be, the plea is that the company was barred by its acquiescence in the pursuer's conduct in taking his seat from enforcing that regulation as against him, and therefore the pursuer's case ultimately came to rest upon what he described as a plea in bar. But then there are two indispensable conditions which must concur in order that acquiescence should create a personal bar, and both of them are absent in this case. In the first place, the conduct which is said to have been acquiesced in must have been known to the party who is alleged to have acquiesced; and in the second place, the party raising the plea must have altered his position to his prejudice. Neither of these things happened in the present case. The officials of the company knew nothing of the pursuer's having taken his seat in the carriage in question until the porter, Gerrie, challenged him, and asked him to come out, and how any plea of acquiescence can be founded upon the conduct of an official, who, as soon as he sees the pursuer in a carriage in which *ex hypothesi* he is not entitled to travel against the will of the company, tells him that he must come out, I am unable to see. But in the second place, if there were any ground for holding that the company had held out to the pursuer the carriage in question as one in which he was entitled to travel, he was not prejudiced in any way by being induced to act in that belief; all that he had done was to take his seat in the carriage, and when the company's officers told him he must go into another carriage, he suffered no more prejudice than if the same thing had been said to him on the platform before he had taken his seat. The plea in bar is therefore untenable. I agree that the pursuer's case here fails for the reasons your Lordships have stated. It is much to be regretted that a case of this very insignificant value should have been brought into this Court. That, however, does not appear to me to be the fault of the railway company, because if the pursuer had any good ground of action at all, it was a matter for the Small Debt Court rather than for the Sheriff Court with a consequent right of appeal.

The LORD PRESIDENT was absent.

The Court assoilzied the defenders.

Counsel for the Pursuer—C. D. Murray. Agent—Alexander Mustard, S.S.C.

Counsel for the Defenders—C. S. Dickson—Ferguson. Agents—Gordon & Falconer, W.S.

Thursday, January 24.

FIRST DIVISION.

[Lord Kyllachy, Ordinary.

CAMERON AND ANOTHER *v.* WILLIAMSON.

Property—Sale—Alleged Defective Title.

The proprietor of certain heritable subjects in 1833 granted a bond and disposition in security over them for £300. In 1856 the creditor in right of the bond assigned it to the extent of £200 by an assignation, duly recorded, which contained a declaration to the effect that the creditor acknowledged that the remaining £100 had been repaid, and that a discharge therefor had been granted. Ultimately the bond to the extent of £200 was discharged in 1888, the discharge, which was recorded, containing the declaration that the remaining £100 had been long ago repaid, extinguished, and discharged. But no discharge of the £100 was on record. The subjects were thereafter sold in 1894, but the purchaser refused to implement his bargain on the ground that the seller was bound to clear the record of burdens, and that the title tendered was bad, in respect that *ex facie* of the record the bond for £300 had only been discharged to the extent of £200. *Held* (*aff.* judgment of Lord Kyllachy) that the purchaser was not entitled to demand that a discharge should be put on record, and was bound to accept the title tendered.

Process — Expenses — Property — Sale of Heritage—Objection to Title.

Held (*aff.* judgment of Lord Kyllachy) that a party who had agreed to purchase certain heritable property, and had repudiated his bargain on the ground of an alleged defect in the title tendered, was liable in the expenses of an action by the seller for implement of the contract, in respect that he had stated no valid objection to the title, and the seller had offered to remedy the defect alleged to exist.

Howard & Wyndham v. *Richmond's Trustees*, June 20, 1890, 27 S.L.R. 800, and 17 R. 990, *distinguished.*

Isabella Cameron and Margaret Cameron were *pro indiviso* proprietors of certain heritable subjects situated at 94, 96, and 100 Nicolson Street, Edinburgh. George Williamson, by missive-offer dated 9th January 1894, offered to purchase the said subjects at the price of £1600 sterling. The offer, which contained, *inter alia*, the condition "a good, valid, and complete title to be given by the exposers, and at their expense, and also searches brought down to term of entry showing a clear record, excepting existing bond for £1100, and thereafter to be brought down by exposers to the said term of Whitsunday showing a clear record," was accepted by the proprietors on 11th January 1894. Thereafter the agents of the purchaser

objected to the title offered, in respect that a bond and disposition in security for £300 over the subjects had only, *ex facie* of the record as disclosed by the search, been discharged to the extent of £200.

The bond in question was granted so far back as 1833 by John Forrest, the then proprietor of the subjects. In 1850 Forrest executed an agreement whereby, on the narrative that the creditor was about to assign the bond to James Fraser's trustees, and that he was about to pay up £100 of the bond, he bound himself to pay interest at the rate of 5 per cent. on the remaining £200. In the same year the bond was transmitted by assignation to Fraser's trustees, and in 1856 these trustees, being then unquestionably in right of the whole bond, assigned it to the extent of £200 to Miss Anna Macleod, and the assignation which they then granted, and which duly entered the Register of Sasines, contained the following declaration:—"Declaring always that to account of the said sum of £300 contained in the said bond, the sum of £100 was paid on the day ; and which sum of £100 was thereby extinguished and discharged, conform to discharge and deed of restriction executed by ." Miss Macleod assigned the bond or what remained of it in 1860 to Mr George Cotton, and it passed to Knox's trustees by successive assignations, each assignation being duly recorded and bearing *in gremio* that the sum of £100 with the corresponding interest had, according to the granter's information, been long ago discharged. Ultimately the £200 was repaid in 1888 to Knox's trustees, who executed and recorded a discharge in favour of the then owner of the subjects, "but that only to the extent of £200, with corresponding interest and penalties, the remaining £100, with corresponding interest and penalties, having, we are informed, been long ago repaid, extinguished, and discharged." This discharge was duly recorded, and it and the discharged bond, with all the transmissions thereof, were delivered up to the proprietor. These deeds were among the titles tendered to Williamson. So far as was known no interest had been paid, except on the £200 since 1856. But no discharge of the remaining £100—that is to say, no discharge by the creditor in favour of the debtor—had been found, and none such had been recorded in the Register of Sasines.

After some correspondence between the parties the purchaser's agents wrote to agents for the sellers on 14th February that their client refused to accept the title tendered on the ground that *ex facie* of the record £100 of the £300 bond was still undischarged. The agent for the sellers replied that he had agreed to clear the record of the £100, and on 17th February he wrote consenting to a suggestion which had been made by the purchaser's agents on 12th February that £100 should be consigned in bank until a formal discharge was obtained. The purchaser, however, adhered to his repudiation of the contract, and the sellers accordingly raised this action against him to have him ordained to implement the missives of sale.

The pursuers pleaded — "(3) The title tendered by the pursuers being valid and sufficient in all respects, and the record having been all along clear of encumbrances other than those mentioned in the missives of sale, the pursuers are entitled to decree in their favour in terms of the conclusions of the summons. (4) *Separatim*, the pursuers having repeatedly offered to clear the record of all encumbrances which could be shown to affect the subjects, and having offered to obtain a formal discharge of the encumbrance alleged by the defender, the defender is bound to implement the contract."

The defender pleaded—"(3) The pursuers having failed to purge the record of an encumbrance affecting the title of said subjects, the defender is entitled to resile from the contract."

Upon 16th November 1894 the Lord Ordinary (KYLLACHY) decerned against the defender in terms of the conclusions of the summons for implement, and found the pursuers entitled to expenses.

"*Opinion.*—I have come to the conclusion that the title offered by the pursuer is sufficiently good, and that the defender is bound to implement the contract of sale.

"The only objection which the defender now takes to the title offered is this—he says that the pursuer is bound to clear the record of all burdens, and that there is still a sum of £100, part of a bond for £300, which one time affected the subjects, and which remains *ex facie* of the records undischarged. The point which I have first to consider is, whether this is so in point of fact. [*The Lord Ordinary then narrated the history of the bond for £300 given above*].

"In these circumstances the defender maintains that the record is not cleared. He contends that the declaration in the deed of 1856, although under the hand of the creditor, and although entering the record, does not have the effect required, because that declaration was a *res inter alios acta*, and moreover, by reason of the blanks which it contains, at least suggests that the discharge of the £100 was only contemplated, and may not have been executed. The pursuer, on the other hand, argues that all that is necessary is that that there should be proof *scripto* under the hand of the creditor for the time that the £100 had been paid, that the declaration in question contained in a deed granted by the creditor in favour of a person who had a material interest in the discharge of the £100 is good evidence *scripto* of the discharge, and that the deed containing the declaration having entered the record, there is no need for anything more.

"I am of opinion that on this matter the pursuer is right. If the debt is once extinguished, there can be no doubt that the infeftment in security is also extinguished, and I see no reason why the defender should require more than competent and adequate evidence appearing *ex facie* of the records, that the whole debt in the bond has been fully extinguished. With respect

to the circumstance that the deed of discharge of the £100 is left blank in the declaration appealed to, I do not think that it is a legitimate inference that (contrary to the words of the deed) the discharge was only contemplated. It must be kept in view, as was well urged by the pursuer's counsel, that in 1856 the assignee to the bond had a material interest to see that the £200 did not rank *pari passu* with another and subsisting debt of £100.

"In the view which I thus take it is necessary to consider whether the pursuer would not yet be in time, and would not yet be entitled to an opportunity to obtain from the representative of Fraser's trustees, and place on record a formal discharge of the £100 in question. As at present advised, I see no sufficient reason why he should not. Time is not, as far as I can see, of the essence of the contract, and I do not find in the correspondence that the pursuer had, before the defender resiled, or has even yet, taken up the position that he will do nothing further to meet the defender's views. As to all this, however, it is not necessary to decide. It is enough that in my opinion the title is good as it stands. I shall therefore decern in terms of the summons."

The defender reclaimed, and argued—(1) *On the question of title*—The defender paid a full price for the subjects in question, and was entitled to demand in payment of the price that a good marketable title should be given to him. Such a title he had not got, in respect that the search disclosed that the bond for £300 had only been discharged to the extent of £200, and he was not bound to accept the declaration in the assignation of 1856 as equivalent to a discharge of the remaining £100. The creditor in 1856, for all that appeared, might have assigned the bond to the extent of £100 to someone who had not yet put it on record—*Robertson* v. *M'Gregor*, December 11, 1840, 3 D. 213; *Mitchell* v. *Thomson's Trustees*, November 27, 1827, 6 S. 135; *Cargill* v. *Craigie*, April 1, 1822, 1 Sh. App. 134. (2) *On the question of expenses*—Even if the defender was bound to accept the title, the expenses of the action which was necessary to clear the record must fall on the seller—*Howard and Wyndham* v. *Richmond's Trustees*, June 20, 1890, 27 S.L.R. 800.

The pursuers, who were called upon to reply only on the question of expenses, argued—The reclaimer was not entitled to expenses, because the sellers, so far from refusing to purge the record, had offered to do so, and this offer was met by the reclaimer repudiating the contract. Besides, the present action was not one to clear the record at the instance of the purchaser, but it was an action of implement at the instance of the seller, to which the only defence was the one which had been overruled, namely, that the title was bad. In these circumstances the pursuers were entitled to expenses.

At advising—

LORD M'LAREN—This is an action at the instance of the seller of certain heritable subjects in Nicolson Street, Edinburgh, against the purchaser in order to enforce fulfilment of the contract of sale, and the defence stated is that the seller has not tendered a sufficient title to the purchaser. When, however, the defence is examined, it is found to resolve itself into this, namely, that *ex facie* of the record a bond for £300, which had been granted in 1833, had only been discharged to the extent of £200, and that the declaration contained in an assignation by Fraser's trustees in favour of Miss M'Leod in 1856 to the effect that the remaining £100 had been previously paid could not be accepted as sufficient legal evidence of the fact of payment. The objection is an extremely critical one, viz., that there is not a formal discharge clearing the record of the difference between the sum contained in the bond and the discharge for £200. But this objection, when considered, appeared to the Lord Ordinary, as it appears to me, to be completely displaced by the history of this obligation as disclosed in the titles. It is also right to point out that the deed of discharge of 1888 set forth that the lands, &c., are redeemed and disburdened of the heritable security, and these words seem sufficient to free the lands of every pecuniary burden affecting them in virtue of the security.

Now, when the defender says he has not got a marketable title, he must mean that he is exposed to eviction of some kind—I suppose by enforcement of the old obligation for £100. When the bond came to be assigned to Fraser's trustees, the debtor executed an obligation, in which he says he is about to pay up £100, and he binds himself to pay interest on the remaining £200. Fraser's trustees assigned the bond to Miss M'Leod in 1856 to the extent of £200, and the assignation contains a declaration that the debt to the extent of £100 had been paid and discharged. Now, as both the creditor and the debtor agree that the obligation to the extent of £100 has been discharged, no one claiming through either can say that it is still subsisting.

The only suggestion that could be made was that Fraser's trustees might have assigned the bond to the extent of £100 to someone who had not put the assignation on record. Now, when objection is taken to a title, the risk of eviction must be sensible, especially when the sum is small, and it is not conceivable that a body of trustees, who had no personal interest to serve, could have committed such a perfectly useless and at the same time fraudulent act of administration. I also notice a letter in the appendix for the respondent, which says that the creditor's statement had been accepted by nine agents by whom the titles were successively examined—I mean the statement that the £100 had been repaid; and this confirms me in the opinion that there is no sensible risk attaching to this title; nothing that would be considered risky or unmarketable in the view of conveyancers.

I therefore agree with the Lord Ordinary that the bond was restricted, and that the title is such as a purchaser is bound to

accept. The only question remaining is, whether there is such an infirmity of title as to entitle the purchaser to the expense of having his title cleared by decree of Court, and a case was cited to the effect that where a legal difficulty is raised and decided, the purchaser is entitled to have the expenses of the action paid by the seller. But here we have decided no question of law. Besides, an offer was made on 14th February 1894 to clear the record of the alleged burden. Now, it might have resulted that the seller was unable to clear the record, but the purchaser did not give him the opportunity; he met this offer by repudiating the sale. In such circumstances the purchaser cannot say that the seller ought to pay the expenses of this action.

On the whole matter, I think the Lord Ordinary has rightly determined this question also.

LORD KINNEAR — I agree with Lord M'Laren and the Lord Ordinary. I am far from saying that a purchaser is bound to accept evidence extrinsic of the record as sufficient to clear the lands of an encumbrance. But then an infeftment in security of debt may be extinguished by payment or discharge of the debt, and the declaration of a creditor assigning the security that the debt has been paid in part, and that the unpaid balance alone is assigned, is competent evidence of the fact of payment, and necessarily enters the record when the assignation is recorded. It is said, for reasons which did not appear to me very substantial, that the declaration may be erroneous. But even if it were reasonably probable that no part of the debt had been paid, the land in question would still be affected by a security for £200 only, and not for £300. Fraser's trustees were infeft in security of £300. But their infeftment is sopited by the conveyance and infeftment of Anna M'Leod under the declaration that £100 has been paid and extinguished, and the infeftment of their assignee is qualified by the same declaration.

The purchaser might nevertheless have been entitled to have the question tried at the expense of the seller if these proceedings had been taken for the purpose of clearing the title by a judgment. But the seller, over and over again, offers to clear the record, and the buyer's only answer is that the contract is at an end; and therefore it appears to me that the true question raised by this action is not how the title should be cleared, but whether the purchaser was entitled to throw up the contract. I agree with your Lordships that he was not, and he must accordingly pay the expenses of this case.

LORD ADAM—I am of the same opinion. That the £100 had been discharged is clear from the assignation which enters the record. Now, that is sufficient, because if the debt is paid there is an end of the infeftment in security, and there is no necessity to clear the record. As to the question of expenses, the defender has tried to get quit of his bargain, and that is the position he has always taken up. As he has failed in that he must pay expenses.

The LORD PRESIDENT was absent.

The Court adhered.

Counsel for the Pursuers—Cullen. Agents—P. H. Cameron & Company, S.S.C.

Counsel for the Defender — D.-F. Sir Charles Pearson, Q.C.—Macfarlane. Agents—Rusk & Miller, W.S.

Thursday, January 17.

SECOND DIVISION.

[Sheriff-Court at Edinburgh.

NISH *v.* NISH'S EXECUTOR.

Husband and Wife—Payment of Husband's Debts by Wife—Claim by Wife for Repayment—Presumption.

Evidence which was *held* insufficient to establish that moneys paid by a wife on her husband's behalf during marriage had been advanced out of her separate estate, and were debts due by the husband to the wife at the date of his death.

Mrs Christina Nish raised this action in the Sheriff Court at Edinburgh, in January 1894, against the executor of her deceased husband, for recovery, *inter alia*, of certain small sums of money which she alleged had been paid by her out of her own estate during the marriage in satisfaction of debts due by her husband.

Proof was allowed. It appeared that Mr and Mrs Nish were married on 20th September 1883. Mr Nish died in October 1892. The pursuer deponed that the sums for which she sued had been paid by her out of her own estate. They had been paid respectively in 1885, 1888, and 1890, in satisfaction of (1) a shorthand writer's account incurred by her husband, who was a solicitor, in the course of his practice; (2) the interest due on a small loan obtained by her husband on the security of real estate belonging to him; and (3) legal expenses incurred by her husband in connection with the mortgage. She had never asked repayment during her husband's life. She expected that her husband would leave her his whole estate. In corroboration of her claim pursuer produced receipts for the said alleged payments made by her on her husband's behalf. The receipts bore that the sums paid had been received from her.

Upon July 24th 1894 the Sheriff-Substitute (RUTHERFURD) found in fact and in law that the pursuer had failed to prove that the sums sued for were "debts due to her by her husband at the time of his death," and therefore dismissed the action.

On appeal, the Sheriff (BLAIR) recalled this interlocutor, and decerned against the defender for payment of the sums sued for.