the two statutes deal with the same matter that the provisions cannot stand together. Between those extremes we have many instances where subsequent legislation only modifies or varies the effect of the provision made in the earlier statute.

Now, the scope of the enactments before us is very different. One enactment deals with the sale of liquors in boats and vessels, in rivers or harbours, and at fairs or markets; while the other is not limited as to place or time, but gives power to the magistrate to grant a special permission when the application has reference to a public entertainment about to be given, and when he is satisfied that the entertainment is of a legitimate and proper character.

Such enactments are not identical, and it is also plain that they are not contradictory. The enactments can perfectly well stand together, and therefore there is no case of implied repeal.

LORD RUTHERFURD CLARK concurred.

The Court accordingly dismissed the appeal.

Counsel for the Appellant—C. S. Dickson—William Brown. Agent—Alex. Morison, S.S.C.

Counsel for the Respondent — Glegg. Agents — J. Douglas Gardiner & Milne, S.S.C.

COURT OF SESSION.

Thursday, March 8.

FIRST DIVISION.

[Lord Low, Ordinary.

FORBES AND OTHERS *v.* WELSH & FORBES.

Contract—Agreement to Buy a Particular Bond and Disposition in Security—Rate of Interest not Specified in Bond—Whether Purchaser Entitled to Resile.

A firm of lawyers offered to take an assignation to a particular bond and disposition in security so as to prevent the heritable subjects over which it was granted being exposed for sale, and this offer was duly accepted. They afterwards refused to implement the contract on the ground that the title was defective, as the bond failed to specify the rate at which the interest stipulated for was to be paid.

Held that they had agreed to accept the bond as it stood, and were not entitled to resile.

Opinion by Lord Low that the bond did not constitute a good security for interest.

Opinions reserved on this point by Lords M'Laren and Kinnear.

Duncan Forbes, Ernan Lodge, Aberdeen, and others, as the holders for their respective rights and interests of a bond and disposition in security for the sum of £3500 sterling, granted by the deceased George Whyte of Meethill over the lands of Meethill, dated and recorded in the Particular Register of Sasines kept for the Counties of Aberdeen and Kincardine on 20th June 1862, served on or about 13th February 1893 upon the debtors in said bond an intimation and requisition for payment of the principal sum contained in the said bond, and the interest then due. Thereafter they, in terms of the said intimation and requisition, proceeded to advertise the security subjects for sale in Aberdeen on 21st July 1893. On 28th June 1893 Messrs Welsh & Forbes, S.S.C., Edinburgh, presented in the Court of Session a note of suspension and interdict craving that they should be interdicted from selling the said subjects. After the bondholders had lodged answers to Messrs Welsh & Forbes' application for interdict the parties came to an arrangement, which was embodied in a letter of offer by Messrs Welsh & Forbes to the bondholders' agents, Messrs Macpherson & Mackay, W.S., and a letter of acceptance by the latter. These letters were in the following terms:—

"*Edinburgh, 18th July* 1893.

Suspension at our instance against Forbes and others.

Dear Sirs—With reference to this case, and in respect that you have agreed to withdraw the sale of the lands of Meethill advertised to take place on 21st curt., we undertake and bind ourselves personally to take an assignation at our expense to the bond of £3500 in favour of ourselves, or of a lender to be selected by us, and to pay the amount therein, with all arrears of interest thereon, the said interest to be calculated at 4 per cent., with simple interest at said rate upon the arrears of interest, and further to pay the expense of the notarial intimation, and of the advertising the subjects for sale and withdrawing them from sale. . . . The settlement on this footing to take place at the ensuing term of Martinmas. In respect of this undertaking it has been agreed that the note of suspension should be withdrawn, neither party being entitled to expenses.—Yours truly, WELSH & FORBES."

"*Edinburgh, 19th July* 1893.

Suspen. Welsh & Forbes v. *Forbes and others.*

Dear Sirs—We hereby accept your offer of yesterday's date, and have accordingly instructed the withdrawal of the property from the market, and also have informed the Bill Chamber Clerk that the case has been settled.—Yours truly, MACPHERSON & MACKAY."

In November 1893 Duncan Forbes and the other creditors in the bond brought an action for implement of the contract, and failing that for damages, against Messrs Welsh & Forbes, who had declined to take the assignation to the bond on the ground that the title was defective. After stating the history of the transaction as given above, the pursuers averred that the title tendered by them was valid and sufficient in all respects, and they pleaded — "(1) The

defenders having contracted with the pursuers, and having refused to implement their contract, all as condescended on, the pursuers are entitled to decree of implement, as concluded for, with expenses. (2) In the event of defenders failing to implement said offer, pursuers are entitled to decree for damages and expenses, as concluded for. (3) The title tendered by the pursuers being valid and sufficient in all respects, the pursuers are entitled to decree in their favour, as concluded for."

The defenders stated that they "received the security writs on 13th September 1893, when they for the first time became aware of what they had previously been ignorant of, viz., that the bond and disposition in security is defective in its terms. The obligation is to repay the principal sums 'with a fifth part more of liquidate penalty in case of failure, and the interest of the said principal sum, from date hereof to the said term of payment.' No rate of interest is specified, nor is it stated that the interest is to be at the legal rate. The defenders therefore maintain that inasmuch as no unknown or uncertain incumbrance can be created over land by bond and disposition in security, the title tendered by the pursuers is not valid and sufficient. As stated in their letter of 10th October 1893 to the pursuers' agents, the defenders are perfectly willing to implement their part of the agreement upon the pursuers establishing that they are in a position to implement theirs by giving the defenders a valid and sufficient title. The defenders maintain that they are entitled to receive, on making payment of the stipulated sums, a title which will enable them to exact payment of the interest out of the lands."

They pleaded—"(1) The pursuers' averments are irrelevant and insufficient to support the conclusions of the summons. (2) According to a sound construction of the arrangement embodied in the defenders' letter of 18th July 1893, and relative acceptance, the obligation to take an assignation to the said bond is subject to the implied condition that they should thereby obtain a valid security over the lands for the payment of interest. (3) In respect the said bond is defective in the interest clause, the defenders are not bound to take an assignation thereto. (4) In any event, the pursuers are bound to establish to the satisfaction of the Court that they are in a position to grant the defenders a valid security over the lands for the payment of interest before calling on the defenders to take an assignation."

Upon 16th January 1894 the Lord Ordinary (Low) pronounced the following interlocutor:—"Finds that the bond and disposition in security described in the summons being defective in the clause of interest in respect that no rate of interest is specified therein, the defenders are not bound to accept an assignation thereof under the offer and acceptance of 18th and 19th July 1893 respectively—To that extent and effect sustains the pleas in law for defenders: Assoilzies them from the conclusions of the summons and decerns."

"*Opinion.*—By letter dated 18th July 1893 the defenders offered to take an assignation from the pursuers of a bond and disposition in security over the lands of Meethill for £3500, 'and to pay the amount therein with all arrears of interest thereon, the said interest to be calculated at four per cent.'

"The offer was duly accepted by the pursuers' agents, and the bond and disposition in security, and other documents necessary, were sent to the defenders in order that they might prepare the assignation and carry through the transaction.

"On examining the bond and disposition in security the defenders found that no rate of interest was specified. The obligation is to repay the principal sum 'with the interest of the said principal sum from the date hereof to the said term of payment.

"The arrears of interest which the defenders had agreed to pay to the pursuers amounted to £854, and in view of the terms of the clause of interest the defenders declined to prepare an assignation on the ground that the bond would not give them a title to operate payment of the interest out of the lands.

"It is not disputed that the defenders are entitled to a valid heritable security for repayment out of the lands, of interest as well as of principal, but the pursuers contend that the bond in question is of that character.

"The argument of the pursuers is as follows—There is an obligation to pay interest, and the only effect of the rate of interest not being specified is that the debtor can be compelled to pay the highest rate of interest for which a Court of law would in the absence of agreement give decree, namely, five per cent. The bond, therefore, did not fall within the rule that an indefinite amount could not be made a burden upon lands, because the rule was satisfied if the maximum amount with which the lands were charged could be ascertained.

"The point is a novel one and is not without difficulty. It may be that, in a question with the debtor under the personal obligation, payment of interest at the rate of five per cent. could be enforced. But it does not follow that the interest is validly constituted a burden upon the lands. The law is settled and precise that in order to the constitution of a valid security over lands the amount secured must be definite, and the full amount of the charge must be capable of being ascertained by inspection of the records. Thus, in *Tod* v. *Dunlop*, 1 D. 231, it was held that a security for the sum contained in certain acceptances was bad, because the amount for which the acceptances were granted was not stated, although they were identified by their dates.

"I think that it is very difficult to hold that a security for interest on a principal sum which does not in any way specify the rate of interest is anything else than indefinite. I am therefore of opinion that the defenders cannot be compelled to

accept an assignation of the bond in question. It is not disputed that the defenders are entitled to a security which is good against the lands both for principal and interest, and I do not think that they are bound to accept a security under which it is at least extremely doubtful whether they can recover the arrears of interest."

The pursuers reclaimed, and argued—(1) The Act of 17 and 18 Vict. cap. 90, repealing the Usury Laws, had not altered the current or legal rate of interest. Apart from agreement, that remained at 5 per cent., and an obligation to pay interest was to pay at 5 per cent. Here, therefore, the lands were burdened with interest at that rate, or alternatively at a rate not higher than 5 per cent. Accordingly the encumbrance was not indefinite. (2) The bond was a perfectly good bond even if it carried no interest. (3) The defenders had not bargained for a valid bond over certain subjects carrying interest at a certain rate. They had offered to buy a particular bond with which they were well acquainted, for it had been the cause of controversy ending in this arrangement. That offer had been accepted, and they were bound to implement the completed contract.

Argued for respondents—(1) The Lord Ordinary was right in holding the title defective. (2) They had bargained for a marketable title. This was evidenced by the words in the offer "or a lender to be selected by us." An offer to buy a bond was necessarily qualified by the condition that it should be a good bond. It was not an offer to buy a piece of paper, but a security, provided it was a valid security. An agreement to take a title as it stands did not bind the person so agreeing to take an unmarketable title. *Carter* v. *Lornie*, December 12, 1890, 18 R. 353.

At advising—

LORD PRESIDENT—The Lord Ordinary has decided this case on a view entirely different from that presented to us in the latter part of the argument in the reclaiming-note. We are now asked to determine what is proper implement of the contract embodied in the letters on pages 7 and 8 of the closed record.

The offer made by Messrs Welsh & Forbes is as follows:—"To take an assignation to the bond of £3500 in favour of ourselves or of a lender to be selected by us, and to pay the amount therein with all arrears of interest thereon, the said interest to be calculated at 4 per cent." . . . Now, the bond is identified in a very distinct manner by the pursuers in their opening statement, because they begin their narrative by saying that they and the defenders came to law over a particular bond dated and recorded upon a given date. It appears—I rely upon the pursuers' statement—that they took proceedings for the purpose of bringing the security subjects to sale, and that Messrs Welsh & Forbes took steps to prevent their doing so. Afterwards Welsh & Forbes made the offer I have read upon condition of the pursuers withdrawing the property from sale. Now, it cannot be taken as other than quite clear that Welsh & Forbes, in making this offer, were in full knowledge of the writ in question.

Taking then the averments in condescendence 1 and 2, from which it appears that the litigation was settled by the bond in question being transferred from the one party to the other, that other agreeing to take an assignation to a particular writ, I think it is impossible to say, because they find something wrong with the bond, which was patent on the face of it, those who agreed to take it are to be relieved from doing so. They must be held to have agreed to take it just as it was.

Now, although the Lord Ordinary has not taken cognisance of this view, I think it gives a short and conclusive answer to the question before us, and that the bargain made must be implemented.

LORD ADAM concurred.

LORD M'LAREN—The persons who agreed to take an assignation to this bond describe and identify it in their letter making the offer. I think, therefore, that they agreed to accept an assignation to that specific bond, and that the case is the same in principle as that of a purchased estate where the purchaser agrees to take the title as it stands. It is accordingly not necessary to consider the question raised in the Lord Ordinary's note, but I think it right to say that I am not to be understood as concurring with his Lordship's view if that question were before us. Whether the bond is a good security for interest may have to be determined hereafter, and on that point I desire to reserve my opinion.

LORD KINNEAR—I concur, and I refrain from expressing any opinion on the question referred to by Lord M'Laren.

The Court recalled the interlocutor of the Lord Ordinary, and decerned and ordained the defenders to implement their part of the contract at or before the term of Whitsunday 1894.

Counsel for Pursuers and Reclaimers—H. Johnston—M'Lennan. Agents—Macpherson & Mackay, W.S.

Counsel for Defenders and Respondents—Graham Murray, Q.C.—C. K. Mackenzie. Agents—Welsh & Forbes, S.S.C.