long to Mrs Connell's trust-estate; 3. That the investments vouched by the certificate specified in article V., C. [being that in her favour exclusive of the *jus mariti*, &c.] belong to Mrs Connell's trust-estate: 4. That the ten bonds in article V., D. [the Clyde Trust bonds] belong to Mr Connell's ten children respectively: 5. That the certificates vouching the investments in article V. under heads E, F, and G, confer a right on the individual children whose names they respectively bear [those in favour of Mr Connell and a child or the survivor, and those in favour of Mr Connell in trust for a child]: 6. That the investments here referred to are not to be reckoned as part of the £15,000 here mentioned; and decern; and authorise the expenses of the parties to be paid out of Mr Connell's trust-estate."

Counsel for Mr Connell's Trustees (First Parties)—Gloag—Penney. Agents—C. & A. S. Douglas, W.S.

Counsel for Mrs Connell's Trustees and the Children of the Marriage (Second, Third, Fourth, and Fifth Parties)—R. V. Campbell—Crole. Agents—Davidson & Syme, W.S.

Saturday, July 17.

SECOND DIVISION.

[Sheriff of Aberdeen, Kincardine, and Banff.

WALKER'S TRUSTEES *v.* MANSON'S TRUSTEES.

Lease — Renunciation — Tenant's Bankruptcy—Landlord's Claim of Damages.

A lease provided that the tenant's bankruptcy or insolvency should, "in the proprietors' option, be an irritancy of the lease." The tenant became insolvent, and the landlords accepted a renunciation of the lease, the deed of renunciation, *inter alia*, providing that it was "hereby specially agreed that all the rights and claims of parties, whether of landlords or of tenant or tenants, are reserved for settlement and adjustment, and that the landlords shall in no way be prejudiced by accepting this renunciation in place of terminating the lease as otherwise therein provided for." The landlords claimed damages in respect that the tenant had given up the lease before its natural termination, and they had been obliged to let it at a lower rent. *Held* that as the acceptance of the renunciation was a voluntary act on the part of the landlords, and as they had not reserved a claim to damages they were not entitled to the damages claimed.

Lease—Meliorations, Discount on, in Respect of Termination of Lease through Tenant's Bankruptcy.

A lease provided that whereas the incoming tenant had paid the waygoing tenant the sum to which the waygoing tenant was entitled as meliorations, the incoming tenant bound himself to maintain the houses on the farm at the value of £126 and to leave them of that value at least, "in which event he shall then be entitled to repayment of £63," being the sum paid to the waygoing tenant, and on the other hand he was to be bound to pay for any deterioration that might have occurred. The incoming tenant became bankrupt, and with consent of the landlord renounced the lease before its natural termination. *Held* that the landlord was not entitled to discount on the sum of £63 in respect of the period of the lease still to run but for the renunciation.

By contract of lease dated May 1880, Robert Stewart Walker of Orrok, with consent of the trustees acting under a trust-disposition executed by him, let the farm of Westburn, part of the lands of Orrok, to Alexander Manson for a period of 19 years and at a rent of £152, 10s. per annum, the lease providing, *inter alia*, that "whereas the said Alexander Manson has paid, or is hereby taken bound to pay, to the waygoing tenant of Westburn the sum to which he is entitled as meliorations on houses over and above the heritor's inventory under his expiring lease, he, the said Alexander Manson, hereby obliges himself and his foresaids to keep up and maintain the said houses on Westburn to the value of one hundred and twenty-six pounds sterling as fixed at the commencement of this lease, and to leave them of that value at least, in which event he shall then be entitled to repayment of the sum of sixty-three pounds sterling paid to the waygoing tenant of Westburn as for meliorations; and on the other hand he shall be bound to bear the loss or pay for any deterioration which may have taken place;" and it being also declared "that the tenant's bankruptcy or insolvency, or a poinding of his effects, cattle or bestial, not discharged within ten days after execution, shall, in the proprietors' option, be an irritancy of the lease, and he shall, in any of these events, be entitled to possession, and to have the tenant removed by any competent process of law."

On 11th November 1884 Manson executed a trust-deed for behoof of his creditors, and on 27th and 29th December he and his trustees executed a renunciation of the lease of Westburn, which proceeded on the narrative that it had been decided that such a deed should be granted, and that the landlords had agreed to accept a renunciation on certain terms, and, *inter alia*, bore that it was "hereby specially agreed that all the rights and claims of parties, whether of landlords or of tenant or tenants, are reserved for settlement and adjustment, and that the landlords shall in no way be prejudiced by accepting this renunciation in place of terminating the lease as otherwise therein provided for." This renunciation was accepted by the landlord and his trustees.

In June 1885 Walker's Trustees brought an action in the Sheriff Court at Aberdeen against Manson's Trustees for payment of £372, 5s. 10d., or alternatively for such sum as might be found to be a dividend in respect of £372, 5s. 10d. on Manson's estate.

The pursuers lodged a state bringing out the sum above claimed, which was made up of a variety of individual claims—of these the only items necessary to be referred to in this report are (1) a sum of damages in respect of the termination of the lease before its natural termi-

nation, in respect the farm had been re-let at a lower rent. The pursuers estimated the yearly loss for the remainder of the lease at £15, 17s. per annum. (2) Discount, estimated by the pursuers at £31, 19s. 9d. on the sum of £63 payable under the lease to the tenant as meliorations. This discount the pursuers also claimed on the ground of the earlier termination of the lease.

The defenders maintained—"The pursuers having accepted a renunciation of Manson's lease without specially stipulating for any claim for loss of rental for the remainder of lease, are thereby barred from now setting up the present claim for alleged loss of rental, and they further maintained that no discount was due under the second head of claim.

On 14th December the Sheriff-Substitute (DOVE WILSON) pronounced this interlocutor—"Finds in the accounting between the parties (1) that the pursuers are not entitled to deduct discount from the sum of £63 payable by them for meliorations; (2) that they are not entitled to damages for the farm having been re-let at a lower rent. . . .

"*Note.*—1. I do not think that the pursuers are entitled to claim discount on the £63 to which the tenant was entitled for meliorations. He paid that sum to his predecessor for them, and by the terms of the lease he was entitled to get payment of the sum, provided he left the houses of a certain value. Admittedly he has left the houses of the value fixed, and I accordingly think he is entitled to get payment. The clause in the lease in *Pendreigh's Trustee* v. *Dewar*, 19th July 1871, 9 Macph. 1037, where a similar claim for discount was allowed, was different. It was there specially provided that the landlord was not to be called on to pay the money for meliorations till the expiration of the lease. As matter of construction this was held to mean at the natural expiration of the lease, and as the landlord was called on (through the lease coming prematurely to an end through the tenant's bankruptcy) to pay before the stipulated time, it was further held that he was entitled to a proportionate discount. But in that case a precise time of payment was fixed by the bargain. Here, while it was of course not contemplated that payment would be demanded till the natural termination of the lease, the language as to the time is left wide enough to cover any mode of termination—the clause being simply that the tenant is to get the money if he leave the houses of the prescribed value.

"2. On the question whether the pursuers are entitled to ask for damages for the farm having been re-let at a reduced rent, I have formed the opinion that they are not. The clause in the renunciation bearing on the point amounts to a provision that the pursuers are to be entitled to ask for damages as if they had exercised their option of terminating the lease on account of the tenant's bankruptcy. If they had exercised that option, I fail to see on what ground they could ask damages. They resumed the lands, and if they had got a higher rent they would not have been bound to communicate the gain to the tenant's creditors. By parity of reasoning, the tenant's creditors are freed from bearing the burden if the resuming possession and re-letting turns out a bad business. If the pursuers had been willing to give the creditors the option of holding the farm, and the creditors had been obliged to abandon it, the estate under their charge would then have been liable for all damages the bankruptcy occasioned. In that event the pursuers would have been in the position of parties able and willing to fulfil the contract of lease, and the defenders and their author in that of parties unable or unwilling to do so, and therefore fairly liable in damages for the non-fulfilment. Here, however, the pursuers, to save themselves from complications, prefer to exercise their right to end the contract; and it seems to me that by doing so they ended the whole matter, and acquired right to all the profit, and took the risk of all the loss which that course might involve. In some leases a provision is found for regulating who is to get the profit or bear the loss should the landlord exercise his right of terminating the lease on the tenant's bankruptcy. In the absence of any such provision I see no reason on which the law can be held to imply a provision of such an inequitable character as that all the possible profit shall go to one of the parties, who at the same time is to be kept clear of any possible loss."

The pursuers appealed to the Sheriff (GUTHRIE SMITH), who on 26th February 1886 pronounced this interlocutor—"Affirms the said interlocutor, with the exception of the second finding, and in lieu thereof finds that the pursuers are entitled to be ranked as creditors of the bankrupt for the sum of £98, being the damage sustained by them by re-letting the farm to another tenant, and with this variation remits the case to the Sheriff-Substitute.

"*Note.*—It is a rule in bankruptcy that a trustee for creditors is entitled to disclaim onerous contracts entered into by the bankrupt and having a period of years to run. The reason is that in liquidating the estate he is not required to incur any personal liability, unless he chooses to do so, and is quite satisfied that it will be for the benefit of his constituents to take up and complete a contract so far as it remains unfulfilled. But this does not affect the right of the other party to claim against the estate the amount of damage which he may sustain in consequence of the disclaimer.

"I can find nothing in this case to take it out of the operation of the well-known rule, and which has long been followed by the Courts both in England and Scotland. (*Kinloch* v. *Mansfield*, 14 S. 905; *Corbett*, 14 Ch. Div. 122.) No doubt the lease contains an irritant clause annulling it on bankruptcy, and assignees, legal as well as voluntary, are excluded. But these are provisions introduced for the benefit of the landlord, and merely give him the option of taking a certain course should he consider it for his benefit. The exaction of a penalty or the declaration of a forfeiture is no discharge of the claim of damages that may accrue through the breach of contract. A penalty is always by and attour performance, and the only use which might be made of such stipulations by persons in the position of the defenders would be to show that having decided and offered to take up the lease and carry on the farm for behoof of the creditors, the landlord, standing on his legal rights, refused to allow them. He would be entitled to refuse the offer, but in that case he would get no damages. (*Bethune* v. *Morgan*, 2 R. 186.)

"It appears that all parties were satisfied that the best course to be taken with the farm in

question was to give up the lease and let the landlord make the best of it. The defenders, as acting for the creditors, accordingly proposed a renunciation, and the pursuers agreed to it. The defenders might at the same time have stipulated for a release from all further claims at the landlord's instance, but they did not do so. On the contrary, the deed of renunciation expressly provides 'That all the rights and claims, whether of landlords or tenants, are reserved for settlement and adjustment, and that the landlords shall in no way be prejudiced by accepting this renunciation in place of terminating the lease as otherwise provided for.' The meaning of this is, that he will get his damages for the bankrupt's breach of contract notwithstanding the deed.

"The only remaining question, therefore, is the quantum of damages. It appears that the farm was let at a reduction of £9 15s. per annum on the rent. I assume, in the absence of evidence to the contrary, and in view of the fact that the reduction which the bankrupt wanted himself was £30, that with every diligence no more could be got for it. The pursuers are therefore entitled to the present cash value of an annuity of £9, 15s. for thirteen years, being the term for which the lease had still to run. Making the calculation on a basis of 4 per cent., the amount is about £98, and for this sum the pursuers will have to be ranked on the estate."

On 1st April the Sheriff-Substitute pronounced an interlocutor in which he, *inter alia*, found "that the pursuers' ordinary claims consist of . . . (2) the sum of ninety-eight pounds of damages allowed by the preceding interlocutor, under deduction of the sum of fifty-seven pounds and eightpence admitted by the pursuers to be due to the defenders, and of the further sum of thirty-one pounds nineteen shillings and ninepence, claimed by the pursuers as discount, but disallowed."

The defenders appealed to the Court of Session, and argued—The landlord had exercised his reserved right to irritate the lease on the tenant's bankruptcy, for his acceptance of the renunciation amounted to nothing else, consequently he had no ground for claiming damages without an express reservation of such a claim. The Sheriff's interlocutor was wrong therefore.

The pursuers argued—(1) The Sheriff was right on the question of damages, but (2) both he and the Sheriff-Substitute were wrong in not allowing discount on the £63 due for meliorations. On the first question the pursuers' claim of damages was not barred by the renunciation. The fair meaning of the deed of renunciation was that they reserved their claim. If the landlord had suffered, or was likely to suffer, damages by reason of the renunciation it was not likely that he would give up all claim to these damages. Penalties were adjected to ensure the performance of his contract by the debtor; they did not absolve him from performance—Ersk. iii. 3, 86; Bell, sec. 1249. It was true that a superior could not claim arrears of feu-duty after irritating the feu. But that case was not analogous. It proceeded on the ground that the whole feudal estate had by the irritancy ceased to exist.

The Court advised (on 19th June) the case as regarded the question of damages before fully hearing the other question.

At advising—

Lord Justice-Clerk—I think that on the question of damages the Sheriff's interlocutor is wrong. I think that as the case stands the landlord has no ground for claiming damages. The tenant has renounced the lease, and the landlord has accepted the renunciation; that was a voluntary act on the part of both, and now comes the question whether the landlord can accept the renunciation of the lease and also claim damages on account of its termination. I am of opinion that he cannot do both. If he had irritated the lease, it is plain, I think, that he would have had no claim for damages. Here instead of allowing the landlord to irritate the lease if he chose, the creditors resolve voluntarily to renounce it, and resort to the landlord, with the result that an agreement is come to between the parties. In that agreement nothing is said about the landlord reserving a claim of damages, and he does not, I think, exercise the option which he had under the Case of declining to irritate. I therefore think that there is no ground on which his claim of damages can be sustained. There are some other questions raised in the case about which I shall say nothing at present. The case will be continued.

Lord Young—I concur. I think it is clear that when a landlord consents to terminate a lease he can have no possible claim of damages on account of its termination, unless he has in allowing the lease to be terminated reserved such a claim. Consequently the only case that can be made for the pursuers here is that in accepting the renunciation of the lease by the creditors they made such a reservation when they provided "that the landlords shall in no way be prejudiced by accepting this renunciation in place of terminating the lease as otherwise therein provided for." It was argued that if he had terminated the lease as otherwise therein provided for he would have had a claim of damages. I am as clearly of opinion as I can be on anything that if he had terminated the lease as he had a right to do he would have had no claim for damages. He cannot possibly claim damages for what he himself does. It may be profitable or it may be the reverse—profitable if the lease was worth taking over, or the reverse if he could not make more out of it by letting it to a new tenant, but the proposition that a landlord shall not have a claim of damages resting and exclusively resting on his own voluntary exercise of a deed in his own favour is, one would have thought, about as clear as any proposition can be. If I had to choose an example of a proposition in law which was almost self evident I could not have a better. Therefore I think that as regards the claim of damages the Sheriff-Substitute is right, and the Sheriff wrong.

Lord Craighill and Lord Rutherfurd Clark concurred.

On July 17th the pursuers argued that they were entitled to the discount on the £63 which they claimed, founding on *Pendreigh's Trustees* v. *Dewar*, cited by the Sheriff-Substitute.

The defenders distinguished *Pendreigh's* case from the present on the grounds stated by the Sheriff-Substitute, and argued that the landlord

having got possession of the subjects ought to pay their full value.

LORD JUSTICE-CLERK—I think that by accepting the renunciation the landlord necessarily agreed that the date of the renunciation should be the termination of the lease.

LORD YOUNG and LORD CRAIGHILL concurred.

LORD RUTHERFURD CLARK was absent.

The Court sustained the appeal, recalled the interlocutor of the Sheriff, and assoilzied the defenders, with expenses.

Counsel for Pursuers—Moncreiff. Agents—Carment, Wedderburn, & Watson, W.S.

Counsel for Defenders—Rhind—Orr. Agent—William Officer, S.S.C.

HOUSE OF LORDS.

Thursday, March 4.

(Before Earl of Selborne, Lords Watson, Fitzgerald, and Ashbourne.)

NEILSON *v.* MOSSEND IRON COMPANY.

(*Ante*, vol. xxii. p. 265, Dec. 19, 1884.)

Partnership—Dissolution—Partnership-at-Will—Tacit Relocation.

Where there is a partnership for a term of years, and it is, after the expiration of the term, continued at will, the presumption is that the new partnership is on the terms of the old so far as applicable, but so far only.

A clause in a contract of partnership provided that "if within three months before the termination of this contract the whole partners of the company shall not have agreed to carry on the business thereof, any one or more of them who may be desirous of retiring shall be entitled to do so, and shall immediately on the completion of the balance after mentioned be paid out by the partners electing to continue the business his share in the concern as the same shall be ascertained by a balance of the company's books as at the termination of the contract, to be completed within not more than three months from said termination," and it provided for a certain mode of winding-up if the partners wished. The time for which the contract was to run expired, and the business was carried on as a partnership at will. *Held* (*alt.* judgment of First Division) that this provision as to three months from a fixed period, the termination of the original contract, were inapplicable to a partnership-at-will, and therefore that that article was not carried into the partnership-at-will.

This case is reported *ante*, 19th December 1884, 22 S.L.R. 265, and 12 R. 499.

The present appeal was by Hugh Neilson jun. in his action founded on his notice of dissolution of 4th May 1883, to have decree of winding-up and realisation of the assets of the company. It will be necessary only to refer to the following facts:—The company was founded in 1842. In 1867 a seven years' contract was entered into. In 1875 Hugh Neilson jun., the appellant, was assumed as a partner, and a draft new contract prepared, which slightly modified the provisions of the 1867 contract, and stated that the term was to be seven years or till 31st May 1882. There were 96 shares, of which Hugh Neilson jun. had five. During the litigation previously reported (see reference *supra*), in which the trustees of the late W. Neilson claimed to be partners, Hugh Neilson jun. gave on 4th May 1883 his notice of dissolution, and raised this action on 14th May 1883.

The Mossend Company contended that the provisions of the draft contract for 1875, or at all events that of 1867, were still applicable although the partnership had become one at will, and that Hugh Neilson jun. was only entitled to have his share paid out in terms of article 12 of the draft contract of 1875.

The clause (12), so far as material, was—"If three months before the termination of this contract the whole partners of the company shall not have agreed to carry on the business thereof, any one or more of them who may be desirous of retiring shall be entitled to do so, and shall, immediately on the completion of the balance after mentioned, be paid out by the partner or partners electing to continue the business, his or their share and interest in the concern as the same shall be ascertained by a balance in the company's books as at the termination of the contract to be completed within not more than three months from said termination, and that either in cash or by his or their bills with security, and in the event of the partners differing as to the security, or as to the date at which the bills shall be drawn, or otherwise, the terms shall be fixed by the arbiter after mentioned, but if the whole partners wish, the property and assets of the copartnery shall be disposed of as follows." . . . .

At delivering judgment—

EARL OF SELBORNE—This is a short and, in my view, a simple question of construction.

There is no doubt about the law that when there is a partnership for a term of years, and it is afterwards, after the expiration of the term, continued at will, the rule, in the absence of contract to the contrary, is that it may be presumed that the new business is carried on upon the old terms as far as they are applicable to it, and only so far; and as far as the principle is concerned I do not think there is any discrepancy between any of the authorities. It is not at all necessary to examine into the particular cases in which it has been held that a particular term of a written contract did or did not go into the new and unwritten contract, because every case has turned upon its own particular circumstances, and upon the question as applied to the words of the particular instrument, whether the old term was or was not applicable to the new contract.

Now, here we have to consider whether the 12th article of the contract, which was for seven years ending on the 31st of May 1882, is applicable to the subsequent partnership at will. The proper way to examine that question, as it seems to me, is first to determine what is the true and proper construction of the words of that article