I fail to see any legitimate interest the pursuers have to plead that such accidents of navigation shall not be as good an answer to them as to the charterers. They had no better or higher right under the bill of lading than Messrs Stevenson & Company could give them, and I do not think that Stevenson & Company by the terms of the bill of lading professed to give them any higher or better right.

On the whole, I come to the conclusion, for the reasons above stated, that the shipowners are not liable either for the iron or for the coal.

The Court pronounced this judgment—

"The Lords having resumed consideration of the cause, with the opinions of the consulted Judges, in conformity with the opinions of the majority of the whole Judges of the Court, Recal the interlocutor of the Lord Ordinary of 24th December 1887: Ordain the defenders to make payment to the pursuers of the sum of £451 sterling, being the market price at the port of delivery of the coals libelled, with interest thereon at the rate of 5 per centum per annum from the date of citation to this action till payment: Find the defenders liable to the pursuers in expenses," &c.

Counsel for the Reclaimers — Graham Murray—Dickson. Agents—Boyd, Jameson, & Kelly, W.S.

Counsel for the Respondents—Jameson—Ure. Agents — Webster, Will & Ritchie, S.S.C.

Friday, December 6.

FIRST DIVISION.

[Lord Kinnear, Ordinary.

TOD *v.* FRASER.

Landlord and Tenant—Lease—Tacit Relocation—Violent Profits—Damages.

A tenant of subjects from year to year gave notice of removal at the following Whitsunday. His landlord accepted the intimation. Owing to illness and other causes the tenant continued to occupy for three months beyond the expiry of his tenancy, but without having made any arrangement with the landlord, and without having obtained his consent to continue in occupation. In an action by the landlord for a year's rent of the subjects — *held* that in the circumstances the lease had not been renewed by tacit relocation, that a claim for violent profits would have been within the strict legal right of the landlord, and decree by the Lord Ordinary on a restricted claim for six months' rent *affirmed.*

Process — Expenses — Debts Recovery Act 1867 (30 *and* 31 *Vict. cap.* 96), *sec.* 2.

In an action in the Court of Session for payment of £40, being a year's rent of a house, the defender argued that the expenses should be estimated on the scale of the Debts Recovery Act. It appeared that after giving notice of removal at the term he continued to occupy the premises for three months thereafter without renewing his lease or obtaining any consent of the landlord. In the Outer House the landlord had restricted his claim to £20. The Court, in the exercise of their discretion, and looking to the fact that the defender had behaved unreasonably, found the pursuer entitled to expenses.

Walker v. *Hoggan*, July 17, 1884, 11 R. 1101, *followed.*

William Tod, proprietor of Howden House, Midcalder, sued William Fraser, lately tenant there, for £40, being a year's rent of this house, which the defender continued to occupy after his lawful tenancy of the subjects had terminated. It had been let to him from year to year for three years.

On 23rd March he wrote to Tod—"It is now very probable that we will be removing to be nearer Glasgow at the coming term, and I now give notice of my intention to leave Howden then. Should I change my mind as the time draw nearer, and you still free to renew my tenancy, we will no doubt can arrange for this."

Tod replied on 25th March—"I have yours of 23rd to-day, giving notice of your intention to leave Howden House at Whitsunday. In the meantime I accept intimation, but should be glad if you saw your way to renewing your tenancy."

On 26th May Tod intimated to Fraser that if he did not remove by the 28th of that month he would hold him liable for another year's rent. On receipt of this intimation Fraser replied on the same date—"I am very much astonished and surprised at this. I believe you knew at the time that my wife had been confined yesterday afternoon, and that in consequence it is impossible for to remove on the 28th instant. I shall remove from Howden so soon as my family are in a condition to do so with perfect safety, but certainly not sooner. Of course I quite understand you cannot hold me for another year's rent."

Tod replied on the 28th May—"I accepted your intimation to leave, but hoped you might see your way to remain; with this expectation I did nothing to secure a new tenant, and therefore hold that as you have not made arrangements to leave at the term, nor had the courtesy to beg to remain a little longer, you are my tenant still. I have no desire to take the smallest advantage of you, only beg you to remember that if you are not my tenant, every day you remain longer at Howden you remain upon my sufferance alone."

Fraser replied on May 30th—"You got proper and due intimation of my intention to leave Howden at this term. I told you if I changed my mind arrangements might be made to renew my tenancy. As you know, I have not changed my mind, nor asked to make arrangements to renew my tenancy. If you have chosen in the face of this to make no effort

to find a tenant, the fault is yours not mine. I am detained here by circumstances beyond my control, and this was within your knowledge."

Scarlet fever broke out in Fraser's family, and it was not until 13th August that he was able to hand over the subjects to Tod. He refused to pay more than £10 for the period he had continued to occupy the subjects without the consent of the proprietor, who raised this action for the sum of £40.

The pursuer pleaded—(2) That as the defender had continued to occupy the subjects in question after the term of Whitsunday, he was liable as tenant for another year to pay a full year's rent.

The defender pleaded—(1) That as the defender had given, and the pursuer had accepted, notice of the termination of the lease of Howden at Whitsunday 1887, he was only liable for rent during the period of his actual occupancy after that term.

The Debts Recovery Act 1867 (30 and 31 Vict. c. 96), sec. 2, provides—"It shall be lawful for any sheriff in Scotland within the sheriffdom to try and determine in a summary way, as more particularly hereinafter mentioned, all actions of debt that may competently be brought before him for house maills, men's ordinaries, servant's fees, merchants' accounts, and other the like debts, wherein the debt shall exceed the value of £12 sterling, exclusive of expenses and dues of extract, but shall not exceed the value of £50 sterling, exclusive as aforesaid," &c.

In the discussion before the Lord Ordinary the pursuer restricted his claim to a half-year's rent, or £20.

On 19th July 1889 the Lord Ordinary (KINNEAR) decerned against the defender for £20, and found the pursuer entitled to expenses.

"*Opinion.*—The defender was tenant of a house and garden belonging to the pursuer under a lease for three years from Whitsunday 1884. On the 23rd of March 1887 the defender gave notice of his intention to leave at the following Whitsunday, and the pursuer acknowledged receipt of the notice. The defender's lease was therefore at an end on Whitsunday 1887, and he was bound to remove at that term. But in his letter of the 23rd March he had suggested that he might possibly change his mind as the time for leaving drew nearer, and that in that event a new arrangement might probably be made. No new arrangement was made, but circumstances occurred which made it inconvenient for the defender to remove at Whitsunday. He and his family continued to occupy the house until the 9th of August, and on that day he intimated to the landlord that he was prepared to cede possession on the 13th. In these circumstances he maintains that he is not liable for a term's rent, but merely for a proportion of a term's rent corresponding to the period of his actual occupancy since Whitsunday. His contention is that the lease was effectually determined, and tacit relocation excluded by his notice in March, but that in consequence of his notice he was entitled to remain in possession without renewing the lease, because he was prevented from removing, first, by his wife's confinement, and afterwards by illness in his family. But to say that a lease has been effectually determined, and yet that a tenant shall be entitled to remain in possession for an indefinite period on any ground of convenience to himself or his family, appears to me to be a perfectly untenable proposition. It is of no consequence to the question of right whether the inconvenience is so serious as it appears to have been in the present case, or comparatively trifling. It was the defender's misfortune that the first cause of detention should have occurred at such a time, and again it was his misfortune that he and his family were attacked by illness. But he is not entitled to throw the burden of these misfortunes upon other people, or to retain possession of his landlord's property except upon conditions to which the latter is willing to agree. It was just a part of the defender's misfortune that he could not conveniently or even safely remove from a house of which he would not otherwise have desired to renew the lease. But there was no middle course between removal and renewal.

"The pursuer's counsel has stated at the bar that he adheres to his offer to accept a half-year's rent, and I therefore give judgment for the sum of £20."

The defender reclaimed.

The case was heard before the Lord Probationer (LORD KINCAIRNEY).

Argued for the reclaimer—*On the merits*—The intimation by the tenant, and the acceptance of this by the landlord, barred tacit relocation; if, however, this was to be viewed as a case of tacit relocation, it continued only during the period of actual occupancy, and the tenant was only liable in the proportion of the annual rent effeiring to the period of his actual occupancy. If the defender had not continued to occupy, the house would have stood empty, for it was not alleged that the house was let, or that the pursuer was in any way prejudiced by the actings of the defender. The £10 offered by the defender was ample remuneration—*Robertson & Company* v. *Drysdale*, February 21, 1834, 12 Sh. 477; Ersk. ii. 6, 35. *On expenses*—Looking to the sum concluded for, the action should have been brought in the Sheriff Court under the Debts Recovery Act 1867, and in the event of the pursuer being successful he was only entitled to expenses on the scale allowed by that Act—*Walker* v. *Hoggan*, July 17, 1884, 11 R. 1101; *Wilkie* v. *Alloa Railway Company*, December 3, 1884, 12 R. 219.

Argued for the respondent—There was in this case tacit relocation, and the pursuer was entitled to a year's rent of the subjects. When the defender found that he would not be in a position to leave the house at Whitsunday he ought to have opened negotiations with the pursuer, but by continuing to occupy without any arrangement he prevented the pursuer from getting another tenant, and inflicted loss upon him,

the measure of which was a year's rent. The house was unfit for letting when the defender quitted it in August in consequence of illness in his family. There was no principle in the mode of fixing the damages sustained by the pursuer suggested by the defender. A year's rent was not an unreasonable demand, but the pursuer was still willing to limit his demand to six months' rent. *On the question of expenses*—The case undoubtedly fell under the Debts Recovery Act, but the question was one, on the authorities cited by the reclaimer, for the discretion of the Court, and looking to the unreasonableness of the defender's demands this was not a case in which the Court would interfere with the discretion exercised by the Lord Ordinary.

THE LORD PROBATIONER was of opinion on the merits that the Lord Ordinary's interlocutor should be adhered to. With regard to the question as to the scale upon which the expenses should be estimated, his Lordship was of opinion that he was not entitled to deal with the matter.

LORD PRESIDENT (after consultation)—Lord Probationer we do not think it necessary to call for your Lordship's opinion as to the scale upon which the expenses fall to be estimated.

At advising—

LORD PRESIDENT—The defender here was the tenant of the pursuer in Howden House near Midcalder, and he held the subjects from year to year for three years at a rent of £40 per annum.

In March 1878 he gave notice to the pursuer of his intention to leave, in these terms—"It is now very probable that we will be removing to be nearer Glasgow at the coming term, and I now give notice of my intention to leave Howden then. Should I change my mind as the time draws nearer, and you still free to renew my tenancy, we will no doubt can arrange for this." This letter was answered by the pursuer two days later in these terms—"I have yours of the 23rd to-day, giving notice of your intention to leave Howden House at Whitsunday. In the meantime I accept intimation, but should be glad if you saw your way to renewing your tenancy." Now, notice of removal having thus been given by the tenant and accepted by the landlord, unless some steps were taken by the tenant to renew his tenancy nothing remained but that he should quit the subjects at the approaching Whitsunday. Nothing was done by the tenant, and the pursuer fully expected that he would leave at the usual time.

When Whitsunday arrived the defender found himself in this difficulty, that whether expectedly or unexpectedly does not very clearly appear, his wife was brought to bed of a child, and afterwards scarlet fever seems to have broken out in the family, and from both these causes it came about that the house was not vacated by the defender until the 9th of August.

The position which the defender took up in the matter is thus set out in a letter by him to the pursuer dated 30th August 1887. He says—"I am in receipt of your letter of the 28th inst., I am very much surprised by what you state. You got proper and due intimation of my intention to leave Howden at this term. I told you if I changed my mind arrangements might be made to renew my tenancy. As you know, I have not changed my mind nor asked to make arrangements to renew my tenancy." So that the position in which the defender puts himself is this, that he continues to occupy this house for three months without any title whatever, his yearly tenancy having expired, and there not having been on his own showing any attempt at a renewal.

Now, if I were disposed to take a strict view of this case, I should say that the defender in the course which he has followed has laid himself open to an action for violent profits, and that the pursuer, had he made such a demand, would only have been acting within his strict legal rights. Instead of this all that the defender is called upon to pay is one half-year's rent, and for my part I cannot understand the ground upon which the defender seeks to resist so exceedingly moderate a claim. I therefore entirely agree with the Lord Ordinary, and am for adhering to his interlocutor.

Another question has, however, been raised under this reclaiming-note, and that is, whether seeing this action is practically for a sum of £20, the action should not have been brought in the Sheriff Court under the Debts Recovery Act 1867, and whether the pursuer is now entitled to recover from the defender a higher rate of expenses than he would have been found entitled to if successful under that Act. [*His Lordship here read the sections of the Act above quoted,*]

Now, we all came to the conclusion in the case of *Walker*, 11 R. 1101, that it was a question entirely for the discretion of the Court whether in the circumstances of any particular case expenses should be awarded at the lower or the higher rate, and that accordingly brings us to the consideration of the merits of the present cause. Now, it appears to me that from the outset here the defender has behaved most unreasonably. Looking to his position in this case, I think he was dealt with most leniently by the Lord Ordinary, and seeing that he was not satisfied with that judgment, but brought it under review, and further, looking to the circumstance that apparently in the opinion of the Lord Ordinary this was not a case for restricting the expenses as his Lordship has not dealt with this matter, I do not see that it is a case in which we should in any way interfere with what the Lord Ordinary has done. I am therefore for adhering.

LORD SHAND—[*After narrating the facts of the case*]—It appears to me therefore that in the circumstances of this case there is no room for tacit relocation; that can only be successfully maintained when the tenant gives no notice of his intention to remove. What the tenant here did was to give

notice of his intention to terminate his tenancy, but he did not follow out his notice by leaving at the Whitsunday following. He now seems to think that because his non-removal was occasioned by a circumstance beyond his control he is on that account entitled to be freed from any damage which the landlord may thereby have suffered. How then is that damage to be measured? It might in the circumstances be fixed at the annual rent of the subjects, but the landlord has consented to limit his claim to half a year's rent, a concession which I consider most reasonable.

On the question of expenses—No doubt in the ordinary case expenses would only be allowed at the lower rate allowed by the Debts Recovery Act, but in the present case I am not disposed to interfere with what the Lord Ordinary has done. There can be no doubt, from the attitude which the defender has assumed throughout the case, that if it had originated in the Sheriff Court, and if the decision there had been adverse to him, he would have brought the case here on appeal. In such circumstances I am not for interfering with the discretion of the Lord Ordinary in such a matter.

LORD ADAM—I agree with your Lordships, and also generally with the Lord Ordinary. There is, however, one sentence in his Lordship's note that I am not quite sure that I concur with. It is that passage in which he says—"There is no middle course between removal and renewal." If by this is meant that the tenancy was renewed on the old footing for another year in consequence of the tenant not removing at Whitsunday, then clearly that was not the case, for as Lord Shand has pointed out, there was not in the present case any room for the doctrine of tacit relocation. That being so, and the tenant continuing to occupy without any title whatever, he was just "a vitious intromitter," and the sum which the Lord Ordinary has awarded in name of damages seems in every way reasonable. I also entirely agree with your Lordships as to the way in which the expenses in this case ought to be dealt with.

LORD M'LAREN was absent.

The Court adhered.

Counsel for the Pursuer — Macfarlane. Agents—J. C. & A. Steuart, W.S.

Counsel for the Defender—Ure. Agents—Cairns, M'Intosh, & Morton, W.S.

Saturday, December 7.

SECOND DIVISION.

[Sheriff of Lanark.

BELL *v.* FREW.

Verbal Lease for Term of Years—Action for Rent — Mode of Proof — Counter Claims.

A tenant under a verbal lease for eighteen years paid rent regularly at the rate of £100 per annum for ten years. At the end of that period he declined to pay a half-year's rent, admittedly due, because he had, as he alleged, counter claims against his landlord for a larger amount than £50. After a proof at large in an action brought in the Sheriff Court at the instance of the landlord to enforce payment of the half-year's rent, the Sheriff-Substitute gave decree as craved, but the Sheriff reversed, holding that the amount of rent due could only be proved by the writ or oath of the defender, and that his admissions must be taken, subject to certain qualifications made by him.

Held that as the tenant had been in possession during the half-year for which rent was sought to be enforced, and had been in use to pay every half-year the sum sued for, decree should be pronounced as craved, reserving to the defender his right to constitute in a separate action any counter claims he might have against the pursuer.

David Frew, farmer, Hill of Westerhouse, Carluke, entered into possession of the said farm at Martinmas 1874 and Whitsunday 1875, under a verbal lease for eighteen years. The proprietor of the farm was the late Andrew Bell, Greenfield House, Wishaw, who died on 15th August 1885. The rent as finally agreed on was £100. A formal lease was prepared in 1876, but as the tenant took exception to its terms it was never executed. The tenant continued to pay the half-year's rent of £50 regularly at Martinmas and Whitsunday respectively until Martinmas 1886, when he declined to pay the half-year's rent then due, on the ground that he had counter claims against the landlord or his representatives which exceeded in value the amount of the rent due.

Mrs Bell, the widow and sole surviving trustee and executrix of the late Andrew Bell, brought an action in the Sheriff Court at Lanark against Frew to enforce payment of the half-year's rent.

The pursuer averred—"There became due and payable at the term of Martinmas 1886 the sum of £50, being the first half of the rent for the year commencing at Martinmas 1885 and Whitsunday 1886 respectively. Notwithstanding that the defender has been repeatedly desired and requested to make payment of the said rent he has failed, or at least delayed, to do so, and the present action has been rendered necessary."