decree in absence had been taken for a sum of between £9 and £10. I do not refer to the note, which specifically stated that nothing was meant to be inferred except that a decree had been taken. It may be true that in a weekly gazette of this character a note so inserted might not obliterate the evil effect of the erroneous entry; but it does not appear to me to be justifiable to infer an imputation of insolvency from a single decree in absence for a small amount. Had the far less strained interpretation been put upon the words that the entry meant that this trader was a person who was refusing or delaying to pay his just debts, this would have enabled the whole facts under both the issue and the counter-issue to go before the jury, because it was exactly that not unreasonable interpretation which the defenders were willing to meet, and if they had established their averments and their counter-issue they would of course have been entitled to a verdict.

It would be productive of wrong if the over-straining of an innuendo were in such a manner and by a finesse of procedure to be permitted to block out the real substance of a case; a verdict for the pursuer in such a situation would be obtained because the jury had been left compulsorily in the dark. I am aware of the answer made, that the debtor's bad record could be looked at for the purpose of mitigating damages and that the jury might grope towards the real truth on the whole case by the light thus let in upon one point as through a chink in the shutter. This again is a finesse of procedure; its use beyond the one point is illegitimate as all parties know. In the case in hand any exclusion of the whole light on the whole case would, in my opinion, be productive of possible mischance and contrary to law.

These considerations illustrate the necessity of confining innuendoes upon, and inferences from, words which in themselves are not libellous within an area which admits of their being made without strain and as an expression of the reasonable, natural, or necessary meaning of the words employed. The present case shows that if that rule were to be departed from it would enable pursuers, first, to strain by inference the meaning of words, and then, secondly, to prevent a complete answer to an issue being made by a defender who might be thoroughly furnished in his defence against the inference which was the reasonable and natural one.

I am aware that in the case of *Hunter* v. *Stubbs*, and also in that of *Crabbe & Robertson*, to which I have referred, the form of issue now to be declared by this House improper was allowed. In *Hunter's* case, however, the defender had agreed to the issue and the question was not raised at the proper stage. *Crabbe & Robertson* has been dealt with fully by my noble and learned friend Lord Kinnear, and I agree with his Lordship's observations thereon and with the course which he suggests should be pursued.

Their Lordships allowed the appeal with expenses.

Counsel for the Appellants—T. B. Morison, K.C.—H. A. M'Cardie. Agents—M'Kenna & Co. (London) and George F. Welsh, Solicitor (Edinburgh).

Counsel for the Respondents—R. Munro, K.C.—M. S. Fraser—J. T. Macpherson. Agents—Hamlins, Grammer, & Hamlins (London)—Erskine Dods & Rhind, S.S.C. (Edinburgh).

COURT OF SESSION.

Friday, May 16.

SECOND DIVISION.

[Sheriff Court at Glasgow.

M'COARD *v.* MICKEL.

Landlord and Tenant—Damage to House from Bursting of Pipes during Tenant's Absence—Duty of Tenant to Turn off Water or Notify Landlord — Duty of Tenant to Use "Reasonable Degree of Diligence" in Preserving House from Harm.

A tenant of a house vacated it for a month in winter without having turned off the water, and without having intimated to the landlord that she had vacated the house and had not turned off the water. The water-pipes in the house burst during frost, and damage was caused to the house.

Held that the tenant was liable for the damage, in respect of her failure to intimate to the landlord that she had vacated the house without having turned off the water.

Observations (*per* Lord Salvesen) on the duty of a tenant to use "a reasonable degree of diligence" in preserving a house from harm.

Robert Mickel, timber merchant and property owner, Glasgow, *pursuer*, brought an action in the Sheriff Court at Glasgow against Mrs Sarah M'Coard, formerly residing in Glasgow, then residing in Kilcreggan, Dumbartonshire, *defender*, for £350 in respect of damage caused by flooding to a house in Glasgow belonging to the pursuer, of which the defender was formerly the tenant.

Proof was allowed and led. The import of the proof, so far as relevant to this report, was that during the defender's tenancy of the house she vacated it on 25th December 1909, leaving no person in it and taking away with her the keys. The stop-cock for cutting off the water from the main was situated outside the garden gate, and on the defender's son failing to find it inside the house, the defender left, without taking any steps to have the water turned off or informing the pursuer of her absence. She left the house empty and without any firing or airing until 26th January 1910. On that date the constable on the beat

discovered that water was flowing from the house, and it was found that the water came from three separate bursts in the pipes that had been caused by the water in the pipes having frozen. The flooding caused damage to the house.

On 15th February 1912 the Sheriff-Substitute (CRAIGIE) (after certain findings in fact) found in law that the damage was caused through the defender's negligence, and decerned against the defender for a certain sum, which he assessed as the amount of the damage.

The defender appealed, and argued—Admittedly a tenant was bound to act reasonably, but the appellant had acted reasonably. There was no duty on a tenant to turn off the water on leaving a house, especially in a case like the present, where the stopcock was situated outside the house and the appellant did not know where it was. Nor was there a duty on a tenant to notify the landlord, especially in a case like the present, where the fact of there being no stopcock within the house entitled the appellant to infer that she was not expected to see to the water being turned off. Doubtless there was a duty on a tenant to sufficiently fire and air a house, but the chance of the water-pipes bursting was, like the chance of fire, a landlord's risk, which it was the duty of the landlord himself to take steps to provide against. *Whitelaw* v. *Fulton*, November 1, 1871, 10 Macph. 27, 9 S.L.R. 25, was referred to.

Argued for the respondent—A tenant was bound to use a reasonable degree of diligence in preserving a house from harm — Ersk. Inst., ii, 6, 43. Thus a tenant was liable for damage caused by damp if the tenant neglected to fire and air a house—Rankine, Leases (2nd ed.), p. 223; *Whitelaw* v. *Fulton* (*cit.*). So also was a tenant liable for damage caused by burst pipes if, as in the present case, the tenant left the house without turning off the water and without taking any precautions against the risk of the pipes bursting during frost—*Smith v. Henderson*, July 14, 1897, 24 R. 1102, 34 S.L.R. 821.

LORD DUNDAS—This case arises out of an unfortunate dispute between a landlord and a tenant at Dumbreck. I say unfortunate, because the possible amount of money involved seems altogether disproportionate to the expenses which must have been incurred in carrying on the case. One cannot help regretting that the parties did not see their way to settle their dispute out of Court upon some reasonable footing, by the exercise of some good sense and mutual concession. But the case is here, and we must dispose of it. We have had a very full and excellent argument from all the four counsel who addressed us, and as we are all of one mind as to the result at which we ought to arrive, I think it is better to give judgment now and save the parties further delay, anxiety, and expense, even if the remarks which are made now may not be so full as might have been the case if we had taken the matter to avizandum and written detailed judgments. The first question is whether there is liability in damages on the part of the defender here at all. On that matter one must look at the facts, which on that point are quite clear. It appears that the defender and the household left this house on or about 25th December 1909 for a holiday. I think they only intended to be away some ten days, but in point of fact the holiday extended into at least a month. The house was left absolutely empty at a frosty period of the year. The keys were taken away to Dunblane. Before leaving, no effectual steps were taken by the defender to turn off the water, and the risk was therefore incurred of bursting pipes at that season of the year. Nor did the defender or any of the household think it worth while to inform the landlord that they were going away. I do not think it is necessary to lay down any absolute general rule of liability in such cases. Mr Erskine puts it broadly that the tenant of a house is bound to use a reasonable degree of diligence in preserving it from harm; and as an illustration of that undoubted law it may well be that a tenant while in the legal occupation of a house runs a risk of liability if he fails to do what is reasonably necessary to light and air it and keep it as it should be kept. Here Mr M'Coard did proceed to look for the toby to turn the water off, which shows that he recognised it would be a very sensible thing to do. But he did not find it, and not finding it I think he took the risk of what might happen by leaving the water on. He might at least have sent a post-card to the landlord to say that he was going away, but he did not do so, and several bursts were discovered in full operation on 26th January 1910, with the result that damage was done. I think on that state of the facts it would be idle to dispute that primarily liability was on the defender, as was argued for the pursuer and as the Sheriff-Substitute has held.

But I think the difficulties in the case arise when one comes to try to estimate the amount of the damage, and to deal with the considerations on the one side and on the other which ought to weigh with us in arriving at the true measure and amount of the damage. [*His Lordship then dealt with the assessment of damages, with which this report is not concerned.*]

LORD SALVESEN—I entirely agree in the result at which your Lordship has arrived. I think the Sheriff-Substitute has not appreciated the true ground of liability, although he has properly found that the defender was to blame for part of the damage which arose through the bursting of these pipes. The only finding that he has on the subject is as follows—"That on 25th December 1909 the defender vacated said house and left no person therein to fire or air the house, and that she continued thus to vacate it until 26th January 1910"; and that in law he holds to constitute negligence. I do not think the premises

warrant the conclusion. The duty of a tenant with regard to firing and airing is to do such firing and airing as is necessary to preserve the house from damp. It is not *per se* a breach of his duty to leave the house empty for a month or two months without firing or airing. If the house does not suffer from the want of firing or airing there is no liability on the part of the tenant towards the landlord, nor can he be compelled to put on fires or air the house. Something may depend on the nature of the subject let, which may require more firing and airing than other subjects; but I do not think it can be affirmed as a general proposition in law that it is negligence on the part of a tenant to leave a house for a period of a month without doing anything in the way of firing and airing.

But then I think, according to the rule laid down by Erskine, that a tenant must use a reasonable degree of diligence in preserving the house from injury. The tenant here failed in his duty. He left the house, taking the keys with him, in the depth of winter, when the pipes were most likely to be exposed to freezing, and he took no precautions to prevent the injury that might arise from the water in the pipes freezing and bursting the pipes and causing a leakage. He was quite alive to risks, because before he left the house he went to ascertain whether there was a stopcock by means of which he could shut off the water. If he had found such a stopcock he would, according to his own account, have prevented the water from the main from getting into the house, and he would also have run the water out of the cistern. He would have then left the house in a safe condition even if there were severe frost. But finding no stopcock, and thinking apparently that there was a legal obligation on the landlord to provide such a stopcock if he wished to avoid the risk of his pipes freezing and the water escaping from the burst pipes, he did nothing further. In the particular circumstances of this case I do not think it was his duty to have searched for the toby outside or to have turned off the water there. In the first place he had not been furnished by the landlord with any means of turning the water off at the toby; he had not even been told that such a toby existed. Accordingly I think he would have fulfilled his duty to his landlord and used reasonable care in the protection of his landlord's property if he had notified the landlord that he was going away leaving nobody in charge, and that if anything required to be done in the way of shutting off the water supply and emptying the pipes the landlord must see to it that that was done. The landlord did not know that he was leaving, and he was entitled in the absence of such a notification to assume that the tenant was remaining in occupation, and that if anything occurred such as the bursting of the water-pipes he would be immediately notified by the persons who were occupying the house.

Accordingly the duty which I think the tenant failed to perform towards his landlord was the duty of intimating to him that he was going to leave the house unoccupied and uncared for and with the cistern and pipes still connected with the water supply. Had he done so, the landlord would have taken means to guard against the risk of bursting pipes—a duty he could not reasonably expect the tenant to perform in the circumstances already narrated. [*His Lordship then dealt with the assessment of damages, with which this report is not concerned.*]

LORD GUTHRIE—I agree with your Lordships, both on the points on which your Lordships agree with the Sheriff-Substitute and on the points in which you find him wrong. I think that the pursuer is entitled to damages, but that he himself was in fault as well as the defender, and that this fault must be taken into account in estimating the amount of the damages.

In regard to the defender's fault the Sheriff holds that the initial blame was on him, and I think he rightly so holds. But then, as your Lordships have pointed out, he mistakes the nature of the blame. The second finding is — "That on 25th December 1909 the defender vacated said house and left no person therein to fire and air the house, and that she continued thus to vacate it until 26th January 1910." In my view the failure was of another kind—namely, that, leaving this house for a month in winter, the weather at the time being frosty, she failed either to turn off the water or to intimate the closing of the house to the landlord.

The question is a jury one, whether she took or did not take reasonable precautions for the safety of the property let to her. It seems to me that the injury which occurred was not only a possible one, as in the case of gas being left not turned off, but it was ordinary, familiar, and probable. She answers that there was no necessary means inside the house of cutting off the water, and that no key had been given for the outside toby and no information tendered to her about it That is no answer to the pursuer's alternative suggestion, that assuming it to be so she ought to have given intimation to the landlord.

Mr M'Coard's view was that the felting should have been sufficient to prevent any possible burst from frost. But the pipes are felted in the view that if the water is allowed to remain on the house will be occupied and firing and airing will take place. It appears to me, therefore, that the defender has no answer to the liability the Sheriff has found, although I think on the wrong ground, for the initial injury which took place. [*His Lordship then dealt with the assessment of damages, with which this report is not concerned.*]

The LORD JUSTICE-CLERK concurred.

The Court recalled the interlocutor of the Sheriff-Substitute and (after certain findings in fact, from which in substance the narrative of this report is taken) found in law that the defender, having left the

villa empty between 25th December 1909 and 26th January 1910 without having turned off the water or informed the landlord of her intended absence, was responsible for the damage so far as caused prior to the afternoon of 26th January 1910, and decerned against the defender for a certain sum, which the Court assessed as the amount of the damage.

Counsel for the Appellant (Defender)—Maclennan, K.C.—MacRobert. Agents—Cumming & Duff, S.S.C.

Counsel for the Respondent (Pursuer)—Horne, K.C.—D. P. Fleming. Agent—W. B. Rankin, W.S.

Friday, May 16.

SECOND DIVISION.

[Sheriff Court at Edinburgh.

ARNISTON COAL COMPANY *v.* KING.

Master and Servant—Workmen's Compensation Act 1906 (6 *Edw. VII, cap.* 58), *Schedule II* (9)—*Process—Sheriff—Act of Sederunt*, 26*th June* 1907, *sec.* 12—*Objection to Recording of Memorandum of Agreement—Claim for Compensation by Initial Writ—Conjunction of Processes.*

A colliery company lodged a minute of objections in terms of the Act of Sederunt, 26th June 1907, sec. 12, to the recording under the Workmen's Compensation Act 1906, schedule II (9), of a memorandum of agreement as to the compensation payable by the company to a workman who had sustained injuries by an accident while in the company's employment, on the ground that it was not genuine. The Sheriff fixed a day for a proof. Meanwhile the workman had commenced an arbitration by initial writ in the Court of the same Sheriff regarding the same injury, in which he averred that no agreement existed, and claimed compensation under the Act. The Sheriff fixed the same day for proof in the second process as he had fixed in the first process, and conjoined the processes.

Held that it was incompetent to conjoin the processes.

Opinion reserved per Lord Salvesen as to whether it was competent for the workman to commence the second proceedings before the question raised in the first proceedings had been decided.

John King, while working in the employment of the Arniston Coal Company, Limited, in the Gore Pit, Arniston, Gorebridge, sustained personal injuries by accident for which the company admitted liability to pay compensation under the Workmen's Compensation Act (6 Edw. VII, cap. 58). On 16th October 1912 the workman lodged a memorandum of agreement regarding the compensation to be paid to him by the company, with the Sheriff-Clerk of the county of Edinburgh, to be recorded in terms of the Act. The company, in the terms of the Act of Sederunt, 26th June 1907, sec. 12, lodged a minute of objections to the recording of the memorandum on the ground that it was not genuine, in respect that no agreement had been entered into between the parties such as was stated in the memorandum, and the workman lodged answers to the minute. Thereupon, on 13th December 1912, the Sheriff-Substitute (GUY) appointed 6th February 1913 for the trial of the cause.

On 12th December 1912 the workman originated an arbitration by an initial writ in the Sheriff Court at Edinburgh craving an award of compensation under the Act against the company in respect of the same injuries, to which writ the company lodged answers. The company did not plead or maintain that it was incompetent to proceed with the second process until the application to record the memorandum of agreement had been disposed of, and the company moved that a proof should be fixed in the second process on the same day as that fixed in the application to record the memorandum, but opposed as incompetent a motion by the workman to conjoin the two processes.

On 16th January 1913 the Sheriff-Substitute pronounced the following interlocutor in the application to record the memorandum—"The Sheriff-Substitute conjoins with this application to record a memorandum of agreement the application presently depending in this Court at the instance of the claimant to fix compensation," and pronounced the following interlocutor in the second process—"Allows a proof and appoints the cause to be heard, tried, and determined on Thursday, 6th February 1913, at 10·30 A.M., within the Sheriff Court House, Edinburgh; conjoins this application with the application presently depending in this Court at the instance of the claimant for warrant to record a memorandum of agreement."

Thereupon, at the request of the company, a Case was stated for appeal, which set forth the reasons given by the Sheriff-Substitute for conjoining the two processes, as follows—"In so acting I held that I was competently exercising a discretionary power. I was of opinion that if the appellants succeeded in establishing their defence to the recording of the pursuer's memorandum, then the way would be clear for the respondent to have his claim for compensation determined. I was also of opinion that conjunction of the arbitrations would save expense to both parties, one proof between the same parties as to the same accident serving to determine the rights of parties, instead of two proofs with many of the same facts requiring to be deponed to twice."

The *question of law* for the opinion of the Court was—"In the circumstances was it competent for me (the Sheriff-Substitute) to conjoin the foresaid applications?"

Argued for the appellant—It was incompetent for the Sheriff to conjoin the two