BALFOUR in answer.

At advising—

The LORD PRESIDENT—I cannot concur with the view of the Lord Ordinary. It appears to me that the claim of the pursuer, if well founded, is not to be got rid of because of the fact of her husband's absence, or of his refusal to concur in the action. The only question for decision is what is the most convenient and satisfactory way in which to establish a valid instance? The other question, as to whether the lady with a curator *ad hanc litem* would have a good title to sue, and, if her claim were established, to decree, it is now necessary to determine, because she alleges and offers to prove that she has been deserted by her husband.

In these circumstances I think this action should be superseded, to allow the lady to make application to the Court under section 1 of the "Conjugal Rights Act 1861" for an order for protection. The effect of that order, if obtained, will be to vest this claim in her own person, and to give her good title to sue the action. This seems to be a solution of the difficulty. It is an inexpensive and not a tedious course of procedure, although the husband may have to be cited edictally—and I beg that it be distinctly understood that, in the opinion of the Court, if this lady succeeds in getting an order for protection, that she has a good title and instance to sue in this action.

The other Judges concurred.

Agent for Reclaimer—William Officer, S.S.C.

Agents for Respondents—Hill, Reid & Drummond, W.S.

Friday March 11.

JOPP AND OTHERS *v.* SCORGIE.

Landlord and Tenant—Inædificatum solo cedit solo—*Dilapidation.* A sub-tenant had erected a small addition to his farm-house, which he found was not sufficient for the accommodation of his family. He entered into a contract with a builder to erect a more substantial structure in its place, and proceeded to pull down the building. A petition for interdict at the instance of the landlord *dismissed*, on the ground that the tenant desired to benefit, and not to dilapidate, the property.

This was a petition to the Sheriff of Aberdeen at the instance of Alexander and Andrew Jopp, as trustees of the late Sir James A. Gordon, proprietors of one-half of the lands of Auchnacant, in the parish of Foveran, and Mr J. A. West, proprietor of the other half of these lands, to have Alexander Scorgie, the sub-tenant of the farm of Brunthill of Auchnacart, interdicted from pulling down or removing a stone and lime addition which he had built and added to the farm house.

The facts of the case appear from the interlocutor and note of the Sheriff-Substitute (THOMSON):—

"*Aberdeen, 26th November* 1869.—Having resumed consideration of the cause, finds in fact that the respondent is sub-tenant of the subjects in question, under a lease which expires at Martinmas 1873: That he built a kitchen of single hollow brick, and with a tile roof, for the accommodation of his family, in 1866; that it became uninhabitable; that he conceived the intention of pulling it down, and of building a habitable kitchen on its site; that he entered into a contract for such new erection; that he pulled down part of the former kitchen: Finds in law that in so doing the respondent does not prejudice the rights of the petitioners as proprietors of the subjects: Therefore sustains the defence; recals the interim interdict formerly granted, dismisses the petition, and decerns: Finds the respondent entitled to expenses of process; allows an account thereof to be given in, and remits the same when lodged to the auditor of Court to tax and report.

"*Note.*—The removal complained of has occurred while there are yet four years of the respondent's lease to run. He erected the building because the existing house was not large enough for his family. It was built as cheaply as possible, of hollow bricks, and has been proved to have become unfit for habitation. The testimony of the witnesses as to its uselessness as a dwelling is unanimous, and is confirmed by the fact that the respondent had actually to hire a house in Newburgh, to which he removed his wife and all of his family who could be spared. Further, there is evidence to show that the respondent entertained no intention of dismantling the premises. He acted and spoke like a man who honestly purposed to rebuild what he was pulling down, but in a more substantial manner. It is highly improbable that he meant to divide his family during the remainder of the lease; and without an addition such as the kitchen in question there is not room for them in the house.

"The rule is well fixed in our law, *Inædificatum solo cedit solo*, but it is quite apparent from the more modern decisions of the Supreme Court that whatever may be the case in questions between liferenter and fiar, and lien and executor, the rule is less rigidly applied in questions between landlord and tenant; see the opinions of the Lords of the First Division, and especially of Lord Currie-hill, in the case of *Syme* v. *Harvey*, 14th Dec. 1861, 24 D. 202.

"In this case the erection was made for a special purpose, arising from the respondent's family circumstances. It became unfit for that purpose, and it is thought that his landlord is not entitled to interfere with him in making it fit for habitation either by repair or renewal."

On appeal the Sheriff (JAMESON) adhered.

The petitioners appealed.

BALFOUR and SHAND, for them, cited *Murray* v. *Bisset*, Hume's Decisions, 818, 21st May 1805; *Oliphant* v. *Thomson*, 1 S. 307; *Elwys* v. *Mawe*, 2 Smith's Leading Cases, 153.

RHIND, for the respondents, was not called on.

At advising—

The LORD PRESIDENT—This is a very special case. The sub-tenant of an agricultural subject erects a building of an unsubstantial and temporary nature because he has not sufficient accommodation for his family in the farm house. If he had possessed it till the end of his lease, I daresay it would not have been of very much value at that time, because the house was built of single bricks with a tiled roof. It was found not to answer, because it let in the rain and cold, and was not fit for human habitation. The tenant accordingly proceeds, in perfect good faith, to pull down this building which he had built, with the view of erecting a more suitable one in its place. At this point of time the landlord, without any warning, presents this note of suspension and interdict. I consider this to have been a nimious proceeding on the part of the landlord, who ought to have made inquiry if he imagined that his property was

being dilapidated. But the tenant has a good answer on the merits. He is going to benefit, not to prejudice, the property, and therefore I think that the Sheriff and Sheriff-Substitute have done right, and that this appeal should be dismissed.

The other Judges concurred.

Agent for Appellants—William Mitchell, S.S.C.
Agent for Respondent—William Officer, S.S.C.

Friday, March 11.

M'CALL *v.* MUIR.

Reparation—Collision—Accident—Proof. Circumstances in which *held* that the upsetting of a hired dog-cart, whereby the pursuer had his arm broken and sustained other serious injuries, was accidental; and an action against the master of the driver of the dog-cart dismissed.

In this action Mr Robert M'Call originally sued John Muir, Innkeeper, Dalbeattie, for damages sustained by him in consequence of his having been thrown out of a conveyance hired by him from the defender on the 15th December 1866. The conveyance was alleged to have upset on the road between Dalbeattie and Auchencairn through the recklessness, negligence, and incapacity of Hugh Kerr the defender's servant, for whom the defender was responsible, whereby the pursuer had his left arm broken and dislocated, and was rendered permanently disabled from working at his trade.

Mr M'Call died in 1868, and the action was now insisted in by his brother Francis M'Call.

After a proof the Sheriff-Substitute (DUNBAR) pronounced the following interlocutor:—

"*Kirkcudbright*, 3*d June* 1869.—Having heard parties' procurators on the record and proofs, Finds as matter of fact that the original pursuer, the late Robert M'Call, coachbuilder, Dumfries, having some business to transact at Auchencairn on 15th December 1866, went on the morning of that day by railway to Dalbeattie, where the defender kept an inn and posting establishment, and there procured on hire a dog-cart and driver to convey him from Dalbeattie to Auchencairn, and back from Auchencairn to Dalbeattie, in time for the afternoon train of that day from Dalbeattie to Dumfries: Finds that the driver of the dog-cart on said occasion was Hugh Kerr, a person of fifty-six years of age, of forty years' experience in driving, and regarded by his master, the defender, as a cautious and steady as well as an experienced driver, and the dog-cart was drawn by a quiet steady horse, that had been in the defender's possession for some years: Finds that said pursuer accordingly proceeded to and arrived safely at Auchencairn in said conveyance driven by Kerr, and having transacted his business there, left it on his return journey to Dalbeattie about 4 P.M. in the same conveyance, under the charge of the same driver: Finds that the pursuer and Kerr the driver were quite sober on leaving Auchencairn, and proceeded on their journey at the moderate pace of seven or eight miles an hour till they reached Thornglass, where they were met by a cart heavily loaded with tiles, under the charge of a young man, Thomas Morton, farm-servant at Hazlefield: Finds that in passing each other the two vehicles came into collision, and in consequence thereof the said pursuer was thrown violently out of the dog-cart and sustained a comminated fracture of the left elbow joint, which required surgical care and attendance for some weeks, and occasioned permanent injury and disability for work in that arm, as well as serious pecuniary loss and damage to the pursuer in his business, both as a master and as an occasionally operative coach builder: Finds that when said collision occurred the dog-cart was on the north, the proper side of the road, and the driver of the loaded cart was at his horse's head, and leading him: Finds that the pursuer, immediately after the collision, and on the same evening, in conversation with the defender and others regarding the cause of it, represented it as accidental, and exonerated Kerr, the driver of the dog-cart, of any blame: Finds that from said 15th December 1866, when the pursuer received his injury, till 27th April 1867, a period of four months and a-half, he never made any complaint to the defender against the driver Kerr, nor intimated any claim of damages against the defender on account of said collision: Finds it not proved that said collision and the pursuer's consequent injury were occasioned by the negligence, recklessness, incapacity, carelessness, or fault of the said Hugh Kerr, the defender's servant, and the driver of the dog-cart on said occasion: Finds, in point of law, that the grounds of action insisted in by the original pursuer, the deceased Robert M'Call, and now maintained by his brother and executor dative Francis M'Call, have not been established: Therefore sustains the defences, assoilzies the defender from the conclusions of the action, finds the defender entitled to expenses, as the same shall be taxed by the auditor of this Court, to whom remits the account thereof when lodged, and decerns."

The Sheriff-Depute (HECTOR) adhered.

The pursuer appealed.

PATTISON and HALL for him.

MILLAR, Q.C. and SCOTT were not called on.

The Court unanimously dismissed the appeal.

Agent for Pursuer—James Somerville, S.S.C.
Agent for Defender—W. S. Stuart, S.S.C.

Tuesday, March 15.

SPECIAL CASE—HOPE AND OTHERS.

Revocation—Discharge—Annuity—Antenuptial Contract. In an antenuptial contract the intending husband and his father bound themselves jointly and severally to pay to the lady, in the event of her surviving her husband, an annuity of £400; and various provisions were made in return on the lady's part to a considerable amount. In consequence of an arrangement entered into after his father's death, the husband received a conveyance from his mother, as executrix of his father, of certain heritable property, in return for which he and his wife granted a discharge, as stipulated, to his mother of liability for his wife's annuity, and he conveyed certain heritable property to trustees in security of payment of the annuity. *Held* the husband and wife could not now revoke this discharge.

Special Case—Counsel. Observed, a special case should be signed only by the counsel in it.

By contract of marriage entered into in April 1857 between Mr William Hope and Miss Margaret Jane Cunninghame Graham, with the special