Friday, March 4.

FIRST DIVISION.

[Sheriff of Caithness, &c.

SINCLAIR *v.* THE CAITHNESS FLAGSTONE COMPANY, LIMITED, AND OTHERS.

Lease — Quarry — Obligation to Work Quarry "in a Proper and Regular Manner" — Action ad factum præstandum after Expiry of Lease—Competency.

By the terms of their lease the tenants of certain quarries bound themselves to work these "in a proper and regular manner."

After the expiry of the lease the landlord raised an action against them to have them ordained to execute the necessary works of construction and repair to put the quarries in proper order and condition.

Held that the action was incompetent, the possession of the tenants having determined, and that the landlord's proper remedy was an action of damages.

Process—Accumulation of Defenders—Conjunct and Several Liability.

A, the tenant of quarries, after working them for some years, assigned his lease to B, who was accepted as tenant by the landlord, subject to the condition that A should remain bound for all the obligations of the lease. After the expiry of the lease the landlord raised an action against A and B, to have them ordained "jointly and severally, or severally and according to their respective liabilities as these shall be established in the present action," to pay a sum of money as damages for failure to implement their obligation under the lease to work the quarries in a regular and proper manner, and to leave buildings in good tenantable condition, and to leave roads, drains, and ditches in good order and repair at the expiry of the lease. There was no averment on record apportioning the liability between the defenders. The defenders first called did not lodge defences.

Held (*following Barr* v. *Neilson*, March 20, 1868, 6 Macph. 651) that the action was incompetent as regards the claim for damage for wrongous working of the quarries, in respect that it concluded for a lump sum of damages for separate wrongs, but that the averments were relevant as regards the claim for failure to leave the buildings, roads, &c., in proper condition at the termination of the lease, an obligation for which both defenders were liable.

Sir John George Tollemache Sinclair raised an action in the Sheriff Court of Caithness at Wick against the Caithness Flagstone Company, Limited, and the Caithness Flagstone Quarrying Company and the individual partners thereof, praying the Court "to ordain the defenders, jointly and severally [or severally, and according to their respective liabilities, as these shall be established in the present action], forthwith to execute the necessary works of construction and repair, to put in proper order and condition the several quarries, roads, ditches, fences, drains, and buildings after mentioned, and that within the period of two months, and at the sight of a person appointed by the Court, and failing the defenders so doing, to authorise the pursuer to execute said necessary works at his own cost, and to ordain the defenders, jointly and severally, or severally as aforesaid, to pay to the pursuer the sum of £1759, 10s., or such other sum as may be determined to be the cost and expense to the pursuer of executing said works; or alternatively to pay to the pursuer the sum of £1759, 10s. as damages." The words in brackets were added to the petition by way of amendment.

The pursuer averred that in 1875 he let certain subjects in Caithness to the Caithness Flagstone Quarrying Company and the individual partners, and that, by assignation in 1892, the Caithness Flagstone Company, Limited, became vested in the whole rights of the first-mentioned Company. By the said assignation the Limited Company bound themselves "to perform, implement, and fulfil, and to free and release and keep skaithless," the Quarrying Company of all the obligations and prestations incumbent on the latter by the lease subsequent to the 14th day of December 1888. The Limited Company were accepted by the pursuer as tenants under the lease of 1875, "but under special reservation of all rights competent to me by virtue of the within-mentioned lease granted by me to the Caithness Flagstone Quarrying Company . . . and under the express declaration that the said Caithness Flagstone Quarrying Company and individual partners . . . shall continue to be bound jointly and severally for payment of the rent and lordship and implement of all the conditions and obligations incumbent upon them, notwithstanding the written assignation and the intimation thereof."

The lease terminated at Martinmas 1895, and the parties failed to arrange for its renewal.

By the said lease it was, *inter alia*, provided that "the said second party (*i.e.*, the quarrying company and the partners thereof) bind and oblige themselves to work the said quarries, and also those that may hereafter be found by them, with as little destruction of ground as possible, and in a proper and regular manner, and in regular faces and of sufficient depth to take out all the marketable flags and slates, and on no account to cover up with rubbish or otherwise the face of any portion of any quarry which is being worked at the time notice is given that such quarry has become unremunerative, nor so as in any way to obstruct or interfere with the full and free access to such quarry."

The pursuer proceeded to aver—"(Cond. 4) In terms of said obligation to work the

quarries 'in a proper and regular manner,' and 'in regular faces,' the defenders were bound to work the quarries so as to keep, and at the termination of the lease to leave, the rock clear of all rubbish and debris, in order that access for working purposes might be immediately obtained by the pursuer or any tenants to whom he might let the same. The defenders have failed to fulfil this stipulation with regard to the Weydale and Whitemoss quarries, which were left at the termination of the lease in a state of extreme disorder. The debris had been allowed, through defenders' neglect, to accumulate to such an extent over and against the rock in different parts of said quarries, that access for working purposes is impossible without preliminary measures of an extensive character to clear the stone. The cubic yards of debris which it is necessary to remove amount to fifteen thousand or thereby in the Weydale quarries, and to two thousand five hundred or thereby at Whitemoss. The cost of removal, it is believed, will not be less than £900 sterling, and immediate measures to that end are necessary, as the letting of said quarries is seriously prejudiced by the presence of said material. (Cond. 5) In addition to said debris which had been left in the face and on the top of rock, contrary to the recognised and well-established rules of all good pavement quarrying, and in direct violation of the terms of said lease, the defenders have further blocked up said quarries with debris, and have left practically no roads through same. If said quarries had been worked in a proper and regular manner, as in point of fact they have not been, roads would have been left through the quarries so as to admit of free access from one end thereof to the other for working purposes, and the formation of such roads is necessary before the working of said quarries can be undertaken by a tenant. The cost of forming such roads, it is believed, will not be less than £200 sterling."

The pursuer also cited a further obligation imposed by the lease on the Quarrying Company—"To maintain during the currency of this lease, and to leave at the expiry thereof, in good tenantable condition, the whole buildings and enclosures of every kind already erected or to be erected on the quarry grounds and pavement yards hereby let, and also to pay their proportion of the cost of leaving in good order all roads leading to or from the quarries or pavement yards hereby let, as also to defray the whole expense of leaving in good repair all drains or ditches made or to be made in connection with said quarries and pavement yards." He averred that the defenders had failed to implement these obligations.

The pursuer pleaded—"(1) The defenders being, in terms of their said lease, bound to work the quarries thereby let to them in a proper and regular manner, and in regular faces, and to leave said quarries redd and clear and with proper roads therein, and having failed to do so as condescended on, decree should be pronounced ordaining them to execute the works necessary to put said quarries in proper order and condition in terms of the prayer. (3) In the event of the defenders failing to execute said works as prayed for, authority should be granted to the pursuer to execute the same, and the defenders should be ordained to pay the cost thereof to the pursuer."

The defenders, the Caithness Flagstone Company, Limited, denied the pursuer's averments of fact, averred that by far the greater part of the debris at the quarries was deposited before they became tenants under the lease, and pleaded, *inter alia*—"(2) The action is incompetent in respect that (*a*) the prayer of the petition is utterly vague and unintelligible as to 1st the alleged defects sought to be remedied, and 2nd the mode in which it is proposed to remedy them; (*b*) it contains joint and several conclusions against defenders who are not subject to joint and several liability; and (*c*) it concludes against different defenders for a slump sum of damages in respect of alleged separate wrongs. (3) The pursuer's averments are irrelevant and insufficient to support the prayer of the petition."

The defenders first called did not lodge defences.

On 8th December 1897 the Sheriff-Substitute (MACKENZIE) repelled the second and third of the defenders' pleas-in-law, and before further answer appointed the case to be put to the roll for further procedure.

Note.— . . . "The second plea is a somewhat comprehensive one, and impugns the competency of the action in the form in which it is presented. As to the defects complained of and the method of remedying these, I do not think the defenders can reasonably complain of want of specification. The prayer of the petition could scarcely be burdened with the whole details which are specified on the condescendence, and the reference to the terms of the lease appear to me to be sufficient to give the defenders ample warning of what is demanded of them. I have been referred to the case of *Middleton* v. *Leslies*, May 19, 1892, 19 R. 801, where the expression 'forthwith' was held to be inapplicable to a decree *ad factum præstandum* with regard to building operations. But here that expression is coupled with the words 'and that within the period of two months and at the sight of a person to be appointed by the Court.' This appears to me to give sufficient warning to the defenders, and to form a substantial qualification of the proposed order to execute the works 'forthwith.' The question of joint and several liability is also raised under this plea by the defenders. I have already dealt to some extent with this plea in my former interlocutor of 16th November last, and I need not repeat what is there said. Looking at the petition alone, it appears to me that the reference to the terms of the lease and assignation is sufficient to support the prayer, which contains a joint and several liability. If there is no separate specific averment that such liability exists, there are facts alleged upon which that liability is founded. Whether it really exists is a question of law upon these facts. Considerable argument has been expended

upon the question whether there are not here separate wrongs for which it is incompetent to ask for one sum in name of damages. As I have before observed, the question of separate wrongs and degrees of liability is one raised by the defenders, and may very well arise for discussion on the merits. It is sufficient at this stage if the pursuer undertakes to prove that the wrongs are really inseparable, which I understand to be his main position. In the case of *Barr* v. *Neilson*, March 20, 1868, 40 Jurist 337, the wrongs complained of were separate alleged slanders by a husband and wife. Such a case does not seem to me to apply to the present, where the wrongs are alleged as occurring over a period of years, and as having been done by a number of defenders who have a joint and several and successive liability. The proof may alter the view to be taken of the facts, but I cannot sustain this as a preliminary objection."

The defenders appealed, and argued—The Sheriff-Substitute was wrong. The action was incompetent except in so far as founded upon the obligation to leave the buildings in tenantable condition and to leave the roads outside the quarry in good condition. As regarded the conclusion *ad factum præstandum*, the pursuer was not entitled to such a remedy. The lease had expired and the defenders had no right to enter upon the quarries in order to put matters to rights. But if the alternative conclusion for damages was considered, it was equally incompetent. Two sets of tenants had occupied the quarries, and the pursuer had not attempted, as he was bound to do, to fix the liabilities of each. It would not do to name a lump sum and leave it to a general proof to disclose the precise liability of the earlier and the later tenant. The amendment of the petition was futile. Each set of defenders was liable for its own wrong and no further—*Barr* v. *Neilson*, March 20, 1868, 6 Macph. 651; *Taylor* v. *M'Dougall & Sons*, July 15, 1885, 12 R. 1304. The character of the obligation was emphasised by contrast with that of leaving the buildings and roads in good repair.

Argued for the pursuer—It was quite true that there was no statement on record as to the time when the debris accumulated, and no attempt to distinguish between what happened prior, and what subsequently to 1888. But joint and several liability was constituted by the minute of acceptance of intimation, and the Quarrying Company continued to be bound to implement all the conditions of the lease. The obligation in the lease to leave the rock clear of all rubbish and debris was unequivocal.

At advising—

Lord Kinnear—By this action Sir John George Sinclair, lessee of certain quarries in the county of Caithness, sues two successive lessees jointly and severally to execute certain works of construction and repair, or alternatively to pay him the sum of £1759, 10s. as damages. He avers that in 1875 he let certain subjects to one of the defenders, the Caithness Flagstone Quarrying Company and the individual partners thereof; and that this lease was assigned to the other defenders, the Caithness Flagstone Company, by an assignation dated in December 1892, and that he accepted the assignees as tenants under the original lease in room and place of the Caithness Flagstone Quarrying Company, but under the express declaration that the Quarrying Company and its individual partners should continue bound jointly and severally for performance of the obligations of the lease notwithstanding the assignation. It was provided by the lease that the tenants were to work the quarries "with as little destruction of ground as possible, and in a proper and regular manner, and in the regular faces, and on no account to cover up" the faces "with rubbish or otherwise, so as in any way to obstruct or interfere with the full and free access" to the quarry; and the pursuer alleges that the defenders have failed to fulfil this stipulation with regard to the Weydale and White Moss Quarries, which he says were left at the termination of the lease in a state of extreme disorder. The lease also contained an obligation that the tenants should maintain during its currency, and leave at its expiry, "in good tenantable condition, the whole buildings and enclosures, and also pay their proportion of the cost of leaving in good order all roads leading to or from the quarries or pavement yards, as also to defray the expense of leaving in good repair all drains or ditches," and the pursuer avers that the defenders have failed to implement these obligations also. On these averments he bases the conclusions which I have mentioned for specific performance, and alternatively for damages.

In so far as regards the first-mentioned conclusion, I am of opinion that the action is incompetent. The pursuer seeks that the defenders shall be ordained to execute certain operations in terms of the lease; but the lease came to an end at Martinmas 1895, and the tenants' right to occupation and the corresponding right to the landlord to require them to occupy the subjects and execute works came to an end with it. If the tenants have failed to perform their obligations for the proper working of the quarries, the landlord's remedy is an action of damages, but I know of no authority in support of the pursuer's claim to require his tenants after the termination of a contract of lease to re-enter the subjects which by their contract they are bound to quit, in order to perform, after their possession has come to an end, obligations which were applicable only to the period of their possession, and which they are alleged to have already broken. They cannot be liable to a decree for specific performance except by virtue of their contract. They have contracted to work in a certain way for a definite term, which is exhausted. If they have failed they may be liable in damages for breach of their contract which they committed while

it still subsisted, but they have made no contract to do anything after the lease has expired. It appears to me, therefore, that in so far as it concludes for a decree for specific implement the action must be dismissed.

We have next to consider whether there is a good conclusion for damages. In so far as that claim is based upon the alleged breach of the obligation to work the quarries in a proper and regular manner, and not to cover up the faces with rubbish, I think that conclusion also is incompetent. The averment is that two successive tenants, each during their own period of occupation, failed to perform the obligations in question, and upon that averment the pursuer seeks to have them made jointly and severally liable in one lump sum of damages.

The defences we are to consider have been put in by the second tenant, the Caithness Flagstone Company, and they maintain that nothing done by their predecessors before their entry can be a breach of contract by them, and that they cannot be made liable for their predecessors' action. That seems to me a good plea, and, indeed, I do not know that it was controverted, but, as I understand the pursuers' counsel, he did not maintain that he could make the defenders liable for anything but their own breach of contract, but rather that when he went to proof he might be in a position to show the extent of their separate liability. But that is not within the conclusions of the action. The conclusion sought is against both tenants jointly and severally, or otherwise severally. Now, I think it would be contrary to all authority to hold that two parties can be made jointly and severally liable for two disconnected breaches of contract. Each is liable for the damage done by himself, but although it may be that the original tenants might be held responsible under the terms of the assignation for damages done by their assignees, there is no liability on these assignees for damages done by operations of the cedents which had been concluded before they had anything to do with the quarry. The pursuer avers that the Caithness Flagstone Company became subject to the tenants' obligations under the lease as from 14th December 1888, and that seems to be in accordance with the terms of the assignation. It follows that these defenders cannot be answerable for any improper working prior to the 14th December 1888. But there is nothing in the conclusions or in the averments to distinguish between the liability for damages incurred by the prior tenants, and the liability incurred by the Caithness Flagstone Company; these latter defenders are therefore to be made liable jointly with their predecessors for the consequences of all the improper working which may have taken place from 1875 downwards. It is no answer to say that there is a conclusion by which the two defenders may be found severally liable, because the sum in which each is to be found liable severally is just the same sum of £1759, 10s. in which it is sought that they should be made liable jointly. It is the value of the entire loss sustained in consequence of both breaches of contract, and the case is therefore open to the same objection as was sustained in *Barr* v. *Neilson*. On the same authority I am of opinionthat the amended conclusion, "or severally and according to their respective liabilities as these shall be established in the present action," does nothing to cure the defect. The observation of the Lord President is directly applicable—"I confess I can give no effect to these words, for it is nothing but calling on the Court to make a case for the pursuer." A pursuer must inform himself and make up his mind as to the specific case he is to make before he brings his action into Court.

If the action be dismissed in so far as regards the conclusions to which I have already adverted, there will still remain the conclusion for damages for failure to leave buildings in good tenantable condition, and to leave roads, drains, and ditches in good order and repair. The averments as to the breach of these obligations appear to me to be relevant, and I do not think that the objection is applicable to them which I have found fatal to the claim for improper working of the quarries. This is an obligation in which both set of tenants were jointly and severally liable. It is not expressed as a stipulation that certain things shall be done from time to time during the currency of the operations, but that the quarry shall be left at the expiry of the lease in a certain condition. That that is an obligation binding upon the second tenant, who was actually in possession at the expiry of the lease, there can be no question, and there is no difficulty in holding that it may be binding upon the prior tenant also, because by the terms of the assignation the cedent was to continue liable jointly and severally for all the obligations of the lease. In so far as regards this claim, therefore, I think that the case should be remitted to the Sheriff to proceed, but that as regards the other conclusions the action should be dismissed.

LORD ADAM, LORD M'LAREN, and the LORD PRESIDENT concurred.

The Court recalled the interlocutor of the Sheriff-Substitute; sustained the second plea-in-law for the defenders so far as it referred to the conclusions of the petition for implement and to the claims of damages for wrongous working of the quarries; dismisses the action so far as regards the said conclusions; and remitted the cause to the Sheriff-Substitute to allow parties a proof of their averments under the remaining conclusions of the action, and to proceed therewith.

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