defenders that the pursuer should be ordained to consign said sum.

B, the concurring pursuer, having failed to pay the said sum, the Lord Ordinary on 8th March 1894 pronounced an interlocutor, wherein, in respect of the failure of the concurring pursuer to pay the said sum, he assoilzied the defenders from the conclusions of the summons, finding no expenses due to or by either party.

The concurring pursuer reclaimed against this interlocutor, and argued—He had a good title to reclaim, for his was the real interest in the case though it was formally brought up by the judicial factor. The Court of Session Act of 1868 contemplated the possibility of others than the pursuer or defender in an action presenting a reclaiming-note. Section 52 provided that "Every reclaiming-note . . . shall have the effect of submitting to the review of the Inner House the whole of the prior interlocutors of the Lord Ordinary of whatever date, not only at the instance of the party reclaiming, but also at the instance of all or any of the other parties who have appeared in the cause." He had been allowed to appear without any objection, and was therefore entitled to be heard. He would of course be liable to any expenses incurred after the date of the reclaiming-note — *Morrison* v. *Gowans*, November 1, 1873, 1 R. 116. This was analogous to the case of a pupil bringing an action with consent where the consenter might be found liable in expenses, and had the right to reclaim.

Argued for the respondents—The concurring pursuer was not really a party to the action, though he called himself so. He had refused to obey an order of the Court, as not being a party to the action. He had no right to come forward now and reclaim as if he were a party to it. This was not a case where a title defective in itself could be remedied by the concurrence of someone else. The reclaimer should have sisted himself as a party to the action before judgment was given in the Outer House if he wished to reclaim.

At advising—

LORD PRESIDENT—When the reclaimer gave his consent and concurrence to this action being brought, he entered into an agreement with the parties, under which it was intended that, so far as he was concerned, his interests in the action should be contested by the judicial factor. If that view of the agreement be correct, it is hostile to the notion that a person who has agreed that someone else should be the *dominus litis*, should be enabled to shake himself free from this agreement, and himself present a reclaiming-note against an interlocutor in the case. There is nothing here to alter the reclaimer's primary position, and accordingly he cannot now be heard.

LORD ADAM—It is quite clear that the reclaimer here was not *ex facie* a party to the action. There might be cases in which something had passed which would change the position of a concurring pursuer and make him a party to the action, but in the present case what has passed leads to the opposite conclusion. For the reclaimer appeared at a stage in the Outer House and pleaded that it was incompetent for the Lord Ordinary to pronounce a certain interlocutor against him, on the ground that he was not a party to the action. I do not think that he can now be heard when trying to take up an opposite position.

LORD M'LAREN—I agree that the position of a concurring pursuer is that he enters into a contract that the question should be settled between the principal pursuer and the defender, and that he should be bound by the decision. It is enough here to say that a person who merely grants his consent and concurrence has no title to reclaim against an interlocutor assoilzieing the defender. Such a step can only be taken by the principal pursuer.

LORD KINNEAR concurred.

The Court refused the reclaiming-note.

Counsel for the Concurring Pursuer—Salvesen. Agent—Party.

Counsel for the Defenders — Dundas. Agent—Thomas White, S.S.C.

Wednesday, May 16.

SECOND DIVISION.

[Sheriff of Aberdeenshire.

DUNCAN *v.* BROOKS.

Lease—Right to Take Peats Imported into Lease—Tenant Deprived of Right to Take Peats under Lease — Abatement — Retention of Rent.

A tenant took a lease of the farm of Newton "all as possessed by him." The tenant and two of his progenitors who had been tenants before him, had been in possession of a peat lair known as the Newton lair, in the moss of Tillychip on their landlord's estate, and from this lair they dug the fuel required for their use. Certain estate regulations were incorporated in the lease, by which the landlord reserved to himself the mosses on his estate, with power to regulate and divide them as circumstances rendered necessary, it being further provided that the tenants should be bound to cast their peats and fuel on the allotments set apart for them.

The proprietor having sold a portion of his estate, including the farm of Newton, to one person, and another portion of his estate, including the moss of Tillychip, to another person, and the latter having intimated to the tenant of Newton that he must take no more peats from the moss — *held* that the right to take peats from the Newton lair in the moss of Tillychip was part

of the subject of the lease, and that the tenant of Newton before paying his rent to the new landlord, was entitled to deduct therefrom reasonable compensation for the right of which he had been deprived.

By lease dated 30th June and 20th and 21st July 1880, the trustees of the Marquis of Huntly let to George Duncan the lands of Newton part of the estate of Aboyne, Aberdeenshire, "all as presently possessed by him," for the space of twenty years from Whitsunday 1878, at a rent of £60.

Two of George Duncan's progenitors had been tenants of the farm before him from a date prior to 1822, and as such they and he had been in possession and enjoyment of an allotment or peat lair, known as the Newton lair, in the moss of Tillychip, which was part of the estate of Aboyne, and lay about one mile from the farm on the other side of the river Dee, and from this lair they dug the fuel required by them for their farm.

Certain estate regulations issued first in 1860 and again in 1873 were imported into the lease and made part thereof so far as not inconsistent with the lease itself. By article 12 of the said conditions and regulations it is provided as follows — "The proprietor reserves to himself all the mosses on the estate, with power to regulate and divide them as circumstances may render necessary, and the tenants shall be bound to cast their peats and fuel in a regular manner on the allotments set apart by the moss grieve, and shall not be entitled to sell or give away peats or turf, and each shall pay a portion of the moss grieve's salary, and of the expense of keeping the roads and drains through the mosses in repair, as well as of making new ones when required. And in the event of the proprietor letting the mosses for cultivation, it is hereby specially conditioned and declared that he shall be under no obligation to find moss for the tenants in place thereof."

In 1888 the Marquis of Huntly's trustees sold a portion of the estate of Aboyne, including the moss of Tillychip, to C. H. Wilson. At the same time they intimated to George Duncan that the moss had been sold, and that therefore he could not be allowed "to go to that moss any more." Thereafter George Duncan refused to pay his rent except under deduction of £10 per annum, as the value of the privilege of taking peat from the moss of which he had been deprived. Legal proceedings were threatened against the tenant for payment of this £10, but none were ever taken.

In 1890 the Marquis of Huntly's trustees sold the lands of Glentana, including the farm of Newton, to Sir William Cuncliffe Brooks, it being provided in the disposition that the lands were sold and disponed subject to the leases then current. After this sale, George Duncan continued to deduct £10 before making payment of his rent to the new proprietor.

In 1893 George Duncan raised an action in the Sheriff Court at Aberdeen against Sir William Cuncliffe Brooks, to have it found and declared "that the defender is bound to warrant and maintain the pursuer as tenant of the farm of Newton of Glentana, part of the lands, earldom, and lordship of Aboyne in the county of Aberdeen, hereinafter called the estates of Aboyne, in the enjoyment and possession of the allotment or peat lair in the moss of Tillychip, known as the Newton lair, and till recently possessed by the pursuer as tenant foresaid, in the parish of Aboyne, part of the estates of Aboyne, together with the right to dig, winn, and lead peats therefrom as fuel for his use as tenant of the farm of Newton of Glentana, and others after mentioned, and that for the period from Martinmas 1890 to Whitsunday 1897, when the pursuer's lease thereof terminates; or otherwise failing the defender so maintaining the pursuer, to grant decree finding and declaring that the pursuer as tenant of the said farm is entitled to an annual abatement on £60, the rent or tack duty of the said farm and others for the years and crops 1891 to 1897 inclusive, and that to the extent of £15 sterling in each year, or to the extent of such other sum as the Court may modify in the course of the proceedings to follow hereon, and finding and declaring that on payment by the pursuer to the defender of the said sum of £60 sterling in name of yearly rent or tack duty at the stipulated or ordinary terms of payment in each year under deduction of said modification of £15, or such other sum as may be fixed by the Court, the defender is bound to grant to the pursuer releases and discharges in full of such rent in each year."

The pursuer averred, *inter alia*—"The peat lair in the said moss was a material part and pertinent of the pursuer's farm. . . . The value of the said moss to the pursuer was £15 a-year at least. Since he was deprived of the said moss he has had to purchase coals in lieu of peats to the extent of 13 tons per annum. The average price of coals at Dinnet station is 25s. per ton, and his loss per annum is £15 sterling at least. . . . The pursuer has made retention from the defender from the rents past due to him, but the defender has intimated his intention to at once raise an action in the Court against the pursuer for payment of the sums so retained; the present action to fix and determine the pursuer's rights in the premises is necessary."

The pursuer pleaded—"(2) The said allotment or peat lair in the said moss being a material part and pertinent of the said farm as let to the pursuer, and no avoidance of the pursuer's right thereto having arisen as against him, the defender is bound to warrant and maintain him in the said right, or suffer an abatement of rent commensurate with the value of the subjects not so warranted."

The defender lodged defences, and pleaded, *inter alia*—"(1) All parties not called. (2) The action is irrelevant. (3) The action is excluded by the terms of the pursuer's lease, and the conditions and regulations therein referred to. (6) The pursuer having, according to his own showing, been excluded from an alleged part of

his farm, and having taken no action against his landlords or their disponees, all before the defender acquired his estate, is not entitled to call on the defender and to reinstate him, or pay damages, or allow abatements from the lease. (7) If the moss was, as alleged, part of the farm let to the pursuer, he was entitled to continue possession thereof against the purchaser of it, and cannot claim from the defender compensation for his failure to do so."

On 5th June 1893 the Sheriff-Substitute (DUNCAN ROBERTSON) sustained the defender's second plea-in-law, and dismissed the action as irrelevant.

On appeal the Sheriff (GUTHRIE SMITH) recalled the interlocutor of the Sheriff-Substitute, and allowed parties a proof of their averments. The proof was taken before the Sheriff-Substitute, who thereafter made avizandum with it to the Sheriff-Principal.

On 20th January 1894 the Sheriff pronounced the following interlocutor—"Finds (1) that the pursuer is in possession of the farm at Newton, under a lease which terminates at Whitsunday 1898; and along with the other tenants on the estate he and his predecessors in the farm had been accustomed to take peats from the moss of Tillychip, part of the same estate; (2) that this practice is recognised and rules laid down for the exercise of the right or privilege in the regulations which are incorporated by reference into the lease forming the contract between the parties; (3) that in 1888 the defender's authors intimated to the pursuer that he could not be allowed 'to go to the moss any more,' the same having been sold to a third party; (4) that the pursuer thereupon refused to pay his rent, which under the lease is £60 per annum—except subject to an abatement equal to the value of the privilege which he had previously enjoyed, and in the knowledge of this claim, the then owners of the property sold the farm to the defender: On these facts, finds in law that the pursuer is entitled to an abatement from his rent corresponding to the value of the right or privilege of which he has been deprived by his landlord's act without his consent: Assesses the same at the sum of £7, 10s. per annum: Repels the defences, and substituting the foresaid sum of £7, 10s. for the £15 claimed, decerns in terms of the last alternative conclusion of the summons," &c.

The defender appealed, and argued—Under the lease there was no obligation on the landlord to find moss for the tenant. The permission to take peats was a privilege given to the tenant, but the latter had no legal right to the moss at all. He had only a privilege terminable at the landlord's pleasure. Even if the tenant had a legal right to take peats, the landlord was entitled to send him to any part of the estate to cast them. If the tenant had a legal right the action should have been brought against Mr Wilson, as he must be held to have bought the lands under burden of the tenant's rights in the mosses—Act, 1449, c. 18; Erskine, ii. 6, 27.

Argued for the pursuer and respondent—The right on the part of the tenant of Newton to take peats from the Newton lair of the moss of Tillychip was not a licence from the landlord, and revocable at his pleasure. As long as the moss was not let for cultivation the tenant's right under his lease, and as interpreted by long possession, was definite and legal. It had been recognised by the landlord, and if it was taken from the tenant, he was entitled to a deduction from his rent in lieu thereof—*Brown* v. *Brown*, February 23, 1826, 4 S. 494. The claim made under the present action was not of the nature of a claim for compensation or damages, but simply a claim founded on the fact that a portion of the rent was not due—*Muir* v. *Macintyres*, February 4, 1887, 14 R. 470. If the Marquis of Huntly when proprietor of Newton was bound to maintain the pursuer in possession of the Newton lair, the defender, who derived his title from Lord Huntly, was under the same obligation.

At advising—

LORD YOUNG—In respect of value the matter involved in this case is a very trifling one. It, however, raises a question of some interest, though in my opinion not of much difficulty. The broad facts of the case may be stated in a few sentences. The pursuer is tenant of part of a farm formerly occupied by his father and grandfather, the period of occupation going back to the early part of the present century. The farm is called Newton, and it may be taken as a fact that during the whole possession of the farm from an early period of the century, the tenant has been in the enjoyment and possession of the peat allotment or lair in the moss of Tillychip, known as the Newton lair.

In the current lease dated in 1880 there is a reference to conditions and regulations to be observed by the tenants, No. 12 of which relates to the mosses, the right to take which was part of the lease. This article commences—"The proprietor reserves to himself all the mosses on the estate, with power to regulate and divide them as circumstances may render necessary." I regard that reservation as a reservation by the landlord of the mosses from the lands let to the tenants. We are all familiar with such reservations as regards woods and plantations. Then the article goes on—"And the tenants shall be bound to cast their peats and fuel in a regular manner on the allotments set apart," &c. That implies and indeed expresses a right on the part of tenants to cast their peat in the allotments set apart, and it appears that an allotment was set apart for the farm of Newton from the earliest period, and the tenant had cast peats there accordingly. No doubt there is a condition that in the event of the proprietor letting the mosses for cultivation, he should be under no obligation to find moss for tenants in place thereof. That, however, is limited to a particular case which has not occurred, and which tenants letting their farms might not regard with

much anxiety. I must say I regard this article, taken in connection with the lease and the long possession, as imparting a right to the tenant of unlimited power to take peats from the allotment set apart for him, and that it is not in the power of the landlord arbitrarily to deprive him of this right.

Lord Huntly sold the estate of Aboyne to different persons; he sold that part containing the farm of Newton to the present defender, and that containing the moss of Tillychip to Mr Wilson. On the sale of Tillychip, which took place first, the tenant of Newton notified to the landlord that he was disturbed in his possession of his right to take peat under his lease, and that this right must either be restored or an abatement granted from the rent. The landlord did not assent to this, and the tenant has taken the matter into his own hands by deducting £10 per annum from the rent for two years. Then came the sale to Sir W. Brooks and this dispute between him, as purchaser of the farm of Newton, and the pursuer, as to whether the latter was bound to pay the whole rent, or was entitled to deduct therefrom a proportionate part if the proprietor was unable to restore to him his lair in the moss of Tillychip. Parties being unable to settle the matter, the present action has been brought.

The action contains a prayer for declarator that the defender is bound to warrant and maintain the pursuer as tenant of the farm of Newton of Glentana in the enjoyment and possession of the allotment or peat lair in the moss of Tillychip known as the Newton lair, and till recently possessed by the pursuer as tenant foresaid, with an alternative to the effect that if he is not able to procure him the enjoyment of that right, then he shall allow him a reasonable abatement from the rent. Criticisms have been made on the form of the present action, but I think the question must be taken as the same and decided in the same way as if the present defender were the pursuer in an action for the whole rent, and the present pursuer were defending on the ground that he was not getting the whole subject let, and that the present defender was not therefore entitled to the whole rent, but must submit to a reasonable abatement.

Two questions are therefore raised—first, Whether the tenant had right under his lease to take peats from Tillychip from the Newton allotment? As to this I have already expressed my opinion that the pursuer had such a right under his lease.

The second question is, Whether there is a right in the tenant to take peats from the moss which is good against Mr Wilson, the purchaser of the moss? That raises a question under the Act 1449. I am inclined to think, although it is not necessary to decide the point, that this right does not fall under the Act of 1449, and that the lease, so far as the taking of peats is concerned, is not enforceable against Mr Wilson. We have thus to deal with this case, that the tenant has been by the action of his landlord deprived of a right under his lease for which he agreed to pay part of his £60 of rent. If Lord Huntly had been here instead of Sir W. Brooks, I should have been clearly of opinion that he could not demand the whole rent, but would be bound to suffer an abatement of the rent corresponding to the reasonable value to the tenant of the right to take peats. The question therefore is, whether the present defender is not in the same position as Lord Huntly? I think that he is. If the Marquis of Huntly is not entitled to the whole rent, the present defender as his assignee is in the same position. The Marquis of Huntly could give the defender no better right than he had himself. I assume that the fair value of the right to take peats is that fixed by the Sheriff, viz., £7, 10s.; indeed, it would be ridiculous to have further inquiry into a matter of that sort.

I am accordingly of opinion that the judgment of the Sheriff is right and ought to be affirmed.

LORD RUTHERFURD CLARK—I am of opinion that the right to take peats from the moss of Tillychip is part of the subject of the lease, and that the full rent is not due from a tenant who has been deprived of that right. I therefore think that an abatement from the rent must be allowed to the tenant.

LORD TRAYNER—I agree in the opinion of your Lordships, but would like to say a word on the general conditions and regulations executed by the landlord to be observed by the tenants on his estates, one of which is founded on by the pursuer in this action. My opinion is that if the tenant had no right to take peats from the moss except what is given to him under the regulations, I should be slow to hold that any right was given to the tenant to take peats, or that any obligation was put upon the landlord to allow peat to be taken. But I agree with Lord Rutherfurd Clark that the lease, interpreted by long possession, gives the tenant a right to take peats, and therefore, founding not on the general regulations, but on the lease, I agree with the decision arrived at.

The LORD JUSTICE-CLERK concurred.

The Court dismissed the appeal.

Counsel for the Pursuer—Ure—Kincaid Mackenzie. Agent—Alex. Morison, S.S.C.

Counsel for the Defender—Dickson—W. Campbell—James Adam. Agents—J. & A. F. Adam, W.S.