appeal from the Sheriff Court, not one under the Judicature Act.

The Court sustained the minute of abandonment.

Counsel for the Pursuer—A. J. Morison. Agent—Alex. Morison, S.S.C.

Friday, December 18.

FIRST DIVISION.

[Lord Stormonth Darling, Ordinary.

THOMSON *v.* THOMSON AND OTHERS.

Lease — Constitution of Lease — Whether Agreement to Assign Business, etc., an Implied Lease of Premises.

By written agreement A assigned to B the business of engineer carried on by him in certain premises, "and the whole stock, funds, assets, rents, and goodwill thereof, together with the whole machinery and appliances in said premises, whether fixed or unfixed, belonging to him." In respect of this assignation B on his part undertook, *inter alia*, to pay to A an annuity of £250 for life.

B entered into occupation of the premises, where he continued to carry on the business, and duly fulfilled his obligations under the agreement.

At a subsequent date A raised an action against B to have him ordained to remove from the premises in question on the ground that he had no lease or other title to possess them.

It appeared from a proof that it would be difficult to find a suitable site for the business in the same locality, and that the erection of new buildings and the removal thither of the heavy plant and machinery in the old premises would involve a large expenditure of time and money.

Held (*aff.* judgment of Lord Stormonth Darling, though for a different reason) that B was entitled to absolvitor, on the ground that in a question with A, and in the circumstances, the agreement must be taken to imply a lease of the premises to B for the term of A's life, and at a rent which, though not definitely stated, was included in the annuity.

This was an action raised by William Thomson, engineer, Glasgow, against his sons by his first marriage, William Thomson junr., and John Thomson, and his son-in-law Charles Davidson, to have them ordained to flit and remove from certain premises in Smith Street, Kinning Park, Glasgow.

The premises in question had been originally purchased by the pursuer and fitted up by him with machinery. His second wife, whom he married in 1871, alleged that they had been conveyed to her by her marriage-contract, and in 1883 the pursuer, who had continued to pay the ground-annual in respect of the premises, and had paid his wife no rent for his occupation of the same, took a formal lease of them from her for a period of twenty years at a rent of £40.

A dispute having arisen between the pursuer and his wife as to the ownership of the subjects, matters were finally settled by Mrs Thomson granting a formal conveyance of the property to her husband.

Prior to this the pursuer had entered into the agreement with the defenders which formed the subject of the present action. Mrs Thomson was originally the pursuer, but on 10th January 1896 her husband, who was by that time owner in title as well as in fact of the premises in Smith Street, was sisted as pursuer in her place.

The agreement referred to was dated 22nd January 1894, and contained the following stipulations:—

First—The pursuer assigned and transferred to the defenders "the business of engineer presently carried on by" him at 57 Smith Street, "and the whole stock, funds, assets, rents, and goodwill thereof, together with the whole machinery and appliances in said premises, whether fixed or unfixed, belonging to" him.

By article 2 it was provided—"The first party [the pursuer] shall, however, remain as consulting engineer in connection with the business at such salary as may be agreed upon from time to time, and the second party shall be bound to take the advice of the first party on all points connected with the practical management and development of said business as well as the ordering of all material and plant necessary for the carrying on of said business and the engaging and dismissing of employees; but the first party shall not be responsible in any way for the advice so given, and he shall only give such time and attention to such points as he may think proper.

"*Third*—The second party bind and oblige themselves to pay the whole debts and obligations of the first party in connection with said business at the date hereof, as the same mature, and to free and relieve, and harmless and scatheless keep, therefrom the said first party in all time coming."

Fourth—In respect of the assignation of the business, and the stock, funds, assets, rents, and goodwill thereof, and machinery and appliances, the second parties bound themselves to pay to the first party an alimentary annuity of £250 during all the years of his life, to begin at the following Whitsunday.

Fifth—In the event of failure to pay the annuity, the first party was empowered to enter into the possession and management of the said business and stock, funds, assets, rents, and goodwill, and machinery, and appliances, and to call upon the second party to retransfer the same to him.

"*Sixth*—The second party shall not be at liberty to dispose, sell, or transfer said business, or any portion of the plant or stock and others, during the lifetime of the first party; nor shall it be in the power of

the second party to assume a partner or partners without making provision to the satisfaction of the first party for payment of annual annuity."

The pursuer averred—"The defenders have failed to carry out the obligations incumbent upon them under the said agreement. They have not paid to the pursuer the stipulated annuity. Further, they have declined to consult the pursuer with reference to the business in terms of article 2nd of the said agreement. They have even excluded him from the premises by force, and have refused to allow him to do any of the matters specified in the said article of the agreement. The defenders have also, with the view of defeating the pursuer's rights, refused to agree upon the amount of salary to be paid to him in terms of the said article of the agreement, and have paid nothing to the pursuer in name of salary since the date of the said agreement."

The defenders averred—"When the agreement above referred to between the said pursuer and the defenders was signed, the said pursuer assured the defenders that they would not be disturbed in the occupancy of the premises at any time. He represented himself as proprietor of the buildings and whole subjects, and stated that his reason for entering into said agreement was that he wished to make a provision for the defenders, who are his children by a previous marriage, as his children of the second marriage had already been provided for. He has now become heritable proprietor of the subjects described in the summons, having obtained a conveyance thereto from his wife. . . . Since the date of said agreement the defenders have been in possession of said premises, and have continued to carry on and develop the said engineering business. They have observed the whole conditions of the said agreement in reference to the said pursuer, and the latter has repeatedly intimated in writing to the defenders that he insisted on the fulfilment by defenders of its terms. The defenders have paid pursuer's debts and obligations, in terms of article 3 of the agreement, amounting to £183 or thereby. They have also paid to the pursuer, on account of his annuity, the sum of £297, 8s. 3d., or thereby, up to Whitsunday 1895. They have also uplifted and retained, with the knowledge of and without challenge from the pursuer, the rents payable by the parties who occupy part of the foresaid land and premises, namely, Messrs Muir & Houston and James Boag. The defenders, in the belief that they would continue to have undisturbed possession, have considerably increased the capital in said business since the date of the agreement, and they have spent considerable sums in keeping up and improving the stock, machinery, and plant. It was the intention and in the contemplation of all the parties that defenders should carry on the business in the said premises where it has for a long time been established. These are suitable for the purposes of the business, which could not be transferred elsewhere unless the defenders succeeded in securing a suitable site and built new premises thereon, and in any case the expense and delay and loss of business involved in such a transference would be very serious, if not ruinons, to the defenders."

The pursuer pleaded, *inter alia*—"(1) The defenders having no right or title to occupy the said subjects, the pursuer is entitled to decree in terms of the conclusions of the summons. (3) The defenders are not entitled to found upon the said agreement between them and the pursuer William Thomson, in respect that they have failed and refuse to perform the obligations incumbent upon them in terms of the said agreement."

The defenders pleaded—"(9) The pursuer, William Thomson, senior, is barred, *personali exceptione*, from insisting in the present action. (10) This action, at the instance of William Thomson, senior, is against the good faith of the agreement between him and defenders, and the actings of parties subsequent thereto. (11) The defenders are entitled, as in a question with the pursuer, William Thomson, senior, to continue in occupancy of the said premises, and the present action at his instance is unfounded and untenable."

A proof was allowed.

The defender William Thomson junior deponed—"The business carried on by my father was that of manufacturing engineers' tools . . . The business has been carried on in the present premises since 1882. The business had been built up there and a connection formed . . . (Q) Was there any question about your having to make any payment of rent in addition to or other than the annuity mentioned?—(A) No, there never was. There is no entry for rent in the books of the firm, even in my father's time, so far as I am aware. There were people of the name of Muir & Houston who were tenants of a store forming part of the works. They paid rent to us for that store. I think the sum they paid was £15, 10s., but I am not quite certain. That was paid to us subsequent to the agreement with my father, by Muir & Houston, and rent was also paid to us by a Mr James Boag. I now exhibit the receipts for these rents, which can be produced if desired. We collected those rents in the same way as my father had done . . . (Q) A reference to rent payable by those people occurs in the agreement?—(A) Yes. I would not have entered into any such agreement if we were not to have the occupancy of the premises; for my part, I never would have thought of it, because we did not have tools or machinery to go on with. We wanted the works along with the machinery, and the machinery was of no use to us without the works. (Q) If you had to remove from the works, and the machinery and plant, the value of which was over £3000, had to be sold, not as a going concern, what would it realise? (A) Somewhere about £1500 or £1600. (Q) Could you get suitable works in the neighbourhood to which you could remove?—(A) We have been trying to get them, but it is not an easy matter. I believe

we could get such premises, but at considerable expense. There is a place about ten minutes' walk from where we are at present. It would cost pretty close on £2 a yard for the ground if we had to buy it, or we would have to pay about £100 a-year of rent. That is the nearest and most suitable place that we have been able to discover up to the present time. In addition to buying the ground, or paying a rent of £100 a-year, we would have had to erect a new place, and the cost of doing so, and removing the machinery and setting it down there, would be pretty close on £2000. We were to get the goodwill of the business along with it, as expressed in the agreement. (Q) Would the goodwill be of any value at all if you had to remove?—(A) I could not exactly say for that. (Q) Would you have to stop business?—(A) Yes, for from nine to twelve months. After that we would have to make an attempt to gather business again. I expect the work would commence to come in by that time—in about twelve months. (Q) And do you think that the business would be greatly injured by such removal from those premises, and by the stoppage for twelve months?—(A) Yes; I am afraid it would be injured considerably for some time—for twelve months at the very least, but not after the works were up; it would take from three to six months after the works were up before we could recover ourselves . . . After my father entered into that agreement with us, we continued to occupy the premises, and we made payments of the annuity to him. I cannot give a detailed statement of these, but we paid him in all £297, 8s. 3d. in respect of the annuity. Payment was regularly made up to March 1895. Since that time we have made several tenders of payment of the subsequent portions of the annuity, but my father declined to accept them. It was part of the agreement that we were to pay the debts that were due at the time of the assignation of the business, and we actually paid debts, in terms of the agreement, to the amount of £180 odds. If we are unsuccessful in getting the ground I have mentioned, we would have to remove further away, possibly out of the district. That would be a very serious matter; it would hurt the business considerably. In the agreement, reference is made to my father being consulting engineer. There has never been any occasion for the services of a consulting engineer in connection with the business. We have just continued the business as we found it. My father has visited the works on several occasions since the agreement was entered into. He just walked about and saw what was doing. From about the month of September 1894 till March 1895 he never came near the works. I don't know what was the reason of that. During that time he never made any request to be consulted or anything of that sort . . . (Q) Your father says in his pleadings that you have declined to consult him as to the business in terms of article 2 of the agreement; is that true?—(A) There never was any necessity for our consulting him, and we were never asked to consult him. There is no truth whatever in the statement by my father that we excluded him from the premises by force. (Q) Your father says further that you have refused to allow him to do any of the matters specified in the agreement; have you refused to allow him to do any of the things that he has a right to do?—(A) We never refused to let him do so. He got leave to walk about as he had a mind, to do anything he wanted. If there had been any change in the plant of the business, or any necessity otherwise for consulting him, it would have been done. (Q) Your father also says that you have, with a view to defeating his rights, refused to agree to the amount of salary to be paid him in terms of the agreement?—(A) There was no agreement made, nor attempted to be made, about salary. The salary was as consulting engineer. There was no service that he ever rendered. Our law-agents and his law-agents had a considerable correspondence. We asked several times for some specification as to what my father wanted, and what he complained about, but we never got any such specification. We again wrote him on the subject on 24th of April, but no reply was made to that so far as I am aware, and we got no specific particulars . . . *Cross.* — The agreement says that the first party (my father) shall remain as consulting engineer in connection with the business, at such salary as may be agreed upon from time to time, but nothing has been done under that. The agreement goes on, 'The second party shall be bound to take the advice of the first party on all points connected with the practical management and development of said business, as well as the ordering of all plant and material necessary for the carrying on of said business, and the engaging and dismissal of employees.' (Q) Have you acted upon that?—(A) Yes. (Q) Have you taken your father's advice on points connected with the practical management and development of the business?—(A) We never asked his advice. (Q) Did you take his advice with regard to the ordering of material and plant?—(A) When we required it—when he was going about the place. I don't think we consulted him about the engaging or dismissal of employees. We have not put my father out of the works."

The defender John Thomson and other witnesses corroborated this evidence.

The pursuer William Thomson deponed—"(Q) Did they ever agree with you for a salary as consulting engineer under the agreement?—(A) No; they said it was premature. (Q) Did they ever consult you as to buying material for carrying on the business, or engaging or dismissing servants?—(A) At first they inclined to do that, and to take my instructions, but afterwards they refused to do anything. . . . *By the Court* (Q)—What are the rents mentioned in that agreement which was prepared by your agents on your instructions?—(A) I have not the slightest knowledge. It was not by my instructions that the thing was put in the agreement; it was only to-day that I found it was so. . . . I cannot say how

often I had been to the works between September 1894 and April 1895. I was for nearly six months under doctors when I was not there at all. (Q) Were you wanting salary for the time you had not been there at all? —(A) Under the agreement."

Other witnesses testified to altercations between the pursuer and the defenders at the works.

On 14th July 1896 the Lord Ordinary (STORMONTH DARLING) sustained the tenth plea-in-law for the defenders, and in respect thereof assoilzied them from the conclusions of the summons.

Opinion . . . .—"The turning point of the case is a written agreement between the pursuer and the defenders dated 2nd January 1894, whereby the pursuer transferred to the defenders the business of an engineer, which, as the deed narrated, he had carried on for many years in these very premises. The transaction bore on the face of it to be a family arrangement, because the transferees were not only his two sons, who are practical engineers, but his son-in-law, who is a rate collector, and was introduced into the business as representing his wife, the only other child of the pursuer's first marriage. The subjects transferred were 'the business of engineer presently carried on by the first party at 57 Smith Street aforesaid, . . . and the whole stock, funds, assets, rents, and goodwill thereof, together with the whole machinery and appliances in said premises, whether fixed or unfixed, belonging to the first party.' In respect of this assignation the defenders undertook to pay the pursuer an annuity of £250 during his life. They also took over the whole debts and obligations of the business. There was a provision enabling the pursuer in the event of the annuity remaining unpaid for six months to enter into possession and management of all the subjects transferred, and the defenders were prohibited from disposing of the business or of any portion of the plant or stock during the pursuer's lifetime. There was also an ill-considered and unworkable stipulation to the effect that the pursuer was to remain as consulting engineer in connection with the business 'at such salary as might be agreed upon from time to time,' and that the defenders were to take his advice upon all points connected with the practical management of the business. These are the chief heads of the agreement, which certainly contains no express provision with regard to the business premises. The question is, whether any such provision is implied, at all events to the effect of barring the pursuer from summarily ejecting his transferees. The question with him is thus essentially different from what it might have been with his wife.

"At the date of the agreement the pursuer was ostensibly tenant of the premises under a lease from his wife for twenty years from Whitsunday 1883 at a rent of £40. I say ostensibly, because he was to all intents and purposes proprietor. He had erected the buildings and the fixed machinery at his own cost; he had regularly paid the ground-annual just as a proprietor would have done, and he had paid no rent to his wife. But on paper he was tenant merely. It followed from this that he could assign his right of occupancy down to Whitsunday 1903, validly enough so long as his wife did not object. It followed also that the machinery which he had erected and affixed to the soil had become a part of the heritable property belonging to his wife, subject only to his power of restoring its moveable character by removing it at or before the termination of the lease—*Miller* v. *Muirhead*, 21 R. 658. The right to remove it was one which he could also assign, and he undoubtedly did so by assigning the fixed machinery itself. But the natural inference, as it seems to me, from his so assigning it, was that he did not intend the removal to take place until the end of the lease, and if so, that he intended his assignees to remain in occupation of the premises till that period arrived.

"Another stipulation in the agreement which points strongly in the same direction is the assignation of 'rents.' The pursuer in his evidence was not at all candid about this, but it is clearly enough established what these rents were. They were small payments made by Muir & Houston and Boag in respect of their occupation of stores in the Smith Street premises. Previous to the agreement these were drawn by the pursuer; since the agreement they have been drawn by the defenders till the present question arose. If any meaning at all is to be given to the word 'rents,' it is one which necessarily, I think, implies that the defenders were to be middlemen in the occupation of the premises, and therefore in a position to draw the rents.

"Again, there is the assignation of 'goodwill.' I do not say that every assignation of goodwill implies a right to occupy the premises in which the business is conducted. But this business had been conducted there for nearly twenty years. It was a business, according to the evidence, requiring for its success a situation in that locality. It was a business also requiring heavy fixtures—a steam-hammer and the like—which could not be removed and re-erected except at a large expenditure of time and money. If the profits are only £400 a-year, as the defenders say they are (and the pursuer says nothing to the contrary), out of which the pursuer himself was to receive £250, it seems out of the question to suppose that the parties intended that new premises might at any moment have either to be bought or leased, and the fixed machinery torn up and removed there. My firm belief is that the parties intended nothing of the kind, and that the annuity of £250 was to be the consideration not only for the assignation of the business and the stock and machinery, but for the right to occupy the premises, or, in other words, was to include the rent of the premises so long as the pursuer could give that right. He is now in a position to give it for the full period during which the annuity is to run, *i.e.*, for the remainder of his life, and I think he is bound to do so so long as the annuity is regularly paid. I arrive at the

conclusion both on a construction of the agreement as a whole, and also on the evidence of the conduct of parties, for I cannot otherwise explain the forbearance to demand any other rent than the £250 for a period of nearly two years on the part of one so little disposed as the pursuer seems to be to forego any of his supposed rights.

"An attempt was made to show that the defenders had broken the agreement by not employing the pursuer at a salary as consulting engineer. There is evidence that the father and sons were on deplorably bad terms, and there may have been faults of temper on both sides. But I do not find that the fulfilment of so loose and unbusinesslike a stipulation was ever brought to a proper test, and I cannot therefore hold that the defenders committed any breach of their contract in this respect. They have regularly paid or tendered the annuity, which was the main thing.

"I shall therefore sustain the 10th plea-in-law for the defenders, and assoilzie them with expenses."

The pursuer reclaimed, and argued—The Lord Ordinary was wrong. (1) The defenders must produce a title to keep out the owner, and the only possible title was a lease. The agreement founded on by the defenders was not a lease. There was no letting of the subjects, no rent was stipulated for, and no period was named for which the premises were let. Every distinctive characteristic of a lease was wanting. (2) Even assuming that there was a lease of the premises, the defenders had not fulfilled the obligations incumbent on them. It was expressly agreed that the pursuer was to be consulted, not merely as to the general conduct of the business, but also in every detail. The pursuer had an undoubted interest to enforce this obligation, for his annuity depended upon the success of the business. It was plain from the evidence that the pursuer had not been consulted at all.

Argued for the defender—The Lord Ordinary was right. (1) This agreement really imported a lease of the premises. There was a fixed period of time, viz., the pursuer's life; there was a fixed money payment, viz., the annuity of £250. Apart altogether from the rights of singular successors in the property in question, the pursuer, who though he might have been *non dominus*, had held himself out to the defenders as *dominus*, was not entitled when he became *dominus* to turn upon them and plead that when he granted the lease he had no right to do so—*Ewart* v. *Cochrane*, April 11, 1861, 4 Macq. 117, referred to. (2) The breach of the agreement complained of was a breach of a wholly subsidiary obligation. But in any event no such breach had been proved, and the pursuer had not discharged the burden of proof which lay upon him.

At advising—

LORD ADAM—This is an action brought to have the defenders summarily removed from certain premises in Smith Street, Kinning Park, Glasgow. The action was originally raised by Mrs Thomson, the present pursuer's wife, but it is now insisted in by Mr Thomson. The defenders are two of his sons and a son-in-law.

The question at issue between the parties depends upon the construction of an agreement, dated 22nd January 1894, entered into between the pursuer and defenders, and the question appears to me to be, whether that agreement contains *in gremio*, either expressly or by reasonable implication, a lease to the latter of the premises, as in a question between them.

At the date of the agreement the title to the premises stood in the name of Mrs Thomson. The pursuer Mr Thomson was in possession of them, and carried on in them the business of an engineer.

He held a lease of them from Mrs Thomson for twenty years from Whitsunday 1883, at the rent of £40, but he was at the same time maintaining that he was the proprietor, having purchased them with his own money and made a gift of them to his wife, which he had revoked. That and other matters became the subject of litigation between the husband and wife, which resulted in an agreement, dated 4th November 1894, by which, *inter alia*, it was stipulated that Mrs Thomson should grant a valid title to the pursuer of the subjects in question. That was subsequently done, and the pursuer was, on 10th January 1896, sisted in her room and place as pursuer of this action.

It will be observed that the agreement of 22nd January 1894, to which I have now to direct attention, contains no reference to the lease which at the time the pursuer held from his wife. It does not profess to assign that lease or to grant a sub-lease, but all the stipulations contained in it proceed on the footing that the pursuer was in a position effectually and validly to contract as to them.

[*After stating the terms of the agreement, his Lordship proceeded*]—

This agreement has been duly implemented. The defenders are in possession of the premises, stock, plant, &c., under it. They have paid the debts of the pursuer in connection with the business at its date, and they have paid him the stipulated annuity. Nevertheless he now seeks to remove them summarily on the ground that they have no lease or other title to possession of the heritable subjects.

It seems to me to be clear that the agreement was primarily one for the transfer of the pursuer's business as an engineer to the defenders. The business which was so transferred is described in the agreement as the business carried on by the pursuer at 57 Smith Street aforesaid, *i.e.*, the premises in question—and looking to the nature of the business of an engineer, and to the fact that part of the plant transferred consisted of heavy fixed machinery which could not be removed except at great expense and loss of time, and that the business had been carried on in the premises for twenty years, and had necessarily acquired a certain goodwill, it appears to me that it was clearly the intention of the parties to the

agreement that the business should be carried on in the same premises as theretofore. If that be so, it was and is necessary that the defenders should have a right to the occupancy of the premises for that purpose. I therefore think that the agreement contains an implied lease of the premises to the defenders for the period of its duration, that is, the lifetime of the pursuer.

But it is said that there can be no lease without a rent stipulated for, and that there is none here. That might, no doubt, create a difficulty in a case with a singular successor, but in this case I think the rent formed part of the sum agreed to be paid by way of annuity, and is included in it. As between the parties it was not necessary to distinguish in respect of what particular obligations the annuity of £250 was payable. Indeed, it appears to me that if it had not been intended that the business and premises should be inseparable during the currency of the agreement, there would have been a separate sum stipulated for as the rent of the premises.

It cannot have been intended that the defenders should pay to the pursuer the same amount of annuity whether they were or were not in possession of his premises. I think therefore that we find in the agreement a lease of the premises for a definite period, viz., the lifetime of the pursuer, and at a rent which, although the amount is not definitely fixed, is yet included in the annual sum payable by the defenders to him, and that I think is sufficient to give them a valid title to the possession of the subjects as in a question with the pursuer.

I concur in the Lord Ordinary's observations as to the inference arising from the assignation of the "rents" and "goodwill," to which I have nothing to add.

The result at which I have arrived might possibly have been different if Mrs Thomson had continued to be the pursuer of the action. In that case various pleas stated on record as against her would require to be disposed of. But I do not think it necessary to do so, because we have now only the present pursuer to deal with, and whether he was or was not *de facto* proprietor of the subjects when he entered into the agreement, he has now become proprietor and is bound to do all he can to implement that agreement, and to do nothing to invalidate it, and it appears to me that the case must be dealt with in the same way as if he had been proprietor of the subjects when he entered into the agreement.

But the pursuer further maintains that the defenders are not entitled to found on the agreement because they are themselves in breach of it. This refers to the clause in the agreement by which it was stipulated that the pursuer should remain as consulting engineer, and that the defenders should take his advice as to the practical management of the business and so on, which it is alleged the defenders are in breach. I agree with what the Lord Ordinary says as to that matter, and have only to add that even if it were true that the defenders had failed to implement the contract in this respect, it would not give rise to an irritancy of the lease and the consequent removal of the defenders, if I am right in thinking that there was a lease.

I observe that the Lord Ordinary has sustained the tenth plea-in-law for the defenders, which is to the effect that the action is against the good faith of the agreement. I think that ground of judgment is somewhat vague, and I should prefer to rest the judgment on the ground that the action is contrary to the terms of the agreement.

On the whole matter I am of opinion that the defenders should be assoilzied.

LORD M'LAREN—The first question for consideration is, what is the true meaning of the agreement between the pursuer and the defenders so far as relates to the occupation of the heritable property in which the business was carried on which is the subject of sale. Now, this is not the case of a sale of a commercial business carried on in a shop and warehouse where the migration to other premises would involve nothing more serious than the removal of the stock-in-trade from one building to another.

The business was the manufacture of certain descriptions of ironwork, and it was carried on in buildings and sheds specially arranged for work of this description, and with the aid of a steam-hammer and other machinery, partly fixed and partly moveable. It is in evidence that it would not be easy to find a suitable site for such a work in the locality where the Thomsons' business has been carried on, and where it is necessary that it should be carried on if the business connection of the firm is to be maintained. Moreover, even if a site were obtained, the removal of the fixed machinery and plant, and the erection of the buildings and sheds which are necessary for its accommodation, could not be accomplished without the expenditure of several hundred pounds, while it is the fact, and it was necessarily known to the pursuer, that his sons at the time of the agreement had no means, and could not possibly have taken over the business, if it were to be carried on elsewhere than in the premises in which it was then placed. These considerations make it clear that a transference of the business to other premises was not in the contemplation of either of the parties to the agreement. The defenders could not have met the expense of establishing a new workshop, the pursuer would not have got his annuity, and the whole arrangement would have been a meaningless form.

But this is not all. The heritable property was purchased in the name of the pursuer's wife, who was the defenders' stepmother, and while the pursuer held the subjects under a lease terminating in 1905, he never paid any rent. It is not disputed that the cost of erecting the buildings and providing the machinery and plant was defrayed by the pursuer, and it is in evidence that the pursuer claimed the land in property as having been purchased with his money. In these circumstances

the pursuer entered into an agreement with his sons, under which he assigned to them the whole stock, assets, &c., of the business described as carried on by him at Smith Street, Kinning Park, Glasgow, in consideration of an annuity for life of £250 and certain other advantages. I think this was a conveyance in general terms of every right which the pursuer had in relation to the business, and that it is no objection to the generality of such a conveyance that heritable estate is not specially mentioned in it.

It follows, in my opinion, that the assignment carried with it such a right to the occupation of the subjects during the pursuer's life as he was able to give, and that the annuity and other considerations were intended to include the rent which would otherwise be payable to the pursuer if he was proprietor, or the rent which the pursuer had agreed to pay to his wife if he were only a leaseholder.

It was of no consequence to the defenders to know what the precise title of their father was, because they were willing to take the premises and business with such right as their father was able to give them, which, as they calculated, was sufficient for their purposes.

Again, it is equally plain that there is nothing in the conditions of the bargain making it improbable that the pursuer should have so bound himself. I mean there is no such improbability and no such inequality in the bargain as ought to influence a court of law to depart from the plain natural meaning of the words used, and to cast about for some more restricted kind of conveyance in order to remove difficulties which do not exist.

The rights of the pursuer were fully protected by the clause which empowered him to resume possession if his annuity were not punctually paid. In other respects the terms of the agreement are such as are usual and suitable to the case of the head of a firm retiring from business, and desiring to be secured in a moderate income and to be relieved from the trouble and anxiety incident to the conduct of a business which depended on personal supervision.

Now, in the absence of words of special conveyance of the tenant's right, or words of special grant of a new leasehold right, it would not be consistent with principle to hold that the premises in Smith Street were warranted absolutely. I think, however, that there was an implied warranty of a more limited character, which imported this much, that the pursuer could not by abandoning the existing lease, and acquiring the land in property from his wife, defeat the rights of his assignees. Whatever title he might acquire to the land would, in my opinion, be burdened by the right of his assignees to possess the property so long as they were able to fulfil their engagements.

These considerations, as I think, suffice for the disposal of the case. I ought also to say that I agree with the Lord Ordinary in holding that the clause in the agreement assigning the rents of certain small subjects which the firm were in use to let, is evidence that in the intention of the parties the defenders were to be the principal tenants of the subjects as a whole. It is not disputed that the defenders have regularly paid the annuity, and I think that the Lord Ordinary's observation regarding the employment of the pursuer as consulting engineer is well founded, viz., that this condition has never been brought to a test, because it has not been proved that the defenders have had occasion for the services of a consulting engineer.

While we may not admire the conduct of the defenders to their father as brought out in the evidence, we have in this case only to consider the question of civil right, and I am of opinion that the pursuer is not entitled to the decree of ejection which he claims.

LORD KINNEAR—I have thought this case one of some difficulty. We cannot add a term to a written contract, and the plea which the Lord Ordinary has sustained appears to me to rest the defence, not on any direct contractual obligation, but upon some indefinite understanding or principle of good faith which is supposed to arise partly from the intention of the contract and partly from extrinsic facts. I should not be disposed to concur in sustaining that plea, but upon consideration I have come to agree with your Lordships that a better ground of judgment may be found in a fair construction of the contract itself.

The purpose of the agreement is to transfer a going business from the pursuer to the defenders, and in carrying out that intention the pursuer assigns to the defenders the business of engineer carried on by him in the premises in question, and the whole stock, funds, assets, and goodwill thereof, together with the whole machinery or plant, whether fixed or unfixed, belonging to him. The material points seem to me to be that at the date of this agreement the pursuer was in fact, as he is now in title also, the owner of the premises in question; that he had carried on his business for many years in these premises; that he had erected the buildings and fixed machinery for the purpose of the business, which, as the Lord Ordinary says, required a situation in that locality, and also required the use of heavy fixtures which could not be removed and re-erected except at the expenditure of a large amount of time and money. I think that by this agreement the defenders undertake to carry on the business as it was at this date. It is for this purpose that the fixed machinery is transferred to them. They have no right to remove that machinery during the subsistence of the agreement any more than to sever any other part of the heritable subjects from the remainder, but are bound to make use of it for the purposes of the business within the pursuer's premises. I think that an agreement of this kind for the transfer of the assets, goodwill, and plant of the business im-

ports and carries with it a licence to the transferees to occupy the premises for the purpose of the business and during the subsistence of the agreement, provided they fulfil the obligations which they have undertaken in consideration of the rights conferred upon them.

I agree with Lord Adam, therefore, that the agreement contains the terms that are necessary to the personal contract of lease. It is not necessary to consider what might be the defenders' right in a question with singular successors, but during the pursuer's life I think that he is not entitled to turn them out of the premises so long as they continue to carry on the business and perform the stipulations in his favour.

The LORD PRESIDENT was absent.

The Court varied the interlocutor reclaimed against by deleting the words "sustains the tenth plea-in-law for the defenders and in respect thereof;" *quoad ultra* adhered, and refused the reclaiming-note.

Counsel for the Pursuer—W. Campbell—Cullen. Agents—Carmichael & Miller, W.S.

Counsel for the Defenders—Shaw, Q.C.—Orr. Agents—George Inglis & Orr, S.S.C.

Tuesday, January 5, 1897.

FIRST DIVISION.

[Lord Stormonth Darling, Ordinary.

SOEDER *v.* SOEDER.

Husband and Wife—Divorce—Adultery—Relevancy.

Averments in an action of divorce on the ground of adultery, which *held* (*aff.* judgment of Lord Stormonth Darling) irrelevant to go to probation, on the ground that they were not sufficiently specific in point of time.

Johann Jjacko Louis Soeder, Edinburgh, raised an action of divorce on the ground of adultery against his wife Jane Mitchell or Soeder, and against William Shaw, spirit merchant, Edinburgh, co-defender, concluding against him for £500 in name of damages,

The pursuer in his condescendence, which consisted of thirty-five articles, specified certain occasions on which adultery had been committed by the defender with the co-defender, and with another man named Berthout. He averred, *e.g.*—"(Cond. 9) On or about 26th June 1893 the pursuer sailed from Leith to Germany, and was accompanied to Leith by the defender. It is averred that after parting with the pursuer, the defender, under previous arrangement, met the co-defender Shaw, whom she took to the pursuer's house in Dublin Street aforesaid, and that he remained with her there for a considerable time, and on that occasion the defender committed adultery with him."

He further averred—"(Cond. 11) During the said years 1893, 1894, and 1895 the defender was in the habit of visiting the said co-defender Shaw at his said shop at No. 2 High Riggs, Edinburgh, and she then within his said shop on the occasion of such visits committed adultery with him. These visits were made for the sole purpose of obtaining drink and for immoral purposes. On such occasions the defender was shown into Shaw's private room in his said shop, where she remained with him for hours. They frequently left this shop and went to the house of a Mrs Munro at No. 4 High Riggs aforesaid, and the pursuer avers that they committed adultery there. (Cond. 15) During the year from July to December 1893, and during the year 1894, and from January to April 1895, Shaw used frequently to meet the defender at the house of a Mrs Boyd, tenanted by her at No. 11 South St James Street, Edinburgh, from Whitsunday 1893 to Whitsunday 1894, and subsequently at No. 38 Balfour Street there, which she occupied from Whitsunday 1894 to Whitsunday 1895, and which houses were well-recognised houses of ill-fame, and well known as such to the defender, and were frequented by men and women for immoral purposes. On the occasion of all such visits the said defender committed adultery with Shaw. (Cond. 24) The pursuer avers that the defender and the said Berthout were in the habit of frequently meeting at the house of the said Mrs Boyd at No. 11 South St James Street aforesaid during the years 1893 and 1894 while she resided there, and that the defender then committed adultery with him. (Cond 25) The pursuer further avers that the said Berthout, during the year from Whitsunday 1894 to Whitsunday 1895, frequently met the said defender at Boyd's house at Balfour Street aforesaid, and that she committed adultery with him there. The pursuer reserves all claims of damages competent to him against the said Berthout."

On 25th November 1896 the Lord Ordinary (STORMONTH DARLING) allowed parties a proof of their averments contained in certain specified articles of the condescendence and relative answers thereto, but these did not include articles 11, 15, 24, and 25 above quoted.

Note.—"I have refused to allow a proof of certain articles of the condescendence, because they are in my view much too vague to be admitted to probation. With regard to articles 15 and 24, inasmuch as the averments refer to visits by a married woman to a house of ill-fame, I should have been disposed to allow proof, if the pursuer had been able to assign a good reason for taking so great a latitude in point of time as two years; but he has not done so, and I am not satisfied that he has taken the usual and proper means of as-