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."

The defender answered — "Admitted, under reference to the defender's statement of facts. The defender is not owing the pursuer any part of the rent sued for;" and in his statement of facts he set forth various counter claims.

The pursuer pleaded—"(1) The defender being the tenant, and having occupied and possessed the said lands and farm for the period stated, is liable in payment of the stipulated rent therefor, payable at Martinmas 1886, and decree should be granted accordingly, with expenses. (2) The claims of the defender are unfounded on fact, are irrelevant, and the pursuer is not owing the sums stated, or any part thereof."

The defender pleaded—"(2) The pursuer being due and indebted to the defender in a sum in excess of that sued for, through faults and failures of herself and her predecessors, arising out of the same bargain, she is not entitled to decree for the sum sued for."

On 22nd April 1887 the Sheriff-Substitute (BIRNIE) pronounced an interlocutor allowing a proof *habili modo*.

"*Note.*—The parties are referred to *Bathie* v. *Lord Wharncliffe*, 1883, 11 Macph. 490, and *Paterson* v. *Earl of Fife*, 1865, 3 Macph. 423."

The pursuer appealed to the Sheriff (BERRY), who affirmed the Sheriff-Substitute's interlocutor.

"*Note.*—I think that a proof cannot be avoided in this case. The defender denies the contract of lease on which the pursuer founds, and as a proof in support of the pursuer's case is necessary, the course taken by the Sheriff-Substitute of allowing a proof on both sides before answer seems expedient."

After the proof the following interlocutor was pronounced by the Sheriff-Substitute:—"Finds the defender liable to the pursuer in £43, 14s. 10d., being £50, the half-year's rent sued for, less £1, 17s. 2d. excess of insurance, and £4, 8s. loss by mineral workings, with interest on said sum of £43, 14s. 10d., as craved: Finds the defender liable to the pursuer in expenses," &c.

The defender appealed to the Sheriff, who pronounced the following interlocutors:—"*Glasgow*, 29*th March* 1889.—Having heard parties' procurators, and considered the whole case under reference to the annexed note, orders the case to the roll of the vacation Court.

"*Note.*—The case set up by the pursuer, under which she claims payment of a half-year's rent from the defender is a lease for eighteen years at an annual rent of £100 payable half-yearly at Martinmas and Whitsunday. There has been no formal lease executed, but an unexecuted lease prepared in 1876, after the tenant had been in occupation of the farm for about a year, has been produced by the pursuer, and if it had been shown that that document embodied the agreement of parties, and *rei interventus* had followed upon it, the provisions contained in it might have been effectual. It is not necessary, however, to look further than to the evidence of the pursuer herself to see that the document was never accepted by the defender as setting forth the contract under which he occupied the farm. She says that the defender refused to sign it, that another document was prepared by him and sent by him to the landlord, her late husband, but that he in his turn would not sign the tenant's draft. In these circumstances the pursuer must be held not to have established that the rights of the parties are regulated by the unexecuted lease. In his defences the defender admits the statements in the condescendence as to the farm having been let to him for eighteen years at the rent specified, but that admission is given subject to certain qualifications as to the conditions of let, which are denied on the part of the pursuer. These qualifications relate to certain matters, including outlay for tiles, in respect of which counter claims are set up on behalf of the defender. Now, the pursuer cannot avail herself of the admission as to the amount of rent without accepting the qualifications under which the admission is made. The parties then being at issue as to the terms on which the farm was let, and the lease being for a period of eighteen years, the only competent evidence in the absence of proof by writing which is open to the pursuer for the purpose of proving the terms of the tenancy is a reference to the defender's oath. As to the competency and propriety of admitting this, I may refer to *Swanson* v. *Gallie*, 9 Macph. 208, and *Macleay* v. *Campbell*, 3 R. 999."

"*Glasgow*, 3*rd May* 1889.—Having resumed consideration of the case, and again heard parties' procurators thereon, allows the minute by the pursuer to be received and form No. 15 of process: Finds that by said minute the pursuer states that she does not wish a reference to the defender's oath: Finds that the only evidence of the pursuer's claim is the defender's admission on record, which must be taken subject to the qualification under which it is made, and according to which the pursuer is indebted to the defender in a sum exceeding that sued for: Therefore recals the interlocutor appealed against, and assoilzies the defender: Finds defender entitled to expenses, including those of the appeal, &c.

"*Note.*—The pursuer states in the minute lodged on her behalf that she does not wish a reference to the defender's oath. In these circumstances I must, in accordance with the views stated in the note to my interlocutor of 29th March, decide in favour of the defender. The case seems to me to fall within the principles of *Milne* v. *Donaldson*, 1852, 14 D. 849."

The pursuer appealed to the Court of Session, and argued—It was not sought here to declare a lease, but to enforce the payment of the rent admitted to be due at the rate hitherto paid. The tenant had occupied the farm and must pay for his occupancy. The counter claims were no defence to this action for rent. In any event, the *onus* of proving them was on the defender, and he had failed to do so.

Argued for the defender—This was a verbal lease for a term of years, and the rent

due, unless admitted, could only be determined by his writ or oath. His admission could only be taken, as the Sheriff had held, subject to their qualifications. If the proof fell to be looked at the counter claims had been made out.

At advising—

LORD RUTHERFURD CLARK—This action has been raised to recover a sum of £50, being the half-year's rent of the farm of Westerhouse due at Martinmas 1886. The rent is admitted, subject to the explanation that the defender has counter claims to a larger amount, which he contends are to be set against the rent sued for.

It would thus appear that the real question between the parties was, whether these counter claims were just claims, although there may be difficulty in reaching it, for it is certain that there is no difference between the parties as to the rent sued for, though there may be no unqualified admission of it.

A proof was allowed, and the Sheriff-Substitute gave decree for £43, 14s. 10d., being the half-year's rent sued for, less £6, 5s. 2d., to which extent he sustained the counter claims of the defender. The case was appealed, and the Sheriff intimated in a note that in his opinion the rent was admitted only subject to a qualification, and that as the pursuer alleged that the defender was holding the farm on an 18 years' lease the rent sued for could only be proved by the writ or oath of the defender. The pursuer lodged a note to the effect that she did not desire to refer the case to the defender's oath, and thereupon the Sheriff recalled the interlocutor of his Substitute, and assoilzied the defender.

I do not think that the Sheriff has taken a right course, and in my opinion the pursuer's case can be decided in her favour as the evidence now stands. It is to be observed that the purpose of this action is not to declare a lease, but to recover the rent for half a year. It is admitted by the defender in the most unqualified manner, that he entered into possession of the farm at Martinmas 1874, and that he is still in the occupation thereof. Further, he admits that he is in possession as tenant, for he avers that he took possession as tenant, and his counter claims are founded to a great extent on an alleged breach of the contract on which he says that he holds the farm. As the defender is thus in possession, and bound to pay rent, I see no difficulty in holding that he must pay for the half-year in question the rent which he has been in use to pay in the foregoing years, or, in other words, £50. For it is, I think, abundantly proved that the defender has been paying for his past possession a rent of £100 a-year. There is no dispute on this subject, and the account which the defender has lodged is made up on this footing. In my opinion the rule of payment which has hitherto been observed must be applied to the period now in question, and in so holding I do not think that I am doing more than giving effect to the admission of both parties.

As I have already said, the real question is whether the counter claims are due. The pursuer contended that they could not be considered as an answer to her claim for rent, and I think that it is for the interest of the defender to allow this view to prevail, so that they may be constituted in a separate action, for the evidence is in a very unsatisfactory condition—so unsatisfactory that I do not think that we, as it stands, could with safety dispose of them, and I am not inclined to withhold from the pursuer an immediate decree for rent by allowing a further inquiry. I should therefore propose that we give decree for the full rent sued for, and that we reserve the counter claims. But the defender must pay the expenses of this action, as it is his own fault that the proof is not in a more satisfactory condition.

LORD LEE—I am of the same opinion, and what affects my opinion is that condescendence 4 of the record and the answer thereto show that the rent is admittedly due. As to how we are to deal with the counter claims, some are clearly illiquid claims for damages, others are claims for tiles, and so on. The *onus* is on the defender to make out his claims, but they are not good as against the claim for rent. Looking to the confused state of the proceedings I agree with Lord Rutherfurd Clark that we should give decree for the rent, but reserve the right of the defender to establish his claims in another action.

LORD JUSTICE-CLERK—I concur. The course proposed by Lord Rutherfurd Clark is a most lenient one for the defender. I should have been inclined to hold that these counter claims were presented in such a slipshod fashion that they could not be looked at, and that we should disallow them, and simply find for the rent, but I am quite willing to accept Lord Rutherfurd Clark's proposal.

LORD RUTHERFURD CLARK—I am disposed to agree with your Lordship as to these counter claims in the present state of the proof, but perhaps they may be presented in a more satisfactory way if we reserve to the defender the right to do so.

LORD YOUNG was absent.

The Court pronounced the following interlocutor:—

"Find in fact (1) that the late Andrew Bell, husband of the pursuer, let the lands and farm of Hill of Westerhouse to the defender for 18 years from the term of Martinmas 1874 as regards the land to be cropped in the then ensuing season, and the term of Whitsunday following as regards the houses and pasture at an annual rent of £95, with £12 as interest on expenditure on buildings, in all £107, which rent was afterwards fixed at £100 payable at Martinmas and Whitsunday; (2) that the said rent was paid prior to the term of

Whitsunday 1886, when the rent of the first half of the year, commencing at Martinmas 1885 and Whitsunday 1886 respectively, being £50, became payable, which rent, less £1, 12s. 2d. for insurance, and £4, 8s. for loss caused by mineral workings remains due and unpaid: Therefore sustains the appeal: Recal the interlocutor of the Sheriff appealed against: Of new ordain the defender to make payment to the pursuer of the sum of £43, 14s. 10d., with interest as libelled, reserving to the defender all action competent to him against the pursuer for all or any of the sums alleged by him to be due to him by the pursuer, and the pursuer's answer thereto: Find the pursuer entitled to expenses in the Inferior Court and in this Court," &c.

Counsel for the Pursuer — Low — Macfarlane. Agent—George Mill, S.S.C.

Counsel for the Defender—Shaw—M'Lennan. Agent—W. & F. C. M'Ivor, S.S.C.

Tuesday, December 10.

FIRST DIVISION.

THOMSON AND OTHERS (SIMPSON'S TRUSTEES) *v.* SIMPSON AND OTHERS.

Succession — Trust — Heir ab intestato— Residue.

A testator directed his trustees, after paying certain annuities and legacies, to dispone and convey the liferent of the remainder of his trust-estate to his daughter whenever she attained to twenty-one years of age, but for her liferent use allenarly, and to the heirs of her body in fee, share and share alike; and failing his daughter and the issue of her body, the trustees were directed to convey the fee of the residue of the trust-estate to certain trustees for charitable purposes. The annuities and legacies had long been satisfied, and the trustees, without conveying the liferent as directed, had continued to administer the estate for the benefit of the testator's daughter, who had attained the age of fifty-eight.

Held that the charity trustees were only entitled to take benefit under the deed if the testator's daughter had failed before attaining twenty-one years; that as she had survived that period, the trustees were bound to convey the estate to her in liferent, and to her heirs in fee; and that failing the daughter and her heirs, the succession passed to the heirs *ab intestato* of the testator.

The late James Simpson, merchant in Haddington, died on 23rd April 1843, predeceased by James, his son by a former marriage, and by his second wife, and survived by Jean, his only child of the second marriage, who was at the date of this case fifty-eight years of age, and unmarried.

The testator by the third, fourth, and fifth purposes of his trust-disposition and settlement provided certain legacies and annuities for various members of his family.

The seventh purpose was in these terms—"I hereby direct my said trustees, after paying and satisfying the foresaid annuities and legacies, to dispone and convey the liferent of the remainder of my said trust-estate and effects to and in favour of my said daughter Jean Simpson, the only child of my present marriage, and to any other child or children which may yet be born of that marriage, and the survivors of them, equally between them, whenever she or they respectively attain to twenty-one years of age, but for the liferent use allenarly of the said Jean Simpson and such other children of my present marriage as may yet be born, and exclusive of the *jus mariti* and right of administration of the husband of the said Jean Simpson if she marries, and the husbands of any other daughters who may yet be born to me as aforesaid, and to the heirs of her and their bodies respectively in fee, share and share alike; whom failing to the lawful issue of the body of my said son James, equally among them; and failing my said daughter Jean and the issue of her body, and issue of the body of my said son James, I direct my trustees to convey the fee of the residue of my said trust-estate to the minister of the first charge in the Established Church of the parish of Haddington, the Chief Magistrate of Haddington, the Convener of the Incorporated Trades of that town, the town-clerk of Haddington, and the session-clerk of the Established Church of Haddington, all for the time being, and to the said John Richardson if alive at the time, and to the acceptors or acceptor of them, declaring the majority accepting to be a quorum, but in trust only for the ends and purposes following, viz.—In order that these last-mentioned trustees may apply the free proceeds of the said residue of my trust-estate in perpetual charity, in paying to such a number of poor, infirm, and destitute men, at the rate of £8 per annum each, and an equal number of poor, infirm, and destitute women, at the rate of £6 per annum each, all resident in the burgh of Haddington, as my trustees or quorum of them may select and think fit objects of charitable aid, and as the said free proceeds shall afford to maintain at these rates."

The trustees applied the income of the trust-estate which was vested in them for the benefit of Jean Simpson.

A portion of the trust-estate, consisting of house property in Park Street, Edinburgh, recently fell to be conveyed under statutory powers to the Edinburgh University Endowment Trustees, and in order to avoid the necessity for proceedings under the Lands Clauses Act of 1845 an agreement was made for sale of the subjects at the price of £500, in exchange for a proper conveyance by the parties interested in Mr Simpson's trust-deed. The agent for the University Trustees, however, expressed an opinion that under the circumstances of the estate the fee could not vest in the trustees.