satisfaction of the Lord Ordinary that this cheque was granted as a favour to enable the granter to meet a pressing claim, and on this condition, that a valuable asset, viz., the cheque of a solvent person, should be indorsed over to him in exchange. Failing this, the drawer was to be entitled to stop payment of his cheque. That he intended the payee to be affected by this condition is placed beyond doubt by his enforcing the condition when he did not receive Russell's cheque, by going to his banker next morning and stopping payment.

Nothing has been pointed out in regard to the evidence that shakes the conclusion of the Lord Ordinary that the bill in the hands of the payee was affected by this condition and that the condition was not fulfilled. It is a remarkable circumstance that no attempt was made on the part of the payee to remonstrate against the dishonour of the cheque or to insist on payment. Instead of that the payee did what an honest man would not have done; he tried to pass on the cheque to a third party, doing all he could to make it appear to be a document of value. It is an old principle of the law of bills of exchange that when a bill is taken by an indorsee out of due course, not for value, and especially with notice of an equity existing between the original parties to the bill, the indorsee takes no higher right than the indorser and is subject to all equities affecting him. This is obviously a very necessary restriction upon the general doctrine that a bill is a negotiable instrument, and it is a restriction as well established as any point in the law of bills of exchange. In this case the pursuer does not stand in the position of a holder in due course; he received the cheque long after its true date and he was made aware of the circumstances under which it had been dishonoured. He was then affected by the condition under which the cheque was issued to the payee; and his claim accordingly fails.

LORD KINNEAR—I agree. I have no doubt that the condition which the defender alleges was attached to the issue of this cheque is proveable by parole evidence as between himself and the original payee, because the alleged condition is not one which qualifies the meaning or effect of the writing. It is a collateral agreement by which the party who delivers the document to the payee stipulates that he shall be entitled to stop payment of it at the bank unless another cheque shall be obtained and put into his hands. This was a perfectly intelligible condition in my opinion provable as between drawer and payee by parole evidence. It is a condition which could not be expressed on the face of the cheque, and I know of no rule of law which requires it to be expressed in writing at all. How far it should affect an onerous indorsee receiving the cheque in due course is a different matter. But that is a question which does not arise in this case, because the pursuer is not a holder in due course. The statute is perfectly precise upon this matter. Section 29 defines a holder in due course as a holder who has taken a bill under certain conditions and, *inter alia*, under the condition that he took it without knowledge that it had been dishonoured. Now, upon this point the pursuer's own evidence is conclusive against his case. It is quite intelligible that he did not understand the meaning of the letters "R. D." on the cheque, but apart from these letters it appeared plainly on the face of the cheque that it had been presented and that payment had been refused, and the pursuer's evidence shows that he knew this perfectly well.

We have heard an argument for the purpose of showing that although it is declared by section 73 that except as otherwise provided the provisions of the Act applicable to a bill of exchange payable on demand shall apply to a cheque, this provision does not extend to the negotiation of cheques. I am unable to see any ground for this distinction, and the rule of common law as it is explained by Lord Blackburn in the case of *M'Lean* v. *Clydesdale Bank*, 11 R. (H.L.) 5, is the same as that of the statute. His Lordship says that the decisions are uniform to the effect that a cheque is a negotiable instrument by the law of Scotland to the same effect as a bill.

The pursuer therefore having taken the cheque with notice of a condition on which the drawer claimed right to stop it, took it subject to any defect which that condition attached to it; and since it turns out to be a good condition against the original payee, it is also good against the pursuer as indorsee.

On the question whether the payee was aware of this condition and took the cheque subject to it, we must accept the Lord Ordinary's opinion as to the credibility of the witnesses, and I agree with him as to the result of their evidence.

The LORD PRESIDENT was absent.

The Court adhered.

Counsel for the Pursuer and Reclaimer—Salvesen, K.C.—J. C. Watt. Agent—A. C. D. Vert, S.S.C.

Counsel for the Defender and Respondent—Shaw, K.C.—W. Thomson. Agents—Carmichael & Miller, W.S.

Friday, January 17.

FIRST DIVISION.

[Sheriff Court at Glasgow.

TODD *v.* BOWIE.

Lease—Agricultural Holdings (Scotland) Act 1883 (46 *and* 47 *Vict. cap.* 62), *sec.* 42—"*Determination of Tenancy*"—*Contract—Breach of Contract—Right to Rescind.*

Section 42 of the Agricultural Holdings (Scotland) Act 1883 enacts:—"Determination of tenancy means the termination of a lease by reason of

effluxion of time or from any other cause."

Where a tenant under a nineteen years' lease had abandoned the farm after three years' occupation on account of the landlord's failure to implement an obligation in the lease to put the fences into good tenantable repair, *held* that the tenant was not entitled to rescind the contract upon the ground stated, and that there had been no "determination of tenancy" in the sense of the Act.

This was an appeal from a judgment of a Sheriff-Substitute at Glasgow (GUTHRIE) in a special case stated for the opinion of the Sheriff Court at Glasgow by the arbiters in a reference under the Agricultural Holdings (Scotland) Acts 1883 to 1900 upon the question whether, in the circumstances set forth in the case, there had been a "determination of tenancy" within the meaning of the Agricultural Holdings Acts.

William Bowie became tenant of the farm of Glenduffhill, Shettleston, of which James Todd was proprietor, under a lease for 19 years from Martinmas 1897. The lease contained a clause whereby the landlord agreed to put the houses and fences in good tenantable repair.

In November 1898 a correspondence began between the parties to the lease with reference to damage sustained by the tenant through losing his hay foggage by reason, as he alleged, of the fences not being put in repair in terms of the lease. The landlord maintained that the fences were sufficient for the purpose for which the farm was let, namely, as an agricultural subject and not as a sheep farm.

On 23rd June 1900 the tenant intimated that, as the loss he was sustaining on account of the fences not being put in a tenantable state of repair was a serious one and was increasing every day, he had resolved to leave the farm after taking off his crop, and to raise an action of damages against the landlord. In reply, on 28th June, the landlord denied that the tenant had any ground of complaint, and alleged that he had been miscropping the farm.

On 16th July 1900 the agent of the tenant sent a letter to the agents of the landlord in the following terms:—"I duly received your letter of 28th ult., and have since seen my client anent same. He explains that he has not miscropped the farm in any way and has given me definite instructions to proceed with an action against your client for the damage already sustained. I have also been instructed by him to intimate that as the fences have not yet been put in order he finds it impossible for him to stay on in the farm. I therefore give you notice that my client intends leaving the farm at Martinmas first and claiming damages for your client's failure to implement the terms of his lease, on account of which failure my client has been obliged to resile from the lease."

The tenant left the farm as to the arable lands at Martinmas 1900 and as to the houses and grass lands at the following Whitsunday, and raised an action of damages against the landlord in the Sheriff Court at Glasgow. The landlord defended the action and maintained that he had let a subject which did not require fences. On 21st December 1900 the Sheriff-Substitute (GUTHRIE) found the tenant entitled to damages to the extent of £35.

On 28th December 1900 the landlord's agents wrote to the tenant's agent in the following terms:—"As your client, the tenant, has intimated both by letter and in the pleadings in Court that he is to leave the arable lands as at Martinmas and the house and grass parks as at Whitsunday next, it is necessary that our client should arrange to find a new tenant. We assume your client has now ceded possession of the arable lands, and we propose to advertise for a new tenant. Of course we shall do so on the distinct footing that our client does not recognise that your client had any right to terminate the lease as he has done, and that he insists upon his claim of damages for breach of contract and also for bad husbandry. We shall be glad to hear from you that you approve of a new tenant being got on the best terms possible, without prejudice to our client's whole claims."

On 29th December 1900 the tenant's agent replied as follows:—"I have your letter of yesterday's date. As my client has now ceded possession of the arable lands, it lies with your client to do the best he can in procuring a new tenant for the farm, a matter with which my client has nothing to do. Meanwhile, I am getting my client's additional claim made out for damage sustained through want of fencing and through his being obliged to leave the farm on that account; also his claim for seeds and unexhausted manure, &c."

In June 1901, after the tenant had quitted the farm, the parties entered into a reference under the Agricultural Holdings (Scotland) Acts upon a claim by the tenant made as on the determination of the tenancy. The claim was for £399, 8s., on account of unexhausted manure, grass seeds, and damages for loss sustained, and for breach of contract by reason of the landlord's failure to put the fences into proper tenantable order.

The landlord, who had entered into the reference subject to reservation of his rights, pleaded that the tenant's claim with the exception of one item was incompetent, and maintained before "the arbiters that there had been no "determination of the tenancy" in the sense of the Agricultural Holdings Acts.

The Agricultural Holdings (Scotland) Act 1883 (46 and 47 Vict. cap. 62), section 42, defines "determination of tenancy" as follows: — "Determination of tenancy means the termination of a lease by reason of effluxion of time or from any other cause."

In respect of the question raised as to whether there had been a determination of the tenancy in the sense of the Acts, the arbiters stated this special case in the Sheriff Court at Glasgow.

The question of law for the opinion and judgment of the Court was as follows:—

"Has there been a 'determination of tenancy' in the sense of the Agricultural Holdings Acts 1883-1900?"

On 11th October 1901 the Sheriff-Substitute (GUTHRIE) pronounced the following interlocutor:—"Having considered the special case and the documents produced, I am of opinion that there has been a determination of the tenancy in the sense of the Acts.

"*Note.*—*Strang* v. *Stuart*, 1887, 14 R. 637."

The landlord appealed to the Court of Session.

Argued for the appellant—The tenant of an agricultural subject under a 19 years' lease had no right to throw up his lease on account of such a failure on the part of the landlord as was alleged in this case. The tenant's remedy for breach of contract by his landlord under a lease of agricultural subjects was not the same as in the case of urban subjects, and consequently the case of *Davie* v. *Stark*, July 18, 1876, 3 R. 1114, 13 S.L.R. 666, did not apply. Even assuming that a tenant was entitled to abandon his lease on account of breach of contract by the landlord, the respondent had abandoned his lease before it was decided in the Sheriff Court action that there was a breach of contract. In the case of *Strang* v. *Stuart*, March 16, 1887, 14 R. 637, 24 S.L.R. 447, which was referred to by the Sheriff-Substitute, both parties to the lease agreed to bring it to an end. Here there was no agreement, which distinguished that case from the present. The lease was still enforceable. The question put by the arbiters should be answered in the negative.

Argued for the respondent — The abandonment of the lease by the tenant was a "termination of the tenancy" within the words of section 42 of the Act of 1883. The words "or from any other cause" were absolutely general. It was not until the appellant had been repeatedly requested and ample time had been given to repair the fences that the respondent had abandoned his lease, and after the abandonment the appellant had intimated his intention to advertise the farm to let; therefore it could not be said that parties were not agreed to terminate the tenancy. The appellant's breach of contract entitled the respondent to abandon his lease. The case was within the rule of *Davie* v. *Stark*, *cit. sup.*, Lord Justice-Clerk, 3 R., p. 1119; *Webster* v. *Brown*, May 12, 1892, 19 R. 765, Lord Trayner, p. 768, 29 S.L.R. 631. Where one party to a mutual contract has failed to perform his part of the contract in any material respect the other was entitled to rescind it—*Turnbull* v. *M'Lean & Company*, March 5, 1874, 1 R. 730, 11 S.L.R. 319.

LORD PRESIDENT — The question submitted for our opinion and judgment is—"Has there been a determination of tenancy in the sense of the Agricultural Holdings Acts 1883-1900?" The facts of the case appear to be that one of the parties is tenant of a farm of which the other party is the landlord, that the landlord refused to put certain fences upon the farm into proper repair, that disputes arose as to these fences, and that in proceedings before the Sheriff the landlord was found liable to the tenant for £35 in name of damages for loss caused to the tenant by the state of the fences. The Sheriff's judgment was pronounced on 21st December 1900, and the tenant ceased to occupy the farm as to the arable lands at the previous Martinmas and as to the houses and grass lands at the following Whitsunday. He says that the fences were necessary to the proper use and enjoyment of the farm, and that in consequence of the landlord's failure at once to put them into satisfactory repair he was entitled to terminate the lease. Apart from the statutory definition, a question might have arisen as to whether the words "determination of tenancy" might have been held to mean "determination of occupancy," as distinguished from determination of the contract of lease; but by section 42 of the Act of 1883 the expression is defined to mean "the termination of a lease by reason of effluxion of time or from any other cause." This plainly implies that the contract of lease is itself to be terminated, not merely the occupancy under it, and the question comes to be whether the circumstances just stated had the effect of terminating the lease in this case. It has certainly not been terminated by the effluxion of time or by agreement of the parties, but it is contended that it was terminated by the landlord's failure to put the fences into a tenantable state of repair. The lease is for nineteen years, and the tenant's contention accordingly is that in a lease for this period the fact that the landlord has during the first year failed to make good his obligation to fence entitles the tenant to treat the contract as at an end. I know of no authority for such a proposition. If the landlord persisted in refusing to fulfil a material term of a mutual contract a right to abandon the subjects let might arise, and if the subjects were, in consequence of his failure to fulfil his obligation, unfit for the purpose for which they were let the tenant might be entitled to leave at once. We have had examples of this in leases of dwelling-houses, in the case of which it has been held that a tenant is not bound to remain if the condition of the house is insanitary or otherwise dangerous, but is entitled to throw up the lease.

But there is nothing of that kind here, and it appears to me that cases of the class referred to have no application to the present case.

I am therefore of opinion that we should answer the question put in the case in the negative.

LORD ADAM—I think this is a very simple case. The question is whether there has been a determination of the tenancy, and, as your Lordship has pointed out, that means a termination of the lease. Now, the tenancy has come to a termination because the tenant has walked off. But the fact that a tenant quits a farm does not bring his lease to an end, which was Mr Morison's first contention. That is as

much as to say that either party may decline to go on with a contract and then say it is at an end, and that seems to me a monstrous contention. The second contention was that the tenant was entitled to bring the lease to an end because there was a breach of the conditions of the lease on the part of the landlord. Now, some conditions are essential, others are not. In this case the landlord came under an obligation to put the fences into tenantable condition, and the position the landlord took up was, as I understand, that the fences were in tenantable condition. The tenant maintained that they were not, and was awarded £35 for the damage he had sustained. That no doubt was an award for a breach of a minor condition on the part of the landlord. But I never heard that a tenant, because the fences were in a bad condition, was to be allowed to walk away.

I agree with your Lordship that there is no doubt whatever that we must answer this question in the negative; and I go further—I think that the tenant had the matter in his own hands, and might have put the fences into proper condition himself and retained the expense he was put to off the rent.

LORD M'LAREN—I agree that we must answer the question in this case in the negative. There has been no determination of the tenancy in the sense of the statute, because there is a current lease, and in my opinion no such state of facts exists as would entitle one of the parties to rescind the contract without the consent of the other party. I do not wish to be understood as suggesting that the tenant is the only party to blame for this dispute. The lease contains a clause of obligation on the part of the landlord to put the fences into tenantable order and condition. One would expect from a reasonable landlord that he should be willing to expend a part of his first year's rent in repairing the fences according to the contract, and when the Sheriff found him in the wrong for not doing so, that he would have been prepared to carry out the obligation. Instead of this his agents wrote two days after the Sheriff's judgment to the agent for the defender — "We assume your client has now ceded possession of the arable lands, and we propose to advertise for a new tenant."

But we are not called on to decide any other question than that put to us, whether there has been a termination of the lease which will enable an arbiter to proceed under the Act to consider the claim. The parties will no doubt be able to determine their respective claims in some other form.

LORD KINNEAR concurred.

The Court answered the question in the special case in the negative.

Counsel for the Appellant—Dundas, K.C. — Hunter. Agents — Millar, Robson, & M'Lean, W.S.

Counsel for the Respondents — Salvesen, K.C.—T. B. Morison. Agents — Macpherson & Mackay, W.S.

Friday, January 17.

SECOND DIVISION.

[Sheriff-Substitute at Dumfries.

BELL *v.* CALEDONIAN RAILWAY COMPANY.

Reparation — Negligence — Railway — Level-Crossing—Injury to Horse through Foot being caught between Rail and Chair in consequence of Wedge not being driven in—Inspection.

In an action of damages, brought by the owner of a horse for injuries sustained by it at a level-crossing maintained by a railway company, it was proved that the accident was caused by the horse's foot being caught in a space between the rail and the chair on which it rests, owing to the wedge which keeps the rail in position not being fully driven in. It was further proved that the rails at the level-crossing were regularly inspected twice a-day for the purpose of seeing that the wedges, which are liable to be displaced by passing trains, were properly driven in, and that the level-crossing had been inspected within an hour before the accident occurred. *Held* that the railway company had not been guilty of negligence, and that they were not liable in damages for the accident to the pursuer's horse.

This was an action raised in the Sheriff Court at Dumfries by Joseph Bell, farmer, Dinwoodie Mains, Lockerbie, against the Caledonian Railway Company, in which the pursuer concluded for £65 in name of damages on account of injuries sustained by a horse belonging to him, which he alleged were caused by the negligence of the defenders.

The circumstances under which the horse met with the injuries complained of are set forth in the following findings in fact, which were made by the Sheriff-Substitute (CAMPION) in his interlocutor, and were ultimately adopted in the interlocutor pronounced by the Court of Session on appeal:—"Finds (1) that the pursuer is tenant of the farm of Dinwoodie Mains, which lies partly on one side and partly on the other side of the defenders' main line of railway between Glasgow and Carlisle; (2) that at Dinwoodie Station, where the said line crosses the public carriage road, there is a level-crossing which was constructed by the defenders under the authority contained in their special Act of Parliament; (3) that on 8th February 1901 John Watson, one of the pursuer's servants, was engaged carting on said farm and had occasion to cross the said level-crossing; and (4) that as he was leading his horse across the line the toe of the shoe on the horse's near forefoot was caught between the rail and the chair on which it rests and became fixed, so that the horse was thrown to the ground and was unable to extricate its foot until forcibly relieved, when it was