Friday, January 18.

FIRST DIVISION.

[Lord Fraser, Ordinary.

STEWART *v.* CAMPBELL AND OTHERS.

Lease—Abatement—Liquid and Illiquid.

A farm was let from year to year under a lease terminable by written notice six months before the term of Whitsunday, and the proprietrix undertook to put the existing buildings into complete repair. She spent a considerable sum on repairs on the entry of the tenants, who continued in occupation for five years, when the lease was terminated. In the third year they asked the proprietrix to put up certain new buildings, but their request was refused. They paid the rent for four and a-half years without reservation of any claim against the proprietrix.

In an action by the proprietrix to recover the last half-year's rent it was pleaded that the tenants were entitled to an abatement, in respect of loss sustained by them during their occupancy from the pursuer's failure to put the buildings into complete repair. *Held* that the demand of the defenders was not justified by the terms of the lease; and that, in any view, a claim of damages for the whole period of occupation had not been timeously made.

By lease dated 4th and 21st June 1883 Mrs Hannah Gow Stewart, proprietrix of the island of Little Colonsay, Argyllshire, let the farm consisting of that island to Mrs Anne Campbell and her son Duncan Campbell. The lease contained, *inter alia*, the following conditions:—1st, The lease was to be "for the period of one year from Whitsunday 1883, and from year to year thereafter unless terminated by written notice on either side six months before the term of Whitsunday 1884, or before any succeeding term of Whitsunday;" 2nd, the rent was fixed at £55 per annum, payable half-yearly, beginning the first term's payment at Martinmas 1883. By the 3rd article the proprietrix agreed to put the whole buildings on the island let, into a thorough state of repair, and subject to this obligation on her part, the tenants accepted the whole buildings as in good and sufficient repair. By the 4th article the tenants were bound not to crop any part of the lands let, but to use them solely for grazing purposes; and, under the 6th article Duncan Buchanan, farmer, Caolis-na-Coan, Ballachulish, bound himself and his heirs, executors, and successors, as cautioners for the rent.

The lease was terminated at Whitsunday 1888, when the tenants were due the proprietrix one half-year's rent, amounting to £27, 10s. At the entry of the tenants the proprietrix had spent a considerable sum on the repair of the dwelling-house on the farm, and the tenants paid the rent for the first four and a-half years of their occupancy without reservation of any claim against the proprietrix. They refused, however, to pay the rent for the last half-year.

On 5th October 1888 the proprietrix raised an action against the tenants, and the cautioner under the lease for recovery of the rent, in which action the cautioner entered appearance as defender.

The defender averred, *inter alia*—"The dwelling house was not habitable at the beginning of the lease, and the steadings and other buildings on the island were from the commencement of the lease, and throughout its continuance, in a very bad state, the barn, stable, byre, and cart-shed being roofless. Mrs Campbell and Lachlan Campbell therefore repeatedly called upon the pursuer to implement her obligation under the lease, by having the steadings and other buildings put into a thorough state of repair. The pursuer, however, notwithstanding these requests failed to have these repaired in any way. The said repairs were necessary and indispensable for the beneficial occupation of the farm, and were to have been executed before the tenants took possession, but pursuer did not give the tenants full possession, and did not deliver the subjects in the state agreed on. In consequence of the pursuer's failure to have the whole buildings put in a thorough state of repair, the tenants suffered loss and damage during their occupancy to an extent of not less than £80, no part of which has ever been made good by pursuer . . . They have assigned their claims against pursuer to the defender. The defender is entitled to plead all defences competent to the tenants."

The pursuer pleaded—"(1) The defenders being still due, addebted, and resting-owing to the pursuer in the principal sum sued for, the pursuer is entitled to decree therefor, with interest and expenses as concluded for. (2) The objection regarding the state of the buildings not being open to the cautioner, the defences should be repelled as irrelevant."

The defender pleaded—"(2) The obligation by the pursuer in the lease, 'to put the whole buildings on the island let into a thorough state of repair,' being an inherent condition of the lease under which the defender Buchanan signed as cautioner, and the same not having been implemented, the said defender is not liable. (3) The defender Buchanan, as cautioner, being entitled to plead all defences pleadable by the principal debtors, is entitled to set off against the claim for rent the loss and damage sustained by the tenants through the pursuer's failure to implement her obligations in the lease; *et separatim*, in virtue of the assignation in his favour by the tenants, he is entitled to set off the loss and damage against the rent claimed. (4) The pursuer having failed to implement her agreement with the tenants to put the steading and other buildings in repair, whereby the tenants were deprived of the beneficial use and enjoyment of the subjects let, to an extent exceeding the sum sued for, the defender is entitled to absolvitor."

From correspondence produced for the pursuer it appeared that the tenants in the autumn of 1885 had requested her to put up some new buildings, a request which she had refused.

The Lord Ordinary (Fraser) allowed a proof before answer, the defender to lead in the proof.

The pursuer reclaimed, and argued—The defender here pleaded an illiquid claim of damage as a set-off to a liquid claim of rent. The rent being from year to year, the tenants might have given up the farm at the end of any year, but

they had remained for five years, during four and a-half of which they had paid the rent without any reservation of the claim now made. If this defence had been raised the first year in answer to a claim for rent it might have been relevant, but it was too late to plead it now that they had left the farm. The only request made by the tenants appeared from the letters produced to have been one for new buildings which was quite outside the landlord's obligation in the lease. This case was quite distinct from *Munro* v. *M'Geochs*, November 15, 1888, 26 S.L.R. 60, for there the defenders were still tenants in occupation of the farm, and they had from the beginning of the lease retained some of the rent on the ground that the landlord had not fulfilled his obligations as to the buildings.

The respondent argued—The proprietrix had not fulfilled her obligation under the lease to put the whole buildings into repair. The tenant had thus not received the subjects in the condition promised, and had suffered damage in excess of the claim for rent. The defender therefore should be assoilzied, as all defences competent to the tenants were competent to their cautioner. At all events, he was entitled to set off the proportion of loss suffered during the last year against the claim for the last half-year's rent—*Graham* v. *Gudon*, June 16, 1843, 5 D. 1207; *Muir* v. *M'Intyres*, February 4, 1887, 14 R. 470; *Munro* v. *M'Geochs*, *supra*.

At advising—

Lord President—This is a case of a lease for one year, but the parties contemplated that it should be prolonged from year to year—that is to say, the tenant might continue as a yearly tenant as long as the landlord was willing. Either of them might give six months' notice that the lease was to terminate at Whitsunday, and in either case the right of the other party would have ended at that term; and the tenants "bind themselves to remove from the said subjects hereby let at any term of Whitsunday on receiving at least six months' previous notice," and so forth. Now, the tenant voluntarily removed from the farm, having been in possession for five years from Whitsunday 1883 down to Whitsunday 1888. Of course he had become due during that period five years' rent or ten half-years' rent, and nine of these were paid by the tenant regularly and without any objection on the ground of his not having received possession of the entire subjects let, or of his not having received them in the condition promised. Now, for the first time after he has left the farm, and his occupancy has ended, the defender sets up the plea that the farm buildings were not put in repair in terms of the landlord's obligation in the lease. I think that plea cannot be sustained in the circumstances.

In the case of *Munro* v. *M'Geochs*, which is the last of the cases on this subject, the facts were all the other way. The lease there was for nineteen years, and the parties were not entitled to put an end to it even on the ground that the landiord's obligations under the lease had not been fulfilled. The tenant protested from the outset against the condition of the buildings, and only paid a sum to account for the first half-year's rent, and this went on till the question came to be tried. There was nothing like acquiescence or abandonment of the claim. On the contrary, there was a constant demand by the tenant on the landlord that the buildings should be put in repair. I can scarcely conceive a more complete contrast than between that case and the present.

Further, if we look at the correspondence we see that the demand made by the tenant was not justified by the terms of the lease at all. It was not made till August 1885, and then it was a demand for new houses. But there is nothing of that kind in the lease; there is nothing in the lease except a stipulation for repairs on existing buildings. Therefore the demand which was made during the currency of the lease was not a demand in terms of the landlord's obligation. I am accordingly of opinion that the tenant's claim cannot be sustained.

Lord Mure—This is a very special case. The lease is substantially a lease for one year, with a power to either party to give notice to quit. The tenant entered into, and continued in possession of the farm, and paid the rent without giving any notice that he was going to quit to the landlord. In 1885 he wrote to the landlord expressing a wish to have some new buildings put up. These were not put up, but the tenant goes on paying rent for the next two years without any reservation, when he hands over to his cautioner whatever right he may have to demand damages for the loss he has sustained from the buildings not having been properly repaired. I am of opinion that he cannot raise a claim for damages now with the view of proving that the subjects were not handed over to him in the condition promised, but were in need of repair.

Lord Shand—The third head of the lease is in these terms—"The proprietrix agrees to put the whole buildings on the island let into a thorough state of repair." That is an obligation which fell to be implemented by the landlord at the beginning of the lease, and I cannot doubt that the tenant would have been entitled to retain the rent, or at least a portion of the rent, until his landlord did so.

Now, if part of the subjects of a lease is not given to a tenant, or if the buildings are not put into the condition stipulated, so that the tenant in effect does not really get the full use of the subjects let, the tenant may retain a portion of the rent and claim for abatement. In the latter, and it may be in both cases, the mode of making the claim may be by stating the amount of damages. The claim is substantially a claim for abatement, although the damage caused to the tenant may be the measure of the claim. I cannot doubt therefore that if in the first year of the lease the tenant in this case had, as in *Munro* v. *M'Geochs*, intimated that the repairs were insufficient, and this was the fact, he would have been entitled to retain part of the rent, and so for the second, third, and fourth years.

The peculiarity of this case, however, appears to be that a large sum was expended by the landlord during the first year, and the tenant paid the rent down to the end of the fourth year without making any claim for abatement. The only writing we have indicates that the claim made in regard to buildings was a request for new build-

ings with a view to the tenant's going on with the lease for a period of some endurance. There is no retention by the tenant of part of the rent, and no indication that he considered that the terms of the lease had not been fulfilled. I am quite clear that the notion of sustaining a claim for damages for the whole period is out of the question.

The only point of any nicety is, whether in lieu of £80 the tenant can now claim an abatement of £16, and make it applicable to his occupation of the subjects for the last year. With reference to that the obligation is peculiar. The lease is one from year to year, and by tacit relocation the obligations of the parties to each other may be the same in the last as in the first year of the tenant's occupation. But this particular obligation is of a peculiar kind. It is plain that five years before there was an obligation to put the subjects in order. It seems to be also clear that in the first year there was outlay by the landlord on the buildings. In these circumstances, and no objection having been made to the payment of the rent for four years, it would have required very clear notice on the part of the tenant that he held the obligation to have been unfulfilled by the landlord in order to raise a claim now. The tenant now says the obligation should apply to the fifth year of the lease, but I think he is barred by his actings, and the absence of any earlier demand from demanding any abatement even in the last year.

The result is that I think the Lord Ordinary's interlocutor should be recalled and the defences repelled.

Lord Adam—It does not appear to me that this claim on the part of the defender is one of abatement of rent at all. It is a claim that the tenant shall not be called upon to pay any portion of the last half-year's rent in respect of loss or damage sustained during the whole of the currency of the lease. If the claim was one for abatement of rent, the loss for each previous year would have been set off against the rent for that year. That would have been the proper way of stating the claim. But that is not so here, for each portion was paid without reservation, and no claim for abatement was made, and so matters continued till the last half-year, and, as I have said before, no claim is set up to retain the portion of rent corresponding to the extent of the farm in which the tenant was not in possession in that half-year. The claim is that the whole loss incurred during the whole currency of the lease shall be set off against that which is, I think, a proper claim for rent for the last half-year. It is an attempt to set off an illiquid claim of damages against a liquid claim of rent.

That being in my opinion the meaning of the record, I am of opinion that we must recal the interlocutor reclaimed against, repel the defences, and grant decree against the defender.

The Court recalled the interlocutor reclaimed against, repelled the defences, and decerned against the defender Duncan Buchanan in terms of the libel.

Counsel for the Pursuer—M'Kechnie—G. W. Burnet. Agent—D. Maclachlan, S.S.C.

Counsel for the Defender—D.-F. Mackintosh—Watt. Agents—Clark & Macdonald, S.S.C.

HOUSE OF LORDS.

Friday, November 18, 1887.

BOWIE *v.* THE MARQUIS OF AILSA.

(*Ante*, March 18, 1887, vol. xxiv. p. 456, and 14 R. 649.)

Appeal to House of Lords—Petition for Leave to Appeal in forma pauperis—*Public Right.*

In an action for declarator that the pursuer as a member of the public had right to fish with rod and line in a river on the defender's property, the Court of Session assoilzied the defender. In a petition for leave to prosecute an appeal to the House of Lords *in forma pauperis*, the Appeal Committeee *refused* the petition.

In the Court of Session 18th March 1887, vol. xxiv. p. 456, and 14 R. 649.

James Bowie, who was an upholsterer in Glasgow, afterwards residing in Ayr, was apprehended on the night of 11th August 1884 by Robert Armour, water-bailiff to the Marquis of Ailsa, on a charge of poaching in the river Doon. In October following Bowie raised an action in the Sheriff Court at Ayr against the Marquis, calling Armour also as a defender, in which he prayed the Court "to find and declare that the pursuer as a member of the public has an undoubted right and privilege of fishing with single rod and line for trout, flounders, eels, and other fish which are not salmon, sea-trout," &c., "in the river Doon, at least in that part of it within the tidal influence of the sea,"—then followed a prayer for interdict.

The Sheriff (Brand) assoilzied the defender.

The pursuer appealed.

The Second Division having doubts as to the competency of the action in the Sheriff Court, agreed to allow the action to stand over to give Bowie an opportunity of bringing an action in the Court of Session. Bowie then raised an action in the Court of Session, concluding for declarator "that the pursuer as a member of the public has right to fish with single rod and line for trout," &c.

The Second Division on 18th March 1887 assoilzied the defender in both actions.

The pursuer presented a petition to the House of Lords for leave to prosecute an appeal *in forma pauperis*.

The respondent's agent objected, on the ground that the appellant was trying a question of public right, and that a committee had been appointed to collect subscriptions to assist Bowie in the litigation.

In the Sheriff Court action the pursuer, when examined as a witness, deponed—"I gave instructions for carrying on this case, and it is carried on under my responsibility, and I am not aware that any subscriptions have been promised. I should be very glad of subscriptions."

Alexander Mitchell, fishing-tackle maker, in cross-examination deponed—"I have agreed to subscribe to help to carry on this case. A subscription-sheet was drawn up, and I put my name to it. The sheet did not specify the sums