came vested in the said Elizabeth Patricia Maule, subject to the fetters of the entail, and subject also to her mother's liferent: Find that when the title of the said Elizabeth Patricia Maule shall have been duly completed she will be entitled, as heir of entail in possession of the said entailed estate, to execute and record an instrument of disentail on complying with the conditions of the third section of the Entail Amendment Act: Remit to the Lord Ordinary to proceed further in accordance with the above findings."

Counsel—Dean of Faculty (Watson)—Johnston. Agents—Lindsay, Howe, Tytler & Co., W.S.

Wednesday, June 14.

FIRST DIVISION.

[Lord Curriehill, Ordinary.

SUSPENSION — HADDEN AND OTHERS (EXRS. OF DAVID SCOTT) *v.* HEPBURN, AND HADDEN AND OTHERS (EXRS. OF DAVID SCOTT) *v.* HEPBURN.

Suspension — Reasons of Suspension — Relevancy — Landlord and Tenant—Lease.

The executors of an agricultural tenant, under a lease excluding them, brought a suspension of a decree *in foro* pronounced in the Sheriff Court after a proof in a petition at the landlord's instance for payment of the expenses of repairing the houses, fences, &c., on the farm, the lease stipulating that these were to be left at its expiry "in the like order and repair" as at its commencement. It was alleged, *inter alia*, that the facts had not been properly inquired into, and that irregularities had occurred in the proof. *Held*—because there was no such specific averment as, for instance, that executors were not liable, or that the fences, &c., were in good order, or that the sum decerned for was excessive—that the reasons of suspension were irrelevant, and that the suspension should be dismissed.

Lease—Landlord and Tenant—Meliorations—Right of a Tenant's Executors to Compensation for Meliorations.

The executors of a deceased tenant under an agricultural lease which has come to a premature termination have no right to compensation for meliorations by which the landlord is *lucratus*.

Observations (*per curiam*) on the case of *Morton* v. *Montgomerie*, February 22, 1822, 1 S. 322.

Observations (*per* Lord President) on the case of *Pendreigh's Trustee* v. *Dewar*, July 1871, 9 Macph. 1037.

Process—Suspension—Bill Chamber—Act 13 *and* 14 *Vict. c.* 36, *secs.* 9 *and* 32—*Act* 31 *and* 32 *Vict. c.* 100, *sec.* 90.

A suspension was brought in the Bill Chamber of a decree *in foro* pronounced in the Sheriff Court after proof. Consignation was made, and the note was passed, with reasons and answers annexed. In a question whether the record then fell to be made up as in ordinary actions, or, seeing it had already been made up and proof led in the inferior Court, whether the cause should not be at once reported to the Inner House—*held* (*per* Lord Curriehill, the Lord President expressing a similar opinion *obiter dictum*) that upon a construction of the statutes the record fell to be closed and proceeded with in the Outer House.

These were two processes, both at the instance of Isabel Scott or Hadden, wife of George Hadden, gardener, Longniddry, and of Christina Scott or Liddell, wife of James Liddell, Gateside, Haddington, disponees and executors of David Scott, tenant of Spittalrigg and Ugstonrigg, on the estate of Smeaton-Hepburn, and of their husbands, for their interests, against Sir Thomas Buchan Hepburn of Smeaton-Hepburn and Letham, Bart. The two processes, although not conjoined, were considered together.

I. The first was a suspension of a decree *in foro* for £202, 3s. 8d., with £56, 5s. 6½d. of expenses, pronounced against the complainers, the parties mentioned above, as disponees and executors of David Scott, by the Sheriff of Haddington and Berwick, in a petition presented against them by Sir T. B. Hepburn, the respondent in this process.

David Scott became tenant in 1866 of the farms of Spittalrigg and Ugstonrigg, upon a lease from Sir T. B. Hepburn, for nineteen and a-half years from Whitsunday of that year as to the houses and grass, and for nineteen years from the separation of the crop 1866 as to the remainder. The lease was dated 24th and 27th February 1866; the farms were let to Scott and his heirs, but expressly excluding assignees and subtenants. It provided as follows, with reference to the buildings and fences on the farms:—"The said Sir Thomas Buchan Hepburn assigns to the said David Scott the obligations on David and William Scott, the present tenants of Ugstonrigg, and on Alexander Henderson, the present tenant of Spittalrigg, contained in their respective leases, to leave the houses, offices, and fences, and in the case of Ugstonrigg, the thrashing-mill and machinery, dams and aqueducts, in the order and condition therein stipulated; and in respect thereof the said David Scott accepts of the whole houses, buildings, and fences on the lands hereby let, and the thrashing-mill and machinery, dams, and aqueducts on the farm of Ugstonrigg in good and sufficient order and repair, and binds himself during the currency hereof to keep, and at the expiry to leave, the whole houses and buildings erected or to be erected, and the whole fences except plantation fences, as after provided for, gates and ditches, and the thrashing-mill and machinery, dams, and aqueducts at Ugstonrigg, in the like order and repair. The tenant binds himself and his foresaids to prune the hedges and dig their roots once a-year, in proper season, and also once a-year to scour the ditches and watercourses; and if he fail to do so, or to repair the fences generally, within ten days after being required, the proprietor shall have power, and is hereby empowered, to do these operations at

his own sight and according to his own discretion."

Scott continued to possess and cultivate the farms until his death on 24th November 1871. He left a disposition and settlement, dated September 1871, whereby he conveyed his whole estates to his sisters, the complainers, whom he appointed his sole executors. The deed further bore to assign them the lease. Scott left no issue, and his heir-at-law was his brother, an imbecile. His sisters, the complainers, after Scott's death, made up titles to, and entered into possession of, his estates. The respondent Sir T. B. Hepburn, failing in negotiations with them as to a voluntary removal from the farm, raised an action of declarator and removing, in which he called the complainers and John Scott, the heir-at-law; and decree in absence having gone out against them, the complainers were compelled to remove at Martinmas 1872. A *curator bonis* had meantime been appointed to John Scott, who on 11th October 1872 renounced the lease, and accordingly on the complainers' removal from the farms the present respondent entered into possession. On his doing so he found the buildings and fences in a state of disrepair, and after endeavouring to effect a settlement with the complainers in reference to these, he raised an action in the Sheriff Court of Haddingtonshire against them, concluding for payment of £202, 3s. 8d., the sum necessary for putting the houses, buildings, fences, ditches, &c., in proper repair, as provided in the lease. Defences were lodged, and after proof had been led of the expense necessary for the execution of the repairs, the Sheriff-Substitute (SHIRREFF) gave decree for the sum concluded for. This was the decree which the complainers now sought to have suspended.

The reasons of suspension, so far as material, were as follows:—

"XII. The lease of the said farms of Spittalrigg and Ugstonrigg contains an assignation to the obligations on the said Alexander Henderson, who was, prior to Whitsunday and Martinmas 1866, the tenant of Spittalrigg, and by which it was said he was bound to leave the houses, offices, and fences in good and sufficient order and repair. The said David Scott never got the obligation on Mr Henderson handed over to him by the landlord, and was thus unable to call on Mr Henderson to put the houses, offices, and fences into good and sufficient order and repair; and the consequence was that the houses, offices, and fences of Spittalrigg were in a worse state of repair at the entry of the said David Scott than they were when the complainers ceased their possession. At all events, the houses and fences of Spittalrigg were not put in repair at the entry of the said deceased David Scott.

"XIII. In or on or about the month of January 1873 the respondent seems to have had the fences and buildings, &c., on the farms of Spittalrigg and Ugstonrigg inspected by Mr Peter Brown, builder, Aberlady, who gave the report of which the following is a copy:—'I have carefully inspected the fences and buildings, &c., on the farms of Spittalrigg and Ugstonrigg, and respectfully beg to report as follows:—I find it will take the following sums to put them in a temporary or tenantable state of repair, in terms of the lease—

'1. Fences on both farms, .	£97 9 11
'2. Buildings on Ugstonrigg, .	37 10 0
'3. Do. on Spittalrigg, .	7 15 0
'*Aberlady*, 18*th January* 1873.	£142 14 11'

"XIV. At first the respondent asked the sum of £140 to put the houses, offices, &c., into a good and tenantable state of repair. This sum the complainers refused to give, and latterly the respondent's agents asked the complainer to offer £50, and that sum, although they were not liable for, they agreed to give to avoid litigation; and the respondent refused to settle on these terms.

"XV. Although the complainers were no party to the lease between the respondent and the said deceased David Scott of the farms of Spittalrigg and Ugstonrigg, but merely possessed the same as his assignees and executors, the respondent never called upon them to be present at any inspection, nor did he ever call on them to put the houses, offices, and fences in the state of repair required by the lease, but the respondent got them inspected for himself, though it is denied the fences on Spittalrigg were so inspected in or about the month of January 1873. The fences on Spittalrigg were inspected by Mr Brown at the time of Mr Henderson's entry to said farm, or when he left, or it may have been on both occasions. The respondent took possession of the houses, offices, fences, and others on the removal of the defenders from the farms and lands of Spittalrigg and Ugstonrigg, and at his own hands cut down a number of the fences, and it is impossible now to ascertain what was their state when the defenders left.

"XVI. The respondent has all along treated with the heir-at-law of the deceased David Scott, or with his *curator bonis*, as to the renunciation or termination of the lease, and it is believed and averred he has taken no legal proceedings to have the heir-at-law found primarily liable to discharge his obligation as heir-at-law under said lease, but has raised the action—the decree obtained in which is now sought to be suspended—to have the complainers found liable in the sum of £202, 3s. 8d., as the expenses necessary for putting the houses, buildings, and fences (plantation fences excepted), gates, ditches, and watercourses on the farms of Spittalrigg and Ugstonrigg, in the parish and county of Haddington, and the thrashing-mill and machinery, dams, and aqueducts on the said farm of Ugstonrigg, in good and sufficient order and repair, as at the term of Martinmas 1872, when the possession thereof by the complainers ceased.

"XXI. The said decreet was pronounced against the complainers without a proper inquiry into, or investigation of, the facts. During the most important stages of the cause the complainers had no law agent, their agent having refused to act. All the witnesses who knew the facts were not adduced, and those who were adduced were not properly or skilfully examined. The complainers were not aware of the judgment, or the steps necessary to bring the same under review by way of appeal to the Court of Session until the decree was extracted and the charges complained of were given, which was on or about the 25th day of March 1875; and in these circumstances the present note of suspension has been rendered necessary."

The complainers pleaded, *inter alia*—"1. The decree falls to be suspended, in respect (1) that the facts and circumstances averred in the action in which the same was procured were not relevant or sufficient to subject the complainers in liability; and (2) in respect regard being had to the conduct and actings of the respondent, and the terms of the lease and other documents on which he founds, the action was incompetent. 2. The whole material averments of the respondent in the action in which he procured the decree sought to be suspended being false and unfounded in fact, the prayer of the note ought to be granted. 3. The respondent, having transacted with the heir-at-law in manner foresaid, is barred *personali exceptione* from holding the complainers liable in the sums charged for."

Answers were lodged by the respondent, and the record was thereafter closed under the circumstances detailed in the following interlocutor and note of the Lord Ordinary:—

"*Edinburgh*, 30*th June* 1875.—The Lord Ordinary having heard the counsel for the parties on the motion of the respondent to have the record in the Inferior Court and the proof therein printed and boxed to the Judges of the Inner House and the cause reported to the Inner House, Refuses the motion; and, in respect the note of suspension with articulate reasons annexed thereto has been passed, after answers have been lodged thereto by an interlocutor now final, Finds that the record must be closed, and thereafter proceeded with in the Outer House: Therefore appoints the cause to be put to the roll for the 6th day of July next, for the adjustment of the record.

"*Note.*—This is a suspension of a decree *in foro* for £202, 3s. 8d., with £56, 5s. 6½d. of expenses, pronounced against the present complainers by the Sheriff of the sheriffdom of Haddington and Berwick, in a petition presented against them at the instance of the present respondent Sir Thomas Buchan Hepburn, Baronet. A record was closed, and a proof was led in the Sheriff Court.

"The time within which the judgment might have been appealed elapsed, and the decree was extracted. The complainers, in order to have the judgment reviewed, both on its merits and in respect of certain alleged irregularities in the procedure, brought the present process of suspension. The note was originally presented on caution with an articulate statement of facts and note of pleas in law annexed, and answers were ordered. Before answers were lodged the complainers lodged a minute offering consignation in place of caution, and of this date (8th May 1875) the Lord Ordinary on the bills (Lord Gifford) allowed the complainers to make consignation of the sums charged for, together with the sum of £50 sterling to meet the expenses of process, amounting in all to £334 sterling.

"Consignation having been accordingly made, answers were lodged for Sir Thomas Buchan Hepburn, and after a full hearing the competency of the suspension was sustained, and the note was passed on 3rd June 1875 by an interlocutor which is now final, and the cause has now been enrolled in the ordinary motion roll for further procedure. The note having been passed with articulate reasons annexed and answers thereto, the record would apparently fall to be closed and the cause proceeded with in the Outer House, in terms of section 9 of the Act 13 and 14 Vict. c. 36, which provides that where answers are lodged by any respondent in a process of advocation or suspension, the record shall thereafter be made up in the same way as in ordinary actions in which defences have been lodged. But the respondent maintains that as in the Inferior Court a record had been ordered and a proof led, he is entitled, under section 32 of the same Act, to have that record and proof at once printed and boxed for the Judges of the Inner House, and reported to the Inner House, and to have the cause disposed of as if it had been reported by the Lord Ordinary upon a closed record prepared in the Court of Session.

"The question now to be decided is, whether section 32 overrides section 9, or whether it does not rather apply to advocations and suspensions other than those with which section 9 deals.

"The question is not free from difficulty, but as the complainers resist the respondent's motion, it is necessary to decide the point.

"To understand the question aright, reference must be made to the practice of the Bill Chamber and of the Court, as regulated by the various statutes and Acts of Sederunt which preceded the Act of 13 and 14 Vict. cap. 36.

"The earliest to which it is necessary to refer is the 50 Geo. III. cap. 112.

"By the 38th section of that statute, bills of advocation and suspension of final judgments of inferior Judges are to be passed on caution without answers, unless it shall appear on the face of the bill that it ought to be refused, in which case it is to be refused; and by section 40 it is enacted that bills of advocation and suspension when so passed are to be enrolled in the rolls of advocations and suspensions in the Outer House, and proceeded with before the Lord Ordinary.

"The next statute is the Judicature Act, by the 41st section of which it is enacted that bills of advocation of final judgments are to contain a copy of the summons or petition and defences or answers with the interlocutors, and without any other narrative or without argument, and such bills are to be at once passed by the Lord Ordinary on the bills of caution for expenses both in the Inferior Courts and in the Court of Session, or on juratory caution.

"By the Act of Sederunt following on that statute it is ordered that in advocations of interlocutory judgments, and in every suspension at the lodging of the letters for calling, articulate reasons of suspension or advocation shall be lodged, and the answers are to be in corresponding form.

"The next statute to be noticed is the Advocations and Suspensions Act of 1838, which enacts that advocations of interlocutory judgments are to be by note in the Bill Chamber, prefixing the interlocutor, and praying for relief or remedy, with articulate statements of reasons of advocation and note of pleas in law; answers may be ordered, and the note, if passed, is to be called, and the record closed on note and reasons, or on revised reasons and answers, or on condescendence and answers, and the cause is thereafter to proceed before the Lord Ordinary and the Court of Session in common form. And by the next section it is enacted that in suspensions of inferior Court decrees *in foro*, except removings, the pro-

cedure is to be by note reciting the import and effect of the decree, and praying for relief; and on caution for implement of the decree and expenses in the Court of Session the note is to be passed, but 'when a party is desirous to have such decree of any inferior Court pronounced *in foro* suspended without caution, or on juratory caution, and also in suspensions of decrees of removing, there shall be annexed to such note of suspension an articulate statement of the facts on which the suspension is founded, and a note of pleas in law, and such note shall be laid before the Lord Ordinary on the bills, who may pronounce such order as shall be just; and where answers shall be ordered, such answers shall be in a similar form to the reasons of suspension; and in case the Lord Ordinary shall pass the note, the same procedure shall take place as is hereinbefore provided in the case of advocation of interlocutory judgments'—that is to say, the record is to be made up by the Lord Ordinary, and the cause proceeded with as an ordinary action in the Outer House.

"By the Act of Sederunt following on that statute it is provided that suspensions shall still be competent on consignation, and that the same procedure is to be observed in such suspensions as in suspensions without caution, or on juratory caution—in other words, as in advocations of interlocutory judgments.

"The next statute is the Act 13 and 14 Vict. cap. 36, the 9th and 32d sections of which have been already recited.

"By the Act of Sederunt, 5th February 1861, it is provided that where by the existing practice notes of advocation or suspension require to be lodged in the Bill Chamber containing an articulate statement of facts and pleas in law, and are followed by answers prepared in a similar form, and such notes are passed by the Lord Ordinary, the complainer shall lodge revised reasons of advocation or revised reasons of suspension as the case may be, when the cause is called, either in time of session or on any box-day in vacation or recess, and, on the other hand, the respondent or charger shall lodge revised answers when he returns the process as aforesaid; and by section 7 it is provided that every record which is closed in the Outer House shall, unless the Lord Ordinary otherwise appoint, be printed, and the interlocutor closing the record or holding the same to be closed shall in all cases be held to be an appointment to print the same, unless the contrary be expressed in the interlocutor.

"By the Court of Session Act 1868 it is enacted that in all proceedings in the Bill Chamber, as soon as the interlocutor passing the note has become final, and caution has been found or consignation has been made when ordered, the cause shall become for all purposes an action depending in the Court of Session, and may immediately be enrolled by either party in the motion roll of the Lord Ordinary to whom it is marked.

"It appears to me by the minute lodged by the complainers before the answers were lodged, the present process became a note of suspension on consignation, which requires an articulate statement of reasons of suspension and note of pleas in law, and as it contained these when presented, and as answers were ordered and lodged, and as the note has been passed by interlocutor, now final, the record must be closed and the case proceeded with in the Outer House. I have therefore refused the motion of the respondent to report the cause to the Inner House."

That interlocutor was not reclaimed against, and the Lord Ordinary, after the case had been discussed in the Procedure Roll, pronounced the following interlocutor:—

"*Edinburgh, 13th December* 1875.—The Lord Ordinary having heard the counsel for the parties in the Procedure Roll, and considered the closed record and Sheriff Court process, repels the first and third pleas in law for the complainer: Finds that by lease dated 24th and 27th February 1866, the farm of Spittalrigg, then occupied by Alexander Henderson as tenant, and the farm of Ugstonrigg, then occupied by the now deceased David Scott and his brother William Scott, both of which farms belong to the respondent, were let by him to the said David Scott and his heirs, but expressly excluding assignees or subtenants, either legal or voluntary, for nineteen and a-half years from Whitsunday 1866 as to the houses, grass, and pasturage, and for nineteen years from the separation of crop 1866 from the ground as to the remainder of the land: Finds that by said lease the respondent assigned to the said David Scott the obligations incumbent on the said David Scott, William Scott, and Alexander Henderson, the then outgoing tenants, in their respective leases, to leave the houses, offices, and fences, and in the case of Ugstonrigg, the thrashing-mill and machinery, dams, and aqueducts, in the order and condition therein stipulated; and that in respect thereof the said David Scott accepted of the whole houses, buildings, and fences on said farms, and the said thrashing-mill and others on Ugstonrigg, as in good and sufficient repair, and became bound during the currency of the lease to keep, and at the expiry to leave, the whole, except plantation fences, in the like order and repair, and bound himself and his heirs, executors, and successors whomsoever, to prune the hedges and dig their roots once a-year in proper season, as also once a-year to scour the ditches and water-courses, and if he should fail so to do, or to repair the fences generally within ten days after being required, the proprietor should have power to do these operations at his own sight, and according to his own discretion; and the tenant bound himself and his foresaids to repay to the proprietor the cost thereof, as the amount should be instructed by a writing under his or his factor or forester's hand, without the necessity of any other voucher: Finds that the said David Scott entered into possession of the said farms, and continued to cultivate the same until his death in November 1871: Finds that the said David Scott, by his disposition and settlement dated 22d September 1871, appointed the complainers Isabella Scott or Hadden and Christina Scott or Liddell to be his executors, and gave, granted, assigned, and disponed to them, equally between them and their respective heirs, executors, and assignees, his whole estate, heritable and moveable, which might belong to him at his death, and of whatever kind, or wheresoever situated, and more particularly the current or any future lease or leases of Spittalrigg and Ugstonrigg farms and others which he might die possessed of, so far as unexpired at his decease: Finds that the complainers were not the heirs of the said deceased David Scott, and that

his heir was his brother John Scott, a person of weak mind, and unable to manage the business of a farm, and that he did not take up the foresaid lease or in any way represent the said David Scott: Finds that the complainers, on the death of the said David Scott, took possession of the said farms of Spittalrigg and Ugstonrigg, and of the whole stock, crop, implements, and others thereon, and that by the permission of the respondent they retained possession of said farms for a time, and sowed and reaped the crop of the year 1872: Finds that although the complainers were willing to have taken up the lease as general disponees of their brother David Scott, the respondent refused to accept them as tenants, and removed them from said farms at Martinmas 1872, in virtue of a decree of removing obtained by him against them in the Sheriff Court of Haddington: Finds that Alexander Henderson, farmer, Longniddry, *curator bonis* to the said John Scott, the heir of the said deceased David Scott, intimated on 11th October 1872 to the respondent that on behalf of his ward he declined to take up the lease, and that such intimation was equivalent to a renunciation of the lease, and that the respondent accordingly himself resumed and entered into possession of said farms at the said term of Martinmas 1872: Finds that the respondent then alleged that the buildings, fences, and ditches on said farms were out of repair, and called upon the complainers, as executors of the said David Scott, and their respective husbands, to put the same in a proper state of repair, or otherwise to pay to him the sum necessary to execute these repairs; but that the complainers refused to admit their liability therefor, and that the respondent accordingly raised in the Sheriff Court of Haddington an action against the complainers for payment of the sum of £202, 3s. 8d. as the expense of said repairs, and that on the 15th October 1874 he obtained decree therefor, with interest as concluded for, and with expenses, which were afterwards taxed at the sum of £56, 5s. 6½d., and decerned for, which decrees are brought under review in the present process of suspension: Finds that the complainers, as general disponees and executors of David Scott, are bound to implement the obligations incumbent on their author under the lease, to maintain and leave the buildings, fences, ditches, &c., in proper repair, as aforesaid; but finds that they are entitled to set off against the respondent's claim for such repairs *pro tanto* the value, if any, of such improvements or meliorations as may have been executed by the said David Scott whereby the respondent shall be proved to have been *lucratus*, and for the ascertainment of which an action has been raised by the complainers against the respondent, and is now depending before the present Lord Ordinary: Finds that the complainers allege that the sum for which the respondent obtained decree against them in the Sheriff Court in name of repairs is excessive, and that the same was pronounced without proper inquiry or investigation into the facts, and that they were not represented at the proof: Finds in these circumstances that the complainers ought in the present suspension to be allowed a further proof of their averments, so far as relevant, but only on condition of paying to the respondent the expenses incurred by him in the inferior Court from and after 6th August 1874, which amount as taxed to the sum of £25, 11s. 11d.: Therefore finds that on payment of said sum the complainers are entitled to be allowed a proof of the averments contained in articles 12, 13, 14, 15, 16, and 21 of their statement of facts in the present process, the respondent being entitled in that event to a proof of his averments; but finds that before any proof is formally allowed or led it is expedient that this process of suspension and the other action already referred to at the instance of the complainers against the respondent ought to be conjoined: Therefore appoints this cause to be put to the roll along with said other process for conjunction; meanwhile reserves all questions of expenses not already disposed of by this interlocutor.

"*Note.*—For the grounds of the foregoing interlocutor, in so far as not sufficiently explained by the various findings therein, reference is made to my interlocutor pronounced of even date herewith, and the note appended thereto in the relative action presently depending before me at the instance of the complainers against the respondent for the purpose of liquidating their claim for meliorations upon said farms, as a set-off against the respondent's claim for repairs. The complainers admitted at the debate that they could not successfully maintain their first and third pleas in law."

II. This was a petitory action between the same parties, in which the executors of David Scott sued Sir T. B. Hepburn, Bart., for repetition (1) of £400, the amount to which they averred the landlord was *lucratus* by the death of David Scott and the imbecility of his heir-at-law; and (2) of £100, the amount which they averred David Scott would have been entitled to recover from the landlord had the lease reached its natural termination.

They pleaded—"(1) The said David Scott not having been survived by an heir-at-law capable of taking up the said lease, the pursuers, as his personal representatives, are entitled to sue this action. (2) The defender having passed over the heir, and elected to hold the pursuers responsible for the obligations under said lease, is barred from objecting to their title to sue. (3) The said deceased David Scott having expended large sums on the improvement of said farms, of which he did not live to reap the benefit, and the defender being, through his death before the expiry of the lease and the inability of the heir to take it up, *lucratus* as condescended on, the pursuers, as representing the said David Scott, are entitled to decree for the sum sued for. (4) The pursuers, as representing the said deceased, having the same rights against the defender for the said counter claims as if the lease had come to its natural termination, the defender is liable to them in the other sums sued for."

The defender, *inter alia*, pleaded that the action was irrelevant, and further averred that the statements of the pursuers were unfounded.

The Lord Ordinary pronounced the following interlocutor:—

"*Edinburgh*, 13*th December* 1875.—The Lord Ordinary having heard the counsel for the parties in the Procedure Roll, and considered the closed record—Finds that, by lease dated 24th and 27th February 1866, the farms of Spittalrigg, then occupied by Alexander Henderson as tenant, and

the farm of Ugstonrigg, then occupied by the now deceased David Scott and his brother William Scott, both of which farms belong to the defender, were let by him to the said deceased David Scott and his heirs, but expressly excluding assignees or subtenants, either legal or voluntary, for nineteen and a-half years from Whitsunday 1866 as to the houses, grass, and pasturage, and for nineteen years from the separation of crop 1866 from the ground as to the remainder of the land, by which lease the tenant became bound to maintain and leave the buildings, fences, and ditches on said farm in good condition and repair, and the proprietor was empowered to execute the necessary repairs at the expense of the tenant in the event of the tenant's failure to do so: Finds that it was by said lease further provided that the said David Scott should consume upon the said farms the whole straw produced thereon, and that as the whole straw and chaff to be raised on the farms was steelbow, and as the said David Scott was to receive at his entry the straw to be left by the outgoing tenants in steelbow, he should leave at the expiry of the lease the whole straw and chaff which might be then upon the farms in steelbow to the landlord or incoming tenant: Finds that the said David Scott entered into possession of the said farms, and continued to cultivate the same until his death in November 1871: Finds that the said David Scott, by his disposition and settlement, dated 22d September 1871, appointed the pursuers Isabella Scott or Hadden and Christina Scott or Liddell to be his executors, and gave, granted, assigned, and disponed to them equally between them, and their respective heirs, executors, and assignees, his whole estate, heritable and moveable, which might belong to him at his death, and of whatever kind, or wheresoever situated, and more particularly the current or any future lease or leases of Spittalrigg and Ugstonrigg farms, so far as unexpired at his decease: Finds that the pursuers were not the heirs of the deceased David Scott, and that his heir was his brother John Scott, a person of weak mind, and unable to manage the business of a farm, and that he did not take up the foresaid lease, or in any way represent the said David Scott: Finds that the pursuers, on the death of the said David Scott, took possession of the said farms of Spittalrigg and Ugstonrigg, and of the whole stock, crop, and implements and others thereon, and by the permission of the defender retained possession of said farms for a time, and cultivated the same, and sowed and reaped the crop of the year 1872: Finds that although the pursuers were willing to have taken up the lease as general disponees of their brother David, the defender refused to accept them as tenants, and removed them from the said farms at Martinmas 1872, in virtue of a decree of removing obtained by him against them in the Sheriff Court of Haddington: Finds that Alexander Henderson, farmer, Longniddry, as *curator bonis* to the said John Scott, the heir of the said deceased David Scott, intimated to the defender on 11th October 1872 that on behalf of his ward he declined to take up the said lease: Finds that such intimation was equivalent to a renunciation of the lease, and that the defender accordingly himself resumed and entered into possession of said farms at the said term of Martinmas 1872: Finds that the defender then alleged that the buildings, fences, and ditches on said farms were out of repairs, and called upon the pursuers, as executors of the said David Scott, and their respective husbands, to put the same in a proper state of repair, or otherwise to pay to the defender the sum necessary to execute these repairs, but the pursuers refused to admit their liability therefor; and that the defender accordingly raised in the Sheriff Court of Haddington an action against the pursuers for payment of the sum of £202, 3s. 8d. as the expense of said repairs, and that on 15th October 1874 he obtained decree therefor with interest as concluded for, and with expenses, which were afterwards taxed at the sum of £56, 6s. 6½d., and decerned for; which decrees have been brought under review in a process of suspension now depending before the present Lord Ordinary: Finds that in respect that the defender in thus enforcing against the pursuers, as the executors of the said David Scott, the obligations as to repairs incumbent on him as tenant under the foresaid lease, the pursuers are entitled to set off *pro tanto* against their liability for said repairs the amount, if any, which they shall establish to have been expended by the said David Scott in improvements and meliorations upon said farm by draining and trenching the land, and applying foreign manures in excess of his obligations under said lease, in so far as these were unexhausted at the time of his death, and in so far as by them the defender has been *lucratus:* Finds that the pursuers' claims for recompense in respect of pasture land said to have been left uncropped, and of feeding stuffs said to have been purchased by the said David Scott, and of alleged improvements upon a piece of land not included in the lease, and of carriages for buildings, are ill founded, and cannot be sustained: Finds that the pursuers' claim for straw left by them on the farm at their removal cannot be sustained, in respect of the provision of the lease above recited, that the whole straw grown upon the farm was to be left by the tenant in steelbow to the landlord; that the pursuers ought to be allowed, before further answer, a proof of their averments that the defender has been *lucratus* by the said David Scott's expenditure in draining, trenching, and manuring the said farms, as above set forth, and that the defender ought to be allowed a proof of his averments, and the pursuers a conjunct probation: But finds that it is expedient that before a proof is formally allowed this action should be conjoined with the foresaid process of suspension: Therefore appoints this cause and the said process of suspension to be enrolled, in order that the actions may be conjoined and thereafter proceeded with, and reserves all questions of expenses.

"*Note.*—In this action a question of novelty and importance is raised as to the right of executors of a deceased tenant, when sued by the landlord for implement of the tenant's obligation to repair buildings, fences, and the like, to meet that claim by a counter action for meliorations made by the tenant upon the farm, by which the landlord is said to have been *lucratus*, and the benefit of which the tenant has not reaped in consequence of his death soon after the commencement of the lease, and of his heir declining to take up the lease, and of the landlord having

enforced the clause of the lease excluding assignees, and having refused to accept the tenant's general disponees and executors as tenants in his room. The circumstances under which the question arises are so fully set forth in the findings of the preceding interlocutor that it is unnecessary to recapitulate them.

"It is quite settled that in the general case a tenant is not entitled to recompense for meliorations made by him upon his farm. The rule of law is nowhere better stated than by Baron Hume in his report of the case of *Officer* v. *Nicolson*, 13th February 1807, p. 827, where he says—'It is a settled point that a tenant has no claim *de jure* on his landlord for reimbursement of money expended in adding to or improving the houses on his farm. He is understood to have done so for his own convenience during his term, and to have had his recompense accordingly; nor is he entitled to pull down or dismantle the buildings at his removal.' Professor Bell, however (see Coms. i. p. 78, and Prin. § 1255, founding on the case of *Morton* v. *Lady Montgomery*, 22d Feb. 1822, 1 Sh. 322), seems to be of opinion that the rule is not applicable in cases where the lease has come to a premature termination by the death or bankruptcy of the tenant, and where a claim for meliorations by which the landlord is *lucratus* is made by the creditors or representatives of the tenant. And although the circumstances of the case of *Morton* were special, and the claim of the creditors of the tenant was not there sustained, it seems to have been assumed that where a landlord is truly *lucratus* by a tenant's outlay under a lease which is prematurely terminated, his creditors would be entitled to claim reimbursement from the landlord. And if so, it appears to me that on principle a tenant's general representatives ought in like manner to be so recompensed where a lease secluding assignees is terminated by the tenant's premature death. In the general case such questions do not often arise when the tenant dies, either because the heir takes up the lease and enters upon the farm in the state in which his predecessor has left it, or because the heir, if he renounces the lease, does so by arrangement with the landlord, in which the value of the meliorations is taken into account in fixing the amount, if any, which may be paid for the renunciation. It is thus only where the heir declines to take up the lease from which assignees and subtenants are excluded, and leaves the farm in the hands of the landlord without asking or receiving any consideration, that any claim for meliorations could be made by the tenant's executors or general disponees, and in an ordinary case of that kind I should have great difficulty in giving effect to any such claims. The claim for meliorations, if competent at all, would rather seem to be an accessory to the right of the heir than a claim competent to the tenant himself and transmissible to his general representatives. And the heir, in abandoning the lease, abandons also the claim for recompense. The case, however, would appear to be different where, as here, the following circumstances exist:—(1) The heir has renounced the lease, or, which is the same thing, has declined to take it up, and the landlord has taken up the farm, and is alleged to be *lucratus* by the deceased tenant's extraordinary outlay; (2) the general disponees and executors of the tenant are desirous to carry on the farm as tenants under the lease, but the landlord has refused to accept them, and has removed them, and has himself taken possession of the farm; and (3) the landlord having thus taken benefit by the tenant's outlay, seeks, without allowance for that benefit, to enforce against the tenant's executors and general disponees an obligation in the lease which they are certainly not primarily liable to implement, viz., the obligation to keep and leave the buildings, fences, &c., in proper repair. I do not think it would be equitable to allow such a claim on the part of the landlord without allowing the executors to plead the meliorations as a counter claim, to the effect at least of liberating them *pro tanto* from their liability to implement the obligation as to repair.

"In the case of *Bethune* v. *Morgan*, 16th Dec. 1874, 2 Rettie 186, and in a previous action between the same parties, not reported, but referred to in the Lord President's opinion, p. 190, the question of the extent of the liability of executors, where the heir of the deceased tenant declines to take up the lease, was considered. There the landlord was willing that the executors should take up the lease, but they declined; and Lord Shand, in the first of the two actions, held the executors liable for the fulfilment of the obligations contained in the lease, and, *inter alia*, for the rents during the remainder of its currency, or for damages for breach thereof. In the second action, which depended before Lord Gifford, and in which the landlord sued for these damages, the liability of the tenant was, after a hearing in the Inner House before seven Judges, held to be *res judicata*, no decision being pronounced upon the general question. Lord Gifford, however, in the note to his interlocutor dealing with the merits of the case, expressed his opinion that in justice and on principle the executor in that case was liable, but that 'probably, if the heir renounced the lease, and the landlord insisted against the executor, equity would require him, as a condition of so insisting, to receive the executor as tenant; but no question of this kind arises here; the landlord has all along been perfectly willing to receive the defender as tenant.' Now, while it is not necessary in the present case to hold that the defender is bound to accept the pursuers as his tenants, if he enforces against them the obligation for repairs, I think that if the defender really is *lucratus* by the operations of his deceased tenant he is bound in equity to allow the pursuers, as the tenants, general disponees, and executors, to plead the amount of these meliorations in extinction *pro tanto* of his claim against them for repairs. I think that in principle the case is not materially different from what it would have been if the pursuers had paid a sum of money to the heir to induce him to renounce the lease. In such a case the primary obligation to put the buildings, &c., in repair, undoubtedly lies with the heir, although the landlord may not be bound to discuss him before suing the executors. I think it would be inequitable to allow him to maintain that after paying money to the person primarily liable to induce him to abandon the lease, he is entitled to enforce the obligation for repairs against the persons liable therefor only in the second place.

And if the fences which the heir is primarily bound to maintain and leave in good order are out of repair, either the money which he gives to the heir for the renunciation ought, in common fairness, to be applied in implementing that obligation, or the landlord must be held as passing from the obligation altogether. But if this be sound reasoning, then when the landlord, instead of paying money to the heir for a renunciation of the farms, takes it in an improved condition without giving any consideration therefor, surely he ought to impute the value of these improvements *pro tanto* to extinction of the liabilities of the whole body of the tenant's representatives to implement the minor conditions of the lease.

"This being so, I think the pursuers are entitled to a proof of the extent to which the landlord has been *lucratus* by the deceased tenant's improvements in the way of draining, trenching, and applying an extraordinary quantity of foreign manures beyond the limited quantity which is provided for in the lease. The other alleged improvements, which are noticed in the interlocutor, appear to me not to be such as to found any claim on the part of the pursuers. Feeding stuffs for stock, leaving grass land in pasture in place of cropping it, are clearly not improvements by which the landlord can be held to be *lucratus*. And in support of the claim for carriages of building materials no relevant statement is made. The allegation that the tenant improved a piece of land not in his lease, on a verbal understanding that he was to have a nineteen years' lease, is not relevant—see *Thomson* v. *Fowler*, 8th Feb. 1859, 21 D. 453. And the counter claim for straw said to have been left by the pursuers on the farm is clearly excluded by the provision of the lease, that all the straw on the farm was to be left in steelbow to the landlord. The claim of the pursuers is thus limited to the value of the trenching, draining, and foreign manures by which the landlord shall be found to be *lucratus*. But I do not think that they ought to obtain decree for payment of any sum of money in respect of these meliorations, or that they are entitled to more than to have the amount ascertained in this action, so as to enable them to set it off *pro tanto* against the cost of the repairs. For that purpose this action should, before proof is led, be conjoined with the suspension, in which the exact amount of the cost of these repairs is to be ascertained."

Sir Thomas Buchan Hepburn reclaimed in both processes, and argued—(1) The claim for repairs was good under the lease against the tenant; it was therefore good against his executors. In any case the reasons of suspension were not relevant or well-founded. (2) There was no authority for the general proposition that a tenant was entitled to compensation when a landlord was *lucratus*. The case of *Morton* v. *Montgomerie*, 22d Feb. 1822, 1 S. 322, raised no question of recompense. The tenant there had implemented the stipulations of the lease, and he contended the landlord was bound to fulfil his. The possibility of the death of the tenant, and of the heir renouncing the lease, ought to have been in the contemplation of parties. There was nothing to warrant the conclusion that a tenant might make meliorations during the lease in the hope that they would be repaid if the lease came to an untimely end. The tenant really undertook that he or his heir would work out the lease. Having failed to do so, he could not claim unexhausted improvements. To hold the contrary would lead to startling results.

Authorities—*Pendreigh's Tr.* v. *Dewar*, July 19, 1871, 9 Macph. 1097; *Thomson* v. *Fowler*, Feb. 8, 1859, 21 D. 453; *Paterson* v. *Greig*, July 18, 1862, 24 D. 1370; *Clarke* v. *Brodie*, Hume's Decisions, 548; *M'Tavish* v. *Trs. of Fraser of Lovat*, Hume's Decisions, 546; *Mags. of Selkirk* v. *Clapperton*, Nov. 13, 1830, 9 S. 9; *Guthrie* v. *M'Kerston*, M. 13,414.

The respondents argued—(1) The construction of the clause in the lease was peculiar. It only bound the tenant to leave the whole in the order and repair in which he got them. In any view there were good grounds for the suspension. (2) There was good authority for the proposition that the creditors of a tenant on a premature expiry of his lease were entitled to meliorations when the landlord was *lucratus*. The case of *Morton* v. *Montgomerie* was conclusive upon that. If so, the present claim was good.

At advising—

Lord President—We have two reclaiming notes before us in the name of Sir Thomas Buchan Hepburn—one against the judgment of the Lord Ordinary in the suspension brought by the executors of the late David Scott, tenant of Spittalrigg and Ugstonrigg, on the estate of Smeaton-Hepburn, belonging to Sir Thomas; and the other in an ordinary action at the instance of Scott's executors.

I shall deal with the process of suspension first. It is a suspension of a decree of the Sheriff of Haddington, pronounced *in foro*, and therefore properly and in every respect a process of review. Now, in a process of review it is not usual to have a record made up in this Court, but according to the Act of Parliament regulating this head of procedure, I think the Lord Ordinary was right in the view he took when pronouncing an interlocutor on the 30th June 1875, that it was quite indispensable to have a record made up and closed in this Court. But then comes the question, What is the suspender to aver in that record sufficient to instruct good reasons of appeal against the Sheriff's interlocutor? He might assail it on the merits, and show that it is ill-founded, and if he succeeded in that he would be entitled to have it suspended. This is not a suspension brought on the ground of irregularities alone, though these might have been good reasons. It is brought for the purpose of quashing the judgment on the ground of irregularities, and also upon the merits of the case.

The late David Scott was tenant of the lands and farms of Spittalrigg and Ugstonrigg under a lease which had a currency of nineteen and a-half years from Whitsunday 1866. He died upon 24th November 1871, having possessed the farms for only five years. His heir was a lunatic, and the *curator bonis* renounced the succession. The landlord then resumed possession after the executors of the deceased tenant had reaped the way-going crop, and had removed the stock, and the action was thereafter brought, the judgment in which is now under suspension.

That action was brought for the purpose of

having the fences on the farm put in a tenantable condition, in terms of an obligation contained in the lease, to which it is necessary that we direct attention. It is as follows:—"The said Thomas Buchan Hepburn assigns to the said David Scott the obligations on David and William Scott, the present tenants of Ugstonrigg, and on Alexander Henderson, the present tenant of Spittalrigg, contained in their respective leases, to leave the houses, offices, and fences, and in the case of Ugstonrigg, the thrashing-mill and machinery, dams, and aqueducts, in the order and condition therein stipulated; and in respect thereof the said David Scott accepts of the whole houses, buildings, and fences on the lands hereby let, and the thrashing-mill and machinery, dams, and aqueducts on the farm of Ugstonrigg in good and sufficient order and repair, and binds himself during the currency thereof to keep, and at the expiry to leave, the whole houses and buildings erected or to be erected, and the whole fences except plantation fences, as after provided for, gates and ditches, and the thrashing-mill and machinery, dams, and aqueducts at Ugstonrigg, in the like order and repair." The construction of this clause is not doubtful. The previous tenant had been under an obligation to leave the buildings, fences, and ditches in a good tenantable condition. Whether that obligation was performed or not it is quite unimportant to inquire. If so, Scott was bound to accept them as sufficient; if not, he had put into his hands the means of putting them in a proper condition, and by this assignation he takes them as being in good order and condition, and binds himself to keep them so. If the buildings and fences were in bad order at the death of Scott, and required repair, it seems quite clear that there was an obligation on his representatives to fulfil the terms of the lease and put them in repair, and it was for the purpose of enforcing the obligation that this process was brought. The Sheriff has decerned for £202, 3s. 8d. as the expense of making these repairs.

It appears to me that there are only three grounds on which *prima facie* that interlocutor can be assailed. The first is that that obligation was not binding upon executors, and that they were not bound to fulfil it. I do not say that in terms it so bound them, as is often the case in leases, but it is quite clear that David Scott was under the obligation himself, and that his representatives, as his disponees and executors, are bound to fulfil it. That disposes of the first ground.

It might, in the second place, be said that, in point of fact, the fences, &c., are not in bad order; and lastly, it might be said that the Sheriff has decerned for an amount which is excessive. I can conceive the decree being assailed upon either of these grounds. But what are the allegations upon record. The Lord Ordinary has found "that the complainers ought . . . to be allowed a further proof of the averments contained in articles 12, 13, 14, 15, 16, and 21 of their statement of facts." Now, it is necessary to examine these statements and to see if they are relevant, and I shall begin with the last, viz., statement 21. Supposing that statement to be true—supposing the proof was misconducted—an appeal was competent. That course was not adopted; but the case is now before us in the shape of a suspension, and regularly so, but still in such a way as that the suspender is entitled on grounds shewn to avail himself of further evidence. We are entitled to deal with the process in any way we please, and amongst other remedies we are empowered by the Judicature Act (6 Geo. IV. c. 120) to allow a party additional proof, and even to send a case to a jury if that be necessary for the ends of justice. But what is the use of saying that the pleadings are irregular if it is not disputed that the decree is just. If the suspenders were subject to the obligation mentioned—if the fences were in disrepair and the sum decerned for was not extravagant—what injustice has been done. Looking back to the other articles which the Lord Ordinary has found relevant, I cannot find anything that can be admitted to probation. Statement 13 sets out the repair of the fences by Peter Brown, but I do not see that that is an averment of the smallest consequence. The suspenders do not aver that the sum of £142, 14s. 11d., which Brown found in his report would be necessary for the execution of the repairs, was enough, or that anything short of that sum was enough for the purpose. Then in statement 14 it is said that Sir Thomas had asked only £140 for the repairs, but it cannot be said that that binds him from asking more. Statement 15 may be true; and if in consequence of the averments there made too much money has been spent, the suspenders may be entitled to redress, but they do not say that £202 is too much. In statement 16 there is an allegation that the landlord has all along treated with the heir-at-law of Scott, or with his *curator bonis*, and has taken no proceedings to have the heir-at-law found primarily liable, &c.; all that is part of the history of the case, but that it has anything to do with its merits I am unable to see. In none of these statements is there one word impugning the justice of the decree which has been pronounced. To say, as is said in statement 21, that all the proof which might have been led has not been led is irrelevant, unless it were also said that on leading the additional proof such and such would be found to be the justice of the case. There is not a word of this in the record, and I am of opinion that upon the averments of the suspenders the suspension should be dismissed.

The other reclaiming note raises a question of a different kind. The disponees and executors of David Scott raise an action against the landlord, among other things for payment of a sum of money as the value of certain improvements which they say were made upon the farm by Scott, in the way of trenching, draining, and manuring, which were not exhausted in their effect at the time of Scott's death. By these the landlord is alleged to have been *lucratus* to a considerable extent. The Lord Ordinary has found in this case, not that the action is relevant and well founded, but that in respect that the defender is enforcing against the pursuers, as the executors of the said David Scott, the obligations "as to repairs incumbent on him as tenant under the foresaid lease, the pursuers are entitled to set off *pro tanto* against their liability for said repairs the amount, if any, which they shall establish to have been expended by the said David Scott in improvements and meliorations upon said farm by draining and trenching the land, and applying foreign manures in excess of his obligations under

said lease, in so far as these were unexhausted at the time of his death, and in so far as by them the defender has been *lucratus*;" and further, "that the pursuers ought to be allowed before further answer a proof of their averments that the defender has been *lucratus* by the said David Scott's expenditure in draining, trenching, and manuring the said farms as above set forth, and that the defender ought to be allowed a proof of his averments, and the pursuers a conjunct probation." In his note his Lordship explains that part of his judgment in the following terms:—"The claim of the pursuers is thus limited to the value of the trenching, draining, and foreign manures by which the landlord shall be found to be *lucratus*. But I do not think that they ought to obtain decree for payment of any sum of money in respect of these meliorations, or that they are entitled to more than to have the amount ascertained in this action, so as to enable them to set it off *pro tanto* against the cost of the repairs. For that purpose this action should, before proof is led, be conjoined with the suspension, in which the exact amount of the cost of these repairs is to be ascertained." I understand his Lordship to mean by that that he is not prepared to give decree in this action which is not conjoined with the process in the suspension, and he makes this clear in the end of his note just quoted.

Now, it appears from this that the Lord Ordinary is not prepared to give judgment in favour of the pursuers, or to give them payment of a sum, but he thinks such a claim may be pleaded by way of compensation against a claim by the landlord for fulfilment of one of the obligations of the lease. That is rather a puzzling result. I am not acquainted with a claim which can be pleaded by way of compensation and not by direct action. There are many cases the other way, where a claim is valid when pleaded directly, but cannot be pleaded by way of compensation, but I am not aware that the converse ever holds. It would be a singular thing, as suggested by Mr Gloag, that if the interlocutor of the Lord Ordinary is well founded, the right of the executors arises indirectly from the failure of the tenant to keep the fences in repair.

But putting that view aside for the present, and assuming that the claim can be made good in this summons, and can be pleaded, let us see whether it is well-founded in point of law. There is, no doubt, a semblance of authority for the proposition to be found in Bell's Commentaries, Bell's Principles, Hunter on Landlord and Tenant, and Bell on Leases, all respectable authorities unquestionably. But the opinions of these gentlemen are all based upon a single case, and that single case, I apprehend, has been misinterpreted and misconstrued by these learned authors. Their concurrence, however, renders the question one of more than usual importance, and makes it necessary to explain the principle on which the right to claim meliorations has been generally regarded, and that on which it is alleged it right to be upheld, where the lease has come prematurely to an end.

As to the general rule, there can be no doubt. The law has uniformly rejected such a claim, and that on this broad principle, that the title is temporary, and that the tenant in making the ameliorations must be held to have done so with an exclusive eye to his own benefit. Does that same principle not apply when the lease comes to a premature termination? If that was unexpected, and a thing against which no provision could be made, there might be some foundation for the argument; but it is not so. Both parties contract in the possibility of a premature termination from various causes, and the lease always provides for this; for instance, in the event of bankruptcy. In the case of death it must come to an end if the heir will not take it up. All these contingencies are contemplated by the parties in making the contract. The tenant, if he improves, knows that he is running a risk, and that more probably the improvements will have an unexhausted value should the lease come to an abrupt termination. The principle, therefore, applies equally to improvements, the value of which is claimed at the natural expiry of the lease, and to those value for which is claimed at its premature termination.

But it is supposed that a principle of a different kind received effect in the case of *Morton* v. *Montgomerie* (22d Feb. 1822, 1 S. 322), and that is the single authority on which the opposite opinion has been ventilated by the writers to whom I have referred. Lady Mary Montgomerie let certain farms for 21 years from Martinmas 1811. The lease excluded assignees and subtenants, and contained the following provision in regard to buildings—"The said tacksmen hereby bind and oblige themselves during the two first years of their lease to lay out at the sight of the masters the sum of £1100 in building and furnishing a steading of slated houses. . . . . which sum the masters are to repay the said tacksmen at the issue of this lease." The lessee commenced to make the new buildings, and he had expended nearly £600 in building a farm-house, but in 1813 he became bankrupt and fled the country. Decree of removal was pronounced against him, and the lands were let to a new tenant. The trustee on his estate then brought an action for repetition of the sums expended on the buildings against Lady Montgomerie, alleging that she was thereby *lucrata*. Now, that claim was not sustained, which of itself takes away from the authority of the case, as a decision affirming the principle contended for. But it is said that the reason of this was that the landlord was not proved to have been *lucrata*, and the opinions of the Judges are said to imply that if the landlord had been *lucrata* the judgment would have been different. I do not think so.

But even supposing the landlord had been proved to have been *lucrata*, would that have been an authority in support of such a claim as we have here. Certainly not. In that case the expenditure had been made, and made upon the authority of the clause in the lease which itself gave the tenant a claim for repayment. The only question was whether, in respect that the lease had prematurely terminated, and the time for repayment accordingly had not arrived, the trustee could demand repayment to the extent to which the landlord was *lucratus*. The question was something like that which we had before us in the case of *Pendreigh's Trustee* v. *Dewar* (July 19, 1871, 9 Macph, 1037), where on a similar clause in the lease the landlord became debtor in a sum of £200 which the tenant had agreed to expend, and had expended, and which was to be repaid to him at the end of the lease if it had

come to its natural termination. The tenant became bankrupt, and we held that, the whole sum having been expended, the relation of debtor and creditor subsisted, and we regulated the rights of parties on an equitable footing. The case would have been somewhat similar to that of *Morton* if in that case the landlord had been *lucratus*. But that would not have affected the general rule that money expended, not under agreement, cannot be reclaimed by the tenant either at the expiry of the lease or at its premature termination. The case of *Morton* has been explained before, in much the same way as I have now done, by Lord Wood in his opinion in the case of *Thomson* v. *Fowler* (Feb. 8, 1859, 21 D. 453). Setting the case of *Montgomerie* aside, there is not a vestage of authority for what the Lord Ordinary has now done. It would be a violation of what has been established by a whole series of decisions that a tenant spending money, as is here averred, does so entirely for his own behoof, and without recourse against his landlord.

I am therefore of opinion that the interlocutor of the Lord Ordinary should be recalled, and the defender assoilzied.

Lord Deas—In the process of suspension I am of opinion with your Lordship that the suspenders must show good cause against the judgment of the Sheriff, and must make averments or state reasons setting forth that the Sheriff's decision is erroneous, and why so. In this particular case the Sheriff had given decree against the suspenders for £202, 3s. 8d., as the amount required at the death of the tenant to put the houses, buildings, and fences in a proper state of repair. I agree with your Lordship as to the construction of the lease. The suspenders do not here aver that the buildings, &c., were in the state of repair in which they ought to have been, or that the sum decerned for by the Sheriff is too large. I see no room for the proof which the Lord Ordinary has allowed.

Upon the question whether the executors of a deceased tenant were liable for the expense of executing the repairs, I have no doubt that under the terms of the lease Scott got the buildings, &c., in a good state, or if not he had himself to blame for it. The important thing under the lease is that he bound himself to keep them constantly in repair, and he might during his lifetime have been compelled to do so. The claim is one which might have arisen against him in his lifetime, for which at his death his executors are liable. I therefore agree with your Lordship so far as the suspension is concerned.

In the other process before us the important question is raised whether, when a lease comes to a premature end a claim is competent to executors for meliorations during the currency of the lease. The lease was to endure for nineteen years after Whitsunday 1866 for the houses and grass, and for nineteen years from the separation of the crop 1866 as to the remainder of the land. The tenant died on 21st November 1871, five years after the lease had come into operation, and it is said that during that tenancy he had expended money by draining and trenching the land, and had improved it, so as that the landlord was thereby *lucratus*. The answer to that is that it is not the fact, and that the lands were in an inferior and ill-cultivated condition. The tenant died unmarried, and his brother, his heir-at-law, was an imbecile. In June 1872 the landlord raised an action of declarator and removing against the executors and the heir-at-law, and decree of removing was pronounced in absence against all as at Martinmas 1872. The landlord says that he allowed them to remain in possession till that date, but I do not know that he could have helped that.

The question arises whether the executors are entitled to a proof of the meliorations they aver. As your Lordship has said, it is quite clear that if the lease had come to its natural termination there could be no claim for meliorations, however great. That is evident upon the principle that the contract was made and the rent was fixed upon the footing that the lands were capable of improvement, at a cost at which the tenant will be quite remunerated by the end of the lease. I take that to be the principle on which all lands are let on a nineteen years' lease in Scotland, and luckily it has generally happened that it has been so. If the lease terminates prematurely without fault on the part of the landlord, it lies upon the tenant's representatives to show some good reason that a claim arises in that event. The case of bankruptcy has been referred to, as possibly raising a case of that kind. I think the case of bankruptcy is the most difficult of all, because the presumption is that the landlord suffers by it. What here took place was that the heir renounced. The executors were not within the distinction, and the landlord was not bound to accept them, nor were the executors bound to carry on the lease. There must have been a new bargain to bring about that result. I have heard no reason assigned why such a claim should arise to the executors of a tenant. There may be loss the one way or the other, but it would be a novelty if we were to enter into a proof whether the profit or loss were the greater. That would be a new inquiry of a very inconvenient, embarrassing, and indefinite kind. If it could be carried out in agricultural leases I do not see why it should not also be so in mineral leases, which are generally for a term of thirty-one years; and in the event of such a lease coming to a premature end, by the heir renouncing it, it would be a very novel kind of inquiry whether during the previous years the tenant had not been making a profit very much larger than anything he had expected in carrying on the lease. I do not know any principle or authority for the one proposition or the other, except the case of *Morton*, which does not bear the construction which has been placed upon it.

In a case of this kind, where the heir refuses to take up the lease, the presumption is that the landlord is a loser thereby.

I likewise agree with your Lordship that we cannot hold the pursuer's averments relevant in the petitory action, and that the claim in that action cannot be made any better by being pleaded as a set-off to the sum, the decree for which is sought to be suspended. It is a claim instantly prestable against the tenant in his lifetime.

Lord Ardmillan—In the process of suspension I have nothing to add.

The tenant's obligation under the lease to keep building and fences in repair has been explained

by your Lordship. I agree in regard to the construction of the lease, and in the result, and in the grounds of your Lordship's opinion.

I think it is right to say, in order to avoid misunderstanding, that the question which arose in *Bethune* v. *Morgan*, Dec. 16, 1874, has not arisen here.

In this case the obligation of the tenant was prestable on his death. The executry estate must meet it to the extent of the executry, and no more has been decided by the Sheriff.

In the action at the instance of the executors of the tenant for meliorations, I have felt considerable difficulty. In refusing this claim without proof, or, in other words, in refusing it on the assumption of the truth of the pursuers' averments, I feel that we are very severely, and indeed inequitably, applying the rule of law. Still, if it be the rule of law, it must be applied.

I think it is quite settled on authority and decision that for improvements in the cultivation of a farm, such as are here set forth, made by a tenant spontaneously and for his own interest, he cannot, apart from special stipulation, claim recompense from the landlord at the expiry of his lease. He is understood to have made the expenditure on his farm in the course of his cultivation and for his own benefit, and in expectation of remunerating return during the currency of the lease. I do not advert to special cases where the express consent or the clearly implied consent of the landlord to an unusual expenditure may be held as creating an obligation to recompense for such unusual outlay. We have no such case here. But the general rule is, that where the course of the lease runs out the tenant cannot on its expiry claim recompense for expenditure made by him in expectation of remunerating return during the currency of the lease. Where the lease has come to premature termination by the death of the tenant early in the lease, I think that there may be some fair and equitable principle in support of the view that the claim of the tenant should be inquired into, and should be sustained in so far as by the tenant's expenditure in improvement the landlord has been *lucratus*. Where the lease is to the tenant and his heirs, excluding assignees, and where the heir of the tenant is, as in this case, a lunatic, and cannot take up the lease, and where the landlord will not permit the executors to take it up, but brings the lease to an end by removing them all from the farm, getting the benefit of the tenant's expenditure and improvements, I cannot help thinking that the claim for meliorations, in so far as the landlord is *lucratus*, would be equitable. The rule of pleading must not be forgotten. A proof is offered by the pursuers; and if the proof is refused the truth of the averments must be assumed. We are on relevancy at present; for the landlord, while resisting a proof, demands judgment on the relevancy—that is, assuming the truth of the pursuers' statements. The pursuers aver that the expenditure was fairly and judiciously made by the tenants; that the land has been improved, and that the landlord is *lucratus;* that if the lease had run to its termination remunerative return for the expenditure would have been obtained; and that the lease was abruptly and prematurely terminated, not by the death of the tenant—it is a mistake to say that—but by the act of the landlord—by the removal of the family at the instance of the landlord—who obtained a renunciation from the curator of the lunatic heir. If the facts are as stated, then I am impressed by the fairness and equity of this demand. The Lord Ordinary has allowed a proof, and a proof would have cleared up the facts. But your Lordships are prepared to refuse the claim of the tenant's executors without proof—without inquiry; to refuse it whether urged as a separate claim or as a claim of compensation or set-off against the landlord's demand for damages in respect of failure to maintain buildings and fences. If the law be so clear as to shut out his claim, it is better for the parties to declare and enforce it at once; and I quite admit that if the tenant's demand is not good as a separate claim, it cannot be sustained as a compensation.

I feel that the rule we are enforcing must often be severe in its application. Accordingly, I have endeavoured to find sufficient direct authority in the law to support the proposition that the premature termination of the lease by the landlord before its natural expiry gives to the tenant or his representatives a right to claim allowance for outlay on meliorations of which the landlord reaps the benefit, but which the tenant could not have claimed if the lease had run its full course. In that case—the case when the lease runs on to its expiry—I concur in holding that the law is settled. The tenant cannot make such a claim. There is no doubt that this is the general rule. An exception from the rule in such circumstances as have here arisen might, I think, have been most equitable and just (of course assuming the pursuers to succeed in their proof); and this is, I think, the opinion of Professor Bell and of Mr Hunter, but I am afraid that in the case of *Morton* (Bell's Prin. par. 1255; Bell on Leases; Hunter's Law of Landlord and Tenant), the only case referred to, the point was not decided, and in the absence of direct decision, and indeed of any decision, I have not a sufficient foundation for pressing this exception from the rule as an exception supported by law. We must abide by decision; and recognising the rule, and in the absence of authority to support the exception, I cannot venture to differ from the conclusion at which your Lordships have arrived.

Of the general rule, as stated by your Lordships, I entertain no doubt; and as Professor Bell's opinion is not supported by the decision referred to, nor by any decision, I cannot maintain the exception, and I must therefore, though with some reluctance, concur in applying the rule.

Lord Mure—I have little to add to what has fallen from your Lordships upon this case, and I have come to the same conclusions. There is no doubt that when a party brings a suspension of a decree *in foro*, he requires to state distinct and relevant grounds why the decision of the Sheriff ought to be set aside. In the present instance there is a finding in the judgment of the Lord Ordinary to the effect "that the complainers allege that the sum for which the respondent obtained decree against them in the Sheriff Court in name of repairs is excessive, and that the same was pronounced without pro-

per inquiry or investigation into the facts, and that they were not represented at the proof." Now, if that were the case, I should not be disposed to differ from his Lordship, that farther proof should be allowed. But I am unable to find in any of the statements of facts for the complainers that the sum claimed by the respondent, and decerned for, was excessive. With reference to statement 21, where it is said, *inter alia*, that "during the most important stages of the cause the complainers had no law-agent," I do not think there is any sufficient relevancy to entitle a party to be allowed proof; and I find further, as matter-of-fact, that an agent was present when the questions of law were decided. Where a full opportunity has been given to an agent to attend, it requires, in my opinion, a much more distinct averment to warrant us in holding that a decree *in foro* should be suspended.

On the important question raised in the petitory action, I agree with your Lordships that in an ordinary lease the tenant has no claim for reimbursement for improvements when it terminates. The opinion of Baron Hume in the case quoted in the Lord Ordinary's note is conclusive, and in practice it has always been acted upon. The question is, whether that rule of law does not apply in the case of a lease suddenly terminating by the death of the tenant. In principle I do not see why it should not apply equally. Such a result must be in the contemplation of parties when the lease is entered into.

The difficulty I feel is in regard to the statements of eminent men as to the rule of law applicable in the case of a premature termination of a lease. The case of *Morton* v. *Montgomerie* upon which they proceed has plainly been misread to a considerable extent, for it proceeded upon the express stipulation that the tenant was to have meliorations for unexhausted improvements. The only question which could arise there was whether the tenant on an equitable basis in the particular case was entitled, the lease having come to an unexpected termination, to get a less sum than £1100, the amount which it was stipulated the tenant was to expend during the lease, and which was to be repaid him at its issue. It was held that he was not so entitled, the landlord not having been *lucratus*, and the case is therefore no authority for the present contention. It has been explained by Lord Wood in the Second Division, in his judgment in the case of *Thomson* v. *Fowler*, Feb. 8, 1859, 21 D. 455.

It is further quite plain to me that the fact that the tenant did not during his lifetime put the fences, &c., in good condition, cannot give his representatives now a better claim against the landlord than they would otherwise have had.

The following interlocutors were pronounced:—

"The Lords having heard counsel on the reclaiming note for the respondent Sir Thomas Buchan Hepburn, Baronet, against Lord Curriehill's interlocutor, dated 13th December 1875, Recal the said interlocutor: Find that the suspenders have not made any relevant averments to support the prayer of the note of suspension: Therefore repel the reasons of suspension: Find the decree and charge or charges orderly proceeded, and decern: Find the suspenders liable in expenses; allow an account thereof to be given in, and remit the same when lodged to the Auditor to tax and report."

"The Lords having heard counsel on the reclaiming note for the defender Sir Thomas Buchan Hepburn, Baronet, against Lord Curriehill's interlocutor, dated 13th December 1875, Recal the said interlocutor: Find that the pursuers' averments are irrelevant to support the conclusions of the summons: Therefore dismiss the action and decern: Find the pursuers liable in expenses; allow an account thereof to be given in, and remit the same when lodged to the Auditor to tax and report."

Counsel for Mr Hadden and others—Guthrie Smith—M'Kechnie. Agent—J. Duncan Smith, S.S.C.

Counsel for Sir T. Buchan Hepburn, Bart.—Dean of Faculty (Watson)—Gloag. Agents—Mackenzie & Kermack, W.S.

Thursday, June 15.

FIRST DIVISION.

SPECIAL CASE FOR THE TRUSTEES OF JAMES PARK AND OTHERS.

Competency—Special Case—Tutor and Pupil.

Held that the Court cannot entertain a Special Case between parties who appear for their own interest and also as tutors for minor children with an adverse interest.

Observed (per Lord President) that a Special Case is a contract binding parties to a certain statement of facts, and that therefore parties who are legally unable to contract cannot enter into a Special Case.

This was a Special Case for James Park, John Park, and Thomas Park, nephews and trustees of the late James Park, merchant tailor and shipowner in Fraserburgh, of the first part; William Park, also a nephew of the late James Park, of the second part; and the said James, John, and Thomas Park, tutors appointed by the said deceased James Park to Douglas James Park, Robert Kidd Officer Park, and Jane Rosamond Park, children of the marriage between the said William Park and Mrs Janet Kidd or Park, of the third part—for the opinion and judgment of the Court on certain provisions of a trust-disposition and settlement executed by the deceased James Park.

When the case was on the Single Bills—

The LORD PRESIDENT said—The Court are of opinion that they cannot entertain this Special Case. The parties are—first, the testamentary trustees of the late James Park, merchant tailor and shipowner in Fraserburgh, and these gentlemen are three of the nephews of the late Mr Park; the second party is William Park, another nephew of the testator; and the third parties are the same individuals as the first parties, in the separate character of tutors appointed by the testator to certain pupil children. Now, there is an ad-