that the water is returned to the natural bed of the stream within Messrs Pirie's property. That answer might meet objections on the part of riparian owners, but it is no answer at all to the complaint of the owners of fishings that the bed of the stream is left nearly dry for three-quarters of a mile and the passage of the salmon completely barred except when the river is in flood.

5. I also hold that the pursuers have not lost their rights by submitting to an adverse use during forty years or for time immemorial. It is, I think, clearly proved that for many years prior to 1882 the quantity of water taken was very much less than it has been subsequent to 1882. Then going back to the prescriptive period antecedent to 1858 or thereby, it is, in my judgment, not proved that water was withdrawn by the joint action of the three mills to such an extent as to call for the intervention of the fishery proprietors. Such evidence as we have applicable to that now distant period (1825 to 1865) points to a use of a much more limited character than the use which Messrs Pirie & Company have had since 1882.

6. I do not think it possible to arrive at anything more than a very approximate estimate of the amount of water taken by the defenders in excess of their rights. For this reason I should have preferred to decide the case by finding that the defenders have infringed the pursuers' rights, and remitting to an engineer or person of skill to report what works were necessary to secure a passage for the salmon, if the parties could not agree as to what should be done. But I do not understand the Lord Ordinary's interlocutor as precluding joint action if the parties desire it, and no question of variation of the form of the interlocutor was raised at the hearing of the case, and as I agree with the Lord President and the Lord Ordinary as to the questions of law and fact which are in issue, I concur in the proposed affirmance of the Lord Ordinary's interlocutor.

LORD ADAM and LORD KINNEAR concurred.

The Court adhered.

Counsel for the Pursuers — Dean of Faculty (Asher, K.C.)—W. Campbell, K.C. —Balfour. Agents—Alex. Morison & Co., W.S.

Counsel for the Defenders — Salvesen, K.C.—Clyde, K.C.—Nicolson. Agents—Morton, Smart, & Macdonald, W.S.

Wednesday, December 17.

SECOND DIVISION.

[Lord Stormonth Darling, Ordinary.

CLARK *v.* HUME.

Lease — Insurance — Stipulation in Lease that Landlord shall Insure, Tenant Paying Half of Premium — Rights of Parties in Sum Recovered—Landlord not Bound to Rebuild.

In the lease of a corn-mill it was stipulated that the landlord "shall insure against loss by fire the whole mills, kiln, machinery, houses, and offices . . . for such amount as he may consider necessary, the tenant paying one-half of the annual premium."

The mill and machinery having been destroyed by fire during the currency of the lease, *held* that the insurance was solely for the benefit of the landlord, and that he was not bound to expend the money recovered under the policy of insurance in rebuilding the mill.

In December 1901 Robert Mossman Clark, miller, Ninewells Corn Mill, Berwickshire, raised an action against John Alexander Ross Hume, of Ninewells, in which he concluded (1) for declarator that in implement of the provisions of a lease dated 23rd July and 10th August 1896, whereby the defender let to the pursuer for ten years from Martinmas 1896 the corn-mill of Ninewells, with the kiln, dwelling-house, and offices attached, the defender was bound to expend the sum of £680 recovered by him from the Caledonian Insurance Company, or such part of it as might be necessary, in rebuilding the mill, &c., so as to restore the subjects leased to the condition in which they were prior to the occurrence of a fire on 12th July 1901; (2) for decree ordaining him to expend the £680 as above stated; (3) in the event of the defender failing to rebuild within a fixed time, for payment to the pursuer of £680 in order that the pursuer might himself reinstate the subjects damaged by the fire; (4) for payment to the pursuer of £200 as loss occasioned to him by the interruption of his business; or otherwise (5) as alternative to conclusions (2), (3), and (4), for payment to the pursuer of £2000 as damages.

The circumstances leading up to the action were as follows:—By the lease above referred to the defender let to the pursuer for ten years from Martinmas 1896 the corn-mill of Ninewells, with the kiln, dwelling-house, and other houses and offices belonging to the said mill, and also the lands attached thereto, the pursuer binding and obliging himself to maintain the whole mill and machinery, &c., in good tenantable condition during the lease, and leave them so at his removal, all at his own expense. The lease contained the following clause:—"And it is further stipulated that the landlord shall insure against loss by fire the whole mills, kiln, machinery, houses, and offices, in some respectable insurance office for such amount as he may consider neces-

sary, the tenant paying one-half of the annual premium at the term of Martinmas yearly when paying his rent; and further, the said Robert Mossman Clark shall be bound to keep at all times insured against loss by fire the whole stock-in-trade, live and dead stock, and agricultural produce on the premises, to the extent of at least one year's rent, and pay the annual premium thereon, and report the receipts regularly to the landlord or his factor at the term of Martinmas yearly, and to assign the policy to the landlord in security of the rent whenever required so to do."

The tenant was also taken bound to take the thrashing-mill on the premises off the hands of the outgoing tenant at a valuation, it being agreed that the landlord or the incoming tenant should be bound at the expiry of the lease to take the thrashing-mill as it should then exist at a valuation.

A policy of insurance for £1190 was duly effected by the landlord in his own name with the Caledonian Insurance Company, on the buildings of the dwelling-house and corn-mill, on the machinery therein, and on the kiln and offices. This policy was kept up by the defender, and the pursuer regularly paid his one-half of the premium. On 12th July 1901 a fire occurred by which the mill and kiln and the machinery in the mill were burned down. The landlord recovered £680 from the Insurance Company in respect of the damage done, and on 12th August the landlord's agents intimated to the tenant that the landlord did not intend to rebuild the mill, as he had been advised that the insurance policy was purely for the benefit of the landlord. They added that the tenant would be entitled either to abandon the lease or to remain in possession and claim an abatement of rent in respect of the subjects destroyed.

The tenant being dissatisfied with either of these alternatives raised the present action.

The pursuer pleaded, *inter alia*—"(1) The defender being, on a just construction of the lease referred to, bound, in the event of the subjects of the lease being damaged by fire during the currency thereof, to require the insurance company to reinstate the said subjects, or otherwise being bound to expend the sum recovered from the insurance company, or so much of it as may be necessary, for the purpose of reinstating the said subjects, the pursuer is entitled to decree of declarator in terms of the first conclusion of the summons, and to decree for restoration in terms of the second conclusion, with expenses."

The defender pleaded, *inter alia*—"(2) The insurance in question having been effected for the benefit of the defender he is entitled to be assoilzied."

On 7th June 1902 the Lord Ordinary (STORMONTH-DARLING) assoilzied the defenders from the conclusions of the summons, and decerned.

Note—[*After a statement of the facts*]—"All of these claims (by the pursuer in the summons) depend on the legal question whether the landlord was bound to rebuild.

"It is, of course, admitted that apart from contract there is no obligation on a landlord to restore buildings which have been accidentally destroyed by fire. It is also admitted (or at least is clear) that the mere fact of a tenant being taken bound in a lease to pay one-half of the premium on a fire insurance policy in the landlord's name will not give the tenant such an interest in the insurance as to entitle him either to claim any part of the money recovered, or to demand that the money shall be expended by the landlord in reinstatement. That was clearly laid down in the case of *The Duke of Hamilton's Trustees* v. *Fleming*, 1870, 9 Macph. 329, the judgment being unanimous on that point although there was difference of opinion on the rest of the case. The obligation on the tenant to pay one-half of the premium is a very usual one in agricultural leases, and is regarded in law as just an addition to the rent. The Juridical Styles (vol. i. pp. 585, 595, and 599) contain clauses which do give the tenant an interest in the money recovered under the policy, and do impose on the landlord an obligation to expend it in restoring the buildings destroyed by fire, but these clauses are in contrast to the bare obligation on the tenant to pay one-half of the premium, a specimen of which is to be found at p. 576.

"Here, however, the tenant maintains that the same result is effected by its being made matter of express stipulation that the landlord shall insure. He distinguishes that from the case where it is left to the landlord to insure or not as he pleases. But I observe that in one of the styles to which I have referred (*i.e.*, what is called the 'Ayrshire Lease, at p. 595 of the style book) the policy is 'to be effected in the name of the proprietor on the whole buildings on the farm hereby let,' which is just as effectual a mode of stipulating that there shall be an insurance as the mode adopted here, and yet the framers of the style apparently thought it necessary to add the express obligation on the landlord to expend the money recovered.

"I grant that where you are dealing with a style it may always be said that the addition of an express obligation is intended merely *ob majorem cautelam* in order to make clear something which might otherwise be in doubt. But I find that the clause of insurance in the *Hamilton* case, which is given verbatim in the late Lord President's opinion at p. 335, was not to any extent optional, because the tenant there was taken bound 'to have the whole houses and machinery on the premises constantly insured in some respectable insurance office to the extent of £1200 sterling, the policy to be taken in name of the proprietor, and he relieving the tenant of one-half of the premium of insurance.' Accordingly, the taking out of a policy was made matter of stipulation just as much there as here, and yet the Court had no hesitation in holding that the insurance was for the benefit of the landlord alone. If it be *pars contractus* that an insurance shall be effected, it cannot make any difference on the legal result whether the insurance is to be taken out by the landlord directly or by

the tenant as the landlord's agent. It seems to me therefore that the *Hamilton* case is decisive of the present question, and although I can quite understand, and even sympathise with, the tenant's expectation that the insurance money would be used for its natural purpose of reinstatement, I cannot hold that the landlord was bound by contract so to use it. The result must be absolvitor."

The pursuer reclaimed, and argued—In the present case the tenant stipulated with the landlord that the mill should be insured. There was therefore an obligation on the landlord to insure, and an implied contract that if the buildings and machinery were burnt down he should reinstate. In this respect the case was distinguished from that of *Duke of Hamilton's Trustees* v. *Fleming*, December 23, 1870, 9 Macph. 329, 8 S.L.R. 266, in which case there was no stipulation. The clause contained two correlative parts, one in favour of the tenant to the effect that the landlord should insure the buildings, and the other in favour of the landlord that the tenant should insure the stock. The agreement in the lease that the tenant was to take the threshing-mill at a valuation from the outgoing tenant, and when the lease was over hand it on at a valuation to the landlord or ingoing tenant, also showed that the insurance was in favour of the tenant as well as the landlord. The Court should sustain the first plea-in-law for the pursuer and remit the case to the Lord Ordinary for further procedure.

Argued for the defender and respondent —The stipulation in the lease was in the landlord's interest, and it was for him to judge whether or not it was for his interest to restore the subjects. If the stipulation had been in the interest of the tenant a sum would have been fixed at which the mill was to be insured. No such sum was mentioned; the matter was left wholly in the discretion of the landlord. The case was the converse of that of *Duke of Hamilton* v. *Fleming*, *supra*, and was ruled by it.

LORD JUSTICE-CLERK—I think that the judgment of the Lord Ordinary is right. The clause in the lease is no doubt in peculiar terms, but to spell out of that clause an obligation on the part of the landlord to reinstate in the event of a fire and a right on the part of the tenant to require such reinstatement is in my opinion impossible. The case presented by the tenant is that in terms of this clause the landlord was taken bound to insure the mill in order to provide against loss by fire on the part both of himself and of the tenant. I do not think that is the meaning of the clause. I think the terms of the clause are only a converse mode of stating the provisions in the lease, which formed the subject of the action in the *Duke of Hamilton's Trustees* v. *Fleming*. The insurance in my opinion was solely for the benefit of the landlord, the stipulation being that he should be entitled to insure the buildings for his own interest, and that if he did so the tenant was to pay one half of the insurance premium.

LORD YOUNG—I am of the same opinion. I think Mr Pitman's contention as to the true import and meaning of the clause in the lease upon which the question in dispute depends is the sound one, that it was a stipulation that the tenant should pay half the premium of any insurance which the landlord should make of the mill for such sum as he thought necessary, and that accordingly the tenant is not the creditor therein but the debtor. The words upon which Mr Millar's argument was founded were "the landlord shall insure." The construction put by Mr Millar upon these words was that the landlord became bound to insure for such sum as he considered necessary, and that the obligation of the tenant was to pay half of the premium. The contention on the other side which I prefer to that is, that there was no obligation put upon the landlord by the use of the word "shall," but that the meaning of the clause was to stipulate that if the landlord saw fit to insure, and did it for what sum he considered necessary, the tenant should pay half the premium. Now, that brings the case within the rule of the common law, which was well illustrated—for it was a mere illustration of the rule of common law—in the case of the *Duke of Hamilton*.

LORD TRAYNER concurred.

LORD MONCREIFF was absent.

The Court adhered.

Counsel for the Pursuer and Reclaimer —M'Lennan —J. H. Millar. Agents — Adam & Sang, W.S.

Counsel for the Defender and Respondent —Campbell, K.C.—Pitman. Agents—J. & F. Anderson, W.S.

Thursday, December 18.

FIRST DIVISION.

[Sheriff-Substitute at Edinburgh.

COLVINE *v.* ANDERSON & GIBB.

Master and Servant — Workmen's Compensation Act 1897 (60 *and* 61 *Vict. c.* 37) *sec.* 7, *sub-secs.* 1 *and* 2—*Factory—Warehouse—Distinction between Warehouse and Shop.*

The Workmen's Compensation Act 1897 enacts (section 7 (1))—"This Act shall apply only to employment by the undertakers as hereinafter defined, on or in or about a . . . 'factory.' . . ." (2) "'Factory' has the same meaning as in the Factory and Workshop Acts 1878 to 1891, and also includes any dock, wharf, quay, warehouse, machinery or plant to which any provision of the Factory Acts is applied by the Factory and Workshop Act 1895."

A workman employed as a lorryman under a firm of drysalters was injured while removing certain casks from