possible. And that was by no means an unreasonable arrangement to make, because unquestionably he was under this agreement undertaking very serious liabilities. In the first place, he had contributed the great erection at his own cost, and had undertaken to remove it to the Botanic Gardens from his own grounds, and to make very large and expensive additions to it. He also undertook to contribute £250 towards the expense of removing certain herbaceous plants from one part of the gardens to another to make room for the conservatory. He also undertook the entire burden of the maintenance of the structure of the conservatory during the whole period of the twenty-one years' lease. In these circumstances, it certainly seems to me a very reasonable arrangement that if he is to gave entertainments in this building at all for his own exclusive benefit, he should be entitled to choose his own time for giving these entertainments. I do not know that we are told what number of nights in the course of the year this conservatory is at present occupied by Mr Kibble for his entertainments, but I do not think it can be said that the number of nights is too great. It is clear that there are various occasions upon which the building is otherwise occupied. Indeed, it is admitted by the complainers themselves that during summer—that is to say, what is called summer in the sense of this arrangement—in the months of April and May—the building has been left unoccupied by Mr Kibble, and has been used by the complainers for their own purposes. Therefore it it is in vain to say that he is monopolising it during the whole time. That turns out not to be the fact. If there was anything very unreasonable in Mr Kibble's position—if it could be shown that he was appropriating the conservatory every night for the whole season—if it could be shown that the use he was making of it was not necessary to give a reasonable profit—I should, in a question of possession such as this, be more inclined to listen to the complainers. But there is nothing of the kind here; there is nothing in the least unreasonable or nimious in the way in which Mr Kibble has used the rights reserved to him, and therefore I am for adhering to the Lord Ordinary's interlocutor.

Lord Deas concurred.

Lord Ardmillan—It is important to keep in view that this is not an action of declarator, but merely a suspension and interdict. It is right also to add that at the previous stage of the case we neither intimated nor entertained any opinion unfavourable to the pleas of Mr Kibble, but I am of opinion that the judgment which we are now to pronounce is of a more satisfactory nature than it would have been had we decided the case on the record as previously before us in the Bill Chamber.

Mr Kibble has undoubtedly made a gift of his conservatory to the complainers under certain conditions. But it is quite clear from the agreement entered into between the parties that Mr Kibble contemplated drawing a return from the conservatory when erected in the complainer's grounds. Accordingly he was to have a lease of the conservatory for twenty-one years. Now I am of opinion that every qualification of his right as a tenant which is of the nature of a limitation or exception must be instructed. Such limitation must be proved. It is not expressed, but it is said to be implied. A fair and reasonable construction of the contract raising implication plain may suffice, but where there are words of limitation, nothing but a clear implication can limit the right of the tenant under this lease. Mr Kibble's right is to the use of the conservatory on lawful days. That right cannot be further limited except in express terms, or by plain implication. He is prohibited having a concert on a Sunday, and he does not seek it; but there is nothing expressly to exclude his concert on any other day out of the remaining six. The eighth and ninth clauses of the agreement must be read together; and I cannot find in their terms any limitation of Mr Kibble's right to three days in the week, or any particular number of days less than six. There is certainly no limitation or restraint which he can be said to have overstepped in the admitted circumstances of this case. There may be equitable considerations which the Court might apply if Mr Kibble were making a nimious and unreasonable use of his right, but no such case has here arisen for consideration. We are however only dealing with a case of suspension and interdict, and should any departure from reasonable use occur in the future I am far from saying that the question might not be raised in the form of a declarator, or declarator and interdict.

Lord Mure concurred.

The Court pronounced the following interlocutor:—

"Having heard counsel on the reclaiming note for the Glasgow Royal Botanic Institution against Lord Young's interlocutor of 17th October 1874, Recal the said interlocutor: Repel the reasons of suspension, and refuse the interdict craved, and decern: Find the complainers liable in expenses," &c.

Counsel for the Complainers—Dean of Faculty (Clark), Q.C., and Balfour. Agents—Hamilton, Kinnear, & Beatson, W.S.

Counsel for the Respondents—Solicitor-General (Watson), Q.C., and M'Lean. Agents—J. & R. D. Ross, W.S.

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*Thursday, February* 18.

## SECOND DIVISION.

[Sheriff of Stirling, &c.

### LAMONT *v.* GRAHAM.

*Contract of Sale—Consenting Party—Heritable and Moveable—Fixtures—Moveable Fencing—Tenant and Liferenter.*

A tenant, who was also a liferenter, erected certain iron fencing, capable of being removed without injury, around the policy of his house. This fencing took the place of an old wooden fence. To a sale of the estate the liferenter was a party, signing the articles of roup and conducting the correspondence, but a year thereafter he claimed the right to the fencing he had put up.—*Held* that the iron fencing was an accessory of the estate, and that the fact of the liferenter-tenant having been a party to the sale, and not having warned the purchaser, placed him in an even worse position.

On 9th April 1874 a petition at the instance of Thomas Graham, Glasgow, was served upon James Lamont, Esq. of Knockdhu, residing at Gartmore House, Perthshire. The petitioner prayed for an order on the respondent "instantly to deliver up" certain continuous iron fencing at Balfunning, or to pay £120 as the price thereof. Mr Graham occupied the house and grounds of Balfunning for a number of years prior to Whitsunday 1873, when entry was given to Mr Lamont, who had purchased the estate from the trustees of the petitioner's father at a public sale in Edinburgh on 5th March 1873. In 1867 the petitioner, being desirous of acquiring additional ground for grazing, entered into an arrangement with the tenant of the adjoining farm, also belonging to his father's trustees, whereby the tenant sublet to him part of a field, and he then, at his own expense, enclosed the portion of the farm of Claehanry so taken in with a continuous iron fence about 4 feet in height. In 1864 Mr Graham, also at his own expense, fenced off portions of the shrubbery from another portion of the ground used for grazing cattle, with a precisely similar fence. A portion of this last-mentioned fence had previously been erected by the petitioner on another portion of the grounds, and was so erected by him for his own convenience. The whole fencing so erected was not less than 450 yards in length, and it was simply stuck into the ground with prongs, so as to be capable of removal without injury to the soil. To the articles of roup of the estate Mr Graham was a party for all his right and interest therein. No intimation was given to the defender or his agents at or previous to the sale of any claim of this nature at the instance of the petitioner; and, on the contrary, the defender, in his preliminary inquiries as to the estate, was, from the terms of certain letters addressed by the petitioner to him, led to think that the petitioner was himself sole proprietor of the estate. Mr Graham, in answer, said that he, being his father's heir-at-law, signed the articles of roup at the request of the agents of his father's trustees, as approving generally of the selling of the property, but that he had nothing to do with the framing of the articles; and he further denied that it was any part of his duty to give intimation to the defender, even though he had known that the defender was going to bid for the property, which he did not. Mr Graham also explained that a Mr Blair, named in the advertisement, had instructions to inform parties looking at the estate that the fences in question belonged to the tenant, but that, so far as he was aware, Mr Lamont never visited the estate or made any inquiries upon the subject. The first claim by the petitioner was made some time after the sale. Mr Graham was liferenter, under his father's settlement, of the residue of his father's estate. At the time of the sub-lease above mentioned there was an old stob and rafter fence between the farm of Clachanry and the original pasture-ground at Balfunning. This fence was in a state of decay, and was rooted out by the petitioner.

The petitioner pleaded—"(1) The iron fencing in question being the property of the petitioner, and the respondent having no lien or right of retention over the same, the petitioner is entitled to delivery thereof. The respondent having resisted the petitioner's first claim, should be found liable in expenses. (2) The fencing sued for being in its own nature moveable, and erected by a tenant for his own convenience, never belonged to the sellers of the estate, and could not pass by their conveyance to the defender. (3) Even though the fences were meliorations, the defender is the party liable in compensation therefor by the articles of roup under which he purchased."

The respondent pleaded—"(1) The fencing referred to in the petition and condescendence having been in the special circumstances of this case heritable in its nature at the date of the sale of Balfunning to the defender, the said fencing passed to the defender as part and pertinent of the estate purchased by him, and is now his sole property. (2) The defender having purchased the estate from Dr Graham's trustees under articles of roup, signed *inter alios* by the petitioner for all right and interest whatsoever which he had or could have in the estate in any manner of way, and the defender having received no intimation previous to the sale from the petitioner of his claim to said fencing, the petitioner is barred from insisting in his said claim *personali exceptione.* (3) The fencing proposed to be removed, in so far as erected in substitution for a former fence, is not removeable by the petitioner, and would not have been removeable by him even had he been a tenant and a party altogether unconnected with the sale of the estate. (4) Any claim which the petitioner might legally possess in regard to the said fencing on the ground of meliorations made by him whilst he was liferenter of the said house and grounds or otherwise, falls to be directed against his father's trustees. And (5) In any case the defender is entitled to have the said petition dismissed with expenses."

The Sheriff-Substitute (SCONCE) pronounced the following interlocutor:—

"*Stirling*, 16*th October* 1874.—Having considered the closed record, proofs, productions, and whole cause, and having heard parties' procurators thereon, and advised the same—Finds (1) That by disposition, No. 6/9 of process, dated 12th, 13th, 14th, and 15th May 1873, granted by the trustees of the late Rev. Dr Graham, the defender, for the price of £18,000, acquired right to the lands of Balfunning and others, with the whole pertinents thereof, with entry as at the term of Whitsunday 1873. (2) That immediately thereafter the pursuer made claim to the wire fencing, the subject of this process, and afterwards presented this petition for delivery thereof; and wherein he avers that for a number of years prior to said term of Whitsunday 1873 he was *tenant* from year to year under the trustees of his father, the said late Dr Graham, of the house and grounds of Balfunning, and that of different dates during his said *tenancy* he erected the said wire fencing at his own expense. (3) That Dr Graham died on 12th January 1865, leaving the trust-deed and settlement dated 14th January 1858, an extract whereof is No. 6/8 of process, and by that deed he conveyed his said estate of Balfunning, and his whole other estates and effects, to the trustees therein named, *inter alia* to hold the residue of his estate for behoof of the pursuer, his only son, in *liferent*, for his liferent use allenarly, during all the days of his life, and to pay to him the whole free annual produce of the said residue, and further, to hold the fee of the residue in trust for behoof of the lawful children of the pursuer, as therein set forth. (4) That shortly after Dr Graham's death the pursuer, under his *liferent* right, and not as

*tenant*, entered into the personal possession and occupancy of the house of Balfunning, policy, offices, and garden, and continued afterwards therein. That shortly after his entry the pursuer erected at his own expense a part of the wire fence in question, to the extent of 140 yards or thereby, in front of the house, and separating the same and a good many ornamental trees round it, and a piece of ornamental grass or lawn, from the policy, then extending to 6 acres or thereby in front, and that wire fence was and is necessary for the protection of the ornamental trees and grass foresaid, and to insure the privacy of the house. (5) That the said policy had originally been included in Dr Graham's adjoining farm of Clachanry, but was reserved by him therefrom when, in the year 1861, he let the farm to Lawrence Stocks, who is still the tenant thereof. At that time Dr Graham erected a stob and rail fence along the west side or boundary of the reserved ground or policy, and thus separated the same from the remainder of the field or fields of Clachanry, of which it had previously formed a part. (6) That in 1866 the pursuer, being desirous of adding to the policy, arranged with the tenant Stocks, for the agreed on annual deduction of £6 from his rent, to cede to him two acres more of his farm immediately to the west of the said wooden fence; and some time afterwards the pursuer took down that fence, and at his own expense erected the other part of the wire fence in question, extending to 310 yards, on the new march between the said farm and the extended policy, and which wire fence then became a *substitute* fence for the old wooden fence, but along the new line of march between the policy and Clachanry farm. The pursuer then also planted some trees along that wire fence, inside the same, and these, with the wire fence, thereafter formed the boundary of the policy on that side. The extent of the whole policy and grounds in and about the house thus became about 10 acres, whereof the portion within the wire fence first enclosed by the pursuer was about 2½ acres. This was the state of the grounds when the defender purchased the same. (7) That the wire fencing is what is called 'Patent Continuous Bar Fencing,' and is fastened in the ground by prongs and iron pillars, conform to the drawing on page 7 of No. 12/2 of process, and the present selling price thereof is 3s. 6d. per yard. (8) That from the time of Dr Graham's death down to the year 1869 the pursuer drew the rents of the estate of Balfunning; and, except for the first year, when they did so for special reasons, the trustees never asked him to account for the same. The pursuer returned himself to the county assessor as *proprietor* of the estate, and his name was entered in the valuation roll as such. (9) That in 1872 the defender began to treat with the pursuer as to a purchase of the estate, and the pursuer held himself out to him as the proprietor and party entitled to sell and arrange as to the price (see Nos. 6/1, 6/2, and 6/3). (10) That when the estate was first exposed for sale by public roup, viz., on 5th January 1870, the articles of roup (No. 6/4) were not only signed by the trustees, but by the pursuer, designed as 'only son and heir of the truster, for all right and interest whatsoever which he had or could have in the said land and others in any manner of way,' and he was also a party to the exposure at a reduced upset price on 3d July 1872, but he was not a party to the exposure at a still further reduced price on 5th March 1873, when the defender purchased the same. (11) Finds, in law, that the disposition in favour of the defender gives him the right to the whole fences on the estate, with a title to hold the same, but subject to such rights as might exist by paction, custom, or law in the tenants or others having preferable claims thereto. (12) Finds in law that the wire fencing in question in both its portions was, in the state of the facts foresaid, heritable, and passed to the defender as part and pertinent of the estate, and cannot be claimed by the pursuer, and specially in respect that he did not occupy the house, policy, and grounds as tenant, but under his liferent right, and that by his destination it was a pertinent of the estate, as well as a necessity for the common and beneficial use of the house, grounds, and policy as existing at the time of the sale to the defender. (13) Finds in law, *separatim*, that the pursuer, 1st, by generally holding himself out as proprietor of the estate, and 2d, specially to the defender, and 3d, separately by his signing the articles of roup, is barred *personali exceptione* from claiming the said wire fencing; and therefore sustains the defences, and assoilzies the defender from the conclusions of the petition, and decerns.

"*Note*.—The case is not unattended with difficulty, for no case of this kind is simple, and each has its own peculiarities; but after careful consideration, the Sheriff-Substitute has come to think that the defender must here prevail. The pursuer's position in regard to the estate of Balfunning is not doubtful, nor can the Sheriff-Substitute have any doubt as to the true character of the possession which he long had of the mansion-house, grounds, and policy. He had the liferent, and his children were the fiars, and unquestionably in his character of liferenter he took and had the possession and occupancy of the house, &c. There seems no ground in law for the view he maintains in this cause, that he was a mere tenant; and yet that is the character he affirms, and on which he relies in making the present claim. He has shown no bargain with his father's trustees for his title of occupancy—no agreement for rent—nothing in the least indicating that, until this action was raised, he had, or said or thought he had, the character of a tenant; and following out his assuming possession, he returned himself to the county assessor as proprietor of the estate, and was entered as such, and as occupier of the mansion-house in the valuation roll of the county. Therefore the case is free from the peculiarity sometimes attending such questions with *bona fide* tenants, vindicating some meliorations, which (without changing the character of any part of their possession) they had for their trade purposes made upon the premises. And here not only has the pursuer not a tenant's character, but, besides being himself the liferenter, his children were the fiars, with, therefore, an interest for himself as well as for them to improve the estate for his or their own occupation while they held the occupancy, and to enhance the price for their respective interests in the event of a sale. That parties intending to purchase would look to the condition of the house, grounds, and policy as an element of value is not to be doubted, and as they might find them in good order and condition, including the fences, so pay a price. And no doubt it would be hard on them, having thus included in their price an allowance for the satisfactory condition of the premises, to have to

pay a second time for the fencing, forming one reason for that condition, and the hardship would be increased in this case by the pursuer, for himself in liferent and his children in fee, having already benefited by the enhanced price. The Sheriff-Substitute considers that the pursuer is here in no other position than that of a proprietor selling the estate, and that just as a proprietor could not have validly made this claim, so neither can he. And this leads to a consideration of the nature of the fencing, and the circumstances attending its erection, which seem to show that it really was destined by the pursuer for the permanent improvement of the estate, and as such passed as part and pertinent of it. The witness Mr Paterson says, as to the fence round the house, 'I think it is absolutely necessary that there should be a fence there if there is to be any privacy about the house or any ornamental trees or grass;' and the pursuer himself says 'no doubt the trees would suffer by cattle passing through them.' This fence just seems one of those constantly seen round mansion-houses, protecting ornamental trees or shrubs, and lawn and flowers, from destruction by sheep or cattle grazing in the policy or park adjoining the ornamental grounds or flower garden, and necessary for that purpose, and for the privacy and beneficial use of these premises. As to the outer fence, the pursuer has to admit that if it was removed 'the policy grounds' would be entirely unfenced, for in short there would be nothing then to keep the Clachanry cattle and sheep off the policy, or those on the policy off that farm. Then the circumstances under which that was erected by the pursuer seem well to indicate its permanent character, and his destination of it. He added two acres to the policy by taking that from Clachanry, and at the same time pulled down the old march fence, and afterwards erected this fence in the new line of march as a *substitute* fence, and further planted trees along the inside of it, thus in a very distinct way permanently *extending* the *policy* up to the new march. No one looking at the place could entertain any doubt of the extension of the policy, or imagine that in the event of a purchase all this could be changed at the will of the pursuer, and the whole policy and grounds left exposed up to the walls of the house. Being pressed at the recent hearing, it could not but be admitted for the pursuer that if the outer fence at least was given up to him there might be some obligation on him to erect a new substitute fence of some kind, either on the old line or on the present line of march with Clachanry, but this seems clearly to indicate the true nature of this fence, its *permanent* character, as well as the pursuer's *intention* regarding it when he erected it, and extended the policy to it. It is true that either portion of the fence could be removed without injury to itself, but the removal would be *injurious* to the *estate*, and that seems more material in this case. Then, again, in fact the outer fence was a substitute fence for a pre-existing fence, and through it, and the trees planted along it, the pursuer extended the policy to its line. The Sheriff-Substitute is not satisfied that even if the pursuer had been a mere tenant he could have succeeded in this case against the defender; but considering his true position regarding the estate, the case seems still more clear, and reference may be made to Bell, Prin. sec. 1475, and also 743. Then in *Sime* v. *Harvie*, 14th December 1861, Lord Deas mentioned two elements which entered into all these questions—the *character* of the alterations or additions as less or more of the nature of fixtures, or less or more removable without injury to the tenement *and* to the materials themselves, and the *intention* of the party in making them. Their character (his Lordship said) may not always be valuable, and that operates in different cases in different degrees; and that there was a difference between the case where the change or addition had been made by a tenant for the purpose of his trade or business, and the case where it had been made for the mere improvement or amenity of the subject. And his observations otherwise are valuable here, considering the pursuer's position and the interest which he and his children had in the estate. Lord Curriehill said, 'When an absolute owner of the *solum* (differing from a tenant) expends his money in making such erections on his property as are of a permanent kind, and adapted for the purpose for which his property is destined, the erections became *pas tenementi*, and his own representatives in that tenement get the full benefit of his outlay, and the erections could not be demolished and the materials severed from the soil without detriment to the tenements, and defeating the intention of the ancestor. In cases of that kind the solution of the question does not depend merely upon the nature or completeness of the physical annexation, but also upon the intention with which that annexation was all made,' words of great weight in the circumstances of this case. Then it is by no means clear that even though the pursuer had been or were tenant he would have been entitled to remove these fences. No doubt, in the case of the *Duke of Buccleuch*, 18th June 1871, it was held that 'wire fencing, wooden paling, and wooden folds voluntarily erected by the tenant of a sheep-farm at his own expense, for the purpose of trying experiments in rearing sheep, and not in substitution of previously existing fences, or necessary for the proper management of the farm, could be removed by the tenant;' but the Lord Justice-Clerk pointed out specially these two elements in that case, that the fences were not intended by the tenant and were not calculated for the *permanent* improvement of the farm, and that they were not *substitutes* for old fences. And Lord Benholme said, 'This wire fence did not come in place of any previous fence; it did not supersede any fence already on the farm. Had that been the case, my opinion would have been influenced by it, because I do not think that a tenant is entitled to allow the fences on a farm to fall into disrepair, and then by erecting a wire fence which he can remove, so denude the farm of all its fences.' Here the case is not even one of a tenant making alterations for his own more advantageous use of the premises for trade purposes, but that of a party acting as proprietor for the amenity of the subject, and towards the benefit of an estate belonging to himself in liferent and his children in fee.

"The Sheriff-Substitute has further the opinion that by the manner in which the pursuer (in possession of these subjects) held himself out generally as proprietor, and to the defender in particular, and (separately) by his signing the articles of roup, although he did not sign the last minute of exposure, is barred *personali exceptione* from making this claim. His *personal occupancy* of the house, grounds, and policy is admitted, and this adds importance to this point, for, with the assumed proprietorship, would render unnecessary any minute inquiry how

each fence was fixed in the ground, or at whose expense it had been erected.

"The Sheriff-Substitute has only further to notice the last plea in law added for the pursuer, founded on the following clause in the articles of roup, 'that the purchaser shall be bound to relieve the exposers of all claims anywise competent to tenants in virtue of their respective tacks for meliorations, or on any other account.' The first answer to this is that the pursuer was not a tenant, and the next that he had no claim against the trustees under any tack for meliorations or otherwise. Then he himself was an exposer, and could not be a tenant to himself. Then it is not shown or even alleged that the pursuer in any character had a claim against the trustees in any way for these fences, but even if he had, it was not under a tack, and the words of the clause would not benefit him; and, not least, considering the judgment of the House of Lords in *Bruce* v. *M'Leod*, 8th July 1822, Shaw's H. of L. Reports, 1 vol., p. 213; and see *Thomson* v. *Fowler*, 8th February 1859."

The petitioner appealed to the Sheriff-Depute (BLACKBURN), who pronounced the following interlocutor:—

"*Edinburgh, 24th November* 1874.—The Sheriff having made avizandum, and considered the whole cause—Finds that the late Rev. Dr Graham, who died in 1865, by *mortis causa* trust-disposition and settlement disponed his whole estate, heritable and moveable, including the lands of Balfunning and others, to trustees: Finds that after other trusts had been fulfilled, the truster directed his trustees to hold 'the rest, residue, and remainder of his means and estate, heritable and moveable,' in trust for behoof of his only son Thomas Graham (the present petitioner), in liferent, for his liferent use allenarly, and to pay to him annually the whole free annual produce of the said residue, whether rents, interest of money, or other income therefrom: Finds that the said liferent provision is declared to be alimentary, and not affectable nor assignable by him for his debts or deeds, nor attachable by his creditors: Finds that by the said deed the truster gave to his trustees full power at any time to sell all or any part of the said trust-estate if they should deem it necessary: Finds that in 1873 the trustees, in exercise of the foresaid power, sold the lands of Balfunning and others by public roup, and the respondent was the purchaser: Finds that after the death of his father in 1865 the petitioner, with assent of the said trustees, occupied the mansion-house of Balfunning, and offices, garden, and policy ground thereto attached: Finds that in 1865 the petitioner fenced off a portion of the ground so occupied by him with continuous iron fencing, from another portion of the ground occupied by him: Finds that the said fence was not in substitution for any other fence then existing: Finds that in 1866 the petitioner made a verbal arrangement with Walter Stocks, the tenant of the farm of Clachanry, to occupy about two Scotch acres of the said farm immediately contiguous to another portion of the policy ground of Balfunning, at a rent of £6 per annum: Finds that the trustees were not parties to this arrangement: Finds that at this time there existed a wooden stob and rafter fence or paling dividing the lands of the farm of Clachanry from the policy grounds of Balfunning: Finds that this fence had been erected when the farm of Clachanry was let to the present tenant, in or about the year 1860: Finds that the petitioner having made the foresaid arrangement with the tenant of the farm, erected a fence of 'continuous iron fencing,' similar in all respects to that before mentioned, to divide the two acres of the farm of Clachanry added to the petitioner's occupation from the remainder of the farm: Finds that there was no existing fence where the said iron fence was erected: Finds that after the erection of the iron fence above described the said paling was removed: Finds that the whole of the said iron fencing was erected at the sole expense of the petitioner, and under no obligation by him to erect it: Finds that the said fencing is not of so fixed a character as to pass necessarily with the property of the land: Finds that there are no special circumstances to show that the petitioner intended the fences to be permanently attached to the soil, or to show that they were sold to the respondent as part of the lands of Balfunning, purchased by him: Therefore sustains the appeal, &c.

"*Note.*—The point in dispute in this case is whether the iron fencing referred to in the petition, and which, it was not disputed, was erected by the petitioner at his own sole expense, passed to the respondent as purchaser at a public roup of the lands of Balfunning along with and as part of the estate.

"The relation in which the petitioner stood to the lands when the fences were erected is of importance as indicative of his intention in erecting these fences. He was undoubtedly occupying the mansion-house, and the grounds around it, if not otherwise let.

"The subjects he occupied were part of the residue of the estate of his father, and he had a liferent interest in the annual revenue arising from that residue. He does not appear to have occupied under any written agreement or lease from his father's trustees, who held the whole property in execution of the purposes of the trust-disposition and settlement of his father, and who had under that deed an ample power to sell the lands whenever they thought in the proper administration of the trust it was necessary to do so.

"The petitioner was not therefore occupying as proprietor in liferent, or as having any independent or indefeasible right to occupy and possess the subjects. His occupancy was apparently nothing more than a convenient family arrangement, acquiesced in for a time by the trustees, while they continued to hold the property. This right of possession was thus eminently precarious, and cannot, as the Sheriff thinks, be placed higher than that of a tenant without a lease.

"Another very important consideration is, whether the character of the fences is such as necessarily to pass with the lands as part thereof.

"The fences are made of what is termed continuous iron fencing. This fencing is fixed in the ground by prongs, but it is easily removed without injury either to the soil or to the fencing itself. Indeed, it is made and sold as specially adapted for the purpose of easy moving, and seems at least to be of so moveable a nature as not necessarily to go with the land as *modificatum solo.*

"Then are the fences, from their position or purposes, such as to be necessary adjuncts of the lands? It is thought not. One portion was erected by the petitioner in 1865 to separate one portion of the lands around the mansion-house from another portion, both in his occupation, and in a position where no fence had been before, and where he was under no obligation to erect a fence.

"The other portion was erected in 1866 under a

verbal arrangement, to which the trustees were not parties, with the tenant of the farm of Clachanry, for the purpose of separating two acres of the farm which the tenant then sublet to the petitioner from the rest of the farm. It was thus a fence subdividing the farm of Clachanry as between the tenant of that farm and the petitioner during the subsistence of their agreement, but not affecting the obligations of the landlord and tenant as to the fences of that farm under the lease between them. It was a new fence erected for a different purpose from any other existing fence, and that purpose a temporary one. The removal of the old paling, fencing the farm of Clachanry from the grounds around the mansion-house, not forming part of that farm does not seem to affect the present question. Whatever the landlord's right may be as to having that fence replaced, no one seems to have objected at the time to the removal of what is described as 'a rather ruinous fence.'

"Thus, in the view taken by the Sheriff of the petitioner's position, and of the nature, purposes, and position of the fences in question, this case seems to be ruled by the same principles as were affirmed by the Court in the case of *Duke of Buccleuch* v. *Tod's Trustees,* 18th July 1871, 9 Macph., p. 1014.

"There is only one other point to be noticed. The respondent founds his second plea in law on personal exception, arising from the petitioner's having been a party to the articles of roup under which the lands were exposed and sold to the respondent.

"The petitioner no doubt signed and agreed to the articles of roup, and was a party to the minute of exposure of the property on two occasions; but he was not a party to the minute under which the property was exposed on the last occasion when it was bought by the respondent. Neither is he a party in any way to the disposition to the respondent. The respondent must have been satisfied himself, at least he ought to have been so, that all parties who had any interest adverse to the sale, and whose consent was required, were parties to the exposure before he bought. The Sheriff does not see that the petitioner had any right or interest in the lands requiring his consent to the sale. But supposing he had, that leaves the question just where it was—Is this fencing part of the lands sold? For the reasons already given, the Sheriff is of opinion that it is not."

The respondent, on 30th November 1874, appealed to the Second Division of the Court of Session.

Authorities quoted—*Duke of Buccleuch* v. *Tod's Trs.*, July 18, 1871, 9 Macph. 1014, 43 Scot. Jur. 552; *Syme* v. *Harvey*, Dec. 14, 1861, 24 D. 202, 34 Scot. Jur. 98; *Dowell* v. *Miln*, July 1874, 11 Scot. Law Rep. p. 673; *Brand's Trs.* v. *Brand*, 12 Scot. Law Rep. 124; Bell's Principles, §§ 475 and 743.

At advising—

LORD NEAVES—My Lords, this is a question of some delicacy, and one which trenches on a province of law which is surrounded by some difficulties, but I am unable to see difficulties in the circumstances under which this action has come before us.

I am not prepared to say what the Court might have been led to do if Captain Graham had been altogether an outsider, or if he had been merely in the position of a legatee or anything of that sort; but the question is not arising under these circumstances at all. It is most important here to notice the position in which Captain Graham actually stood as regards that sale of the estate of Balfunning. It would strengthen the argument for Captain Graham very much even were it shown that he was placed in an unnatural position, but that is not so, because, in the first place, he was the *de facto* occupier of the house and policies, and was also the liferenter of the estate under Dr Graham's will; secondly, that estate which he so liferented was to pass on his death to the fiars, his children; and thirdly, he was permitted by the trustees to come forward, and he did come forward, as the *dominus* in the whole transaction of the sale. This is shown by the expressions used by Captain Graham in his letter to Mr Lamont, of the 29th March 1872. He there says:—"I think there can be no doubt but that you have formed a very low estimate of Balfunning. Your calculations seem to be based on the present rental at thirty years' purchase. Now, as the farms come to be let in two or three years, it is as certain as the sun shines that an increase of rent on all the three farms, equal at least to what I formerly indicated to you, will be got for the asking, or even without asking. I consider it, therefore, quite fair to take this prospective rise into consideration. I have consulted men on whose opinion I place confidence, and am prepared to come a little nearer to your offer. In a word, I will accept an offer from you for £20,500. If this does not suit you, then I will cause my agents to have the estate advertised for sale by public roup, and I have no fear but that it will sell for its full value. I will, however, do nothing in the matter till I hear from you, as until you are clear off with it no one else will get any offer. If you insist on the march fence being now commenced, I can say nothing against your at once proceeding with it; but in the circumstances I think it might be as well to delay for a week or two till it can be seen what the course of events will be." That is to me the letter of a man who put himself forward for the interests of himself during his life, and of his children after his death—the letter of a man who not only managed this transaction, but who actually afterwards formally agrees to it as well as the trustees. Captain Graham came here to be a principal contracting party entirely cognisant of everything which related to the *bona fides* in making the purchase. At that time there existed this iron fence between the policy and the park outside, but during the whole progress of the negotiations nothing was said about this fence, though the reference to the March fence made in the letter from which I have read shows that Captain Graham was attending to and taking an interest in such matters. I look upon the matter in this light, that Captain Graham was, in the position in which he stood, committed, if either by his conduct or by his silence he allowed this fence to be regarded as a part of the property exposed for sale. There is, moreover, one feature in the case which tells against the pursuer, and that is the consciousness evinced by him that it was right to inform intending purchasers of the position in which this fence was. He himself says in his answers to the respondents that he told Blair to inform any intending purchasers of his rights in the fence, but Blair never did so inform the defender. When entry was given to Mr Lamont there was not any attempt made to carry off this iron fencing,

indeed no application was made to the defender regarding it until the April following. Mr Lamont purchased the estate as it stood, and he was entitled to get it all for his money, indeed he may especially have considered this fence in his purchase.

In conclusion, I can only add that it is my opinion that there was here an implied contract to allow the *status quo* to remain, and that this rules; and further, that it would be contrary to good faith were it not to do so.

LORD ORMIDALE—I am of the same opinion, and have only a few additional observations to make. It is, I think, important to keep in view that the question here is not one between landlord and tenant, and that accordingly the principle established by the decisions as to trade fixtures does not apply. Again, the case is not one of heir and executor, nor of liferenter and fiar, although questions as between persons so situated might involve the element in the present case. No example has been cited to us in which the present element has arisen, no question substantially as between the seller and the purchaser of the estate. It is, I am aware, said that Captain Graham was not truly the seller, and looking at the feudal title he was not so, but for the purposes of this case substantially Captain Graham occupied that position, being the liferenter, a limited proprietor of the estate of which his children were the fiars, and there can moreover be no doubt that he took an important part in the negotiations. I am disposed to deal with this case on the footing that Captain Graham was the seller substantially, and that Mr Lamont was the purchaser.

The real question is, What must be held to be the implied contract between the purchaser and seller? To enable an answer to be given to this it becomes necessary to know what was the nature and object of this fence. Now, it is quite true that this iron fence could be removed if required without injury, but it does not follow that although a thing is quite moveable in itself it must therefore be "a moveable" in a question like this. For instance, we have such things as gates, or doors and windows, which though in themselves quite moveable, could not be carried off by the seller in a transaction of this kind. Now, does not this amount substantially to the same thing? The purchaser Mr Lamont goes over the ground, sees a policy and enclosure, and very likely may have taken a great fancy to this policy, and to the grounds and situation so much praised in the correspondence by Captain Graham. If this fence were taken away there would no longer be properly speaking a policy at all. What then must have been the implied contract? It seems to me that there can be no reasonable doubt that Mr Lamont was entitled to rely on having those fences—enclosures in fact—round the policy grounds.

LORD GIFFORD—I am of the same opinion, and am quite content to rest the grounds of judgment on this—What is the fair and honest meaning of the contract of sale? This fence, looking at its position, might fairly be taken by the purchaser to be a regular part of the property. The fence took the place of the old "stob and rafter" put in by Dr Graham. If Mr Graham had not been a party to the sale at all he might have been in a much more favourable position. When he considered he was bound to warn intending purchasers through Mr Blair, he was also bound to tell to those who came to himself as Mr Lamont did. To the moveable character of the fence I do not attach much importance, for an iron fence of this kind may merely take the place of a stone wall, and we must look to the position in which it is placed and the purpose for which it is used. I do not draw any distinction between the 260 yards of fence and the 140 yards, but I regard this whole iron fence as an accessory of the estate, and I think that the purchaser was entitled to take it as such.

LORD JUSTICE-CLERK—My Lords, I entirely agree, and I do not think it needful to enter into any detail. The fences on a landed estate are *prima facie* heritable accessories of the subject. It may, of course, be otherwise; for example, if we had here to deal with the tenant of a shooting from year to year who had put up his iron fence in place of no other fence. But even in that case if the tenant had gone away leaving the iron fence in its place until after the sale, and without any explanation of its character, the purchaser might have had a good deal to say. Now, we have here nothing at all of that kind, although the petition is entirely based upon the alleged tenancy, a position which the petitioner had now entirely abandoned. I think that to allow Captain Graham to remove this fence would be against the good faith of the contract of sale.

The Court sustained the appeal, recalled the judgment of the Sheriff, and assoilzied the defender with expenses in both Courts.

Counsel for Petitioner (Respondent)—M'Laren. Agents—Webster & Will, S.S.C.

Counsel for Respondent (Appellant)—Solicitor-General (Watson), Q.C., and W. F. Hunter. Agents—W. & J. Cook, W.S.

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*Tuesday, February 23.*

## SECOND DIVISION.

[Sheriff of Argyllshire.

### SHEARER *v.* ALEXANDER.

*Seduction—Cheque—Value—Condition—Proof.*

A person who has seduced a woman is not entitled to attach a condition—that she will not reveal his name—to a cheque granted as an alimentary provision to the woman and as reparation for the loss of her situation.

This was an appeal from the Sheriff of Argyllshire. The appellant Alexander Shearer, who is a joiner at Innellan, is respondent in the action in which the appeal is taken, the pursuer being the present respondent—Mary Alexander, domestic servant in Glasgow. That action was raised to enforce payment of the contents of a cheque for £35, which was granted to the pursuer by the defender on 5th September 1873. The cheque was on the City of Glasgow Bank, and on her presenting it for payment it was dishonoured—the defender having withdrawn his money from the bank. He defended her action against him on the ground that, she having accused him of having seduced her, he gave her the cheque and £5 in money on condition that she should not make his name public, instead of which she immediately showed the cheque to different persons in his father's hotel at Innellan, where she was then in service, and told his mother that he was the father of a child with which she was then *enceinte*. In these circum-