is, was Hugh Campbell, who was in occupation at Whitsunday 1886, in June, when the Act passed, but who died before the confirmation of the Commissioners' determination by the Secretary of State, a crofter in the sense of the Act of Parliament? All the essentials as regards occupation were fulfilled, but we must refer for light upon the question to the definition of the word "crofter" in sec. 34, which says—"In this Act 'crofter' means any person who at the passing of the Act is tenant of a holding from year to year, who resides on his holding, the annual rent of which does not exceed thirty pounds in money, and which is situated in a crofting parish, and the successors of such person in the holding, being his heirs or legatees."

It is quite plain that the first part of that definition applied to Hugh Campbell. He was a crofter at the time, he was a tenant of his holding from year to year, he resided on his holding, the annual rent of which did not exceed £30, and the holding is now situated in what has been designated the crofting area, and neither he nor his successors can be removed therefrom. It does not appear that there is anything awanting in the case of Campbell to comply with this definition in the Act. It does not say that a crofter at the beginning of the Act will not be enough. Nothing of the kind. The expression used is a very remarkable one—"Any person who at the passing of this Act is tenant of a holding from year to year." It is not "was" but "is." There may be a little difficulty as regards the time at which the parish becomes a crofting parish, but anything awanting in that respect is made up for by the direction that "crofter" shall include the heirs and successors of the man in possession at the passing of the Act. Thus Hugh Campbell remained in his croft until his death in September, and when he died the other part of the definition comes in—"successors of such person in the holding, being his heirs or legatees." There was thus all that was necessary in the way of occupation, and that was followed by the designation of the parish by the Commission, and the approval of that designation by the Secretary for Scotland.

The only other difficulty experienced by the Sheriff regarded the 19th section, which enacts that the Crofters Commission after due inquiry shall ascertain what parishes within certain counties are crofting parishes, and shall determine that this Act shall apply to them. Such determination is to be reported to the Secretary for Scotland in one or more reports and may be confirmed by him with or without modification, and from and after the date of such confirmation it shall apply to the parish included in the determination. The provisions of the Act, no doubt, can only be carried out after that, but because that is so, there is nothing in that which, according to my view of the matter, detracts from the character stamped upon "crofter" and "heirs or legatees" at the time of the passing of the Act. The subsection which follows is of some moment for it says—"Within the parishes to which the Act is determined to apply as aforesaid, this Act shall apply to every crofter who is the tenant of a holding at the passing of the Act, and to his heirs and legatees, in the same manner as if the tenancy were a lease." It is to apply to the man in occupation at the passing of the Act, and if he is deceased at the time when the Commissioners designate the parish and the Secretary for Scotland approves, the other portion of the definition comes to receive effect, and indeed, if that were not so, the Act in many cases, as in this, would become of no avail. But in this case I do not think there is room for doubt. I do not see how you can get the better of that reading. I quite see how a plausible complexion may be given to a reading the other way, but I do not think the difficulty is a great one, and I therefore take the same view as the Sheriff-Substitute. I am obliged to dissent from the other view which was adopted by the Sheriff. It would seriously encroach on the provisions of the statute, and the rights intended to be conferred.

Lord Young was absent from illness.

The Court sustained the appeal, recalled the interlocutor appealed against, and assoilzied the defender.

Counsel for the Appellants—M'Kechnie—Shaw. Agents—Curror, Cowper, & Curror, W.S.

Counsel for the Respondent—Lorimer. Agent—F. J. Martin, W.S.

Wednesday, February 29.

FIRST DIVISION.

[Sheriff-Substitute, Edinburgh.

MENZIES *v.* WHYTE.

Reparation — Damage Caused to Tenant by Operations on Adjoining Premises—Duty of Tenant to Call on Landlord to Protect—Relevancy.

In an action of damages at the instance of the tenant of a shop against his landlord, in respect of operations by a third party upon the adjoining premises, which the tenant averred had compelled him to leave the shop, *held* that it was the duty of the tenant, before leaving, to have called on the landlord to protect him in the beneficial occupation of the subjects let, and, as there was no averment that he had done so, action *dismissed* as irrelevant.

This was an action of damages at the instance of Robert Menzies, fishmonger, against William Thomas Whyte, chartered accountant, Edinburgh. The defender had let to the pursuer the shop and premises No. 173 Morrison Street, Edinburgh, to be occupied by him as a fishmonger, at an annual rent of £15, for three years, with entry at Whitsunday 1887.

The pursuer's averments were these:—"The pursuer entered into possession on 1st July 1887. On the 4th of that month, being three days after pursuer's entry, operations were commenced to take down the old buildings immediately to the west of pursuer's said premises, and a new tenement is in course of erection on the site. In these operations there has been erected on the west side of pursuer's front shop a hoarding of about six feet high, which extends from the front wall of said shop and into

Morrison Street 36 feet or thereby. Said hoarding encroaches on the front wall of pursuer's said shop, cutting off or covering part of his sign-board; besides, the hoarding is so defective that it does not afford protection against lime and other dust arising from said operations reaching pursuer's said premises, and destroying his goods. The drainage-pipe within the front railing of pursuer's said premises, and connected therewith, has been cut, and the pursuer deprived of the use thereof. Part of the oven in the pursuer's back shop, and which oven is required by him in his business, has been taken down, and an opening made through which any person may enter the premises. As said new building is proceeded with, the pursuer will be deprived of the window light in the centre room or division of said premises. By these proceedings the pursuer has been deprived of the use of said shop and premises and he has been compelled to leave the same and relinquish his business."

Immediately before the pursuer left the premises in question his agent had written a letter to the defender on 12th August 1887 in these terms—"By the operations on the tenement, or in the building of a new tenement, adjoining Mr Menzies' shop at 173 Morrison Street, his business has been stopped, and the shop shut. A hoarding has been put up in front of, and close to, and on the front wall of the shop, the window in the centre division of the shop has been broken, and in time will be built over. Part of the back wall has been taken down, and through the opening the shop can be entered. Mr Menzies will claim damages for the stoppage thus put to his business, and being compelled to leave the shop."

The pursuer pleaded—"(1) The defender having let to the pursuer the premises as condescended on, and the pursuer having been compelled to leave the same through his being deprived of the use thereof, the pursuer is entitled to damages as concluded for. (2) The defender being proprietor of the premises let by him to the pursuer is bound to protect him in the useful possession thereof, and the defender having failed to do so, and the pursuer having been compelled to remove from the same under the circumstances condescended on, the pursuer is entitled to decree as craved, with expenses."

The defender pleaded that the action was irrelevant.

On 21st October the Sheriff-Substitute (Rutherfurd) found that the pursuer's averments were not relevant or sufficient to infer liability for damages on the part of the defender, and dismissed the action.

The pursuer appealed to the Court of Session, and argued—This was not a case for a mere abatement of rent; the landlord should be found liable also in damages for the loss of business suffered by the tenant—Ersk. ii. 6, 43; *Deans*, 1681, M. 10,192. What was made out against the landlord here was personal fault, because when asked to vindicate his tenant's rights he refused. The duty of the landlord was to maintain his tenant in the beneficial possession of the subject, and this he had failed to do—*Kippen* v. *Oppenheim*, Dec. 13, 1847, 10 D. 242; *Goskirk* v. *Edinburgh Station Access Company*, Dec. 19, 1863, 2 Macph. 383; *Laurent* v. *Lord Advocate*, March 6, 1869, 7 Macph. 610; *Miller* v. *Renton & Beattie & Son*, Dec. 8. 1885, 13 R. 300.

Argued for the respondent—The action was irrelevant. The tenant was not entitled to leave before writing the letter of 12th August. He ought to have waited to see whether the defender would do anything for him. The damage complained of was repaired as soon as notice was sent regarding it. The actings of the pursuer were unreasonable—*Gardner* v. *Donald & Walker*, July 19, 1862, 24 D. 1430.

At advising—

Lord President—The premises in question were let by the defender to the pursuer to be used by him in his business as a fishmonger. The allegation of the pursuer is that he entered into possession of the premises upon the 1st of July last, and that three days thereafter operations were commenced for the purpose of taking down certain old buildings immediately to the west of his premises; that a hoarding was erected in front of his shop which caused him great inconvenience, and that in consequence of these operations on the adjoining buildings his goods were destroyed. I think it was admitted by the appellant's counsel that these statements were not relevant; but then the pursuer goes on to aver that "the drainage-pipe within the front railing of pursuer's said premises, and connected therewith, has been cut, and the pursuer deprived of the use thereof. Part of the oven in the pursuer's back shop, and which oven is required by him in his business, has been taken down, and an opening made through which any person may enter the premises." Now these are undoubtedly encroachments upon the rights of the pursuer in his enjoyment of the subject of the lease, whether they are made by the landlord or by some third party. What the pursuer ought to have done was undoubtedly to have gone to his landlord and called upon him to defend him in the beneficial occupancy of the subjects. If the defender here had thereupon refused to take any steps to protect his tenant, or had delayed to do anything for him, that would have been a very different state of matters from what we have to deal with. But it is essential that the pursuer should aver that he took some step of this kind, and I can see no relevant averment that any such course was followed. What the pursuer has to show is that on his applying to the landlord to defend him the latter absolutely refused or wilfully delayed to do so.

In place of making any such averment the pursuer's counsel read a letter which I have no doubt he would desire if it could do him any good to embody in his condescendence. That letter is as follows—[*reads letter quoted above*].

Thereafter, without waiting to see if the landlord would do anything in the matter, he shuts the shop and leaves the premises. In all this I can see nothing to suggest a failure of duty on the part of the landlord, but a good deal to indicate a failure of duty on the part of the tenant, and I think his action of damages against his landlord accordingly breaks down.

I am for adhering to the Sheriff-Substitute's interlocutor.

Lord Adam and Lord Kinnear concurred.

Lord Mure and Lord Shand were absent from illness.

The Court adhered.

Counsel for the Appellant—M'Lennan. Agent—R. Broatch, L.A.

Counsel for the Respondent—Gunn. Agents—Cownie & Galbraith, S.S.C.

Tuesday, February 9.

OUTER HOUSE.

[Lord Kinnear, Ordinary.

BURNETT AND OTHERS *v.* THE BRITISH LINEN COMPANY.

Husband and Wife—Wife's separate Estate—Promissory-Note.

The income of a married woman's separate estate was paid by trustees quarterly into her bank account. She granted a promissory-note to the bank, along with her husband, for an advance made to the latter. The promissory-note was not retired when it fell due, and the bank debited the wife's account with its amount. *Held*, in an application for interdict against the bank, that they were entitled so to debit the wife's account.

George Burnett, advocate, 21 Walker Street, Edinburgh, and Alexander Nicolson, advocate, Greenock, were trustees acting under the marriage settlement of Mr Æneas Ronald Macdonell of Morar, and Mrs Catherine Sidgreaves or Macdonell his wife, dated 12th September 1859, and were also trustees acting under the will of the late Mrs Dorothy Sidgreaves of Preston, dated 8th December 1862.

The funds held by the trustees under the marriage settlement and will were by both these deeds directed to be invested, and the trustees were thereby directed to pay the income thereof to Mrs Macdonell for her life, "for her separate use, without power of anticipation."

Mrs Macdonell had kept a current deposit account for many years with the British Linen Company at their West End branch at Edinburgh, and had been in the habit of regularly drawing cheques upon that account, which were always honoured. Her trustees at her request paid the income of her separate estate into her account in quarterly instalments of about £225 each.

On 9th July 1887 Mr Macdonell presented the following promissory-note, signed by himself and his wife, to the agent of the bank:—"Three months after date we jointly and severally promise to pay to the British Linen Company Bank, or order, at their West End branch here, the sum of one hundred and fifty pounds stg., value received. £150. ÆNEAS R. MACDONELL—CATHERINE MACDONELL,"—and he requested an advance of the amount contained in the promissory-note. The bank's agent made the advance requested.

On 1st October 1887 the trustees paid into Mrs Macdonell's account the sum of £225, and upon 12th October the promissory-note not having been retired, the bank's agent wrote a letter to Mrs Macdonell in the following terms:—"I beg to acquaint you that I have to-day debited your account with £150, being the amount of the joint promissory-note to the bank by Mr Macdonell and yourself due to-day. This leaves a balance of £31 at your credit. Please send me your cheque for £150. On receipt of your cheque I will send you the pro.-note."

Mrs Macdonell declined to give her cheque for £150 in exchange for the promissory-note.

The trustees then presented along with her a note of suspension and interdict against the British Linen Company, praying the Court "to suspend the proceedings complained of, and to interdict, prohibit, and discharge the said respondents from debiting the moneys which at or before 12th October 1887 were paid by the complainers, the said trustees, to the credit of the complainer Mrs Macdonell with the respondents' West End branch bank in Edinburgh, with the amount of a pretended promissory-note, dated on or about 9th July 1887, by which it is alleged that the complainer, three months after date, jointly and severally with her said husband, promised to pay to the British Linen Company Bank, or order, at their said West End branch, the sum of £150, value received; and further, to ordain the respondents, if the moneys shall have been so debited, to restore the said sum for £150 to the credit of the complainer Mrs Macdonell in their books as on the 12th day of October 1887."

The complainers averred that Mrs Macdonell had received no value for the promissory-note which had been discounted with the bank agent by her husband for his own purposes, and that she repudiated it as null and void, and of no force against her or her separate estate.

The respondents in their answers stated that being accustomed to honour Mrs Macdonell's cheques, and relying upon her long course of honourable dealing with them, their agent, on receiving the promissory-note, made the advance requested, upon the faith of her signature to it.

The complainers pleaded—"(1) The said pretended promissory-note being null and incapable of being enforced against the complainer Mrs Macdonell or her separate estate, the complainers are entitled to suspension and interdict as prayed for. (2) The moneys paid to the credit of the complainer Mrs Macdonell with the respondents' said bank by the complainers the said trustees being applicable under the said marriage settlement and will only for her separate use, and without power of anticipation, are not subject to the said pretended promissory-note. (3) The respondents, if the said moneys shall have been so debited, ought and should be ordained to restore the said sum of £150 to the credit of the complainer Mrs Macdonell in their books as on the 12th day of October 1887, in terms of the prayer to that effect."

The respondents pleaded—"(2) The complainers George Burnett and Alexander Nicolson, as trustees foresaid, have no title to sue this suspension and interdict. (4) It being too late to interdict the act complained of, the note ought to be refused. (5) The said promissory-note being valid and obligatory on Mrs Macdonell, and enforceable against her separate estate, this note of suspension and interdict ought to be refused. (6) The said promissory-note being equivalent to a draft by Mrs Macdonell upon her account, the respondents were entitled to place it when due to the debit of he