remove those cottars. The defender pleads that he is not bound to remove them; that no such duty is incumbent on him by the terms of the lease; and that it was not intended or contemplated by either party that he should do so. He explains that these persons are not tenants; that they pay no rent; and that by the custom of the country their holdings are permanent, descending from father to son, as long as they fulfil their obligations. He further maintains that in the absence of those parties he cannot be subjected to a decree for specific implement even although failure to remove them might subject him in damages.

The Lord Ordinary has given effect to this last view, and has held, on grounds which he has fully explained, that the circumstances are not such as would warrant such a decree.

I entirely concur in his judgment, and I shall add one or two other considerations which occur to me. First, I think the pursuer has failed to make any sufficient allegations to support so serious and precise a demand. I agree with the Lord Ordinary that the defender's statement is very meagre and defective as regards the tenure of these cottars, and was at one time inclined to think that we should require more accurate statements on both sides, and if necessary to have the facts ascertained. But I have come to think that, apart from other views, to which I shall immediately advert, the pursuer's statement is altogether insufficient. It does not in the least follow as a necessary incident of such a right as this lease that the owner is bound to depopulate a whole district. That is a matter depending either on specific contract or on the nature and objects of the occupation contemplated. The pursuer was bound to have specified the persons to be removed, the position and nature of their belongings, and to have given some information as to the way in which his interests were affected by their continuing to possess. Because I can quite well suppose that it might depend on the circumstances whether their removal was or was not a necessary incident to the full enjoyment of the subject let for a purpose for which this lease was entered into. I think such information as I have indicated was essential to support a demand for specific implement, if it could otherwise have been entertained.

But secondly, I think it very doubtful if the defender under this lease undertook to remove those cottars; and there are strong reasons for believing that no such obligation was intended. I think so because the matter of clearing the ground is very anxiously provided for in the lease in great detail, and apparently provided for in every case in which it was intended that such provision should be made. The general words in the commencement of the lease no doubt cover as part of the subject let all the houses and all the lands—and everything in fact within the district—but it was quite manifest that the subject of the lease embraced a large variety of matters which could not fall under that general clause, and which were never intended to fall under it. Accordingly, the lease makes provision for all the cases (as I read

it) in which the removal of occupants was intended. From the position which most of the occupants held it was essential to regulate these matters according to their different rights. First, There is the current agricultural lease for nineteen years, expiring in 1893, in regard to which there are detailed covenants. No possession or right of occupation could arise until the expiration of the tenants' right under it; and so anxious were the parties that all such rights should be provided for, that even a roadside inn, held at the time under a tack with two years to run, is specially provided for.

There only remain, lastly, the shepherds and other occupants of premises occupied in connection with the land; and they are dealt with in a clause in the lease which is in the highest degree significant. The provision is this—"And also declaring that as regards Incheroe and Morvich, at present in possession of the first party, he shall be allowed till the 12th of August 1882, to remove his stock off the ground, and the shepherds and occupants from the buildings occupied in connection with this ground." That disposes of the shepherds, of whom there were several who had houses more or less in the centre of the ground, and that clause is intended to provide for their removal, and about them there is no further dispute. It is remarkable that the pursuer in his condescendence (Art. 5) founds on this clause in support of his claim, and misquotes it by inserting the very element in it which it does not contain. He makes it run "from the buildings and premises upon or in connection with the farms." The clause does not say "upon the farms;" it says "in connection with" the farms. There are no such words as those quoted by the pursuer in the clause, which is framed, and intentionally so, to embrace only the occupants of buildings in connection with the farms, and consequently to exclude those cottars whose occupation was in no respect connected with it. Nor do I think that this phraseology was accidental. The pursuer and his advisers in revising this lease had ample notice of the position of the cottars, and to that extent we are fairly entitled to look at the correspondence, although it cannot qualify the lease when it was granted. The pursuer, however, and his advisers, had ample notice that there were such cottars, and they knew that the defender expected them to remain. Their attention had been specially called to that fact; and even had it not been so, they must have been held to know for what they were stipulating. It would have been simple, and easy, and natural, even by the use of the word interpolated by the pursuer himself in his record, to have made this matter clear, had such been the pursuer's intention. I should not, as far as I see at present, think that I read the words too strictly were I to infer from them that it was not intended to include the cottars.

I forbear, however, to do more on this head than indicate an impression, but a very strong impression, that such is the true reading of the clause; but the question may arise for adjudication hereafter.

I read with regret the long and angry correspondence which followed between the parties; the only part of which that has any bearing on the case is that portion of it which shows that the defender believed that the lease laid on him no

such obligation, and that finding the pursuer under a different impression he first offered to surrender the lease which the pursuer had, and then, while prepared to face any claim for damages, declined absolutely to remove the cottars, stating that he had no power to do so, and would not do so even if he could.

Now, the question is, whether specific implement in the way of removing these cottars *de plano* is the proper and appropriate remedy? On this matter, I am, as I have said already, very clearly of opinion with the Lord Ordinary, that this is not a case for specific implement. What the pursuer's remedy may be, or whether he has suffered any wrong which demands one, it is not necessary that we should at present consider. Certainly to decide in this way on the rights of those cottars in their absence would be unjust, and the authorities on this branch of the law fully warrant the conclusion at which the Lord Ordinary has arrived, and to which I propose that your Lordships should adhere.

I would only add, although I presume looking to the tenor of the correspondence it is very hopeless to add, that it seems to me that parties in the position of the parties here would do well, having ventilated this question, if they found a middle course, or allowed their friends to find for them a middle course, which would relieve us of further discussion; their interests on both sides are so clear that the matter should be adjusted, and it is so clear that the matter admits of adjustment, that that is the course which should be followed.

LORD YOUNG—I entirely concur in your Lordship's judgment.

LORD CRAIGHILL—This action has been raised by Mr Winans, who is pursuer, to compel the defender Mr Mackenzie of Kintail to fulfil the obligations said to have been undertaken by the latter in a lease granted by him to the pursuer, of date 2d and 7th March 1882, and that by giving the pursuer immediate possession of the houses and other heritages forming parts and portions of the estate of Kintail to which the pursuer has right under the said lease, and more particularly "by giving the pursuer immediate possession, free from the occupation or possession of the defender's late or present manager, gamekeeper, shepherds, servants, and other dependants, and all other occupants of buildings and other premises still occupied or possessed by the said manager, gamekeepers, shepherds or others foresaid upon the farms and lands of Morvich and Incheroe, part of the said estate of Kintail." This is the conclusion of the summons, and from its generality it is difficult even to conjecture either what the houses are the occupation of which by others is withheld from the pursuer, or to realise with certainty the precise obligation in the lease which is the ground of action, and which the defender is to be ordained to implement. On the former point the condescendence is as vague as the conclusions of the summons; but fortunately the latter is made clear by the facts on which the pursuer has condescended. In cond. 1 the subjects leased are described as they are described in the lease; in cond. 2 the provisions of the lease, which are im-

material on the present occasion, are narrated; in cond. 3 there is quoted the clause in the lease by which it is declared that "as regards Incheroe and Morvich, at present in possession of the first party (the defender) he shall be allowed to remove his stock from off the ground, and the shepherds and other occupants from the buildings occupied in connection with this ground; in cond. 4 the pursuer sets forth the rent for the payment of which he became bound; and in cond. 5 it is set forth that "the pursuer entered to the subjects let, so far as the same were available, at the term of Whitsunday last, and has incurred much expense in making them available for the purposes of the lease; but the defender has failed to remove his manager, gamekeeper, shepherds, servants, or dependants, and other occupants from, *inter alia*, the buildings and premises upon or in connection with the farms of Incheroe and Morvich, and to give the pursuer full and free possession of the houses and buildings on these farms, which he was bound to have done on the 12th of August last, in terms of the foregoing provisions of the lease, or at all events on 15th August, to which date the pursuer agreed to extend the term fixed in the lease."

The case of the pursuer as thus presented is, that the occupants of houses or premises against whose continued occupation the pursuer seeks redress were persons whom the defender was bound to remove "on 12th August last in terms of the foregoing provisions of the lease, or at all events on 15th August, to which the pursuer agreed to extend the term fixed in the lease." The obligation quoted in cond. 3 is consequently the ground of action; and unless the pursuer can show that the defender has failed to do what was there undertaken, he is not entitled to the judgment of the Court.

Reading articles 3 and 5 of the condescendence together, we see that the obligation of which the pursuer seeks implement is that quoted in the former. But by the latter the import of that clause is misrepresented. What the defender, so far as the present controversy is concerned, was bound to do was "to remove the shepherds and other occupants from the buildings occupied in connection with this ground"—that is to say, the ground on Incheroe and Morvich in possession of the defender, from which his stock was to be removed.

The houses from which shepherds and other occupants were to be removed were not buildings upon or in "connection with Incheroe and Morvich," but were houses occupied in connection with this ground. Yet the former is the gloss put by the pursuer on the clause which is the ground of action. To remove the occupant of a building on Incheroe or Morvich is one thing; to remove the occupant of a building occupied in connection with this ground is another thing. The defender has undertaken the latter, but the former, by the clause containing the obligation of which implement is to be compelled, was not undertaken by the defender. The issue therefore may, and as I think should, be thus presented—Has the pursuer alleged that any shepherd or other occupant of any building on Incheroe or Morvich occupied in connection with this ground has not been removed by the defender? If he has, then, if necessary, there must be a proof; if not, the action must be dismissed.

There were two classes of persons who the pursuer says were to be removed—the one was shepherds; who the others were we do not know from what the pursuer says, although we gather it from what the defender has explained on the record—all that the pursuer says about them being that they were occupants of buildings and premises upon or in connection with Incheroe and Morvich. As regards the shepherds, the defender from the first admitted that his obligation applied to them, and explaining why they had not been warned in time to be removed in 1882, he undertook that they should be removed at Whitsunday 1883. They accordingly have been removed, and the decree concluded for so far as they are concerned is unnecessary, the result desired having been already accomplished.

The other class of persons who the pursuer says ought to have been removed by the defender he describes merely as occupants of buildings upon or in connection with the farms. Who these are, or where the buildings are from which they are to be removed, has not been stated, and this omission would alone be fatal to this action in all probability were the point to be the subject of determination. But be that as it may, are the persons referred to occupants of buildings "occupied in connection with this ground?" The pursuer does not say that they are, and he has (cond. 5) misstated the terms of the obligation on which he founds, that he may be relieved from the necessity of making and framing such an averment. We all know that they are not, though his failure to allege, and not our knowledge of the fact, must be the basis of judgment. These things being so, I concur with the Lord Ordinary, though for a different reason, in thinking that this action ought to be dismissed.

On his grounds of judgment relative to other occupants than the shepherds, I say only that I am well pleased that I have found another ground satisfactory to my own mind which enables me to support his interlocutor without committing myself to an opinion in one way or the other on the reasons by which he was influenced in giving his decision.

LORD RUTHERFURD CLARK—I also am of opinion that the interlocutor of the Lord Ordinary should be affirmed.

The Court adhered to the Lord Ordinary's interlocutor.

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