

Friday, May 26.

SECOND DIVISION.

EDMOND V. REID.

Landlord and Tenant—Lease—Condition of Residence—Irritancy. A landlord stipulated in the lease that his tenant should reside personally on the farm. There was no clause of irritancy on failure to comply with that condition.—*Held* that, on the refusal of the tenant to reside, the landlord was entitled to bring the lease to an end.

The pursuer, Francis Edmond of Kingswells, let to the author of the defenders, Mrs Reid and her husband, the farm of Cairdhillock on lease for nineteen years from Whitsunday 1855. This lease contained a condition that the tenants must reside personally on their farm. The defenders had not complied with this condition, and stated that they did not intend in future to comply. The object of the action was to have it declared that the defenders had forfeited all right to the farm.

The Lord Ordinary (MURE) pronounced an interlocutor, in which he found "that the defender Mrs Reid has failed and refuses to obtemper the provisions and conditions of the lease entered into between the pursuer and the late John Low, to which she succeeded on the death of John Low in 1863, by residing personally, with her family, on the farm in question; therefore finds, decerns and declares, that the said defender has forfeited all right to the possession of the said farm, and croft and ground occupied therewith, and that the pursuer is entitled to enter upon the possession of and use the same, all in terms of the second conclusion of the summons: Finds the pursuer entitled to expenses, subject to modification, &c.

"*Note.*—1st, It is not without some hesitation that the Lord Ordinary has come to the conclusion that the pursuer is entitled to have the lease in this case declared forfeited. Because, since the marriage of the defender in the year 1864, down to the date of the present dispute, she appears to have resided constantly with her husband at the farm of Danestown, where they now live, with the knowledge and acquiescence of the pursuer; and in ordinary circumstances,—more especially when it is not alleged that any actual damage has been sustained through non-residence,—this might, it is thought, be held to amount to an abandonment, on the part of the landlord, of his claim to enforce stipulations as to personal residence during the few remaining years of a lease. But as it has been explained by the pursuer that this was done in continuation of an arrangement come to between him and the original tenant, to whom the defender succeeded, to the effect that so long as the defender's mother was personally resident upon the farm in question he would not object to the tenant residing elsewhere, it appears to the Lord Ordinary, now that the arrangement has come to an end by the death of Mrs Low, that the pursuer is not precluded from insisting upon the fulfilment, on the part of the defender, of the condition of the lease as to residence, which seems to have been waived by him in respect only of that arrangement.

"Dealing with the case then, on this footing, the weight of authority is, in the opinion of the Lord Ordinary, with the pursuer. It is not disputed that had there been a clause of forfeiture in the lease, the defender would in the circumstances have had

no good defence against this conclusion of the summons; and it seems to be settled law, where there is a clause in the lease requiring personal residence, that when the tenant goes abroad, though involuntarily, and hands over the cultivation of the farm to his family, who continue to reside there, the lease is void, although there is no clause of irritancy in it.—*Drummond*, 1806, M. App. "Tack," No. 6. In the present case however, the non-residence is not the involuntary act of the defender; and although there has not been an abandonment of the farm by the defender leaving the country, no reason has been assigned for her refusing to fulfil the obligation in the lease, except that she and her husband consider Danestown a more agreeable residence. They are quite free to live at the farm in question if they choose, because it appears from the husband's evidence that there is no clause in the lease of Danestown requiring the tenant to reside there. In these circumstances, the non-fulfilment of the obligation must, it is thought, be held to lead to the same results as in the case of *Drummond*; and it appears to the Lord Ordinary that there is authority for this in the case of *Wallace*, January 31, 1696, 4 B. S., p. 302. For, although there was no actual decision to that effect, it seems to be implied in the course there adopted by the Court, that if the order to reside in terms of the obligation was not obtempered, the charge would be allowed to proceed."

The defender reclaimed.

ADAM, BALFOUR, and J. J. REID, for her, argued,—the failure to comply with the condition of residence does not bring the lease to an end. A lease is a real right, and the ordinary rules of contracts do not apply to it. A special stipulation would be required to irritate a real right. A feuar who violates his feuing plan does not necessarily give rise to an irritancy. Other violations of the tenant would not imply an irritancy, such as failure to pay rent, miscropping, or failure to maintain his fences. E. 2. 6. 45; *Lennox*, M. 7206; *Roxburgh*, 7202; *Hamilton*, 8 D. 308; *Drummond*, M. App. Tack, 6; *Wallace*, Brown's Sup. 302, Hunter's Landlord and Tenant, p. 116.

The Solicitor-General (CLARK), WATSON, and ASHER for the respondent. A lease is really a consensual contract, and if one of the parties fails to perform his own part, he cannot compel the other to perform his. The tenant cannot found upon a contract of lease when he has not fulfilled his part. The quality of real right is merely the statutory right to remain in possession. *Delectus personæ* is essential to a lease, and if residence made a condition, the landlord is entitled on failure to comply to take proceedings to bring the lease to an end. *Dalhousie*, M. 1531; *Watson*, 13 Dec. 1811, F.C.

The Court unanimously were of opinion that the Lord Ordinary was right, and pronounced an interlocutor substantially adhering.

Agents for Pursuer—M'Ewen & Carment, W.S.
Agent for Defender—James C. Baxter, S.S.C.

Saturday, May 27.

FIRST DIVISION.

DOBBIE, PETITIONER.

Arrestment, Loosing of—Bond—Judicial Factor. A purchaser agreed with the seller of some houses that certain bonds over the property