"I do not think that it can be held that the obligation to leave the money invested for five years was extinguished by the granting of the bond, any more than that the agreement to restrict the interest to 4 per cent. was so extinguished. The reason is, that these conditions in their inception were not intended to be introduced into the heritable bond, but were to remain personal. The granting of the bond accordingly neither vacated nor confirmed these conditions, but left them standing on the basis of the written offer and acceptance.

"That being so, the agreement as to the five years is apparently an unsecured personal obligation qualifying the effect of a recorded heritable bond.

"If in a case like the present the heritable creditor should become bankrupt, his creditors apparently would not have the power of calling up the bond before the expiration of the prescribed period. The reason is, that creditors take the bankrupt's estate by the title of gratuitous alienees, and in the case supposed their title—*videlicet*, the heritable bond—would be affected by the personal condition that its powers of sale and realisation should not be enforced within the prescribed period.

"But here it is the debtor in the bond who has become bankrupt, and the position of the trustee on his estate is altogether different. His title is Mr Mackintosh's sasine in the estate of Farr. The heritable bond is no part of his title; it is an encumbrance upon his title. It would be a strange and alarming extension of the doctrine of *tantum et tale* if creditors were to be bound not only by latent qualifications of the bankrupt's title, but by obligations affecting every person deriving right through the bankrupt. So far as the defender (the trustee) is concerned, the obligation not to disturb the loan appears to me to be nothing more than a personal contract, resolving into a claim for a dividend in consequence of its nonfulfilment. I do not understand that the pursuers' claim to a dividend is contested, but it must be worked out through the sequestration.

"These questions of the real or personal quality of obligations are a little perplexing, and I was somewhat impressed with the argument founded on the authorities as to the limited nature of a trustee's title. But on consideration I think it will be found that wherever the doctrine of taking *tantum et tale* truly applies, the qualification of the bankrupt's title always and necessarily is a right in some other person coming into existence at a time either antecedent to the bankrupt's acquisition of the estate or simultaneously with that acquisition. As regards rights subsequently acquired by the bankrupt, and which have not been made real, these are held unfulfilled obligations entitling the creditor to a ranking. An obligation by a landlord to give security over his estate is, for example, of no value in bankruptcy except as supporting a claim to a ranking, because although it has relation to the estate it is in no sense a qualification of the debtor's title. The claim now preferred appears to me to be of a cognate description.

"It was argued for the pursuer that the notice of payment given by the trustees was open to challenge on various grounds. It appears to me that a different form of action would be necessary to raise such questions. It is also objected that the sum consigned is insufficient, because the trustee ought to have allowed interest, not at 4 per cent., but 5 per cent. in terms of the bond. Probably the trustee is officially liable in interest at the rate of five per cent. until payment, because he cannot ignore the personal contract as to the loan being for five years, and at the same time found upon it in order to restrict the rate of interest to 4 per cent. But this point also would only arise upon a challenge of the consignation. If consignation has not been made in terms of the statute, I presume the debt is not paid off, and in that case the bond gives the pursuers the means of recovery of any balance of termly payments which may be due to them. In this action I must assoilzie the defender with expenses."

Counsel for Pursuers—Guthrie Smith—Jameson. Agents—Macrae, Flett, & Rennie, W.S.

Counsel for Defender—J. P. B. Robertson—W. C. Smith. Agents—Gordon, Pringle, Dallas, & Co., W.S.

Tuesday, January 20.

FIRST DIVISION.

[Sheriff of Forfarshire.

CORRIE, MACKIE, & COMPANY *v.* STEWART.

Lease—Landlord and Tenant—Rent—Undue Use of Premises Let.

The floor of premises let to a jute merchant gave way under the load placed on it, and he abandoned the premises and refused to pay rent for them. *Held*, on a proof, that the floor gave way because he had loaded it unreasonably, and that he was liable for the rent.

This was an action for rent, raised in the Debts Recovery Court at Dundee, by David Stewart, solicitor, Dundee, proprietor of a warehouse at Arcade Buildings there, against Corrie, Mackie, & Company, jute and flax merchants. The warehouse was let to the defenders by the pursuer for nine months from 28th February to Martinmas 1884, at a rent of £60, payable half at Whitsunday and half at Martinmas 1884. The rent claimed in this action was £30, being that alleged to be due at Martinmas. The defenders refused to pay, and maintained that the rent was not due in respect that the subjects were let as a flax and jute warehouse, that the flooring gave way when only loaded to the extent of half its cubical capacity, and was even to a greater extent structurally defective and unfit for the purpose for which the warehouse was let.

It appeared that about the beginning of April some of the beams and joists of the floor of the upper flat of the warehouse gave way, and this part of the store became useless for the purpose of storing jute. The defenders shortly after removed the whole of their jute from the warehouse and abandoned their lease.

After a proof the Sheriff-Substitute, on 27th November 1884, found, *inter alia*—"(4) That at the time when the floor gave way . . . the defenders had in the upper flat of the warehouse about 1797 bales of jute, representing a

weight of about 321 tons, and that these were arranged on the floor in tiers of eight and nine bales in height, representing a pressure on some parts of the floor equivalent to about 4 cwt. per square foot; and (5) That this was in the circumstances an unreasonable use of the upper flat on the part of the defenders, and the giving way of the floor was due not to any defect in its construction or in the materials, but to its being improperly overloaded by the defenders: Finds in law on these facts that the defenders are liable in the rent sued for, and that their claim of damage is not maintainable to any extent; Therefore decerns against the defenders for payment to the pursuer of the sum sued for, being £30 sterling, and also for the further sum of £27, 6s. 4d. sterling of expenses, &c.

"*Note.*—The result of the evidence in regard to the strength of the floor seems to me to be that it was a good ordinary warehouse floor, capable of bearing safely a weight of about 200 tons evenly distributed over it, and it is plain that its giving way was occasioned simply by the defenders putting a greater weight of jute upon it than it was intended to bear, or was capable of bearing. But the place was let to the defenders as a warehouse for storing jute, and therefore, unless it can be shown that the use which they took of the upper flat was excessive and unreasonable, having regard to its apparent strength or to its strength as known, or as it should have been known to them, I am undoubtedly bound to decide in their favour, at least to the extent of allowing them some abatement of rent, together with the costs incurred by them in shifting the jute that was in the upper flat. They were not, in my opinion, under any obligation before putting goods into that flat to have the floor examined to ascertain what weight it would safely bear, but were entitled to assume that the subject was reasonably fit for the purpose for which they took it, viz., as a jute warehouse. On the other, however, they were, I think, bound to use the subject reasonably, and if they have caused damage to it by what the Court or a jury consider a reckless and undue use of it, they must stand the consequences. Take, by way of illustration, the extreme case—the upper flat of this warehouse is, it appears, 22 feet 6 inches in height, and of such dimensions as to admit of about 600 tons of jute—which owing to its being very tightly packed is for its bulk an extremely heavy commodity—being placed in it, but would any business man say that it would be reasonable to put that quantity of jute upon an ordinary wooden floor of the area of the one in question. Mr Mackie himself admits in his evidence that it would be unreasonable to do so, and I cannot doubt the propriety of the admission. But if the defenders were not entitled to fill the flat with jute up to its cubical capacity, the question arises how much jute were they entitled to put into it? where, in other words, is the line to be drawn? To this question it is not possible to give any definite answer. All that can be said is that the Court will support any use which is not shown to be on the part of the tenants clearly unreasonable in extent, regard being had in considering the matter to what the tenants knew or ought to have known about the strength of the floor.

"Now, what as matter of fact was the extent of the use which the defenders made of this upper flat? Upon this branch of the case I entertain no doubt, but am satisfied that the result of the proof in regard to it is correctly given in my fourth finding. . . . .

"Assuming these to be the facts, it may be doubted whether even if the defenders had had no previous acquaintance with the warehouse they could have escaped a verdict against them on the question of unreasonable overloading. It is unnecessary, however, for me to say what conclusion I might have come to had I been dealing with strangers to the warehouse. The defenders were not in that position. The block of warehouses to which No. 4 warehouse belongs, if not built expressly for them, was certainly built in the expectation that they were to become tenants of the whole block. They were consulted about the plans. Black, their warehouse inspector, is proved to have stated to the pursuer's architect that the upper flats would not be required for jute; and at the suggestion of the same gentleman—a suggestion made with a view to obtaining greater use of the ground flat—the plan of No. 4 warehouse was altered to this extent, that one of the two rows of pillars by which according to the original design the floor of the upper flat was to have been supported was dispensed with, which had, as Mr M'Laren tells us, and as can be easily understood, the effect of somewhat diminishing the bearing strength of the floor. Add to all this that the defenders were in reality paying next to nothing for the upper flat (for calculated at 30s. per 1000 cubic feet, which is the rent they had Nos. 1, 2, 3, and 5 warehouses at, the rent of the accommodation afforded by the ground floor of No. 4 would from the period from 26th February to Martinmas be about £57, while the total rent agreed to be paid by them for No. 4 for that period was only £60), and I think I am justified in saying that at the time they were making their bargain they did not anticipate getting much use of the upper flat, and in holding that in loading it as they did they acted unreasonably and recklessly. That at least is the opinion which after full consideration I have formed, and which is the basis of the above judgment, but I am free to admit that it is by no means a clear or decided one, and that the case has puzzled me not a little."

Upon appeal the Sheriff (Trayner) adhered.

"*Note.*—[*After stating concurrence with the Sheriff-Substitute, except in the finding that the warehouse was let as intended for storing jute*] —I am of opinion (1) that the warehouse was not let specially as a warehouse for storing jute; (2) that the warehouse floor was, as regards its strength and construction, equal if not superior to most warehouses in Dundee; (3) that the defenders loaded the warehouse floor unreasonably; and (4) that the floor gave way in consequence of the unreasonable load placed upon it, as well as (to some extent) through the bad usage it received at the hands of the defenders' servants. On these grounds I am of opinion that the pursuer is entitled to decree."

The missives of let were produced. They are referred to in the opinion of the Lord President.

The defender appealed to the Court of Session, and argued that the premises were quite insufficient for the purposes for which they were let, and on the evidence they were defective in con-

struction; there was no undue loading of the floor. In the circumstances no rent was due.

Authorities—*Sauer* v. *Bilton*, 1878, L.R. 7 Ch. Div. 815; *Manchester Bonded Warehouse Company* v. *Can*, 1880, L.R. 5 Com. Pl. Div. 507.

Argued for pursuer—The warehouse was of ordinary construction. No warranty of sufficiency was given. The warehouse was grossly overloaded and unequally packed. There was undue and unreasonable use of the warehouse.

At advising—

Lord President—This is an action for the recovery of rent for premises let by the pursuer to the defenders, under missives dated 26th February 1884, at a rent of £60, from 26th February to 28th November of that year.

The missives contain no statement by the pursuer of the nature of a warranty, but it was a fact known to the pursuer that the defenders were flax and jute merchants, and the pursuer therefore must presumably have known the use to which the warehouse would be put.

The defenders took possession of the warehouse and filled the lower floors with jute; they stored no flax in the building at all, but in the upper flat they put 1797 bales of jute, weighing about 321 tons.

The case on the evidence comes therefore to be this, whether this was an unreasonable load for the upper floor of this building to carry?

Now, this is a pure question of fact, and there is no law in the matter. The Sheriff-Substitute and Sheriff are both agreed that there was in the circumstances an unreasonable use of the premises let, and as I entirely concur in their judgments I do not consider it necessary to enter into any analysis of the evidence.

I am therefore for refusing this appeal.

Lords Mure and Shand concurred.

Lord Deas was absent.

The Court refused the appeal.

Counsel for Pursuer (Respondent)—Sol.-Gen. Asher, Q.C. — Mackintosh. Agent — J. Smith Clark, S.S.C.

Counsel for Defenders (Appellants) — Lord Adv. Balfour, Q.C.—H. Johnston. Agents—Morton, Neilson, & Smart, W.S.

Wednesday, January 21.

SECOND DIVISION.

HERSKIND AND OTHERS (OWNERS OF "HILDA") *v.* HENDERSON AND OTHERS (OWNERS OF "AUSTRALIA"), *et e contra.*

(*Ante*, p. 70, November 7, 1884.)

Process — Expenses — Expense of Commission Abroad.

In taxing the account of a party successful in an action arising out of a collision at sea, the Auditor allowed a charge of £60 as the fee to a British Consul abroad and other expenses in taking the evidence of one witness on a commission which had been obtained by the successful party. The unsuccessful party objected to the report, but the Court *refused* to disturb the decision of the Auditor.

In this case (reported *supra*, p. 70, November 7, 1884) the owners of the "Hilda" were successful, and were found entitled to damages and to the expenses of the process. The usual remit was made to the Auditor, who taxed the amount of expenses at £448, 16s. 8d. (including the £60 hereafter referred to), but reserved a question for the determination of the Court as to the extent of the defenders' liability for the expense of the examination by commission of one of the pursuers' witnesses named Salvatore Farrugia, a Maltese pilot at Port Said, which amounted to £60, 6s. There were seventy-five interrogations, and the report of the commissioner, the British Consul at Port Said, extended to fifteen pages of print. The time occupied in the examination was stated at three and a-half days, and the commissioner's charge (including 5s. 6d. for postages) was stated at £37, being at the rate of £10, 10s. per day. The clerk's fee was charged at £11, being at the rate of £3, 3s. per day, and the allowance to witness (including hotel and travelling expenses) amounted to £12, 5s. At the audit the defenders' agent objected to the expense of the commission as exeessive, and the pursuers' agent, while concurring in this view, stated that he had no alternative except payment of the charge or loss of the evidence. The pursuers' agent also stated that he had been in correspondence with the Foreign Office on the subject, and had received a letter reporting that the explanations given by the commissioner appeared quite satisfactory to Lord Granville. A portion of the examination was conducted in Italian, the commissioner acting as interpreter, and the Auditor, while considering that this to some extent explained the length of the time occupied, could not help concurring with the agents as regards the rate of fees for the commissioner and clerk as unusually high, and the time occupied as excessive, assuming the days to have been ordinary business days. Practically, there was no check on the expense of commissions executed abroad, but the question remained, by whom was any excess of charge to be borne? In the present case the Auditor had not felt at liberty to disallow any part of the expenses incurred.

Counsel for the owners of the "Australia" argued—The ordinary rule that the losing party must pay the expenses of process could not be applied in this special case. The expenses in this commission, so far as in excess of what was reasonable, must be borne by the pursuers, whose duty it most clearly was, when they found how high the commissioner's charges were to be, to have come to the Court and asked for the appointment of a new commissioner.

Counsel for the owners of the "Hilda" stated that it was a rule of the Suez Canal Company that their pilots should only appear for examination before a Consul or an official of the Commissioners.

At advising—

Lord Young—I do not think we can do anything except approve of the Auditor's report. The Court cannot well give any general instruction. Such a case as this is not of frequent