Sheriff-Substitute may or may not have erred in point of law in giving judgment for the £12, but it appears to me to be clear enough that there is no appeal from his judgment. Apart from this, and even assuming that there was jurisdiction in the Circuit Court to review his decision, I am of opinion that the appeal must be dismissed. The issue which was left to be determined was whether or not £12 were due, and if £12 remained due after sums not established had been disallowed, the Sheriff-Substitute, as I think, was not only entitled but bound to decern for the £12 to which the claim had been restricted. What the practice upon this question has been is in controversy. But what was done on the present occasion by the Sheriff-Substitute appears to me to be within his powers, and cannot be reviewed upon any of the grounds on which a judgment in a Small Debt Court may be submitted for review of the Circuit Court.

His Lordship accordingly dismissed the appeal.

Counsel for Appellants—M'Lennan. Agents—William Brown & Co., Hamilton.

Counsel for Respondent — Steele. Agent — Andrew Paul, Writer, Glasgow.

COURT OF SESSION.

Friday, February 23.

FIRST DIVISION.

[Sheriff of Forfarshire.

IRELAND AND OTHERS (MITCHELL'S TRUSTEES) *v.* LAMB.

Lease—Miscropping—Pactional Damages—Unqualified Receipts for Rent—Acquiescence.

The lease of a farm for nineteen years prescribed certain rotations of cropping, and stipulated that for each acre miscropped an additional rent should be payable, which should be pactional and not penal. The tenant, with the knowledge of the landlord and his factor, for a long period cropped fields under the six-shift which were stipulated by the lease to be under the seven-shift, and *vice versa*, and receipts for rent were granted to him without any reservation for all the years except the last. At the expiry of the lease the additional rent was demanded from the tenant for each acre miscropped during the last two years of the lease. *Held* that the demand was barred by the landlord's acquiescence in the system of cropping complained of.

By lease dated 12th October and 30th November 1863 James Earl of Southesk let to David Kinnear Hall, residing at Fithie, and David Mitchell, then residing at Kirkside House, St Cyrus, and their heirs, the farm of Fithie in the county of Forfar, for nineteen years from and after Martinmas 1861. In January 1865 Hall assigned his interest in the lease to Mitchell, who thereafter continued as sole tenant down to the expiry of the lease at Martinmas 1880. It was, *inter alia*, stipulated by the lease that the tenants should be bound to cultivate and crop the lands according to the rules of good husbandry, and in particular that one portion of the farm should be cropped according to the six-shift rotation, and the other according to the seven-shift rotation; and the tenants bound and obliged themselves, in case they should deviate from the method prescribed, to pay to the proprietor the sum of £3 of additional rent for each acre miscropped, such additional rent being considered as pactional and not penal.

This was an action in the Sheriff Court of Forfarshire at Forfar at the instance of David Lamb, the incoming tenant of the farm of Fithie. He sued as assignee of the Earl of Southesk of his right of action for recovery of whatever pactional rent or damage had accrued from the miscropping, to recover from David Mitchell the amount alleged to be due in respect of miscropping during the last two years of the lease, viz., for the year 1879 the sum of £219, 4s. 10d., whereof one-half, or £109, 12s. 5d., was payable at Candlemas 1880, and the other half, or £109, 12s. 5d. at Lammas 1880, and for the year 1880 the sum of £257, 19s. 9d., payable at Martinmas 1880.

It was not denied that a different course of cropping had been adopted from what the lease prescribed; in a number of instances fields had been cropped under the six-shift which the lease said were to be under the seven-shift, and *vice versa*. The result at the end of the lease was, that the defender had a larger acreage under green crop, one-year-old grass, and permanent grass, and a correspondingly smaller acreage under grain and second year grass, than he would have had if he had strictly adhered to the provisions of the lease.

The defender pleaded, *inter alia*, that the landlord, the pursuers' author, had acquiesced in the cultivation complained of.

From the evidence of the defender and his grieve it appeared that the change in the mode of cultivating the farm began very soon after the defender entered on the lease, and the landlord's factor, Mr C. Lyall, knew of it, and drew the defender's attention to it from time to time. On 19th March 1874 he wrote to the defender as follows:—"Dear Sir,—I take this opportunity to draw your attention to the cropping clause in the lease. My reason for doing so is that I see some of the fields in two divisions, and I cannot see how this should be if the cropping had been right. I am not in the habit of looking very particularly as to the cropping if I see other things right, but the foul state of the quarry field, which has to be sown down, renders it necessary for me to bring these matters under your notice." On 9th February 1878 he again wrote:—"Dear Sir,—When passing Fithie to-day I noticed that you had begun to plough up the field of one-year-old grass to the east of the Rossie Muir road. Allow me to call your attention to the terms of the lease, and to point out to you that the field should have remained in grass for another year. I would recommend that you should at once stop breaking up this field, as by doing so you will be contravening the terms of the lease.—Yours," &c. Mr Lyall was examined as a witness, and in the course of his evidence said—"I always gave receipts in full to the defender, which I presume means acquiescence on my part to the system of cropping he was adopting. There was neither remonstrance, protest, nor reservation on my part, nor on that of

the landlord. . . . I thought that the defender had a very dear bargain, and being otherwise satisfied with him, I took no exception to anything that was going on. I might certainly have seen that there was not the same quantity of two-year-old grass that there used to be had I looked narrowly into it, but I did not look narrowly into it for the reason I have given." In 1878 Captain Carnegie became factor, and although he spoke and wrote to the defender about the cropping of the farm he gave him a full discharge for crop 1877, for crop 1878, and a receipt which the Sheriff-Substitute and Sheriff held to be a discharge for crop 1879. The claim of the pursuer was restricted to the two last years of the lease, although the miscropping had gone on for many years, because full receipts for rent were admittedly given every year except the last two.

On 9th February 1882 the Sheriff-Substitute (Robertson) pronounced this interlocutor :—"Finds that by this lease a certain portion of the farm was to be cultivated under what is known as the seven-shift system, while another portion was to be cultivated under the six-shift system: Finds that soon after the defender entered on the farm a different system of cropping was adopted from what the lease prescribed: Finds that certain fields which are correctly set forth in the condescendence, and which ought by the lease to have been cropped under the seven-shift system, were cropped under the six-shift: Finds, on the other hand, that certain other fields which by the lease should have been cropped under the six-shift system, were cropped by the defender under the seven-shift: Finds that this deviation from the cropping laid down in the lease was practised under the eye of the landlord and his factors: Finds that the defender was allowed by them to continue this system of cropping down to the end of the lease: Finds that no claim for miscropping or reservation in the receipts for rent was ever made during the lease, but that full receipts were given for the rent of the farm with the exception of the last year, the rent of which has not yet been settled: Finds that a final statement of what rent was due for the last year of the lease was given by the agents of the landlord to the defender some months after he left the farm, and after the expiry of the lease: Finds that in this final state, which disposed of certain counter-claims against the landlord, a certain balance of rent was brought out, which the defender was asked to pay: Finds that no claim was made in this final state for miscropping: Finds that, owing to the defender's counter-claims being still under consideration, the accounting between Lord Southesk and the defender has never been adjusted, and no receipt has yet been given for the last year's rent: Finds in law, that a proved course of acquiescence for a series of years is a bar to a claim for miscropping: Finds further in law, that such acquiescence can be proved by facts and circumstances: Finds that the facts and circumstances of the present case, as brought out in evidence, show acquiescence, which in law bars the present claim: Therefore assoilzies the defender from the whole conclusions of the petition, but finds no expenses due to or by either party, and decerns."

"*Note.*— . . . Although no actual consent has been proved in the present case, the long continued acquiescence which has been proved comes so very near to it that the Sheriff-Substitute cannot bring himself to think, either in equity or fair dealing, that the present claim can now be sustained."

The pursuer on 14th February 1882 appealed to the Sheriff (Trayner), who on 3d April 1882 pronounced this interlocutor:—"Recals the interlocutor appealed against: Finds that the defender during the year 1880 cropped the farm in question to some extent in contravention of the terms of the lease, and has thereby incurred liability for the additional pactional rent of £3 per acre for each acre so miscropped in that year, and with this finding remits to the Sheriff-Substitute to proceed with the cause."

"*Note.*—It is not disputed that the defender has for many years, if not during the whole currency of his lease, cropped his farm in a manner different from that prescribed by his lease. His contention, however, is that such deviations from the terms of the lease were known to and acquiesced in by the landlord or his factor. I think the defender has failed to prove this. Mr Lyall, who was factor up to 1878, does not seem to have paid any particular attention to the defender's mode of cropping the farm, and it may be that miscropping went on without his objecting to it. But it is certain that both in 1874 and 1878 he checked the defender's proceedings and called attention to the requirements of the lease. The defender's attention was again called to this by Mr Carnegie in 1880, who by that time had become factor. These letters are quite inconsistent with the idea of the landlord or his factor having authorised or acquiesced in deviations from the lease, and it appears to me that the defender has failed to show that, any time after the lease was granted, any authority was given to him to depart from its provisions, or that any such departure was known and acquiesced in. On the other hand, I am of opinion that the receipts granted to the defender year by year, discharging the rents due to the landlord, bar the latter (and the pursuer, his assignee) from now claiming any pactional rent for miscropping during these years. It may be doubtful whether the receipt for the last half-year's rent for year and crop 1879 is of such a kind as to bar the landlord's claim, but I am disposed to give the defender the benefit of that doubt, and accordingly hold the pursuer's claim limited to the miscropping that took place in 1880."

On 5th October 1882, the defender having died, his trustees were sisted in his place, and on 31st October 1882 the Sheriff-Substitute decerned against them for the sum of £236, 18s. 11d. as the amount of pactional rent due by them, but in respect of the *pluris petitio* of pursuer in making a claim for the year 1879 found him entitled only to one-half of his expenses.

The defenders appealed to the Court of Session, and argued—That although no assent had been proved, the long-continued acquiescence was equivalent to it—*Taylor* v. *Duff's Trustees*, January 13, 1869, 7 Macph. 351; *Forrest & Barr* v. *Henderson*, November 26, 1869, 8 Macph. 187—and that the landlord was barred by the terms of the receipts for rent from making any claim for any year preceding 1880—*Hunter* v. *Broadwood*, February 2, 1854, 16 D. 441; *Baird* v. *Mount*, November 19, 1874, 2 R. 101.

The pursuer relied on the case of *Millar* v. *Gwydir*, May 26, 1824, 3 S. 42—*aff.* March 8, 1826, 2 W. & S. 52.

At advising—

Lord President—The lease with regard to which this question has arisen began in 1861, and therefore, as it was for nineteen years, ended in 1880, and it appears that under its terms the farm was to be cultivated according to two systems — the one portion according to the six-shift, and the other according to the seven-shift rotation of cropping. There are very distinct stipulations that these two systems are to be followed, and the lease goes so far as to describe in precise terms what each rotation means, and then follows this clause:—"And in respect the rent before mentioned is stipulated for these methods of culture, therefore, in case the said David Kinnear Hall and David Mitchell shall deviate from the plan hereby prescribed, they bind and oblige themselves and their foresaids to pay to the proprietor or his foresaids, or to his or their factor as aforesaid, the sum of £3 sterling of additional rent for each acre so miscropped, and which additional rent shall not be considered as penal, but as pactional rent, which the said David Kinnear Hall and David Mitchell hereby agree to pay at the terms and under the same conditions with the original rent of the year in which such miscropping takes place; with power, nevertheless, to the proprietor and his foresaids to stop such miscropping, in whole or in part, as they may incline."

Now, the miscropping which is alleged consists in cultivating part of the land which should have been under the six-shift rotation under the seven, and part which should have been under the seven-shift under the six. It further appears that the deviation began at an early period—it is not exactly fixed when—but it was soon after the lease began, and it must be held to have been within the knowledge of the factor, and therefore of the landlord. Indeed, Mr Lyall, the factor, is quite candid and distinct, and states it as his reason for not objecting that he thought the tenant had a hard bargain, and that unless he could do pretty much what he liked he would not be able to go on, and that therefore he was indulgent. That he came to know of the miscropping is evident from a letter which he wrote in 1874—a date which is important for a reason I shall afterwards state—which shows that Mr Lyall was then aware of what was going on, which was not a mere deviation from the terms of the lease for one or two years, but a systematic deviation as regards portions of these parts of the farm which should have been in six and seven-shift rotations respectively. No notice was taken or objection made to this systematic deviation, although the landlord had a double remedy, either to exact an extra rent of £3 for each acre of land miscropped or to put a stop to the miscropping. Neither the one remedy nor the other was adopted until the end of the lease. There was no challenge or objection except the mildest hints in some letters which are produced, and the tenant goes on systematically miscropping from 1874 until 1880.

This was a system of miscropping resulting in consequences which could not easily be undone, and that constitutes the peculiarity of this case. It is unlike a case where the conditions of the lease are violated one year and not another; for example, where it is provided that so many acres of hay shall be cut, then if more is cut than the prescribed amount the tenant is bound to pay for the excess; or where it is provided that the fallow shall not carry more than a certain amount of potatoes. Such a deviation does not entail any consequences, and the penalty is just paid for the year whether it be called pactional rent or damages.

It is different here, for when a system is put out of joint it cannot be put right in the next year. Clearly, if there is a violation of the six or seven-shift rotation, it takes six or seven years to put it right, and it is here that the importance of the fact lies that in 1874 the factor and landlord knew of the miscropping that was going on. Mr Dickson argued that the important point is to have the farm left in as good a condition—and that the violations in the course of the lease are not important so long as the land is left in as good a condition--at the end of the lease as it was at the beginning. If, therefore, in 1874 the landlord and factor had not been disposed to enforce their rights against the tenant, but had ensured the farm being left all right; if in 1874 they had said "We see things are going all wrong, we don't mind, but you must leave the farm right at the end of the lease," then their position would have been quite different. But the only time to do that was in 1874, and they did not do it. The landlord goes on without taking notice, he does not ask any additional rent, and does not remonstrate until the last year, when he claims additional rent. The answer is that "it is by things you yourself have condoned that the land cannot be cultivated in the mode prescribed in the lease." I think that is a good answer, and that it is founded on what is established in fact, namely, acquiescence. It is not a mere non-demand of rent, but silence in the knowledge of what was going on, which makes this case peculiar and prevents it being ruled by any case which was cited.

The point lies there that the condition of the land in the last year of the lease is a thing necessarily resulting from what was permitted and acquiesced in by the landlord and his factor for a term of years. I am therefore of opinion that the Sheriff-Substitute is right, and that the interlocutor of the Sheriff should be recalled.

Lord Mure—I am of opinion that the Sheriff-Substitute is right, and I think this is a very special case on the terms of the lease. It is quite clear that since 1874 the system of cropping prescribed has not been observed, and it has been shown that the factor knew that the shift had not been adhered to. Mr Lyall, the factor, then called the attention of the tenant to the fact, but does not proceed further, and the receipts which were granted for rent were without reservation. It is admitted that the pursuer cannot make any demand for miscropping for an earlier period than is covered by this action. This indicates that the landlord was aware of what was going on, and the tenant was entitled to infer that provided he was just in regard to his cropping of the land generally he would not be called upon for any extra rent. The evidence of Mr Lyall is very distinct that the landlord intentionally did not remonstrate, because he was satisfied with the general management of the tenant. It is now proposed that for

the last year the tenant should pay the extra rent stipulated for in the lease for every acre of land miscropped. I think, however, with your Lordships, that if the landlord allowed this mode of cropping, and thus allowed the farm to get into such a state that it could not be put right in the last year of the lease, he must be held to have waived all claim for pactional rent.

Lord Shand—If it had here been proved that there had been a verbal arrangement between Lyall, the factor, and the tenant that the five and six-shift rotations of cropping might be varied, then the case would be ruled by the case of *Duff's Trustees*, where it was held that after verbally assenting to an alteration of the shift for a period of years the landlord was not entitled to have the farm laid out in the last year as stipulated. Here there is no agreement, but I agree with the Sheriff-Substitute that the acquiescence is so clear as to amount to an agreement. In the case of *Duff's Trustees* one of the findings in Lord Kinloch's interlocutor was to this effect:—"Finds it proved as matter of fact that by the terms of his lease the pursuer was bound to observe a six-shift rotation of crops, but that in the course of his possession under the said lease the pursuer changed to a five-shift with the consent and acquiescence of his landlord and continued to prosecute the same;" and here it has been proved that there was assent and acquiescence. Lyall says in that part of his evidence given in the Sheriff-Substitute's note that he presumed the granting of receipts in full meant acquiescence in the system of cropping. He says:—"There was neither remonstrance, protest, nor reservation on my part nor on that of the landlord;" and he gives his reason—"I thought that the defender had a very dear bargain; and being otherwise satisfied with him, I took no exception to anything that was going on;" and so he purposely allowed the system to continue.

Now, if there had been a deviation for only one or two years, I could not hold that the landlord would be bound to allow it to go on; but he would be bound to tell the tenant that what had become a system would not be allowed. I think that the Sheriff-Substitute is right when he says that "although no actual consent has been proved in the present case, the long continued acquiescence which has been proved comes so very near to it, that the Sheriff-Substitute cannot bring himself to think, either in equity or fair dealing, that the present claim can now be sustained. I agree with your Lordships that the interlocutor of the Sheriff should be recalled.

Lord Deas was absent on Circuit.

The Court recalled the interlocutor appealed against and assoilzied the defenders.

Counsel for Appellants--Mackintosh--Jameson. Agents—Henry & Scott, S.S.C.

Counsel for Respondents—J. P. B. Robertson. —Dickson. Agents—Webster, Will, & Ritchie, S.S.C.

Friday, February 23.

SECOND DIVISION.

[Sheriff of Ross, Cromarty, and Sutherland.

HUMPHREY *v.* MACKAY.

Lease—Mutual Obligation—Retention of Rent by Tenant in respect of Illiquid Claim of Damage.

The tenant of an arable farm let on a nineteen years' lease paid the rent regularly for twelve years. Thereafter, the rent not being paid, the landlord applied for sequestration. The tenant consigned the rent and found caution for expenses, but claimed right of retention of the rent on the ground that the landlord had not implemented his part of the contract in various particulars, especially in failing to secure him an adequate water-supply for his thrashing-mill. *Held* that, looking to the conduct of the tenant, and the absence of specific averment of failure on the part of the landlord to implement the lease, the defence was irrelevant.

John Humphrey, heritable proprietor of the estate of Bayfield, in the county of Ross, let to Murdo Mackay the Mains farm of Bayfield on a nineteen years' lease from Whitsunday 1868 at a yearly rent of £450, payable half-yearly at Martinmas and Whitsunday. Mackay entered into possession of the farm and paid the rents down to Whitsunday 1880. The rent payable at Martinmas 1881 and Whitsunday 1882 not having been paid, Mr Humphrey presented a petition for sequestration in the Sheriff Court of Ross, Cromarty, and Sutherland at Tain. The defender averred that the pursuer had failed to fulfil the obligations undertaken by him in terms of the conditions of let—(1) by withholding possession of a substantial portion of the subjects, that portion consisting of a house known as the Carse, and a piece of ground extending to one acre or thereby; and also by depriving him of a field, 6 acres in extent, which he had been led to believe, at the time he offered for the farm, belonged to the farm; (2) by failing to put the farm-buildings and offices into proper tenantable repair, as provided by the conditions of let; and (3) by failing to supply to the defender the necessary water-power for the working of his thrashing-mill. His averments on this point were as follows—"The pursuer has failed to supply to the defender the necessary water-power for the working of the threshing mill as existing and used during the proprietor's occupation of the subjects as at December 10, 1867. The said water-power is stored in a dam on the Bayfield estate, from which it runs through the subjects occupied by defender, and by the said thrashing-mill down to a meal-mill held or leased from the pursuer by Robert Munro, miller, Bayfield. A due and available supply is necessary for the defender's proper working of the subjects, but from his entry down to the present date the defender has been unable to obtain a suitable supply, even when the dam was full, as he has been prevented from exercising any right or control over it by the pursuer or his said tenant, and the pursuer or his tenant have latterly locked the upper dam and deprived the defender of all con-