side of the question, I am clearly of opinion that the claim of the defender with respect to which he retains the rent is not an illiquid claim. I do not think the matter turns on liquid or illiquid at all. The position of a landlord and tenant is different from that of people entering into a bargain for the exchange of commodities, a particular quantity of goods being exchanged for a particular sum of money. A tenant is necessarily in a different position with his landlord. A tenant may have difficulty in making up his mind not to accept the subjects because something has not been put right. It might be hard upon the landlord if he did so, and might place the tenant himself in embarrassing circumstances and render him unable to get another farm. Therefore he may accept the subjects in the hope that if there are things to be done the landlord will do them, and on that footing he may be content to take up the lease. We know there are cases in which strong representations are made by the tenant to get things done, and in which there is considerable dilatoriness on the part of the landlord, or perhaps more often on the part of the landlord's chamberlain or factor. Therefore I do not think the tenant is to be prejudiced by having paid rent for some years—he is always hoping to get the things done. But there comes a point at which he takes up the position—"I have waited these two years, and in this position of affairs I cannot go on unless I get these things done. I am not going to pay my rent until they are done." In these circumstances it has been held in certain cases, especially in *M'Donald* v. *Kydd* (3 F. 923), that a tenant may have ground for taking up such a position.

In this case I am of opinion that the tenant is in the position in which he may take up that ground. He has consigned the rent, and therefore, as Lord Salvesen has pointed out, this is not an attempt on the part of the tenant to evade his obligation. He has parted with the money, but he says he will not consent to it being paid to the landlord unless the landlord fulfils the obligation incumbent upon him in the lease. The question of the character of a grazing farm is of course a question of fact and not of law, and can only be answered upon evidence of the customs and knowledge of those who are engaged in agricultural pursuits. But in the meantime we are in this position that the parties are in dispute as to the practical meaning of the obligation contained in the lease. That being so, the condition of matters is this. In the Sheriff Court at present there is an action by the present tenant against his landlord, and here we have an action by the landlord against the tenant for payment of the rent. In these circumstances it seems to be, that if ever there was a case where the decision in *M'Donald* v. *Kydd* should apply, it is this case. No question arises here as to whether the obligation which is claimable against the landlord will cost as much as the amount of the rent which is consigned in Court. There have been cases in which the Court has seen fit, after making a cursory examination of the proceedings, to set free a certain part of what has been consigned and hand it over to the landlord. We have no materials to do anything of the kind here; it may be done in the Sheriff Court. I cannot help holding that the defender here has not gone beyond his rights looking to the allegations he makes, because if his allegations are well founded he has been put to considerable loss and trouble. I hold that this case is ruled by the case of *M'Donald* v. *Kydd*, and accordingly the Sheriff's interlocutors should be recalled and the case remitted back to the Sheriff Court. Both parties will consider the suggestion of Lord Dundas, whether, when the case goes back, it would not be advisable that the two cases should be conjoined and proceed together. We will find the appellant entitled to expenses since the date of the interlocutor of the Sheriff-Substitute, ordain the Auditor to report to the Sheriff, and grant authority to the Sheriff to decern for amount.

LORD ARDWALL was absent.

The Court recalled the interlocutors appealed against, and remitted to the Sheriff-Substitute to allow a proof.

Counsel for the Pursuer (Respondent) Constable, K.C. — MacRobert. Agents — Cowan & Stewart, W.S.

Counsel for the Defender (Appellant)— Macmillan—Jameson. Agents—Langlands & Mackay, W.S.

Friday, May 19.

FIRST DIVISION.

(SINGLE BILLS.)

PEARSTON, PETITIONER.

Company—Process—Winding-up—Liquidation—Death of Liquidator—Note for Appointment of New Liquidator—Companies (Consolidation) Act 1908 (8 *Edw. VII, c.* 69), *secs.* 135, 149 (7), *and* 285.

A note for the appointment of a new liquidator falls to be presented to the Lord Ordinary in the liquidation, and not to the Division.

The Companies (Consolidation) Act 1908 (8 Edw. VII, c. 69) enacts — Section 135 — "The Court having jurisdiction to wind up companies registered in Scotland shall be the Court of Session in either Division thereof, or, in the event of a remit to a permanent Lord Ordinary, that Lord Ordinary during session, and in time of vacation the Lord Ordinary on the Bills." Section 149, sub-sec. (7)—"A vacancy in the office of a liquidator appointed by the Court shall be filled by the Court." Section 285—"In this Act, unless the context otherwise requires, the following expressions have the meanings hereby assigned to them

(that is to say) . . . 'The Court' used in relation to a company means the Court having jurisdiction to wind up the company."

On 19th July 1910 Mrs Isabella Macgregor or Pearston, 10 Queen's Drive, Glasgow, a shareholder and sole director of the Scottish Proprietary, Limited, presented a petition to the First Division praying that the company might be wound up by the Court under the provisions of the Companies (Consolidation) Act 1908. On 3rd August 1910 the Lord Ordinary officiating on the Bills ordered the company to be wound up by the Court, and appointed Mr Norman Cairns, C.A., Edinburgh, to be official liquidator thereof. On 15th October 1910 their Lordships of the First Division remitted to Lord Cullen to proceed in the winding-up. Mr Cairns having died on 12th April 1911, a note was presented to the First Division by Mrs Pearston for the appointment of a new liquidator.

The note appeared in the Single Bills on 19th May, when counsel for the petitioner moved for intimation.

LORD PRESIDENT—We think this application ought to be presented to the Lord Ordinary in the liquidation, and not to this Court.

[The Court did not write upon the application.]

Counsel for Petitioner—W. T. Watson. Agents—Dove, Lockhart, & Smart, S.S.C.

HIGH COURT OF JUSTICIARY.

Saturday, May 20.

(Before the Lord Justice-Clerk, Lord Dundas, and Lord Salvesen.)

STIRLING *v.* H. M. ADVOCATE.

Justiciary Cases—Habitual Criminality—Proof—Prevention of Crime Act 1908 (8 *Edw. VII, c.* 59), *sec.* 10 (2).

The Prevention of Crime Act 1908, sec. 10 (2), enacts—"A person shall not be found to be a habitual criminal unless the jury finds on evidence (*a*) that since attaining the age of sixteen years he has at least three times previously to the conviction of the crime charged . . . been convicted of a crime, and that he is leading persistently a dishonest or criminal life. . . ."

In order to warrant conviction of habitual criminality it is necessary for the Crown, in addition to proving that the accused has been three times previously convicted of crime, to prove in evidence that he was in fact leading a dishonest or criminal life at the time of his apprehension.

This was an appeal under the Prevention of Crime Act 1908 (8 Edw. VII, cap. 59), sec. 17 (5), by Robert Stirling, who had on 8th March 1911 been convicted, at the Circuit Court at Glasgow, of being a habitual criminal, and sentenced to five years' preventive detention. The appeal was supported on the ground that there was no evidence that the appellant was at the time of apprehension persistently leading a dishonest or criminal life.

The substance of the evidence led at the trial and the arguments of parties sufficiently appear from the opinion of the Lord Justice-Clerk.

Counsel for the respondent referred to *Gillan* v. *H. M. Advocate*, 6 A. 205, 1910 S.C. (J.) 49, 47 S.L.R. 676.

LORD JUSTICE-CLERK—This is a case under a new statute which introduced a new mode of depriving a citizen, it may be for a long period, of his rights as a citizen and a free man, not on the ground of any particular offence, but on the ground of his general life as indicated by convictions against him, of which there must be three, and by other evidence which proves that he is persistently leading a dishonest and criminal life. When a man has been convicted several times there is a very strong natural tendency on the part of a jury to hold, without further proof, that he is a habitual criminal. If that were to be held as sufficient evidence it would come to this, that no man who has been a criminal could ever cease to be a criminal unless by re-establishing character by good conduct over a long series of years. In such a case as this it is essential, in order to ensure a just conviction, to show that the person who has been brought up and tried for the offence is a person who at the time is living a dishonest and criminal life, and this is the first thing which I should expect the prosecution to prove if it could be proved. It is not enough to show that the man is wavering between dishonesty and an honest life. The accused must be stamped with the present character of a habitual criminal. If a man in order to make a pretence of leading an honest life does some honest work when truly he is associating with thieves and acting generally as a dishonest person, the odd jobs that he does would not affect the minds of any sensible jury. But it is surely for the prosecutor to prove clearly and indubitably that the man is leading a dishonest and criminal life. The only evidence there is in this case shows that the accused had done some jobs. There is no evidence that immediately prior to the act of which he was convicted he was leading a dishonest life. He was in Glasgow at the time. He must be well known to the police and be a person whom the police would keep under their regular supervision. It is their duty to do so, and they always do their duty most efficiently. In a previous case it was proved that the panel who was said to be doing honest work was a constant associate of thieves. Here a police constable was brought to give evidence, but he did not say that he ever knew the pursuer before or had ever seen him in suspicious circum-