evidence the farm premises have not been put into the condition into which the landlord was bound to put them. I therefore concur with the judgment of the Sheriff, and think that this appeal ought to be refused, and that with expenses.

LORD TRAYNER—I am of the same opinion. The claim which is sought to be enforced by this action is a claim for rent, and payment of rent is the obligation on the defender under the contract of lease. But the contract imposed obligations on both parties—the landlord and the tenant. The tenant's obligation is to pay the rent—the landlord's obligation is to give a tenantable subject. Now, I am disposed to put my judgment simply upon the application of the general rule, that where a person seeks to enforce the terms of a contract against another he is excluded from doing so if it can be shown that he is in default himself in the obligation that the contract puts on him. I think the case has been a little embarrassed by the introduction of the fact that there has been a change in the proprietorship of the subject. I think this case must be decided without reference to that change of proprietorship at all. It suggests, no doubt, a reason why the defender should set up this plea now which he did not set up six months or twelve months ago; but I think it does not affect the question to be determined nor the judgment to be pronounced on it. I think the pursuer's case has failed, and the Sheriff has properly dismissed the action on the ground that the pursuer cannot enforce a contract, the obligation in which, binding on himself, he has failed to fulfil.

LORD MONCREIFF—The Sheriff finds in point of fact that the barn and stable wing and hen-house and earth-closet were not in habitable condition and repair at the defender's entry, and that nothing has been done to put them in repair; that the pursuer has offered to execute certain repairs mentioned in the minute of tender, and that the said repairs would not be sufficient to put the building into habitable condition and repair. I think the evidence establishes these findings in fact. The findings in law are—"(1) that the pursuer is bound to put the said buildings in habitable condition and repair; (2) That the defender is entitled to retain the said rent until that is done: Therefore dismisses the action." Now, I think that is a sound ground in law for the decision of the case. It is simply this, that the landlord has not fulfilled his obligation under the lease, and therefore is not in a position to demand payment of the rent. Mr Blackburn maintained that in order to a good plea of retention of rent it was necessary that the tenant should establish damage to the amount of the rent retained. I do not agree in that. I have no doubt that the Court is entitled to take cognisance of the kind and amount of damage alleged by the tenant, and that they will not allow retention of rent where the damage complained of by the tenant is trivial. But where the damage sustained is solid and substantial then I do not think it essential that the tenant in order to make good a plea of retention should prove what specific amount of damage he has sustained. What he demands is not damages but that the landlord should fulfil his obligation to put the buildings in order before he can demand payment of the rent.

There is only one other point that requires to be noted, namely, the plea of acquiescence. It is maintained that this tenant by occupying for three years and paying rent discharged the landlord of his obligation. I think the explanation of that is very simple, and that is that the landlord very properly had been recognising his obligation, and had been fulfilling and discharging it bit by bit till the time came when he sold the property. Now, very likely, if the property had not been sold the tenant would have waited the landlord's time and have given him an opportunity of completing the work as he was doing. But the property having been sold, I think that was a proper time for the tenant to bring things to a point, and to call on the landlord to fulfil his obligation. Therefore I have no hesitation in agreeing that the decision of the Sheriff should be affirmed.

The Court dismissed the appeal, found in fact and in law in terms of the findings in fact and in law in the interlocutor appealed against, and dismissed the action.

Counsel for the Pursuer and Appellant—W. Campbell, K.C.—Blackburn. Agents—Dundas & Wilson, C.S.

Counsel for the Defender and Respondent—Salvesen, K.C.—W. Brown. Agents—Tawse & Bonar, W.S.

Friday, June 14.

SECOND DIVISION.

[Lord Pearson, Ordinary.

EASSON'S TRUSTEES *v.* MAILER.

Expenses — Trust—Trustees Found Liable in Expenses—Expenses not to be Paid out of Successful Defender's Share.

In an action by testamentary trustees for recovery of a sum of money, which the defender alleged had been given to her by the testator during his lifetime, the Court held that the alleged donation had been proved, assoilzied the defender, and found her entitled to expenses. The defender, who was one of the testator's residuary legatees, moved the Court to find that no part of the expenses of the litigation should be paid out of her share of the residue. The Court *granted* the motion.

William Hazell and another, the testamentary trustees of the deceased Thomas Easson, Dundee, brought an action against Mary Mailer, in which they concluded for payment of £500, received by the defender from the testator during his lifetime, which the pursuers averred was part

of his estate. The defender, who had been housekeeper to the testator for twenty-one years down to the date of his death, averred that the £500 sued for had been paid to her by the testator in recognition of her services as housekeeper.

After a proof, the Court held, reversing the judgment of the Lord Ordinary (PEARSON), that the alleged donation had been proved, assoilzied the defender, and found her entitled to expenses.

The defender, who was one of the testator's residuary legatees, moved the Court to find that no part of the expenses of the litigation should be paid out of her share of the residue, and cited *Cameron* v. *Anderson*, November 12, 1844, 7 D. 92; *Adam & Kirk* v. *Tunnock's Trustee*, November 17, 1866, 5 Macph. 40; M'Laren on Wills, sec. 2328.

The pursuers objected.

LORD TRAYNER—I have looked into the authorities and I think that the rule is settled.

LORD MONCREIFF—I do not see my way to resist the motion.

The LORD JUSTICE-CLERK and LORD YOUNG concurred.

The Court pronounced this interlocutor:—

"Recal the interlocutor reclaimed against, and assoilzie the defender: Find the defender entitled to expenses, and remit, &c.: Declaring that no part of the expenses of the litigation are to be paid out of the share of the deceased Thomas Easson's estate falling to the defender."

Counsel for the Pursuers and Respondents—Solicitor-General (Dickson, K.C.)—Chisholm. Agent—David Milne, S.S.C.

Counsel for the Defender and Reclaimer — Campbell, K.C. — Wilton. Agent — William Cowan, W.S.

Tuesday, June 18.

SECOND DIVISION.

[Sheriff of Lanarkshire.

JACK *v.* M'GROUTHER.

Trust — Innominate Contract — Proof — Husband and Wife—Verbal Agreement Between Widow and Children as to Estate of their Deceased Husband and Father—Act 1696, *cap.* 25.

A woman died intestate survived by her husband to whom she had been married in June 1876, and by a son who was the issue of a former marriage, and who was decerned her executor dative *qua* next-of-kin. At the date of her decease she had standing in her name a deposit-receipt for £500. Her husband brought an action against her son as her executor dative, in which he claimed one-third of that sum as belonging to him *jure mariti*. The defender averred that this sum of £500 represented the estate left by his mother's first husband, his father, who died intestate in 1869; that before she was married to the pursuer she and the defender and another brother, who had since died unmarried and intestate, entered into a verbal agreement whereby she renounced her right to the third share falling to her *jure relictæ* in favour of her sons and the survivor, in consideration of her receiving the interest of the whole estate during her life; and maintained that in virtue of this agreement neither the said sum nor any part thereof belonged to her either at the date of her marriage to the pursuer or at the date of her death, and that it belonged to the defender. In support of this contention he led parole proof of the agreement, and produced a deed of assumption executed by his mother shortly after her marriage to the pursuer, and without his knowledge or consent, whereby upon a narrative of the agreement she assumed the defender and his brother into the trust created thereby. It also appeared that she had received the whole interest of the sum of £500 above-mentioned from the date of the alleged agreement until her death; that for fourteen years prior to her death she had lived separate from the pursuer; that he had not contributed anything to her support during that time; and that the defender and his brother had made contributions towards her maintenance.

Held (1) That the alleged agreement, if it constituted a trust at all, did not import a trust to which the statute 1696 cap. 25 applied, and that it was therefore proveable by parole evidence. (2) That the deed of assumption, although executed by the deceased without her husband's knowledge or consent, was competent evidence of the existence and terms of the antecedent agreement; (3) that the agreement was sufficiently proved by the evidence adduced. (4) That even if the pursuer's claim were well founded, he would be bound to repay the interest upon the two-thirds of their father's estate falling to the defender and his brother, which the deceased had received for twenty-six years on the faith of the agreement, and which would more than suffice to extinguish her husband's claim.

Thomas Jack, husband of the deceased Mrs Jane Horne or M'Grouther or Jack, brought an action in the Sheriff Court at Glasgow against James M'Grouther, executor-dative *qua* next-of-kin of the pursuer's said deceased wife, for payment of (1) a sum of £166, 13s. 4d., and (2) a sum of £60.

The sum first sued for was claimed by the pursuer as being the amount of certain funds which belonged to the deceased at the date of her marriage to him in June 1876, and which he accordingly claimed as belonging to him *jure mariti*.