own name. The Lord Ordinary sustained the plea of no title to sue and dismissed the action, and a reclaiming note was brought against his Lordship's judgment. Your Lordships upon the hearing took the view that the Lord Ordinary's judgment was quite right, but that there was no reason why the pursuer should not take advantage of the recent Act of Sederunt, 20th March 1907, section 2 (*a*)—that is to say, that he could amend the instance by putting the executor in as pursuer, taking, so to speak, a compulsory borrowing of the executor's name, which is always allowed where an executor will not raise an action which a beneficiary seeks to raise, if the beneficiary keeps the executor free in the matter of expense, and accordingly the parties were given time in order that the proposed amendment might be made and arrangements made about expenses.

Now the amendment could only be allowed upon payment of expenses, because the progress of the action so far was quite useless; it was really equivalent to making a new action; and the matter came up again by the pursuer's counsel appearing and saying that though the pursuer was willing to make the amendment and to pay the expenses as a condition of being allowed to make that amendment, he was not in a position to find caution in ordinary form for the executor's expenses, because he had been long absent from the kingdom, and he did not happen to have friends whom he could ask to find caution, and in lieu thereof he proposed to consign the sum of £200, and upon that he asked your Lordships to allow the action to go on.

There is no question that the ordinary condition of allowing a beneficiary to use an executor's name is that the executor should be kept *indemnis* by satisfactory caution being found, and I am far from suggesting that we should countenance any deviation from the ordinary rule except in a very special case. It is not to be supposed that parties are to come forward and make offers of consignation where they should find caution. But there are cases--and this may be one of them—where a man has no friends whom he can ask to come forward as cautioners, and where it might amount to a denial of justice if the case were not allowed to proceed on other terms. The executor, however, comes forward and says, "£200 is not enough—that sum would not keep me *indemnis*." I do not think this is a question which we can at this stage determine. On the other hand, it is quite clear that the executor is entitled to be kept *indemnis* against proper expenses incurred, and therefore I think, following the semi-precedent—it is not really a precedent—in the case of *Harvey* v. *Farquhar* (1870, 8 Macph. 971) the circumstances there were different, and that is why I call it a semi-precedent—we should pronounce an interlocutor allowing the amendment only upon payment of the actual expenses already incurred, and that we should then remit the case to the Lord Ordinary to allow the pursuer to go on upon the £200 being consigned, but with leave to the executor to apply at any stage of the proceedings in which he can satisfy the Lord Ordinary that the expenses already incurred by him have come so near the £200 that he needs further indemnification, and leave the Lord Ordinary to deal with that situation as it arises.

LORD KINNEAR—I agree.

LORD M'KENZIE—I also agree.

LORD JOHNSTON did not hear the case.

The Court pronounced this interlocutor—

"Recal said interlocutor: Ordain the pursuer to consign the sum of £200 as offered by him in said minute: Find him liable in expenses since the closing of the record . . . and remit the account thereof to the Auditor to tax and to report to the Lord Ordinary, to whom remit the cause to sist George Steel Morrison, executor-dative of the deceased William Morrison, . . . as a pursuer in the action and to allow the amendments proposed in said minute, but that only on consignation of the above sum and payment of the expenses above mentioned. . . ."

Counsel for Pursuer (Reclaimer)—Constable, K.C. — D. Anderson. Agents — Purves & Simpson, S.S.C.

Counsel for Defenders (Respondent)— J. A. Christie — Mercer. Agent — G. R. Stewart, S.S.C.

Wednesday, March 20.

FIRST DIVISION.

[Lord Guthrie, Ordinary.

HUBER *v.* ROSS.

Reparation—Landlord and Tenant—Derogation from Grant—Urban Tenement—Damage Due to Landlord's Operations on Adjacent Subjects—Measure of Damages.

The tenant of urban subjects which had been let to him for a photographic studio brought an action against his landlord for damages in respect of structural damage and loss of business which he alleged he had sustained through the defender's operations upon the adjacent premises of which he (the defender) was in occupation as proprietor. The operations, which were of an extensive character and accompanied by noise, dust, vibration, and interference with access, were conducted without negligence and under warrant from the Dean of Guild.

Held (*rev.* judgment of Lord Guthrie, Ordinary) that the pursuer was entitled to recover, not only in respect of the cost of restoring his premises to their original condition and loss of business during such restoration, but also in respect of (1) injury to furniture and photographic materials, and (2) loss of business during the operations complained of arising from such physical and tangible injuries as were of a mate-

rial and not merely temporary character, and including therein injuries due to vibration and dust, but not to noise or temporary interference with access.

Opinion per Lord Johnston that the pursuer was also entitled to damage for such inconvenience arising from defender's operations as resulted in patrimonial loss.

Laurent v. *The Lord Advocate*, March 6, 1869, 7 Macph. 607, 6 S.L.R. 411, *distinguished* and *commented on.*

On 27th June 1910 A. C. Huber, photographer, 120c Princes Street, Edinburgh, *pursuer*, brought an action against his landlord A. M. Ross, 14 Atholl Crescent, Edinburgh, *defender*, in which he sued for £400, being the loss which he alleged he had suffered owing to the defender's operations on the adjacent property of which he (the defender) was also proprietor. The operations, which were extensive, included, *inter alia*, the striking out of new doors and windows, the insertion of iron beams, the removal of certain partition walls, and the replacement of part of the front wall of the tenement by wooden oriel windows.

The pursuer averred—"(Cond. VI) In consequence of said operations, and the noise and shaking of his premises, pursuer was unable to properly carry on his business as photographer. Numerous customers of pursuer who had called to be photographed, refused to sit when they heard the excessive noises and felt the vibration caused by the operations. While numerous others who did sit for their photographs, declined to return to be re-photographed in consequence of the negatives being spoiled. Other customers had to sit two or three times, but even then in some cases the negatives were spoiled. The pursuer repeatedly made complaints personally and through his agents to the defender during said building alterations, but no attention was paid thereto. The defender's said operations have caused the pursuer's premises to sink, and be thrown off the level, and in consequence the doors cannot be opened or shut properly. Further, said operations caused cracks and rents in the walls of pursuer's studio, while the slates and glass in the roof were cracked and broken, with the result that the rain leaked through and destroyed pursuer's furniture. The decorations, carpets, and furnishings in pursuer's premises were injured with lime and dust and soot. The entrance and staircase to pursuer's premises were blocked up with scaffolding and building material, and his showcases in the entrance were covered with lime and dust. The result of the defender's operations was that during the period of reconstruction it was impossible to carry on business in the premises. The appearance of the entrance on street level suggested that the whole premises were closed for alterations, and that no invitation to the public was offered to enter the building in its then derelict condition."

The items of damage sued for, as stated in a minute of amendment for the pursuer, were as follows:—

"(1) Cost of repairing structure .	£38
(2) Cost of papering and painting	53
(3) Damage to furniture and furnishings . . .	34
(4) Damage to materials and stock	15
(5) Loss of income from business during and consequent on the operations . .	200
(6) Loss of income from business during and consequent on necessary repairs and redecorations . . .	60
	£400"

He pleaded, *inter alia*—"(1) The pursuer being entitled to the peaceable possession of the subjects leased by him, and the defender having disturbed him therein as condescended on, decree should be pronounced as craved, with expenses. (2) The operations of the defender having rendered the subjects unfit for the purpose for which they were let to the pursuer, decree should be pronounced in terms of the conclusions of the summons. (3) The operations complained of having been productive of loss, injury, and damage to the pursuer, . . . the pursuer is entitled to decree as concluded for."

The defender admitted liability for structural damage to the pursuer's premises, but pleaded *quoad* the rest of the claim that the action was irrelevant.

On 25th April 1911 the Lord Ordinary (Guthrie) pronounced this interlocutor—"Finds in fact—(*First*) That the defender's operations condescended on caused injury (*a*) to the structure (including the painting and papering) of the pursuer's premises, the restoration of which (the pursuer's business being simultaneously carried on in the premises) would involve an expenditure of £85, during a period of a month to six weeks, in the course of which the pursuer's business would be prejudicially affected to the extent of £30; (*b*) to the furniture and materials in the pursuer's premises, to the value of £40; and (*c*) to the pursuer's business, apart from the period of six weeks above mentioned, to the extent of £100; and (*second*) that the said operations were conducted with reasonable regard to the pursuer's interests: Finds in law—(*First*) That the defender is bound (*a*) to restore the pursuer's premises to the condition in which they were prior to the commencement of the defender's operations, and that at the sight and to the satisfaction of a skilled person appointed by the Court, or, failing restoration as aforesaid, to pay to the pursuer the sum of £85, and (*b*) to pay to the pursuer the sum of £30 above stated; and (*second*) that, in the circumstances above stated, the defender is not liable in damages for the injury to furniture, materials, and business (apart from the sum of £30 above stated) claimed by the pursuer: With these findings, appoints the cause to be put to the roll for further procedure, reserving in the meantime the question of expenses."

Opinion.—"The pursuer, a tenant of the defender's, carrying on business as a photographer in the top flat of 120C Princes Street, Edinburgh (one of the original houses in that street, at least 100 years old), claims damages from the defender for loss alleged to have been sustained in consequence of certain operations by the defender, or authorised by him, on one of the lower floors of the tenement and on the tenement to the east. His claim is to be found in the original record and in the minute.

"The pursuer took his premises from the defender's predecessor for the purposes of a photographic business, with entry at Whitsunday 1907, for seven years at the rent of £60. By arrangement with the landlord the premises were converted by the pursuer at considerable expense into photographic rooms. The defender's whole operations were executed under warrant of the Dean of Guild. The defender's petition was not served on the pursuer.

"The pursuer's claim is divisible into three heads—(first) repair of structural damage, including under that head injury to painting and papering; (second) injury to furniture and materials; and (third) loss of business.

"The first head raises no question between the parties except possibly one of expenses. The defender offers to repair all structural damage as above defined, at the sight of a man of skill appointed by the Court. In my opinion his common law obligation, as landlord, to maintain the pursuer's premises in a tenantable condition during the course of the lease involves this liability; and the extent of his obligation will not be affected by the badly designed or structurally defective condition of the premises at the time when the defender's operations began. Whatever questions might arise as to his liability, if the damage resulted from operations of another subjacent or adjoining proprietor, there can be none when the damage results from his own voluntary act. This view makes it unnecessary to consider in detail under this head the evidence (first) as to whether the defender's operations, specially in connection with the pinning or keying up of the steel beams or girders, were conducted with due regard to the pursuer's interests; (second) as to the extent to which the present dilapidated condition of the pursuer's premises is due to the defender's operations, and how much may be attributed to previous subjacent operations; and (third) as to the amount required to put these premises into a proper condition. In case, however, a different view may be taken on appeal, I value the operations necessary to restore the pursuer's premises to a tenantable and habitable condition (the measure of which may fairly be taken in this case as the state in which they were before the defender's works below and alongside began) as follows:—

1. Mason, joiner, and plasterer £30
2. Painter and paperhanger 55—£85

"The other heads involve serious questions both of fact and law. So far as loss of business will result from the total or partial stoppage of the pursuer's business during the period of structural restoration, I think it follows that, while the defender would not be liable under this head if the loss of business had resulted from the operations of another proprietor, he must be liable, in the circumstances of this case, for this loss of business as a necessary result of his own voluntary act. I assess this amount at £30, including under this head all incidents, such as the cost of shifting furniture and damage to furniture and materials in the course of the operations.

"Putting aside structural damage and loss of business resulting directly therefrom, has the pursuer any claim? Or, to put it in another way, suppose there had been no structural damage, would the pursuer have had any claim?

"The defender admits that in so far as his operations were not conducted with a reasonable regard to the interests of the pursuer he is liable, but not otherwise. The pursuer maintains (first) that the defender is liable for all injury to his furniture and material and for all loss of business resulting from the defender's operations, even if conducted with the utmost regard reasonably possible for the pursuer's interests; and (second) that in any case the defender is liable for all such damage and loss, because his operations were not conducted with reasonable regard for the pursuer's interests. It is obvious that the latter alternative is too broadly stated. The defender's operations, however skilfully conducted and under whatever provisions in the pursuer's interests, were bound to cause injury and loss to the pursuer. Under the latter alternative, therefore, he can only recover damages to the extent to which his injury and loss were attributable to the defender's negligence.

"I negative the pursuer's first contention as applicable to this case. In the event of a landlord letting premises to tenants who would necessarily make the adjoining premises of one of his existing tenants incapable of use for the special purpose for which they were let, the tenant last mentioned would be entitled either to an interdict or to cancel his lease and claim damages. The case of a building next to a house, already let as a nursing home, being let as a manufactory (both nursing home and manufactory having the same landlord) would be an illustration. If the impossibility of use were only temporary the same result would follow unless the landlord was willing to find other premises temporarily for the nursing home, and to bear all incidental expenses of removal and return or to pay for the loss resulting from the temporary closing of the nursing home.

"In my opinion the present case does not fall under either of the cases above suggested. The following averment in condescendence 6 is not proved—'The result of the defender's operations was that during the period of reconstruction it was impossible to carry on business in the

premises,' nor is the averment at the end of condescendence 7 proved—'During the months of March, April, and May 1910, when the foresaid building operations were being carried on, the pursuer's premises became useless to him for carrying on his business.' The business recorded in the pursuer's books while the operations were going on, by itself and by comparison with previous years, disproves this contention. The defender's whole operations did not last more than ten weeks, and during the largest part of that time they were not such as to cause any injury to the pursuer. It is not proved that at any time during the operations (which did not directly affect the storey immediately below the pursuer) the pursuer could reasonably have demanded, at the defender's expense, temporary premises elsewhere. The pursuer could not have interdicted the defender's operations *ab ante;* had he been made a party to the Dean of Guild process, he could not have obtained any alteration in the defender's plans; and had he applied for interdict during the course of the defender's operations it would have been refused.

"Therefore apart from structural damage caused by the landlord, involving the landlord's obligation to maintain, the pursuer can only prevail if and to the extent to which he has succeeded in proving loss arising from the defender's failure to work with reasonable regard to his interests. Under this head the defender is not in breach of any contract, express or implied, and the pursuer's claim is in no better position than if the question had arisen between the pursuer and a neighbouring proprietor—*Laurent* v. *Lord Advocate*, 1869, 7 Macph. 607; *Cameron* v. *Fraser*, 1881, 9 R. 26. Of such failure, neglect to apply water so as to keep down the dust, is a good illustration. There is no evidence of such failure, and there is sufficient evidence that the precaution was carefully attended to.

"As already indicated, I have no doubt that the defender's operations resulted in injury to the pursuer's furniture and materials, and in loss of business. That injury and loss has been greatly exaggerated by the pursuer; but the noise, vibration, and dust, and the interference with access, inseparable from such operations however carefully conducted, must have substantially prejudiced the pursuer's moveable property, and his business, so far as it consisted of photographing sitters (especially women and children) on the premises, as distinguished from copying work, and from developing the photographs taken at his branch at Aberdour; and it is proved both by the direct evidence of sitters and books, and by reasonable if not necessary inference, that it did so, in point of fact.

"Such evidence is irrelevant except in so far as the injury and loss arose from operations by the defender which were conducted without due regard to the pursuer's interests. The operations themselves, in their object and in their method, were of an ordinary nature, and they were planned and executed by competent and experienced architects and contractors; it is therefore for the pursuer to aver and prove what things were done or omitted to his prejudice to which he was entitled to object, or which he was entitled to have done. In case, however, a different view is taken of this point on appeal I assess the total injury and loss sustained by the pursuer in consequence of the defender's operations as follows:—

1. Injury to furniture . £30
2. Injury to materials . 10
3. Loss of business . . 100—£140

"It is proved that certain important provisions were devised and observed for the pursuer's benefit (some of which are contained in the specification No. 79 of process, and some are not), specially (1) that all materials were carried in, and up, from the back, (2) that sheets of lead were used in connection with the placing of the steel girders to prevent noise and vibration, (3) that the beams were inserted in short lengths, (4) that water was regularly used to keep down dust, and (5) that as much work was done after the pursuer's working hours as possible, without raising questions with the tenant of the Central Hotel on the west. It is remarkable that no complaints were made by any of the other tenants in the tenement of which the pursuer occupies the top storey and attics, or by any of the tenants of the adjoining tenement. Some of these tenants carried on businesses liable to be injuriously affected by dust.

"As to the things done, to which the pursuer claims he was entitled to object, he specifies—

"1. The short time for completion of the work, namely, ten weeks. But this, while it may have contributed to the alleged effect on the structure, does not bear on the noise, vibration, and dust, and the interference with access, with which we are alone concerned in this part of the case. Indeed, had the defender's operations been spread over a longer period the damage to the pursuer's business would have been so much greater.

"2. Carrying on business on the ground floor of the tenement while the operations above were going on. The same remark applies here; the pursuer's only ground of objection under this head arises from the occupation of the ground flat, which he says made it impossible to put in what are called shoring, or raking struts, and thus prevented the use of appliances which would have obviated the alleged structural injury to the pursuer's premises.

"3. Shutting off water on two or three occasions, for a short time on each occasion. It is not proved that the defender was responsible for this, and it is not explained why the pursuer did not utilise the water in his cistern during these short intervals when the main water was shut off.

"4. Turning off the gas. The defender is not proved to have been responsible for this. In any case the damage, if any, was trifling.

"5. Keying up beams during the day

instead of after the pursuer's working hours. But the whole operations connected with the insertion of these steel girders required to be carried on continuously, and it is proved that keying up is an important operation, which is most efficiently done in daylight.

"6. Obstructing the stair of access. It was proved that the pursuer's stair was made dusty and unsightly through the defender's operations, but unnecessary or unduly prolonged obstruction, to the pursuer's loss, was not proved.

"As to the things not done, which the pursuer says should have been done if reasonable regard had been shown to his interests, he specifies—

"1. Failure to consult him as to the hours when the defender's operations, causing noise, vibration, and dust, and interfering with access, could be carried on so as not to interfere with his business or injure his furniture and materials. The pursuer expected the defender would come to him when any such operations were to be carried on. Looking to the injury which the defender's operations necessarily inflicted on the pursuer, this was impossible; it was the pursuer's business to go to the defender to make any particular arrangement; and it is not proved that special requests made by him, when reasonable, were disregarded. Miss Macrae, pursuer's book-keeper, says—'I was sometimes sent down by the pursuer to ask the workmen to stop for a little, in order to allow photographs to be taken. They usually stopped for a sufficiently long time.'

"2. Failure on the defender's part to take the pursuer along with him in fixing the building conditions in the contract with the contractors. I am not aware of any such obligation in law, but had such consultation taken place no reasonable alteration in the contract in the pursuer's interests has been suggested.

"The result is that I hold the pursuer's case for damages (apart from his right to restoration), stated in his first and second pleas, and in the first branch of his third plea, as irrelevant, and that I find he has failed to prove the case stated in the second branch of his third plea-in-law."

On 31st May 1911 his Lordship, in respect of certain minutes of tender, pronounced this interlocutor—"Appoints the defender to restore the pursuer's premises to the condition in which they were prior to the commencement of the defender's operations, and that at the sight and to the satisfaction of Mr R. S. Lorimer, architect, Edinburgh; and decerns against the defender for payment to the pursuer of £30 in full of the conclusion for damages."

On 7th June 1911 his Lordship, on the motion of the pursuer, granted leave to reclaim.

Argued for reclaimer—The Lord Ordinary was in error in thinking that the pursuer's claim for loss other than structural damage was irrelevant, for a landlord who for his own purposes interfered with his tenant's business was liable without proof of negligence, *i.e.*, he was liable on the contract. Where, as here, a landlord had let the subjects for a particular purpose there was an implied warranty in the lease that he would not by his own operations injure his tenant, or in other words derogate from his grant. That being so, he was liable here—Ersk. Inst., ii, 6, 43; *Blanc* v. *Greig*, July 18, 1856, 18 D. 1315; *Hamilton* v. *Turner and Others*, July 19, 1867, 5 Macph. 1086, at 1095, 4 S.L.R. 202; *Cameron* v. *Fraser*, October 21, 1881, 9 R. 26, 19 S.L.R. 9; *Macdonald* v. *Johnstone*, June 12, 1883, 10 R. 959, 20 S.L.R. 651; *Craig* v. *Millar*, July 20, 1888, 15 R. 1005, 25 S.L.R. 715. The case of *Laurent* v. *The Lord Advocate*, March 6, 1869, 7 Macph. 607, 6 S.L.R. 411, on which the respondent relied, was distinguishable, for the question of liability as for breach of the contract of lease was not there raised. Accordingly where, as here, a lease had been granted for a specified purpose, there was an implied obligation on the lessor not to use the subjects retained by him so as to render the subjects let unsuitable for the purpose. *Esto* that this rule did not extend to acts which merely occasioned personal discomfort or injury to amenity only, it did extend to all acts which directly and physically affected the subjects let, even although such acts were of a temporary nature. The rule in England, which was based on an implied covenant of quiet enjoyment, was to the same effect—Woodfall on Landlord and Tenant (17th ed.), 759; *Shaw* v. *Stenton*, (1858) 2 H. & N. 858; *Sanderson* v. *Mayor of Berwick-on-Tweed*, (1884) L.R., 13 Q.B.D. 547; *Robinson* v. *Kilvert*, (1889) L.R., 41 C.D. 88, *per* Lindley (L.J.) at 95-6; *Aldin* v. *Latimer, Clark, Muirhead, & Company*, [1894] 2 Ch. 437, *per* Stirling (J.) at p. 444; *Tebb* v. *Cave*, [1900] 1 Ch. 642; *Grosvenor Hotel Company* v. *Hamilton*, [1894] 2 Q.B. 836; *Budd, Scott* v. *Daniell*, [1902] 2 K.B. 351; *Browne* v. *Flower*, [1911] 1 Ch. 219, *per* Parker (J.) at p. 225 foot.

Argued for respondent—Where, as here, the defender had conducted his operations without negligence the pursuer had no claim for loss other than structural damage. So far as regarded such other loss, the landlord was in the same position as a stranger, for each was entitled to make alterations on his own property. The pursuer's claim for such other loss was therefore irrelevant—Rankine on Leases (2d ed.), 209; *Laurent* (*cit.*), at p. 611. The dictum of Erskine on which the pursuer relied was really in the defender's favour, for it inferred the existence of negligence, and that was absent here. That also differentiated the cases of *Fraser* (*cit.*) and *Craig* (*cit.*). The case of *Macdonald* (*cit.*) was also distinguishable, for it was a case of encroachment which could have been avoided. The law in England, so far as unaffected by a covenant for quiet enjoyment, supported the respondent's contention—Woodfall (*op. cit.*), 757; Foa on Landlord and Tenant (4th ed.), 302; Beven on Negligence (3rd ed.), 413; *Harrison* v. *Southwark and Vauxhall Water Company*, [1891] 2 Ch. 409; *Manchester, Sheffield, and Lincolnshire*

Railway v. *Anderson*, [1898] 2 Ch. 394, at 401; *Davis* v. *Town Properties Investment Corporation, Limited*, [1903] 1 Ch. 797; *Clark* v. *Lloyd's Bank*, [1910] Weekly Notes, 187. The cases of *Aldin* (*cit.*) and *Grosvenor Hotel Company* (*cit.*) were distinguishable, for there the injury was of a permanent nature, whereas here it was merely temporary and a usual incident of the occupation of town property.

At advising—

LORD PRESIDENT—The pursuer in this case took certain premises which consisted of the top flat of No. 120c Princes Street, Edinburgh, for the purpose of a photographic studio. That purpose was undoubtedly known to his landlord at the time, because there are arrangements made by which the pursuer at his own expense was to make certain alterations in the premises with the view of making them suitable for the business.

The defender thereafter purchased the whole tenement of which the top flat 120c is a part, and thereby became the pursuer's landlord, and of course became liable under all the obligations of his author towards the pursuer. The defender, in pursuance of his ordinary rights as proprietor, proposed to alter the other flats of the tenement in order to make them more commodious and suitable for business premises, and he proceeded to do so. The result of his doing so was to necessitate building operations on a large scale, whereby great alterations were made in the structure, new doors and windows were struck out and beams were put in, and there were the usual concomitants of dust, noise, and vibration which accompany building operations. The result of these operations generally was to make the pursuer's premises, which remained unaltered, decidedly uncomfortable, if I may use a neutral word, during the period of building. There were also some actual structural lesions caused to the pursuer's premises, and this action was brought to recover damages for the structural damage and for the general discomfort and annoyance to which the pursuer had been put. A proof was allowed, and the Lord Ordinary has brought out his view of what is proved in the case by certain findings. He finds by his interlocutor of the 25th April 1911—"(First) that the defender's operations condescended on caused injury (*a*) to the structure (including the painting and papering) of the pursuer's premises, the restoration of which (the pursuer's business being simultaneously carried on in the premises) would involve an expenditure of £85, during a period of a month to six weeks, in the course of which the pursuer's business would be prejudicially affected to the extent of £30; (*b*) to the furniture and materials in the pursuer's premises to the value of £40; and (*c*) to the pursuer's business, apart from the period of six weeks above mentioned," during which reconstruction would be going on, "to the extent of £100; and (secondly) that the said operations were conducted with reasonable regard to the pursuer's interests." Upon these findings he found in law, first, that the defender is bound to restore the pursuer's premises to the condition in which they were prior to the defender's operations, that is to say, to replace the structural damage; and second, to pay to the pursuer the sum of £30 above stated; and thirdly, that the defender is not liable in the circumstances for the damages to furniture, materials, and business (apart from the sum of £30 above stated) claimed by the pursuer.

His Lordship has pronounced that interlocutor, and I think it is really based upon his view of what was decided in this Court in the case of *Laurent* v. *The Lord Advocate* (1869, 7 Macph. 607). Put in a single sentence, what the Lord Ordinary has done is this—he has said that the pursuer is entitled to restoration of structural damage. There did not need to be a figure put upon that, because a minute was put in by the defender offering to restore the structural damage physically, and that was accepted by the pursuer. The work of restoration, I understand, actually has either been completed, or is in process of being done, at the sight of an architect appointed by the Court, so that that portion of the case does not need any further determination. But his Lordship found a sum of money due which represents the damage which the business suffered during those necessary operations of restoration of the structural damage. He has, by a slip I think—I think it is really a slip—not included the sum of £40 at which he assessed the damage done to the furniture and materials in the pursuer's premises apart from the structural damage; at any rate, whether that is a slip or not, I will give my reasons afterwards for saying that that should be included. But he has not allowed any further sum, and, as I say, I think his judgment is based upon the case of *Laurent* v. *The Lord Advocate*.

I think it is first advisable to say what *Laurent* v. *The Lord Advocate* exactly decided. It was an action which was brought by the keeper of a public-house in Edinburgh against his landlord for damage (I am reading from the rubric) "from loss of custom in consequence of the amenity of the pursuer's premises having been injured by the execution of building repairs by the landlord upon adjoining premises belonging to him." The case was precisely the same as the present to this extent, that the landlord who was sued had not granted the lease but had acquired the premises subsequently. But the issue—for it was tried by jury—put before the jury in that case was whether between certain dates the said Board of Inland Revenue wrongfully executed certain alterations or repairs upon part of the said tenement. The matter came up upon a bill of exceptions. Now the Lord President, who delivered the first judgment, after detailing the issue which was put before the jury, said—"This issue raised no question as between landlord and tenant for breach of the contract of lease.

It raised no question as to the liability of the landlord to keep in repair the premises let by the lease according to the obligation which the common law implies in every contract of lease. Any such claim would have been made the subject of an issue expressed in a different form. This is an issue to try a claim of damages alleged to have arisen from a legal wrong or delinquency on the part of the defenders." And then he goes on to say this—"It is clear from the pursuer's case as made at the trial that it was the proper issue to try the question raised by the record. The defenders' operations had the effect of breaking the plaster of the walls and the glass of the windows in the pursuer's premises, and inflicting other damage of the same description, and these the defenders have admitted the liability to repair, and have repaired, for the simple reason that being in the position of landlord of the pursuer they were bound to repair such damage even if it had been the result of mere accident." And then he goes on to point out that "the present action is raised not to recover damage of that sort, but damage arising from injury done to the pursuer's business as a tavern-keeper during the progress of the defenders' operations." He then goes on to discuss that matter, and he comes to the conclusion that where an action is not based upon any contract at all, but merely upon delinquency, you cannot say that it is delinquency on the part of a person to carry on ordinary building operations in a town, if these operations are conducted in a perfectly proper and usual manner, even although the result of them must be a certain amount of inconvenience to the neighbours.

Now Lord Deas did not concur in that judgment, because he considered that the issue as framed did not exclude the idea of there being a liability in respect of the lease, and he put the question thus—"Does the landlord incur no liability to the tenant for loss and injury to his business unless the tenant can prove that the landlord's operations were recklessly or negligently executed?" He says—"I cannot answer that question in the affirmative. The landlord stipulates for and gets a high rent for the shop on the footing that it is suitable for carrying on a profitable business, and it is neither law nor justice, in my opinion, that he should be entitled, for his own advantage, to render the shop either temporarily or permanently unfit for the purpose for which it was let, and at the same time to exact his full rent. It is unnecessary for me to go into the question of redress in analogous circumstances between neighbours." Accordingly, reading the issue differently from the Lord President, Lord Deas really refused to consider the question as one between neighbours, but considered it entirely one between landlord and tenant; what damages were due he could not say, because he was in the minority of the Court.

Lord Ardmillan, although indicating upon the general question of law that he agreed with Lord Deas upon the reading of this particular issue, agreed with the Lord President, and accordingly considered that the questions mooted by Lord Deas were not open before the Court—as undoubtedly they were not, because in a bill of exceptions the Court could of course only deal with the record as it stood with the issue. Accordingly, agreeing with the Lord Ordinary, Lord Ardmillan did not find it necessary to go into the question which Lord Deas discussed.

Lord Kinloch, agreeing with the Lord President in the result that his Lordship came to, undoubtedly went further, because he says at the end of his opinion—"I have only to add that I do not think the case is varied by the fact that the parties stood in the relation of landlord and tenant. The question is not one which, in any sound sense, arises out of the obligations of the lease, direct or implied. When a proprietor in burgh lets the lower floor of his house and retains the floor above to himself, he therein retains all the rights competent to a proprietor to make alterations on the retained floor. He can only, as I think, be made liable in damage to his tenant in respect of such alterations on the grounds applicable to every other proprietor."

Now when one comes to look narrowly at the opinions in *Laurent* v. *The Lord Advocate*, I do not think the case can really be held to have decided the question for which undoubtedly it has often been quoted, namely, that there is no difference between the position of a landlord towards his tenant and the mutual relation of neighbours. I think that the majority of the Court in that case went upon the form of the issue and the form of the issue alone, and that the form of the issue as they construed it excluded that question.

Accordingly I am bound to say that I think the question is not, as the Lord Ordinary thinks, concluded by *Laurent's* case, but the question is an open one. *Laurent's* case being out of the way, authority on the matter is almost non-existent in Scotland, because the case of *Cameron* v. *Fraser*, 1881, 9 R. 26, quoted, really does not add anything further. All that that case did was to recognise that if a person conducted his operations in an unjustifiable way he would be liable. That is a proposition which is equally true whichever way you solve the question as between landlord and tenant. But there undoubtedly exists, and there was quoted to us in an interesting debate, a great deal of English authority. Now while I am very willing to go to the English authorities to see what guidance we can have, so far as it rests upon principle, I am bound at once to sound a warning note upon a too strict adherence to English authority. I mean strict adherence in the sense of arguing that because on certain facts a certain result was reached in England, the same result would necessarily be reached here; because there are two differences between English and Scots law in this matter, one of which to a certain extent,

and the other to a greater extent, go very deeply into these authorities. The first difference, about which I shall say more presently, is that a good many of the English cases are decided upon what is the true effect of an expressed covenant for quiet enjoyment. Now the covenant for quiet enjoyment is a very ordinary stipulation in an English lease, and is held as implied in many a lease even when it is not expressed. It is not a covenant that is known to us in Scotland. There is of course something not very far away from it, for the obligation of warrandice is in some senses analogous; but there is no covenant for quiet enjoyment upon which you have a set of decisions as in England. The other difference—and it goes a great deal deeper—is the radical difference between Scots and English law upon the question of what we call negative servitudes, and what they call easements without the distinction of positive and negative. There is no question that in the English law you can have what we would call a negative servitude created by implication in the grant. That is absolutely contrary to the Scots law, and is not permissible. Our view of the freedom of property from burdens has been strongly developed not only upon the question of servitudes but upon the question of restrictions, and your Lordships know there is a whole series of cases upon that. On the other hand, there is the doctrine of ancient lights in the English law, which is firmly established, and which is absolutely repugnant to the law of Scotland. A great many of the cases cited will be found to depend to a great extent upon that principle.

There is the case of *Tebb* v. *Cave*, 1900, 1 Ch. 612. Now *Tebb* v. *Cave* is a case in which I personally do not think we could have arrived at the same conclusion upon the facts according to the law of Scotland for the reasons that I have already given. I think that the doctrine of negative servitude is involved in the decision. But none the less it is a very good case to cite for the discussion of the general principles which it contains, and in particular I would like to cite it at the very first for a remark of Buckley, J., at p. 646, where he says this—"The plaintiff's case has been put in two ways. It is said, first, that under the covenant for quiet enjoyment he is entitled to relief, because the acts which the defendant has done are an interference with the quiet enjoyment which he covenanted to give to his lessee; and, secondly, it is said that, apart from that, or in addition to it, the act which has been done has been done by the lessor in derogation of his grant, and that on that ground the plaintiff is entitled to relief. The cases which have been referred to on those two heads to some extent overlap each other, but I do not know that it is desirable or useful to keep them separate."

I cite that for this reason, that the principle of no derogation from the grant is quite good Scots law, and indeed it is interesting to note that whenever the English judges begin to discuss this principle they start with a Scottish case—a case in the House of Lords, but none the less a Scottish case—the well-known case of *The Caledonian Railway Company* v. *Sprot*, 1856, 19 D. (H.L.) 3, and the principle of implied grant in England has also been applied in a long series of cases known as cases of servitudes of necessity, such as access, drainage, and so on.

Buckley, J., quotes with approval the judgment of Stirling, J., in the case of *Aldin* v. *Latimer Clark, Muirhead & Company* ([1894] 2 Ch. 437), in which he puts the result of the whole of the English cases thus—"The result of these judgments appears to me to be that where a landlord demises part of his property for carrying on a particular business, he is bound to abstain from doing anything on the remaining portion which would render the demised premises unfit for the carrying on of such business in the way in which it is ordinarily carried on, but that this obligation does not extend to special branches of the business which call for extraordinary protection."

Now that is putting the proposition in a very general and I think a very good form, but here again, for the reasons that I have already stated, the application of that proposition would not be precisely the same in Scotland as in England, for wherever judges in England are proceeding upon what may be called the "quiet enjoyment" part of the general principle, you there do not have any distinction I think between acts which the landlord does upon the property retained which have a physical effect upon the property demised, and acts upon the property retained which have no such physical effect. I think it is plain that where you are under the only principle which we recognise in our law of derogation from the grant, the thing the landlord does must have some sort of necessary physical effect upon the thing which he gave. The idea of derogating from grant is that the thing which you gave will be made in some way less than the thing as you gave it, and I do not know that I can get a better illustration of what I mean than by saying—I do not do it as a matter of criticism, but it brings it out extraordinarily clearly—that the best example to the contrary is given by the illustration which the Lord Ordinary puts, and which I think is perfectly false. On page 4 of his note he puts the general proposition in very much the same words as Stirling, J., has put it, and then he goes on—"The case of a building next to a house already let as a nursing home being let as a manufactory (both nursing home and manufactory having the same landlord) would be an illustration. If the impossibility of use were only temporary the same result would follow unless the landlord was willing to find other premises temporarily for the nursing home, and to bear all incidental expenses." That is to say, as he puts it—"In the event of a landlord letting premises to tenants who would necessarily make the adjoining premises of one of his existing tenants incapable of use for the special purpose for which they were let, the tenant last men-

tioned would be entitled either to an interdict or to cancel his lease and claim damages." With great deference to the Lord Ordinary, I think that is perfectly unsound. I think the landlord would be entitled according to the law of Scotland, although he knew from the beginning that the house which he had let was to be used for the purpose of a nursing home, to let the house which he retained, even if it were next door to it, as a manufactory, or a public-house, or Salvation Army premises, or a theatre of varieties, or anything else that he chose, which was so conducted as not to be a nuisance at common law, although at the same time it might be exceedingly disagreeable to the next-door neighbour. If it was not for that I really do not know what would be the use of much of our code of law upon building restrictions. What is the meaning of binding yourself to put restrictions upon building lots retained, that they are only to be used for dwelling-houses and not as manufactories or anything of that sort, if it is already a matter of implication that if you let or dispone for the purpose of residential occupation then you may not use the ground retained in any way that the resident would object to in the occupation of his next-door neighbour? I think it is a very good illustration of the falsity of the general principle in Scots law. On the other hand, if you let a house as a nursing home, I have no doubt you would not be entitled to rig up next door a steam engine that made such vibration that it shook the patients in their beds, for there I think there would be physical interference.

Now, putting the doctrine for Scotland entirely upon implied grant, I think there are very valuable observations by Parker, J., in the case of *Browne* v. *Flower* (1911, 1 Ch. 219). He first of all has dealt with the covenant of quiet enjoyment, and then he says this—"The plaintiffs next relied on the maxim that no one can be allowed to derogate from his own grant. This maxim is generally quoted as explaining certain implications which may arise from the fact that, or the circumstances under which, an owner of land grants or demises part of it, retaining the remainder in his own hands. The real difficulty is in each case to ascertain how far such implications extend. It is well settled that such a grant or demise will (unless there be something in the terms of the grant or demise or in the circumstances of the particular case rebutting the implication) impliedly confer on the grantee or lessee, as appurtenant to the land granted or demised to him, easements over the land retained corresponding to the continuous or apparent quasi-easements enjoyed at the time of the grant or demise by the property granted or demised over the property retained." And then, curiously enough, although it is good Scots law so far as applying to positive servitudes, he goes on to give an illustration which undoubtedly would not be the law in Scotland. He says—"For example, if the owner of a house with windows overlooking vacant land of the same owner, grant or demise the house, the grant or demise will in general by implication confer on the grantee or lessee easements of light and support over or by the vacant land." With us it would certainly not be so. Then, after dealing with easements in a passage I need not read, he goes on to say this—and I think it is exceedingly valuable as explaining some of the English cases—"But the implications usually explained by the maxim that no one can derogate from his own grant, do not stop short with easements. Under certain circumstances there will be implied on the part of the grantor or lessor obligations which restrict the user of the land retained by him further than can be explained by the implication of any easement known to the law. Thus, if the grant or demise be made for a particular purpose, the grantor or lessor comes under an obligation not to use the land retained by him in such a way as to render the land granted or demised unfit or materially less fit for the particular purpose for which the grant or demise was made." And then he quotes the case of *Aldin* v. *Latimer Clark, Muirhead, & Co.*, and the case of the *Grosvenor Hotel Co.* v. *Hamilton*, where there was vibration which did not amount to a legal nuisance, and then he goes on to say—"In none of these cases would any easement be created, but the obligation implied on the part of the lessor or grantor would be analogous to that which arises from a restrictive covenant. It is to be observed that in the several cases to which I have referred the lessor had done or proposed to do something which rendered or would render the demised premises unfit or materially less fit to be used for the particular purpose for which the demise was made. I can find no case which extends the implied obligations of a grantor or lessor beyond this."

Now applying the general doctrine of these cases, under the necessity of remembering the great difference between the law of Scotland as regards servitudes and the law of England as regards easements, and also seeing that in Scotland the doctrine must be put upon implied grant without any reference to the covenant of quiet enjoyment, the general result I come to is that the proposition of Lord Kinloch in *Laurent* v. *The Lord Advocate* is too wide. I do not think it is possible to say that there may not be a distinction, and is not a distinction, between the case of the landlord and the case of the neighbour, but, inasmuch as the obligation of the landlord other than that of the neighbour, which is a mere obligation of neighbourhood, rests upon the principle of not derogating from his own grant, I think that the cases in which derogation from the grant can be successfully pleaded must be limited to these—first of all, structural damage, which every one admits—structural damage in the proper and strict sense of the term—and secondly, I would also include any physical tangible injury which is done to the demised premises. Now I use the word "physical" to begin

with, because I think that injuries of the class which do not affect the premises but which might affect the nerves of those who live in the premises do not count. In the particular case before your Lordships I think vibration, which makes the premises completely unfit while the working is going on for the purposes of photography, is an injury to the premises. I think, on the other hand, that the class of injury which was spoken to, that many sitters were nervous ladies who shook when they were sitting, and would not come to be photographed, is a class of injury that would not fall within any definition of physical injury to the premises. I use the word "tangible" because in one sense you may say that noise is a physical interference with the demised premises, because noise, when you come to inquire what it really means, is a setting in motion of certain vibrations in the air which extend to the demised premises but that is not tangible in the sense in which I use the word. There may be a better word, but I think it shows sufficiently what I mean. And in the same way, I think the injury must be material, and I think that excludes anything that is merely temporary, because it is quite evident that you may have injuries which are injurious for the moment but are so immaterial and temporary that they cannot count at all. One of the most familiar illustrations of that is a right of passage. Supposing I have a house with a door entering into the opening of a wide "close," and that my tenant has a house beyond. I am bound of course to give him (his only door being in the same "close" and further in) a right of passage. If my cart is at the door of my house I temporarily block his road, but nobody supposes he has a right of action against me for obstruction. I am only temporarily obstructing him in the ordinary manner, and so again I do not think an interference with this photographer's passage for half-an-hour or an hour would give him an action. On the other hand, I do think he is entitled to recover for injuries caused by vibration and by the actual dust that was put upon his premises to such an extent as really to interfere with his operations.

At the beginning of my opinion I said that I thought the Lord Ordinary had made a slip in not including the £40. I think it really does not matter much whether that was a slip or what I should hold to be an error of judgment. According to the views which I have stated it is quite evident that if by your building operations you crack a man's sideboard or his photographic plates, you have to pay for that just as much as if you crack his wall, and on that ground I should be prepared to allow the whole £40.

The result is that the Lord Ordinary's judgment stands as far as the £30 goes. I add to that the £40, and then as regards the £100 I think the parties must be allowed to have an opportunity of being heard upon the question as to how much of the £100 the pursuer is entitled to ask for in the light of the views that I have expressed. It is quite clear that to a great deal of it he is not entitled, and to some of it he is, and I do not think our attention was sufficiently directed to the matter in the debate. I understand the majority of the Court agree with what I have said about the defender's liability in damages, and we shall give parties an opportunity tomorrow morning immediately after Single Bills of being heard upon the amount. We shall not consider the quantum of damages to the furniture and materials, because that is fixed at £40, and we see no reason for disturbing that sum. The question upon which we desire to hear counsel is as to how much of the £100 is allowable, and how much is not.

LORD KINNEAR—I concur.

LORD JOHNSTON — I take the circumstances of this case as found by the Lord Ordinary. The missives of lease for seven years between the pursuer and the late James Paton in April 1907, disclose on the face of them that the premises were leased to the pursuer for the purpose of a photographic studio, and authorised the lessee to make at his own expense alterations for suiting them to that purpose. And these alterations cost the pursuer a substantial sum—between £150 and £200. The subjects of lease were the upper flat and attics on the west side of the common stair of 120c Princes Street, Edinburgh, and these with the flats immediately below were one property in Mr Paton's hands. I am not sure whether the basement and street floors were his or not. But it is immaterial. Mr Paton's property was acquired on his death by the defender A. M. Ross, who proceeded to alter them for his own purposes, in relation to other adjoining property to the east, belonging to him, by cutting out the entire front wall below the level of the floor let to the pursuer and replacing it by steel pillars and girders and a glass front. As may be supposed, this was not done without racking the structure of the pursuer's premises, and besides causing actual structural damage to them, creating noise, vibration, and dirt, and also obstruction of access by the common stair.

Given that these serious operations had to be done, it is not proved that they were not undertaken with reasonable care and skill. But they lasted for ten weeks, and interfered with the pursuer's conduct of his business, to his loss. Moreover, it will take from four to six weeks' time to repair the damage, with corresponding additional interruption of the pursuer's business.

The question is, was the pursuer bound to put up with this interference as an incident to the occupation of urban property, the possibility of which he was bound to contemplate when entering into his lease. The defender admits that under his obligation as landlord to maintain the property in repair he was bound to restore it structurally, but *quoad ultra* maintains the positive of the above proposition. That what this contention means may be

realised I take the Lord Ordinary's findings. Premising that the contract of lease under which the pursuer holds runs with the property, and that the defender Ross lies under every obligation incumbent on the original lessor Mr Paton, what the Lord Ordinary tells us is—(1) That the structural damage to the subjects, by operations which lasted for ten consecutive weeks, cannot be remedied under an expenditure of £85, of which over £50 is required for the repair of the structure and about £30 for painters' work. (2) That the work of repair will take from four to six weeks, during which the pursuer's loss of business may be estimated at £30. (3) That in the course of the ten weeks of the defender's operations the pursuer's furniture was damaged by the dust and other incidents of the defender's operations to the extent of £30, and his stock of photographic materials to the extent of £10. And (4) That in the course of the same time he suffered loss in or through interference with his business to the extent of £100.

It is possible that the Lord Ordinary may have exaggerated the 4th item, or damage for loss of business, but we had no serious argument on this aspect of the question, and having regard to the view which I understand to be entertained by your Lordships, I do not think I should detain the Court by considering it, but should confine myself to the question of law raised. The Lord Ordinary has discriminated. He has found the defender liable either to repair the structural damage to the premises by his operations, or to pay the pursuer £85 to enable him to do the repairs himself, and also to pay him £30 to recoup him for interference with his business during the six weeks, which he estimates that it would take to perform the repairs. On the other hand, he finds him not liable to the pursuer for the damage done to furniture and photographic materials during the execution of the defender's operations, although he estimates that damage at £40, or to recompense him for the loss occasioned by disturbance of his business, although he estimates that loss at £100.

As to the damage to furniture and photographic materials, I think that the Lord Ordinary has inadvertently fallen into error. The same considerations which led him to give the pursuer the first two items of claim require that he be also awarded the third. The real question relates to the fourth item or damage for loss of business.

The Lord Ordinary founds his discrimination upon the view that, while the landlord's obligation to maintain the premises let renders him liable for structural damage, he was perfectly entitled, as proprietor, to perform the work which he undertook on his own adjoining property, and provided that it is not proved that he did not execute the work wlth reasonable skill and care, that he is not liable for any incidental loss suffered by the pursuer. I cannot but say that it is a somewhat startling result that a landlord who lets premises to a tenant for a special purpose can, for ten consecutive weeks of the period of let, occupy himself in doing work of alteration on his own adjoining property for his own benefit, and as a necessary consequence (for *ex hypothesi* he works with care and skill) can do structural damage to his tenant's premises, interfere with the use for which he let these premises, and can thus disorganise and damage his tenant's business, and yet, though liable to repair the structural damage, should go scot-free for the loss occasioned by and during the period of such operations to the business for the conduct of which he has let the premises. Further, I confess to some difficulty in understanding why, if the pursuer is not entitled to damage for business disturbance during the execution of the defender's operations, he is held entitled to such damage during the time requisite for executing repairs. The two appear to me to be *in pari casu.* When it is admitted that the damage done—and done, on the defender's contention, in exercise of his right as proprietor of property adjacent to the subjects let—is to cost £85 to repair and to take six weeks to effect the repair, the contention takes such an extravagant form that one is inclined to think that if there be authority for it there must be grounds for doubting that authority. For the result is, as *ex hypothesi* the work was done with all skill in the execution and all care for the interest of the tenant, that the law of neighbourhood entitles the lessor to damage the premises let if it be necessary for the advantage of his other adjoining property, and will only require him, after his operations are completed, to execute repairs, which though they cannot replace the subjects in the condition in which they were when let, will supply the next best substitute, but will leave the tenant to bear the incidental loss, even where such incidental loss, though consequential, was not remote but immediate.

The basis of the Lord Ordinary's discrimination is that the law of neighbourhood requires a neighbour, for the general benefit, to put up with the inconvenience to him which necessarily accompanies the execution of such work as that in question; and further, that in regard to this matter it makes no difference whether the relation of the neighbouring parties is that of independent proprietors or that of landlord and tenant.

Two things are, I think, disputable—first, whether even in a case of neighbouring proprietors the term "inconvenience" covers the damage which was done in the present case, and whether a proprietor is entitled to do such structural damage to his neighbour's property without being liable not merely for its repair but for concomitant incidental effects, though with this question we are not directly concerned; and second, whether independent neighbouring proprietors and landlord and tenant are really *in pari casu.* This I am satisfied they are not. I think that there is an implication in the contract relation between

landlord and tenant which is disregarded in the law, if it be law, which the Lord Ordinary has considered himself bound to apply. This law he finds in the case of *Laurent* v. *Lord Advocate* (6 Macph. 607). I do not think, after what your Lordship has said, that I should be justified in examining the details of that case. As an authority it is affected by the fact that it was sent to a jury on an issue which did not bring out the pursuer's real case, and was in these circumstances decided on a bill of exceptions. The judgment of the late Lord President (Inglis) must be read in relation, not to the actual facts of the case, but to the case as brought into Court, in the way in which it was brought into Court. And even then the position he adopts is not accepted by Lord Deas and Lord Ardmillan.

In Scotland we are not in use to express a covenant for quiet enjoyment in a lease. But I think that there is no real difference between the English and the Scottish law on the subject. Where premises are let on lease, in neither country can the lessor do that which derogates from his grant. He lets the subjects in their then condition, and he lets them to be used in that condition. What will amount to derogation from his grant depends on the use for which the premises are let. But if he does derogate from his grant, he is, I think, liable for the loss which he inflicts on his tenants. Deprivation of the use of the premises to full advantage for the purposes for which they are let, is a loss to the tenant. If inflicted by the act of the landlord, and none the less if inflicted in prosecution of his own advantage for the improvement of his other property, it is not on nuisance, it is not on delinquency, it is on breach of an implied term of the contract, that the lessor is liable.

The question may not have been directly raised and authoritatively decided in Scotland. But I think that the principle which I have endeavoured to state was clearly recognised in *Blanc* v. *Greig* (18 D. 1315), where the operation complained of would have been admissible as between independent proprietors, but was held preventible as between a proprietor and his tenant in adjoining premises. It is also very amply illustrated in the series of English cases to which we have been referred, a substantial section of which are not affected by the specialties to which your Lordship has referred.

But I may be permitted to revert to the term "inconvenience," to which I have already referred. I think a good deal of the difficulty and misconception in this matter has arisen from the use of the term. Inconvenience may be personal merely, but it may also lead to patrimonial loss. The circumstances of life, and particularly urban life, may require that even a tenant must put up with some personal inconvenience at the hands of his landlord, but not, I think, when the inconvenience involves patrimonial loss. And I may here with advantage refer to the *Manchester, Sheffield, and Lincolnshire Railway Company's* case, [1898] 2 Ch. 394. There the inconvenience was not only personal but very temporary, and it did not interfere with the estate, or the title, or the possession, to use the words of Lord Lindley, then M.R. (at p. 401). It was on that ground, only, held not to be a breach of the covenants of the lease.

This case is different—the inconvenience was not temporary, but of substantial continuance. It was not personal merely, but resulted directly in patrimonial loss. And I cannot discriminate as your Lordships do, between its causes, on the ground that dust and vibration are the result of physical disturbance of the subject let, and noise mere nervous affection of the occupants, whether the tenant or his customers, and interference with access a mere imaginary or sentimental consideration. Dust may have repelled customers, and spoiled plates. Vibration may have interfered with the obtaining of negatives. But I can understand a photographer's customer being equally repelled by the noise created by masons and joiners, and still more by the condition of the only stair of access during the progress of the work. These are all connected with the execution of the work of alteration and directly connected with it, and independent of the use to which the adjoining premises are to be put after alteration. The bearing of such items of interference is, I think, dependent on circumstances. In the circumstances of this case, though I do not say in every case, they all, I am satisfied, contributed directly to the pursuer's loss of business, and, subject to any question of amount, I think that the Lord Ordinary would rightly have awarded his fourth item of damage also, as well as his first three. And against the amount we have had no real attack. I should therefore be for altering the Lord Ordinary's judgment in terms of the alternative findings of which he has given us the benefit.

LORD MACKENZIE—The items of damage now in dispute are thus referred to in the opinion of the Lord Ordinary—"I have no doubt that the defender's operations resulted in injury to the pursuer's furniture and materials, and in loss of business . . . the noise, vibration, and dust, and the interference with access, inseparable from such operations, however carefully conducted, must have substantially prejudiced the pursuer's moveable property, and his business so far as it consisted of photographing sitters (especially women and children) on the premises, as distinguished from copying work, and from developing the photographs taken at his branch at Aberdour; and it is proved, both by the direct evidence of sitters and books, and by reasonable if not necessary inference, that it did so, in point of fact." The Lord Ordinary being of opinion that the pursuer's operations were conducted with all due care, disallows these items, but assesses the injury done under these heads for the purpose of raising the question which has now been argued as follows—Injury to furniture, £30, to materials, £10, and loss

of business, £100. I am of opinion that such injury as was due to vibration and dust, being of the nature of physical interference with the premises, is recoverable, and that therefore the injury to furniture, £30, and materials, £10, should be allowed, and to a certain extent injury from loss of business. I am unable to hold that noise or interference with access constitute in the present case any breach of the obligations incumbent upon the landlord. It is not possible without further argument to say how much of this loss of business is due to these causes and how much to vibration and dust, and it is necessary parties should be heard on this.

In my view the injury resulting from vibration and dust, though no negligence is proved, should be regarded as of the same nature as injury caused to the structure itself. The principle applicable is that where a lease is granted for a special purpose which is known to the lessor there is an implied obligation upon him not to do anything voluntarily to prevent the subject let from being used for the purpose for which it was let. This is the principle contained in *Caledonian Railway* v. *Sprot*, 2 Macq. 449, that a granter cannot derogate from his grant. There is an implied warrandice to this effect in a lease in Scotland. It appears that in England the purpose is frequently effected by what is termed a covenant for quiet enjoyment. Damages under such circumstances may be claimed by the tenant for something that is not a nuisance for which no action would lie against a third party, and in respect of operations which have been conducted without negligence.

It was contended that a contrary view is laid down in the case of *Laurent*, but this argument overlooks the form of the issue which was before the jury there. The issue was whether the lessor had "wrongfully" executed certain alterations or repairs upon premises belonging to him adjoining the subjects let to the pursuer as a public-house. It was held that to entitle the pursuer to recover damages for loss of custom it was necessary for him to prove the landlord's operations to have been either illegal in themselves or negligently executed. The Lord President, whose opinion is founded on by the defender here, states distinctly that the issue raised no question as between landlord and tenant for breach of the contract of lease. That is the question raised in the present reclaiming note. The Lord President then says that the issue there was to try a claim of damages alleged to have arisen from a legal wrong or delinquency on the part of the defender. Upon the averment in this case no serious question of delinquency was raised. It was practically conceded that all reasonable care had been taken, but upon that assumption it was argued that there had been a breach of an implied term in the lease. It was pointed out in *Laurent* that the defenders had admitted liability for structural damage, and Lord Kinloch's view was that there was the same liability for the destruction of the *ipsa corpora* of moveables. I think that if a landlord is liable for damage to the structure, it is difficult to find a sufficient reason why he should not be liable for injury to moveables in the structure, if this is due to physical interference in consequence of his operations. On the same principle, if the vibration consequent on his alterations was so great as to shake the structure of the premises let and thus make them temporarily unfit for taking or developing photographs, I think the landlord is liable—so also as regards dust, in so far as this constituted a physical interference with the photographer's apparatus.

Further than this I feel unable to go. I do not think that a landlord can be held to warrant that all his tenant's customers will have nerves which are proof against the noise caused by hammering, or to guarantee that none of them will turn back from a partially-obstructed access. If there is a loss of business arising from such causes, then I think that, provided the inconvenience is temporary and does not render the premises useless for the time being, it is just what any dweller within burgh must submit to when his neighbour, whether his landlord or no, is lawfully engaged upon operations *in suo* for the purpose of altering or repairing his property.

Reference was made to a number of English cases upon breach of the covenant for quiet enjoyment, of which the latest is *Browne* v. *Flower*, 1911, 1 Ch. 219, decided by Parker (J.), who said—"It appears to me that to constitute a breach of such a covenant there must be some physical interference with the enjoyment of the demised premises." I think that in Scotland, when the operations are temporary, and do not render the tenant's premises useless for the time being for the purpose for which they were let, there is no breach of the implied warrandice in the lease unless there is physical interference.

I am accordingly of opinion that the pursuer should be allowed the additional sums of £30, £10, and whatever part of the £100 may be fixed after hearing counsel.

Counsel having been further heard as to the sum to be awarded for loss of business—the pursuer suggesting £100, the sum allowed by the Lord Ordinary, and the defender £70—the opinion of the Court was delivered by

LORD PRESIDENT—We have considered the arguments upon the amount of damages, sitting as a jury as it were, and the opinion of the Court is that the pursuer should be found entitled to £75 out of the £100. The other sums will of course remain as we fixed them yesterday.

The Court pronounced this interlocutor—

"Recal said interlocutors" [viz., those of 25th April 1911 and 31st May 1911]: "Of new appoint the defender to restore the pursuer's premises to the condition in which they were prior to the commencement of the defender's operations, and that at the sight and to the

satisfaction of Mr R. S. Lorimer, architect, Edinburgh: Further, decern against the defender for payment to the pursuer of the following sums, viz., (*a*) the sum of thirty pounds sterling in name of damages to the pursuer's business during the period of said restoration, (*b*) the sum of forty pounds in name of damages to the furniture and materials in the pursuer's premises, and (*c*) the sum of £75 in name of damages to the pursuer's business by the defender's operations complained of in the summons: Find the pursuer entitled to expenses, modified to two-thirds of the amount thereof as taxed, and remit the account thereof," &c.

Counsel for Pursuer (Reclaimer)—Constable, K.C.—D. Anderson. Agents—T. F. Weir & Robertson, S.S.C.

Counsel for Defender (Respondent)—Sandeman, K.C.—Wilton. Agents—Davidson & Syme, W.S.

Tuesday, March 19.

FIRST DIVISION.

[Lord Dewar, Ordinary.

TAYLOR *v.* MAGISTRATES OF THE BURGH OF SALTCOATS.

Reparation—Burgh—Street—Public Street—Public Footpath—Burgh Police (Scotland) Act 1903 (3 *Edw. VII, cap.* 33), *sec.* 104, 2 (*c*).

The Burgh Police (Scotland) Act 1903, section 104 (2) (*c*), which makes a new 128th section for the Burgh Police (Scotland) Act 1892, enacts—"Subject to the provisions of the Roads and Streets in Police Burghs (Scotland) Act 1891 and of the Burgh Police Acts, the town council shall have the sole charge and control of the carriageway of all the public streets within the burgh and footways thereof, and also of all public footpaths, and all such public streets, footways, and footpaths are, for the purposes of the said Acts and of such charge and control, hereby vested in the town council accordingly."

An old mineral railway was constructed along an embankment and protected from the sea by a sea wall. Thereafter a public railway was constructed just on the landward side of the other and at about the same level. The mineral railway fell into disuse, with the result that the top of the old embankment outside the fence of the public railway became available for walking on. The sea in process of time battered down the old retaining wall in places, and so far as was necessary for the safety of their line the public railway company repaired it, with the consent of the proprietor of the lands. As the proprietor raised no objection, the top of the embankment became a place of resort by the inhabitants of a neighbouring burgh, and the magistrates erected a few seats. A person walking along the embankment, within the burgh boundary, tripped or fell to the bottom of the embankment injuring his ankle. He raised an action against the magistrates of the burgh on the ground that the embankment or "promenade" was a public thoroughfare under their control and management, and that the accident was due to the magistrates' failure to keep it in safe and secure condition.

Held (*rev.* judgment of Lord Dewar, Ordinary) that the pursuer's averments disclosed no ground of liability against the magistrates, in respect that the embankment or promenade was not a public street or public footpath within the meaning of the Burgh Police (Scotland) Act 1903, section 104 (2) (*c*), and defenders *assoilzied.*

Opinion by the Lord President—"I think a public footpath means a footpath which is a recognised way of getting from one place to another, and means something of the character of a street."

The Burgh Police (Scotland) Act 1892 (55 and 56 Vict. cap. 55), section 4 (31), enacts—"'Street' shall include any road, highway, bridge, quay, lane, square, court, alley, close, wynd, vennel, thoroughfare, and public passage, or other place within the burgh used either by carts or foot-passengers, and not being or forming part of any harbour, railway, or canal station, depot, wharf, towing-path, or bank."

The Burgh Police (Scotland) Act 1903 (3 Edw. VII, cap. 33), section 104 (2) (*c*), makes a new 128th section for the Burgh Police (Scotland) Act 1892, which is quoted *supra in rubric*, and enacts, section 103—"Expressions used in this Act shall, unless there be something in the subject or context repugnant to such construction, have the same meaning as in the principal Act [Burgh Police (Scotland) Act 1892]: Provided that, unless there be something in the subject or context repugnant to such construction, the expression . . . . (5) 'public street' shall in the principal Act and this Act mean (i) any street which has been or shall at any time hereafter be taken over as a public street under any general or local Police Act by the town council or commissioners; (ii) any highway within the meaning of the Roads and Bridges (Scotland) Act 1878, vested in the town council; (iii) any road or street which has in any way become, or shall at any time hereafter become, vested in or maintainable by the town council; and (iv) any street entered as a public street in the register of streets made up under this Act."

Thomas Taylor, engineer, Townhead, Glasgow, *pursuer*, raised an action of damages for personal injuries against the