a carting contractor, had engaged with Messrs Bryce Whyte & Sons to carry certain bundles of staves. Carting is not part of the business of Messrs Bryce Whyte & Sons. They are coopers. All that the pursuer had to do as their servant was to assist in placing the bundles upon the defender's cart. The duty of securing them upon the cart, according to custom, rested upon the carter.

I am of opinion that the doctrine of non-responsibility for injuries suffered in common employment has no application to the present case, for I hold that common employment has not been proved. It is said that there was as much common employment in this case as in *Congleton* v. *Angus*. If that observation be true, and I am not able to say that it is not, then I think that *Congleton* v. *Angus* cannot have been well decided. It is certainly not supported in that view by the case of *Woodhead* v. *Gartness Company*, and I do not admit the authority of *Congleton* v. *Angus* as extending the rule laid down in *Woodhead* v. *The Gartness Company*. I doubt if the decision can be supported upon the facts stated in the report. But at all events I hold this case not to be within the rule of *Woodhead* v. *The Gartness Company*.

The Court pronounced this interlocutor:—

"Find in fact in terms of the findings in the interlocutor of the Sheriff appealed against, dismiss the appeal, and affirm the said interlocutor: Of new, assess the damages at £35 sterling: Ordain the defender to make payment of that sum to the pursuer with the legal interest thereon from the date of citation to this action till paid: Find the pursuer entitled to expenses in this Court," &c.

Counsel for the Appellant—A. S. D. Thomson. Agent—J. Stewart Gellatly, S.S.C.

Counsel for the Respondent—Rhind—Hay. Agent—Wm. Officer, S.S.C.

Wednesday, June 11.

FIRST DIVISION.

[Sheriff of Argyllshire.

SIVRIGHT *v.* LIGHTBOURNE.

Lease—Obligation to Repair Buildings—Retention of Rent—Liquid and Illiquid.

In an action by a landlord against a tenant for payment of a year's rent which was in arrear, the defender averred that he had been in possession of the farm for a number of years under a lease which expired at Whitsunday 1887; that after some negotiations with the pursuer's agents he offered for the farm a rent of £50 per annum by holograph letter of 18th April 1887, the offer being made under the express condition that the dwelling-house, byre, and stirkhouse should be slated and otherwise put in a tenantable state of repair; that this offer was accepted by letter from the agents addressed to the pursuer's factor, and intimated by him to the defender; that the pursuer had not executed the stipulated repairs, but that during the year for which rent was said to be due the buildings had remained in a grossly dilapidated, and untenantable state of repair, and that the whole rent sued for would not compensate the defender for the loss he had thereby sustained.

Held that the defender was entitled to a proof of these averments before answer.

This action was raised by William Henry R. B. Sivright, proprietor of the estate of Ardincaple, in the county of Argyll, against George Lightbourne, tenant of the farm of Barnafeochaig on said estate, for payment of £45 as the balance of rent due by the latter for the year ending Whitsunday 1888.

It was averred in statement of facts for the defender—"(Stat. 2) The defender has been in possession of said farm and offices for a number of years, under a lease granted by the pursuer's predecessors (the former proprietors of the estate of Ardincaple). The said lease expired at Whitsunday 1887. At the commencement of said lease the dwelling-house and offices attached to the farm were not, as they should have been, put into a habitable and proper tenantable state of repair, but remained throughout the whole currency thereof in a grossly dilapidated and untenantable condition—this condition arising from natural decay and old age. (Stat. 3) During the currency of said lease the defender repeatedly complained to the factors or managers of the pursuer and his predecessors as to the state of the house and farm buildings, but in particular, at each rent collection, he made these complaints to Brown, the factor on the estate, and requested that the house and offices should be put into a proper tenantable condition, and at the said rent collections the defender also reserved all his claims for damages. (Stat. 5) During the currency of the said lease the defender and his family have suffered severely in their health, so much so, that the insanitary condition of the dwelling-house caused an illness to one of his family from which he died. In addition, the defender has suffered large losses on account of his farm stock having greatly deteriorated in value, so much so, that not only they could not be disposed of except at a great loss, but the defender, owing to their poor condition, could not work and cultivate his said farm to a profit from the dilapidated condition of the farm buildings. (Stat. 7) During the year from Whitsunday 1886 to Whitsunday 1887 negotiations were entered into for a new lease, and in the course of these negotiations the defender wrote to Messrs Tods, Murray, & Jamieson, W.S. Edinburgh, the pursuer's agents, offering a rent of £45 per annum if the house, byre, and

stirkhouse were roofed and slated of new, and the dwelling-house otherwise made tenantable. The agents did not reply directly, but did so to Hamilton, the gamekeeper on the estate, who called on defender and read a letter to him to the effect that as the expense of putting the houses in repair would be so very great the rent would require to be £55 instead of £45. In reply to this the defender, by holograph letter dated 18th April 1887, made an offer for the said farm and offices of Barnafeochaig. The said offer was for a rent of £50 per annum, and was made under the express condition that the dwelling-house, byre, and stirkhouse should be slated and otherwise put into a thorough and tenantable state of repair. A few days after this offer had been made, the gamekeeper, the said Hamilton, again called on the defender and read a letter he had received from the said Messrs Tods, Murray, & Jamieson saying that the defender's offer had been accepted, and he arranged with him (the defender) that the lease should be for seven years with a break at the end of three. Owing to these negotiations and the said arrangement having been come to, the defender departed from his intention of giving the requisite statutory notice of his intention to leave the said farm. (Stat. 9) During the year for which the said rent now sued for is said to be due, the dwelling-house and farm offices on said farm have not only remained in the grossly dilapidated, insanitary, and untenantable state of repair in which they were during the currency of the former lease, but have become more dangerous and unfit for the purposes of the farm. (Stat. 12) The whole amount of the rent sued for will not compensate the defender for the loss, injury, and damage he has sustained."

The pursuer denied that he had come under the obligation alleged by the defender to put the buildings in repair, and averred that the defender had been distinctly told that the pursuer would not expend any money on the buildings unless the defender paid up his arrears of rent and found caution for future payment, which he had not done. The pursuer also denied that any final arrangement by way of lease had been come to with the defender who had merely been allowed to keep on the farm at the reduced rent of £50 per annum.

The defender pleaded—"(1) The defender not having obtained possession of the premises in a good and tenantable state of repair is not due the sum sued for, and is entitled to decree of absolvitor with expenses. (2) The pursuer having failed to implement the obligation undertaken by him in said lease is liable in damages, and the defender is entitled to set off the amount thereof against the claim for the said rent."

On 25th March 1889 the Sheriff-Substitute (MacLachlan) pronounced this interlocutor:—"Finds that the defender was tenant of the farm of Barnafeochaig, on the pursuer's property of Ardincaple, for some years under a lease which terminated at Whitsunday 1887, and after some correspondence and verbal negotiation between the parties the rent was reduced to £50 a-year, but no new lease was executed, and the defender remained on in the said farm at the reduced rent: Finds that the rent due at Whitsunday and Martinmas 1888 has not been paid with the exception of £5 paid to account on 6th June 1888, leaving a balance of £45 sterling still due to the pursuer: Finds that the defender's averments are not relevant to infer a valid claim for abatement or set-off to the pursuer's claim for rent: Therefore repels the defences; grants decree as concluded for; finds the defender liable in expenses, &c.

"*Note.*—The question to be now decided is, whether the defender should be allowed a proof of his averments as to the state of the buildings on the farm occupied by him so as to constitute a relevant ground for withholding the rent due to the landlord. His lease terminated at Whitsunday 1887, but he avers that by *rei interventus* following upon written communications and verbal arrangements a new lease of seven years' duration was constituted between him and the pursuer. There was, however, no written lease or missives of lease, and it is settled that a verbal lease for a term of years is not binding even for one year unless possession has followed, in which case it is obligatory for one year—Rankine on Leases, p. 105. The possession must be unequivocally referable to the prior agreement—Rankine, p. 114; but here the defender was already in possession, and from his own statements it rather appears that he remained on in the farm because he had not given sufficient notice of removal under the Agricultural Holdings Act 1883, to prevent tacit relocation from taking place, and the only result of the negotiations is, as admitted by the pursuer, that the rent was reduced to £50 a-year. The defender's claim therefore for an abatement, if referable to any obligation by the landlord in the new lease which is averred to be constituted by the circumstances narrated in Answer 2 of the defences, is repelled on the ground that there is no such lease, and if referable to the original lease there is sufficient authority in the recent case of *Stewart* v. *Campbell and Others*, 18th January 1889, 26 S.L.R. 226, for holding that it is too late now to complain of not having obtained possession of the premises in a good and tenantable state of repair."

The defender appealed to the Sheriff (Forbes Irvine), who on 19th July 1889 pronounced the following interlocutor:—"Recals the said interlocutor: Finds that the defender's averments of *rei interventus*, even if proved, are not sufficient to warrant the conclusion that he possesses under a lease of more than a year's duration, and therefore in the absence of any written lease he must be regarded as holding simply from year to year; and to this extent repels the pleas for the defender; but before further answer allows to him a proof of his claim for damages as against the landlord, and to the pursuer a conjunct probation; remits to the Sheriff-Substitute to take

said proof, and thereafter to proceed with the cause as accords; meantime reserves the question of expenses, and decerns.

"*Note.*—The defender concedes that without the aid of *rei interventus* he cannot hope to make out that he holds under a lease for a term of years. It is well settled, however, as stated by Professor Rankine—'Leases,' p. 113—that 'where great cost is incurred by operations carried on under the eye of one having a right to stop them, or where, under the eye and with the knowledge of him who has the adverse right, something is allowed to be done which manifestly cannot be undone, the law will presume an agreement or conventional permission as a fair ground of right.' Also *per* Lord Chancellor Chelmsford in *Wark* v. *Bargaddie Coal Company*, 1859, 3 Macq. 467.

"Here, for instance, if the defender had been able to aver that he had put up the farm-buildings, or had made large additions to them, or had executed extensive improvements which could hardly have been expected of a person holding by the year, the Sheriff would have had no hesitation in allowing him a proof of such *rei interventus*. In so far, however, as the Sheriff can see, the only *rei interventus* alleged is to the effect that the defender has had possession since the date of the informal missives on which he founds. It need scarcely be said that such possession is quite as consistent with a holding from year to year as with a holding for a term of years. The Sheriff is therefore unable to allow to the defender the proof which he asks of a seven years' lease.

"With regard to the claim for damages there is no doubt considerable difficulty; but, on the whole, keeping in view (1) that there does seem to be a tendency in the courts of law to relax the old rule, and (2) that the rents sued for have been consigned, so that the pursuer runs no risk of losing them, and (3) that it is always desirable to avoid a 'cumulation of actions,' the Sheriff has felt that he might allow a proof, and has accordingly done so."

The pursuer appealed to the Court of Session, and argued—The only kind of case in which a claim of abatement was allowed to be pleaded in answer to a demand for rent was when it was alleged that the tenant had not received full possession of the subjects let under a lease. This was not a case of a new tenant entering on a farm. The old tenant was merely allowed to sit on at a reduced rent while negotiations for a final settlement were going on. No agreement was come to, and the constitution of the obligation founded on by the defender was thus in dispute. The defence in the present case accordingly fell under the usual rule that an illiquid claim of damages could not be pleaded as a defence to a liquid claim for rent—*Munro* v. *M'Geochs*, November 15, 1888, 16 R. 93; *Stewart* v. *Campbell*, January 19, 1889, 16 R. 346; *Drybrough* v. *Drybrough*, May 21, 1874, 1 R. 909; *Humphrey* v. *Mackay*, February 23, 1883, 10 R. 647.

Argued for the defender—A claim for abatement of rent might be pleaded in defence to an action for rent where there was a violation by the lessor of an express and material condition of the lease, even though the tenant might have got full possession of the subjects let—*Davie* v. *Stark*, July 18, 1876, 3 R. 1114; *Gordons* v. *Suttie*, July 13, 1826, 4 Murray 86; *Munro* v. *M'Geochs*, and *Stewart* v. *Campbells supra.*

At advising—

LORD PRESIDENT—The question before us in my view is whether the case is to be decided on the principle laid down in *Munro* v. *M'Geochs*, or on the principle in *Stewart* v. *Campbells*, both of which cases we decided last year, and for my own part till the facts are known I am quite unable to decide that question.

LORD SHAND—If a party comes into Court saying that there is a lease under which the subjects are let to him unconditionally no claim of the kind we have here can be listened to. If a claim of damages is made in such a case it must be by a separate action. But it is stated here that it was made a condition of any rent being paid that the houses should be put in a tenant-able condition. Why the landlord should in such a case get the rent, leaving the tenant to raise another action to recover damages for breach of the stipulated condition, I do not see, and it will, I agree with your Lordship, depend entirely on what are proved to have been the conditions stipulated in the lease whether the claim of set-off will be allowed.

LORD ADAM—No doubt the fact that the proof is before answer removes a good deal of the objection I feel on account of the well-known principle applied in cases between landlord and tenant. It is not disputed that the tenant was in possession of the subjects for the whole year, and that the amount of rent was £50. That being so, the tenant has had possession for the stipulated time and the rent is due, and if he has any claim in the nature of damages it must I think be constituted, and affords no reason for his objecting to pay the rent of the subjects. On the law of the matter I am quite content to take the statement of Lord Shand in the case of *Stewart* v. *Campbell*, that this defence is open to the tenant if he has not had the full use of the subjects let. There is nothing on record to show that the tenant had not the full use of the subjects here. All that is said is that there was a condition, which is disputed, as to putting the buildings into repair.

Having these views, if I had been judge in the first instance I should have held that an illiquid claim for damages was not to be set off against a liquid claim for rent, but as your Lordships have taken the view which you have stated I am not opposed to proof before answer.

LORD M'LAREN—There is no doubt when a tenant claims not under his lease but in consequence of some injury done him by the landlord outside the subject-matter of the lease, his claim cannot be put forward

as a set-off against a claim for rent, but what difficulty there is results from leases very generally stipulating for things to be done during their currency, and the question arises whether the omission by the landlord to perform one of his obligations under the lease and the damage resulting from it can be pleaded as a counter-claim to be recovered by retention of the rent? Speaking generally, my view is that such questions under the contract of lease, whether it be constituted in writing or by verbal agreement, are to be dealt with on the same principles as are applied with regard to the rights of parties under other contracts. These are dealt with in a number of leading cases, which, though dealing with questions of mercantile law, are full of instruction as to this class of case. The general rule, if no rule is laid down on the subject by the contract, is, that the question whether the two obligations are mutual is to be determined by the written terms of the contract generally and the surrounding circumstances.

Coming to the class of cases which deal with leases, there are certain obligations of the landlords the breach of which is held to afford a claim of set-off against a claim for rent—for example, if the landlord withhold the subject or a material part of it; but I am not prepared to say that that is the only breach of obligation which can be set off against a claim for rent. In written leases it is convenient and proper that the Court should, by reading the lease and hearing argument, determine without proof, whether the two obligations mutually condition one another so as to give rise to a right of set-off the one against the other. But when the lease is not in writing it is extremely difficult to decide that, and the whole conditions must be taken into account in determining the question.

In the present case we cannot come to a decision till the whole contract is before us, and the Sheriff was, I think, right in allowing a proof before answer. After the proof it will be for the Judge who has to consider the evidence to determine, 1st, whether the obligation here set forth was part of the contract; and, 2nd, whether, taking all the circumstances into consideration, it was a condition-precedent to the right to demand rent, and having decided these points he will give his decision accordingly.

The Court refused the appeal, and remitted to the Sheriff to proceed with the case.

Counsel for the Pursuer—Low, Salvesen. Agents—Tods, Murray, & Jamieson, W.S.

Counsel for the Defender and Respondent—C. S. Dickson—Craigie. Agents—Gill & Pringle, W.S.

Tuesday, June 10.

SECOND DIVISION.

[Lord Trayner, Ordinary.

MENZIES *v.* MENZIES AND OTHERS.

Reduction—Essential Error—Undue Influence — Misrepresentation and Concealment — Inadequacy of Consideration—Motion to Amend Record.

The only son of an heir of entail in possession of estates worth about £300,000, who upon his father's death would have been entitled to acquire the estates in fee-simple, brought an action against his father for reduction of an agreement entered into between them and of the deeds following thereon, whereby, in consideration of his annual income being increased from £600 to £900 a-year and his debts—amounting to £6000—being paid, the son agreed to the estates being re-settled upon trust for his father in liferent, himself in liferent allenarly, and the heir-male of his body in fee, whom failing the heir of the barony of M. in fee. The son had on several previous occasions applied to his father and received help out of pecuniary difficulties, but before this agreement was entered into his father had declined to treat with him or save him from impending bankruptcy proceedings except upon the condition of a re-settlement of the estates.

The pursuer averred that he had entered into the agreement under the undue influence of his father and of his agent, who had professed to act as his own legal adviser, and in essential error induced by that agent, who in his father's interests had misrepresented to him that this arrangement was the only alternative to ruin, had concealed from him that he could have borrowed the money from any respectable insurance company by means of a *post-obit* bond without either his father's consent or the surrender of his rights of succession, and that he had thus been led to accept a grossly inadequate consideration. *Held* that the pursuer's averments were irrelevant (*diss.* Lord Rutherfurd Clark, who thought a proof should be allowed).

Motion to Amend Record.

A motion made at the close of the third speech by the pursuer's counsel for an adjournment to enable him to consider the advisability of amending the record *refused* (*diss.* Lord Rutherfurd Clark).

Neil James Menzies, Captain in the Scots Guards, residing in London, only son of Sir Robert Menzies, Bart., of Menzies, in the county of Perth, brought an action against Fletcher Norton Menzies, secretary of the Highland and Agricultural Society, Scotland, Albert Butter, manager, Union Bank of Scotland (Limited), Perth, and James Auldjo Jamieson, W.S., Edinburgh, trustees acting under certain deeds sought to