to be found much that is improbable and inconsistent, partly due perhaps to the imperfect view which the witnesses had of the vessel's movements, and the fact that the position of the sandbanks was concealed by the water.

This view, if well founded, is sufficient for the decision of the case. If, however, it were held that the harbourmaster did not take control of the "Genista," and that while under the orders of the pilot she touched or "smelt" the eastern sandbank, and ultimately grounded near the jetty, a more difficult question would arise, but one which need not necessarily be answered adversely to the pursuer. Richardson was a pilot of great experience, and he had as much knowledge of the condition of the entrance to Silloth Harbour as anyone. It is not said that he was drunk while he was in charge of the "Genista," or that those on board had any reason to find fault with him, and yet on this as on two previous occasions we find that large vessels under his charge took the ground almost precisely at the same place and in the same way. He says himself that it was impossible to take a large vessel in in safety owing to the bank. That statement, if taken literally, is, I think, an exaggeration, because it appears that the fairway left was of sufficient width if the conditions were favourable. But if it merely means that under unfavourable conditions it was very hazardous to take a large vessel in, I think there is much to support it, both in what is proved as to the position and extent of the sandbanks, and in what happened on three previous occasions in the case of large vessels. If the entrance to a harbour to which large vessels are invited to resort is kept in such a dangerous condition that even when steered by an experienced pilot, they run a serious risk of taking the ground, there is much to be said for the view that the owners of the harbour are responsible when a vessel grounds, even although the pilot might by the exercise of exceptional skill or good fortune have been able to avoid the sandbanks.

If the accident were due solely to the fault of the pilot, I am not satisfied that the defenders would be liable. I do not think that in steering the "Genista" Richardson was acting as the defenders' servant. Their arrangement with him simply was that in order to secure his services for vessels coming to the port of Silloth, and as an inducement to vessels to come there, the defenders guaranteed him remuneration up to a certain amount, he in return accounting to them for the whole of the fees drawn. I think that this arrangement was entirely outside his position as pilot, and that therefore it would not be safe to hold that he was acting as the defenders' servant when the accident occurred. That is my present impression, but it is not necessary to decide the question.

The result is that I think the Lord Ordinary's interlocutor should be adhered to.

LORD YOUNG was absent.

The Court adhered.

Counsel for the Pursuers—Ure, Q.C.—Salvesen—Younger. Agents—Boyd, Jameson, & Kelly, W.S.

Counsel for the Defenders—Balfour, Q.C.—Johnston, Q.C.—Aitken. Agent—James Watson, S.S.C.

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*Tuesday, July 5.*

## SECOND DIVISION.

[Sheriff of the Lothians.

## FERRIER *v.* READMAN.

*Lease — Conditions of Lease — Repair of Fences—Landlord Bound to have Ground "Always Duly Fenced."*

By the lease of a farm certain portions of the lands occupied by collieries, brickworks, and roads and railways leading thereto were exempted from the lease, and the landlord reserved power to resume for feuing or other purposes. It was declared that the landlord should be bound "to have the ground excepted from or taken out of the lease always duly fenced, either by himself or his tenants in such ground." The landlord also bound himself as at the term of entry "to put the houses and fences upon said lands into tenantable order," and the tenant bound himself, "on the houses and fences being put into said order," "to maintain and uphold the same, and any additional buildings, fences, dykes, and roads which may be made on the lands."

*Held*, in an action by the tenant against the landlord for damages resulting from the fences of part of the originally excepted ground not being kept in tenantable repair in certain specified years during the currency of the lease, that the landlord was bound in terms of the lease to keep the fences of the ground excepted from or taken out of the lease in tenantable repair.

This was an action brought in the Sheriff Court at Linlithgow by William Cochrane Ferrier, tenant of the farm of Whittockbrae, Bathgate, Linlithgowshire, against George Readman, advocate, proprietor of said farm, in which the pursuer sought decree for the sum of £47 as damages due to him in respect of his being deprived of the use of certain grass parks on the farm, which he alleged that he had been unable to use for grazing purposes owing to their not being kept properly fenced by the landlord in terms of the lease.

The defender maintained that he was not bound under the lease to repair the fences in question.

By the lease, which was for 19 years from Martinmas 1881, the defender's predecessor let to the pursuer "All and whole the farm and lands of Whittockbrae . . . but reserving from said lands of Whittockbrae all land which at the commencement of this lease was occupied by collieries, brickworks, and roads and railways leading

thereto . . . As also reserving to the proprietor power to resume from the said lands at any time such portion or portions as he may think proper, not exceeding one-tenth part thereof, for feuing, planting, or for any other purpose or use whatever . . . Declaring always that the proprietor shall be bound to have the ground excepted from or taken out of the lease always duly fenced, either by himself or his tenants in such ground."

The lease also contained the following clauses—"And further, in addition to the said expenditure" (being £300 which the landlord was to expend on drainage and other improvements), "the proprietor binds and obliges himself, as at the term of Martinmas 1881, being the term of the entry under the lease, to put the houses and fences upon said lands into tenantable order, and on the houses and fences being put into said order, the tenant binds himself and his foresaids to maintain and uphold the same, and any additional buildings, fences, dykes, and roads which may be made on the lands, and to leave them at their removal from the lands in the like good condition and repair, ordinary tear and wear always excepted . . . and in case of their neglecting to fulfil these obligations, the proprietor and tenant shall be bound to appoint arbiters to assess the cost of putting said buildings, fences, dykes, and roads in proper condition and repair at the tenant's expense."

The pursuer averred that part of the ground reserved under the lease was occupied by a mineral railway, on the east side of which he occupied under the lease a certain grass park, and on the west and north sides of which he occupied under the lease a certain other grass park, that the defender was bound under the lease to keep the fences of the mineral railway adjoining these parks "always duly fenced," throughout the course of the lease, that he had failed to implement this obligation, and in particular failed to keep the railway fence of one of the parks in a fencible state during seasons 1896 and 1897, and also failed to keep the railway fence of the other park in a fencible state during season 1897, with the result that the pursuer was prevented from using the parks for grazing purposes during those seasons.

The defender pleaded—"(1) The pursuer's averments are irrelevant and insufficient to support the prayer of the petition."

By interlocutor dated 22nd February 1898 the Sheriff-Substitute (MACLEOD) repelled the defender's first plea-in-law, and allowed both parties a proof of their averments, except as regards the damage, which was to be settled by a judicial referee.

The defender appealed to the Sheriff (RUTHERFURD), who, by interlocutor dated 22nd March 1898, recalled the Sheriff-Substitute's interlocutor, sustained the defender's first plea-in-law, and dismissed the action, with expenses, adding the following note:—

*Note.*—"The pursuer in this action claims damages from the defender in respect of his alleged failure to keep duly fenced a piece of ground occupied by a mineral railway excepted from the pursuer's lease of the lands of Whittockbrae. In the opinion of the Sheriff the defender's obligation under the lease in question, whether as regards ground excepted at its commencement, or of which he might resume possession during its currency, was not to keep but to 'have' the ground duly fenced. On the other hand, the tenant's obligation, after the fences had been put into good tenantable order, is to maintain and uphold them in the like condition, ordinary tear and wear excepted. It is not matter of dispute that the ground occupied by the mineral railway was duly fenced at the date of the pursuer's entry to the subjects, and that being so, the Sheriff thinks that it was incumbent on him to maintain and uphold the fences adjoining the railway, and that the defender's first plea-in-law ought to be sustained."

The pursuers appealed, and argued—The expression "to have always" duly fenced, meant that the landlord was to keep these fences in repair throughout the lease, not merely to put them in repair at the beginning of it. The clause with regard to the fences of "said lands" only referred to the farm fences proper, not including the fences of the excepted portions. The fences of what was excepted were in a different position from the farm fences proper. The Sheriff had failed to give effect to this distinction, and he had also ignored the word "always" in the clause regarding the fences of the excepted portions. The result of the defender's interpretation of the lease would be to impose a most unjust burden on the agricultural tenant of upholding fences with which he had really nothing to do, and this would be especially the case in the event of the landlord reserving ground for feuing.

Argued for the defender—The tenant was bound to keep the fences of the excepted portions of the lands in repair himself, the landlord being only bound to "have" them in repair at the beginning of the lease. The word "always" in the clause as to the fences of what was excepted, meant in the case of every piece of ground which was excepted or taken out of the lease. The obligation on the tenant to keep the fences in repair was perfectly general, and it in terms contemplated the case of additional fences being made during the lease. This could only refer to fences of land taken out of the lease under the reservation clause. The fences of excepted ground were just as much farm fences as any others.

LORD JUSTICE-CLERK—The Sheriff-Substitute allowed to the pursuer a proof of his allegation that the defender had failed to implement his obligation to keep the fences of the mineral railway on ground excepted from the pursuer's lease always duly fenced by himself or his tenants, and that in consequence he, the pursuer, lost the grazing of certain parks for the time specified on record.

The defender maintained, and the Sheriff has found, that the action was irrelevant, because under the lease the defender—the landlord—was only bound to "have" the mineral railway duly fenced, and the pursuer himself—the tenant—was thereafter "to maintain and uphold (the fences) in the like condition," and because it was not disputed that the ground occupied by the mineral railway was duly fenced at the date of pursuer's entry. Now, I do not read, as the Sheriff does, the provision as to fencing ground excepted from the lease or resumed during it. It would, I think, be an unreasonable interpretation of the lease to hold that if the landlord during the currency of the lease resumed a considerable portion of the ground for feuing or planting, and thereby added a large amount of fencing, the tenant was to maintain that fencing. In the case of a feu the fence erected might be a wall round the feu, or other expensive boundary fence, yet the landlord's construction is that the tenant must maintain that wall.

The clause provides that the landlord is "to have the ground excepted or taken out of the lease always duly fenced, either by himself or his tenants in such ground." That means that he must keep such excepted or resumed ground fenced, maintaining the fences himself or through his tenants in such excepted or resumed ground, and not that the pursuer should maintain these fences.

I propose that we should recal the Sheriff's interlocutor, affirm the Sheriff-Substitute's judgment, and remit to him to allow proof of new.

LORD YOUNG — I am of the same opinion. I think that the defender's plea that the action is irrelevant should be repelled. I think that the note of the Sheriff shows wherein his error lay. He says that the defender's duty was to "have" the excepted or resumed land duly fenced, and not to maintain the fences. Now, I am of opinion that the declaration that the defender's obligation is "to have the ground excepted from or taken out of the lease always duly fenced either by himself or his tenants in such ground," signifies not only that he must have sufficient fences put up but must maintain them.

LORD MONCREIFF — I am of the same opinion. There are in this lease two distinct and separate provisions as to maintaining fences. The first relates to excepted or reserved ground. The proprietor is to be bound to "have" such ground "always duly fenced either by himself or his tenants in such ground," *i.e.*, the mineral tenants. The second relates to the fences of the farm property so-called. With regard to these the proprietor's obligation is "to put the houses and fences upon the said lands into tenantable order" as at Martinmas 1881, the term of entry, and the tenant's obligation, that being done, is "to maintain and uphold the same, and any additional buildings, fences, dykes, and roads which may be made on the lands." The Sheriff has failed to note that those clauses relate to different matters, and also has given no effect to the word "always" in the first clause.

I think that we should recal the Sheriff's interlocutor and affirm that of the Sheriff-Substitute.

LORD TRAYNER was absent.

The Court pronounced the following interlocutor:—

"Sustain the appeal: Recal the said interlocutor appealed against: Affirm the interlocutor of the Sheriff-Substitute dated 22nd February 1898, and remit the cause to the said Sheriff-Substitute to proceed therein as accords," &c.

Counsel for the Pursuer—H. Johnston, Q.C.—John Wilson. Agents—J. A. Campbell & Lamond, C.S.

Counsel for the Defender — Sol.-Gen. Dickson, Q.C.—M'Clure. Agents—Drummond & Reid, W.S.

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*Wednesday, July 6.*

## SECOND DIVISION.

[Lord Kincairney, Ordinary.

## PURVES' EXECUTOR *v.* PURVES.

*Succession—Vesting—Survivorship Clause—Vesting Suspended till Event which Becomes Impossible.*

By her last will and testament a testatrix bequeathed £600 to each of four nieces, who were sisters, and bequeathed her silver plate, personal belongings, and all the residue of her estate to A, one of the nieces. She provided that there should be no division of the estate till A attained the age of twenty-one, and also that, should any of the nieces die before A attained the age of twenty-one, then "said share" should "be divided equally between the surviving sisters." A died unmarried before attaining the age of twenty-one. *Held* that no right to any part of the testatrix' estate vested in A, vesting being suspended in respect of the survivorship clause, that the whole interest in that estate destined to her passed to her surviving sisters, that the suspension of vesting ceased on her death, and that the sisters' original legacies, along with their respective shares of what was bequeathed to A, vested in them and became payable at that date.

Miss Jessie Jolly, who resided at the Cottage, Dunnet, in the county of Caithness, died on 5th June 1894, leaving a holograph last will and testament dated 2nd April 1894. After providing for payment of debts and certain legacies the will proceeded as follows:—"I bequeath to my nieces Isabella, Frances, Janet, and Christina, the the sum of £600 each = £2400. To my