to express an opinion upon the proper construction to be put upon section 65 of the Act of 1872. In my opinion the Lord Ordinary is clearly right in the view he takes.

Miss Marshall has now been added as a party to the case, which obviates any difficulty as to our giving judgment in the case.

I am of opinion the Lord Ordinary's interlocutor is right.

LORD CULLEN—I have had an opportunity of reading, and I concur in, the opinion of Lord Dundas. I desire entirely to reserve my opinion as to the construction of section 65 of the Act of 1872.

The Court adhered.

Counsel for the Pursuers — Macmillan, K.C.—T. G. Robertson. Agents—D. & J. H. Campbell, W.S.

Counsel for the Defenders—The Solicitor-General (Morison, K.C.) — J. H. Millar. Agent—George Inglis, S.S.C.

Thursday, December 17.

SECOND DIVISION.

[Sheriff Court at Glasgow.

JOHN HAIG & COMPANY, LIMITED *v.* BOSWALL PRESTON.

Landlord and Tenant—Lease—Sequestration for Rent—Retention of Rent.

A landlord let a workshop, office, and store to a firm of motor car agents from Candlemas 1911, by a lease, dated 28th March 1911, which contained an obligation on the landlord to do "needful repairs to the roof, which is presently leaking," and "to keep the premises wind and water tight." He died before signing, and by a supplementary minute of agreement executed in August 1911 heritable creditors of the landlord, who had become proprietors of the premises, homologated the lease. The tenants paid the rents until Martinmas 1912, but refused to pay the rent due at that term on the ground that the landlords had never implemented the obligation with regard to the roof, and in consequence the subjects were not and never had been fit for the purposes let. The heritable creditors brought an action for sequestration for rent. It was proved that no sufficient repair had ever been executed on the roof so as to remedy the defects existing at the beginning of the lease. The Court *dismissed* the action.

John Haig & Company, Limited, distillers, Markinch, who were heritably vested in certain subjects in Glasgow, *pursuers*, brought an action in the Sheriff Court at Glasgow against Gordon Houston Boswall Preston and Alistair Houston Boswall Preston, sole partners of and trading under the firm name of The Central Motor Engineering Company, 51 Pitt Street, Glasgow, *defenders*, for sequestration of defenders' effects within said above-described premises in security and for payment of rent, interest, and expenses, for payment of past due rents, for an order to replenish, and failing implement, for warrant to eject.

The defenders pleaded, *inter alia*—"(1) In respect that the defenders have not got possession of the entire subjects let to them under said lease they are entitled to retain the rent now sued for until such possession is given them. (2) The pursuers having failed to implement their obligations under the lease are not entitled to insist on the performance by the defenders of the counter part of these obligations. (3) The defenders being entitled to retain the half-year's rent until the pursuers have fulfilled their obligations under the lease by putting the premises into the condition in which the pursuers contracted to put them the defenders are entitled to absolvitor."

The *facts* are given in the *note* of the Sheriff-Substitute (BOYD), who on 22nd January 1913 allowed a proof before answer, and on 5th April 1913, after proof led, pronounced the following interlocutor:—"Finds the pursuers are owners and the defenders are tenants of premises, in terms of the minute of lease and minute of adoption, whereby the pursuers bound themselves to do 'needful repairs to the roof which is presently leaking,' and to keep the premises wind and water tight; that the pursuers failed to sufficiently perform this obligation in spite of reasonable complaints by the defenders, and the defenders retained the half-year's rent due at 11th November 1912 on the ground that full possession of the subjects let had not been given to them: Finds that the defenders were entitled so to do until the pursuers shall fulfil the obligation under the lease: Therefore assoilzies the defenders from the conclusion of the action."

Note. — "The pursuers are whisky distillers and owners of licensed premises in Glasgow and elsewhere. They are owners and the defenders are tenants of a workshop, office, and store in Pitt Street, Glasgow, which is used as a motor garage, and this is an action of sequestration for rent of the premises due 11th November 1912.

"The defence is that entire possession of the subjects was not given, and that the defenders were entitled to retain the rent sued for.

"The defenders entered into a minute of agreement with John Dove on 28th March and 22nd April 1911, and acquired the tenants' rights under the current lease of the subjects of this action from Candlemas 1911 till Whitsunday 1915, with a break to the defenders at Whitsunday 1912, which they did not exercise. The rent was £97, 10s. a year till Whitsunday 1912, and £80 a year for the three succeeding years. The minute was executed by the defenders, but not by John Dove, as he died on 10th April 1911. The minute provided, *inter alia*, that 'The second parties accept the premises let as in good tenantable repair subject to the first party repairing the broken glass and doing needful repairs to the roof which is presently leaking, and bind themselves to maintain and leave them in the like good

condition at the termination of the let, ordinary tear and wear excepted, the first party being bound to keep the premises wind and water tight and the drains outside the premises in good condition.'

"The pursuers became proprietors of the premises and gave their consent to the minute of lease by a supplementary lease executed by the parties in August 1911.

[The supplementary minute of agreement contained the following clause — "*First.* The first parties hereby for all right competent to them homologate *qua* heritable creditors in possession the granting of the minute of agreement of lease before written."]

"The defenders maintain that the pursuers failed to implement the obligations undertaken by them regarding the roof in spite of the defenders repeated complaints, and that in consequence the subjects were not fit for the purposes let from the beginning of the lease, and the defenders have not been in possession and have suffered damage. Accordingly they retained the rent at Martinmas 1912. The defenders consigned the amount of the half-year's rent and insurance payable by them—£43, 7s. 3d. —in bank in the joint names of the pursuers' agent and the defenders' agent and identified this as the rent and insurance in question. The pursuers in spite of this applied for and obtained sequestration on 29th November 1912. On the 30th November 1912 the defenders consigned the additional sum of £80, the amount of the whole year's rent, in the hands of the Clerk of Court, and the sequestration was recalled.

"The question is whether the pursuers failed to perform the obligations they had undertaken.

"To start with, the landlord admitted in March 1911 that the roof was leaking, and this same view was adopted in August 1911. The pursuers agreed to make the roof secure, and afterwards to keep it secure. There is no evidence that at the outset the pursuers proceeded to put the roof into proper repair. They led much evidence to show that repairs were done whenever complaints were made, and contended that that was enough to discharge their liability. I think there were many complaints by the defenders of the leaking nature of the roof, and also several repairs by the pursuers. But even assuming that the particular defect was remedied at the time, I do not think the roof was ever put into a sound condition and kept in that state, as the pursuers had undertaken to do. I think it was in a very bad state. [*His Lordship discussed the evidence.*]

"I thought these witnesses were all credible persons, and the general result of their evidence is that during the currency of the lease the premises have never been wind and water tight in spite of the repairs executed by the pursuers.

"There is no better expert evidence to be obtained in Glasgow than that of Robert C. Boyce, C.E., James M'Gown, plumber, and William M'Neil, builder, in their several departments. The result of their reports is that the premises are in such a state of dilapidation and decay that they are not fit for the purpose for which they were let. [*His Lordship further discussed the evidence.*]"

"I think the question of the case is simple. The landlord's obligation was to make and keep the roof sound. There were many complaints by the tenants, and a considerable number of repairs by the landlord, but I do not think these were sufficient radically or made the roof sound.

"There is evidence that the defenders warned the pursuers that they would retain the rent."

The pursuers appealed to the Sheriff (GARDINER MILLAR), who on 25th July 1913 pronounced this interlocutor—"Recals the interlocutor of 5th April 1913: *Finds in fact* that the defenders entered into an agreement with the deceased John Dove, during the month of March 1911, whereby they acquired the tenants' rights under the current lease of the subjects of this action, from Candlemas 1911 to Whitsunday 19I5, with a break to the defenders at Whitsunday 1912, at a rent of £97, 10s. for the period from the date of their entry to Whitsunday 1912, and £80 a-year for the three succeeding years; that the agreement was embodied in a minute executed by the defenders but not by John Dove, as he had died on the 10th of April 1911: Finds that by the proposed minute it is provided that 'the second party accept the premises let as in good tenantable repair, subject to the first party repairing the broken glass and doing needful repairs to the roof which is presently leaking, and bind themselves to maintain and leave them in the like good condition at the termination of the let, ordinary tear and wear excepted, the first party being bound to keep the premises wind and water tight and the drains outside the premises in good condition:' Finds that the pursuers thereafter became proprietors of the premises and entered into a minute of lease with the defenders, in the month of August 1911, whereby they let to the defenders the premises under the same conditions and with the same term of entry and ish as in the proposed minute of lease between the defenders and the said John Dove: Finds that the defenders have failed to prove that at the beginning of the term of lease the landlords did not carry out the express obligation to repair the broken glass and do needful repairs to the roof: Finds that on several occasions defects became apparent in the roof, and that the pursuers, when called upon, executed repairs, but that at no time did these defects interfere with the beneficial use of the premises by the defenders to any serious extent: *Finds in law* that the defenders, not having been deprived of the beneficial use of the premises to any serious extent, are not entitled to retain the rent due by them at Martinmas 1912: Therefore, reserving any claim of damage they may have in respect of these defects, decerns against the defenders for payment to the pursuers of the sum of £40 sterling, in terms of the first conclusion of the action: Grants warrant to the Clerk of Court to pay said

sum of £40 to the pursuers out of the consigned money in implement of the above decree, and to pay the balance thereof to the defenders." . . .

"*Note.*—I think the effect of the minute of lease entered into between the parties in August 1911 was to place them in the same position as if the pursuers had been parties to the original agreement with the deceased Mr Dove. The defenders had already entered into possession of the premises, and the pursuers took over all the obligations, and placed themselves in the same position as if the minute of lease of August had been granted in the month of March 1911. It is agreed that the premises let were old, and it seems to me that the defenders must have known, when they entered into this lease, that defects would more probably arise than in premises that had been recently erected.

"The defenders maintain that the pursuers were in breach of both the obligations in the lease, namely, the one to repair the broken glass and to do the needful repairs to the roof, which was leaking at the period of entry, and (second) the continuing obligation on the landlords to keep the premises wind and water tight. With regard to the first obligation, both the defender Alistair Preston and their clerk Miss Jane Swan, who seems to have taken a prominent part in the proceedings, admit that the glass in the roof was repaired, and that certain repairs were done to other parts of it where it was defective. There is no proof that the defenders ever called upon the pursuers when the lease of August 1911 was entered into to carry out this obligation, and the defenders remained in possession of the premises and paid rent therefor for two of the succeeding terms. They further did not take advantage of the break in the lease at Whitsunday 1912. It seems to me therefore that the defenders cannot maintain that the pursuers failed to carry out their obligation to repair the glass and the roof at the beginning of the lease.

"With regard to the continuing obligation of maintaining the premises wind and water tight, it clearly appears from the evidence that on several occasions the roof was defective, and that rain did enter in sufficient quantities as to cause pools of water on the floor of the garage. There is evidence that complaints were made to the pursuers or their factor, and that these complaints were attended to and repairs made. I can find in the evidence of Alister Preston and Miss Swan no distinct evidence that on any one occasion any complaint was made of a serious defect which resulted in flooding of the premises which they say was not attended to by the pursuers. All the parties agree that the premises were old, indeed Alistair Preston says—'I knew this property was an old one, and I was anxious to have the premises as a motor garage.' The expert evidence for the defenders goes to this, that what should be done in order to put the premises in what they consider good repair would be that the premises should be pulled down and rebuilt altogether. But the taking down and rebuilding of the premises was not the obligation that was undertaken by the landlords in the lease, and this evidence throws a light upon the evidence given by the defenders' experts. The evidence of Alister Preston and Miss Swan is to the effect that frequent complaints were made of defects in the roof and the windows, of burst pipes, and of defects in the w.-c. The answer of the pursuers is that on every one of these occasions instructions were given at once to competent tradesmen, and their accounts are produced as showing the work that was done.

"Upon these facts the question arises, Are the defenders entitled to retain the rent due to their landlords at Martinmas 1912? I can find no case where a tenant was entitled to retain his rent on the ground that a landlord had failed to repair a defect which emerged subsequent to the entry of the tenant. Counsel argued that the obligation to maintain the premises wind and water tight was equally binding with any obligation to put the premises right at the beginning of the lease. I am not prepared to say that this is not so; it seems to me that the tenant would then have to prove that the defect upon which he founded was so serious as to deprive him of the beneficial use of the premises, and that he had called upon his landlord to remedy it and that this had not been done. The tenant may have a claim against the landlord for damages for failure to repair any less serious defect, but then, of course, such an illiquid claim of damage could not be set against the landlord's claim for past due rent. As the defenders may be able to prove that they have such a claim I have reserved their right to it in granting decree; but they certainly in my view have not set forth that they have been deprived of the beneficial use of the premises to such an extent as to justify them in retaining the rent which is now past due.

"Counsel for the pursuers intimated that they did not insist upon their claim for anything more than £40 due at Martinmas 1912, and I have only given decree for it."

The defenders appealed to the Second Division of the Court of Session, and argued—The action was incompetent. It was an action for sequestration for rent, which in the circumstances ought never to have been brought—*M'Leod* v. *M'Leod*, February 11, 1829, 7 S. 396; *Cumming and Others (Tennant's Trustees)* v. *Maxwell*, March 2, 1880, 17 S.L.R. 463; *Guthrie* v. *Shearer*, November 13, 1873, 1 R. 181, 11 S.L.R. 70. Moreover, it was incompetent, in respect that the defenders had consigned the rent—*Oswald* v. *Graeme*, June 26, 1851, 13 D. 1229; Stewart on Diligence, p. 778. Even if it was competent, the defenders' contention that they were entitled to retain the rent should be sustained. By the supplementary minute of agreement the pursuers had homologated the original agreement between the landlord and the defenders contained in the earlier deed, and had established the engagement, not merely from the date of homologation, but from the beginning—Bell's Prin., sec. 27. In accordance with the terms of

that engagement the pursuers bound themselves to execute certain needful repairs, an initial obligation which they had not fulfilled up to the date of the proof. The *onus* was on the pursuers to show that they had done so, and they had failed to prove it. The evidence showed also that they had failed to keep the premises wind and water tight. Breach of any obligation *inter naturalia* of a lease was a good ground for refusal by the tenant to pay the rent. If it were otherwise a party who broke a contract would be entitled to insist on the other party's fulfilling it, and to contend that the only remedy open to the other party was an action of damages. It was unnecessary for the defenders to counter-claim—*Earl of Galloway* v. *M'Connell*, 1911 S.C. 846, *per* Lord Dundas at 851, 48 S.L.R. 751, at 754; *Macnab* v. *Nelson*, 1909 S.C. 1102, *per* Lord President (Dunedin) at 1109, 46 S.L.R. 817, at 822; *Scottish Heritable Security Company* v. *Granger*, January 28, 1881, 8 R. 459, *per* Lord Young at 465, 18 S.L.R. 280, at 282; Rankine on Leases (2nd ed.), p. 230. In *M'Donald* v. *Kydd*, June 14, 1901, 3 F. 923, 38 S.L.R. 697, where the action was dismissed, there was no counter-claim. Whether the defenders had or had not made complaints to the pursuers about the state of the premises was an irrelevant consideration. It was a consideration which was only relevant in a case where the credibility of the witnesses was doubtful, and only in so far as it bore on the question of their credibility.

Argued for the respondents—The action was competent. Whenever a term of payment was passed without the rent being paid a landlord was entitled to sue not only for past-due rent but also for accruing rent, but although the pursuers were entitled to get decree in terms of the crave in the initial writ, the present action had throughout been really an action to enforce the pursuers' right to uplift £40 out of the £80 which had been consigned. By the clause of homologation the pursuers were only bound by the contract in the original lease in so far as it had not been executed in August 1911, when they homologated the original lease—Bell's Prin. (*cit*). The supplementary minute of agreement was not a new lease, but only a taking up of the obligations under the old lease. Therefore although the pursuers were bound to keep the premises wind and water tight—an obligation which the evidence showed they had fulfilled—they were not bound by the initial obligation to put the premises into tenantable repair, because the defenders had already accepted them as such. Moreover, the defenders had paid the rent when it fell due at the two previous terms. During the whole of the period for which the rent was outstanding the defenders had had the possession of the subjects which they had contracted to get. Accordingly they were not entitled to retain the rent—*Webster* v. *Brown*, May 12, 1892, 19 R. 765, 29 S.L.R. 631. Even if the pursuers were bound by the initial obligation to put the premises into tenantable repair, the evidence showed that they had done so. A landlord was bound to repair only such defects as were brought to his notice—*Hampton* v. *Galloway & Sykes*, January 31, 1899, 1 F. 501, *per* Lord Trayner at 507, 36 S.L.R. 372, at 376; *Wolfson* v. *Forrester*, 1910 S.C. 675, *per* Lord President (Dunedin) at 680, 47 S.L.R. 525, at 528; *Dickie* v. *Amicable Property Investment Building Society*, 1911 S.C. 1079, *per* Lord Skerrington at 1085, 48 S.L.R. 892, at 895—and there was no evidence that the pursuers had failed to attend to any complaints made to them by the defenders. In any event there was no evidence as to the damage which the defenders alleged they had suffered, and therefore the defence was irrelevant—*Christie* v. *Birrells*, 1910 S.C. 986, 47 S.L.R. 853; *Baikie* v. *Wordie's Trustees*, July 14, 1897, 24 R. 1098, 34 S.L.R. 818; *Stewart* v. *Campbell*, January 19, 1889, 16 R. 346, 26 S.L.R. 226; Rankine on Leases (2nd ed.), p. 306. In any event the defenders were not entitled to decree of absolvitor, but only to decree of dismissal.

At advising—

LORD JUSTICE-CLERK—In this case heritable creditors seek decree for rent of premises which were let to the defenders on lease. The defenders signed a lease under agreement with the proprietor, but he had not signed the lease before his death, and heritable creditors who held a bond over the property became parties to the let. The defenders had already been allowed to take possession at the date set forth in the uncompleted lease. They sue for the rent for the six months following Whitsunday 1912, which the defenders have retained as against a claim by them to have the premises wind and water tight under the obligation which the pursuers incurred when they agreed with the defenders. The defenders did not make any claim to retain rent in previous half years, and paid the rent stipulated. The question therefore is what was the state of the premises in the half year when the rent was withheld. I have no doubt about that. It is a jury question whether the premises were in any reasonable sense wind and water tight. It is clear, I think, on the evidence that they were not in the condition into which the landlord was bound to bring them and keep them. The Sheriff-Substitute reached, in my opinion, the right view of the facts disclosed. There certainly was a failure to keep the premises wind and water tight in a reasonable sense as between landlord and tenant. They were not in the state contracted for in the lease and agreement.

Upon the law there can be no doubt. And accordingly I would move your Lordships to revert to the findings in the Sheriff-Substitute's interlocutor subject to this alteration, that the decree be varied by granting dismissal only of the action.

LORD SALVESEN—The question in this case is whether the defenders, who are tenants under the pursuers of a machine shop, garage, and office in Glasgow, are entitled to retain the half year's rent due at Martinmas 1912 on the ground that the pursuers have failed to fulfil an obligation contained in the lease to do "needful repairs on the roof," which is described as "presently leaking," and to keep the premises

wind and water tight. The obligation in question is set forth in the third head of the lease, which was executed by the defenders in March and April 1911, but was not completed by the then owner of the premises, a Mr Dove, who died shortly after. On the faith of the lease being signed, however, the defenders had already obtained entry with consent of the landlord, and were therefore secured in possession of the premises for at least a year. The pursuers, who were heritable creditors of Mr Dove, in possession of the said subjects, were approached to become parties to the said lease, and a supplementary minute of agreement was executed by them and the defenders in August following. Under this agreement the pursuers homologated the lease, while the defenders on their part undertook to implement their obligations *qua* tenants of the pursuers. I agree with the Sheriff that the effect of the supplementary minute of agreement was to place the pursuers in the same position as if they had been parties to the original lease. It was indeed urged by the pursuers that they were entitled to assume that the initial obligation of the landlord to do needful repairs to the roof had already been performed, unless they got intimation to a contrary effect, but in the view which I take of the case this is not a point of any importance.

The main issue of fact between the parties is—whether the obligation to do needful repairs to the roof had been implemented prior to the half term in respect of which the claim of retention has been put forward. On this matter the Sheriffs have differed, the Sheriff-Substitute holding that the pursuers had failed to sufficiently perform this obligation in spite of reasonable complaints by the defenders; while the corresponding finding in the Sheriff's interlocutor is "that the defenders have failed to prove that at the beginning of the term of lease the landlords did not carry out the express obligation to repair the broken glass and do needful repairs to the roof." After a full argument I have come to prefer the conclusion at which the Sheriff-Substitute arrived; and I can express shortly what I think is the import of the somewhat voluminous evidence that has been led.

(1) The lease is conclusive evidence that at the time of the defenders' entry to the premises the roof was in fact in a leaky state. After repeated complaints the broken glass was replaced, but nothing was done to render the roof itself water tight.

(2) The summer of 1911 was unusually dry, and the defenders did not at first suffer any inconvenience through the leaky condition of the roof. When wet weather came on, and the defects became apparent, they did from time to time complain, and tradesmen were employed by the pursuers to replace glass and make certain small repairs to the roof, but no general repair was ever made. In particular, in April and September 1912 some sheets of corrugated iron, of which the roof of the garage was largely composed, were replaced, and a zinc apron was repaired. At no time, however, during the period prior to the raising of the action was there any general overhaul of the roof, and the repairs executed did not have the effect of preventing leakage through the roof in wet weather.

(3) A violent storm took place in the end of November 1912, by which the roof and the glass that formed part of the same were considerably damaged, and this state of matters was temporarily remedied by tradesmen employed by the pursuers.

(4) At the date of the proof, which took place in March 1913, in spite of further more or less extensive repairs that had been made on the roof, it was still in a bad condition, and not wind or water tight.

And (5) the defenders suffered serious inconvenience during the whole period of the tenancy prior to the raising of the action through rain water flooding their premises and dropping on the motors which they had in their garage.

A strong point was made against the defenders that they had paid their rent at Martinmas 1911 and Whitsunday 1912 without objection. I think it is very likely that their having done so may preclude them from claiming any damage suffered during that period, or, indeed, prior to the time when they called upon the pursuers to implement the obligation in the lease, but their delay in doing so cannot extinguish their right. If, for instance, they had never got possession of a portion of the premises let, and had, nevertheless, paid the full rent for the year, this would not involve acquiescence, except for the period during which the rent was paid; and they would at any time be entitled to call upon the landlord to give them full possession, and failing his doing so they would be entitled to retain the rent. The same thing I think is true when, although possession has been given of the subjects let, it has not been given in the state contracted for, which I hold to be the case here. Up to the end of November 1912 the defenders acted in a singularly unbusiness-like manner from the point of view of their own interests, but on the 26th of that month they did give notice that they would retain the rent unless the necessary repairs were executed on the roof. The reply to this intimation was the service of the present action, which is one of sequestration for payment of a half-year's rent, and in security of another half-year's rent. On record the defenders tabled their case, based upon the obligation in the lease very distinctly, but they were met by a denial that the pursuers had in any way failed to implement the obligation incumbent upon them thereunder, or that there was anything in the condition of the premises which needed repair. Had the pursuers succeeded in making good their position they would have been entitled to decree, but as I hold with the Sheriff-Substitute that they have entirely failed to do so, and that the breach of the initial obligation undertaken in the lease has been fully established, the claim to retain the rent until the obligation is fulfilled must be sustained.

Although a great many cases were cited

to us, there is no real controversy as to the law—assuming the facts to be as I have stated them. Had the initial obligation to make the roof water tight in a reasonable sense been implemented, I think it is quite true that the landlord's obligation in respect of defects otherwise emerging is only to have them repaired with reasonable dispatch after he has received intimation of their existence; and this was apparently the assumption on which the pursuers proceeded. They seem, however, to have entirely overlooked—and not unnaturally, looking to the history of their connection with the property—the express clause in head three of the lease, and this no doubt forms an explanation of their whole actings. When, however, their attention was pointedly called, as it was in the defences, to the existence of this obligation, they took up a wrong attitude, for which I fear they must suffer. I am therefore of opinion that we should substantially revert to the interlocutor of the Sheriff-Substitute, with this difference, that the defenders should not be assoilzied, but that the action should simply be dismissed.

LORD GUTHRIE—The defenders, tenants of the pursuers, paid rent for the premises in Pitt Street, Glasgow, let to them as a motor garage at Martinmas 1911 and Whitsunday 1912. This action relates to the right of the defenders to retain the rent, as they did, due at Martinmas 1912 for the half-year from Whitsunday to Martinmas 1912, on the ground that they were deprived during that period to a substantial extent of the beneficial use of the premises which were not in the condition of repair contracted for, and to retain the said half-year's rent as at the date of the action on the ground, if that is necessary, that the pursuers' obligations as to repair had not been implemented when the action was brought in November 1912 or when the proof was led in March 1913.

The pursuers' case is clearly stated in cond. 5, where it is averred that the subjects let "were when said rent became due, and still are, wind and water tight." The defenders, in view of the terms of the contract between the parties, dispute that the *onus* is on them, but maintain that if it is they have proved that this averment is ill founded. They admit that they would not be entitled to retain the rent in question for any failure by the pursuers to repair prior to Whitsunday 1912 or subsequent to Martinmas 1912, and that they must show that the pursuers were in default during the very period for which the rent accrued. Their case is that the pursuers down to the date of the proof had never fulfilled their contractual obligation in regard to repair.

The key to this case seems to me to be furnished by the view evidently held by the respondents, and strongly maintained by both their junior and senior counsel, that when the respondents took over Dove's lease as at August 1911 they were entitled to assume that the initial obligation undertaken by Dove—an obligation which was not collateral to but *inter naturalia* of the contract, namely, that of repairing the broken glass and doing needful repairs to the roof, which is presently leaking—had been already implemented by Dove, who, it may be noticed, had never signed the original lease. The Solicitor-General went so far as to maintain that in August 1911, when the respondents entered into contractual relations with the reclaimers, the qualification as to initial repair had been already read out of the original contract which they homologated, and that they were entitled to take it that the acceptance by the reclaimers of the premises as in good tenantable repair applied without qualification. I find no warrant for this either in the terms of the supplementary minute of agreement or in the circumstances of the parties. The first article of that supplementary agreement, under which the defenders homologated the original agreement of lease, established the engagement from the beginning, not from the date of homologation (Bell's Prin., sec. 27). I think when the defenders signed the supplementary agreement their duty was to obtain a report detailing the work necessary to fulfil their initial obligation, and to take steps to have the general overhaul of the roofs of corrugated iron, glass, and slates which the evidence shows was necessary. If, however, they held, as they evidently did, and as their counsel argued, that this initial obligation had been already implemented by Dove, their predecessor, it explains how no report was got by them, and how, as I think, no general overhaul was ever either ordered or executed.

The pursuers indeed maintained that the contract contains nothing more than an ordinary wind and water tight clause, and does not contemplate any general initial operations. Their purpose in so arguing was to lay a foundation for the argument that they were under no obligation to take any step till called on by the defenders. Now, no doubt after premises have been handed over to a tenant in a condition of repair, if landlord's disrepair ensues the tenant must give notice to the landlord, and can only retain the rent or claim damages or throw up the lease if the landlord disregards the notice. But this rule does not apply to a case where, as here, a landlord has undertaken to proceed forthwith to execute repairs, the necessity for which is acknowledged by him in the lease.

The evidence as to what was done by the landlord by way of repair and when is conflicting. I do not ignore the difficulty caused by the absence of written complaints by the complainers, or the special circumstances caused by exceptional storms and by burst pipes. But I am satisfied that the Sheriff-Substitute has come to a sound conclusion on the evidence as a whole when he says—"There were many complaints by the tenant and a considerable number of repairs by the landlord, but I do not think these were sufficient radically or made the roof sound."

In regard to the respondents' arguments founded on, first, the payment of rent at Martinmas 1911 and Whitsunday 1912,

second, the failure of the defenders to claim and establish their right to damages, and third, as to the alteration which must be made on the form of the Sheriff-Substitute's interlocutor, I adopt the views expressed by Lord Salvesen.

LORD DUNDAS was absent, being engaged in the Extra Division.

The Court pronounced this interlocutor—

"Sustain the appeal: Recal the interlocutor of the Sheriff dated 25th July 1913: Find in fact and in law in terms of the findings in the interlocutor of the Sheriff-Substitute dated 5th April 1913: Recal said interlocutor of 5th April 1913 in so far as it assoilzies the defenders from the conclusions of the action, in lieu of which dismiss the action: *Quoad ultra* affirm said interlocutor, and decern."

Counsel for the Appellants (Defenders)—Constable, K.C.—Duffes. Agents—J. S. & J. W. Fraser-Tytler, W.S.

Counsel for the Respondents (Pursuers)—The Solicitor-General (Morison, K.C.)—Fenton. Agents — Simpson & Marwick, W.S.

Thursday, December 17.

SECOND DIVISION.

[Lord Cullen, Ordinary.

ININMONTH *v.* BRITISH ALUMINIUM COMPANY, LIMITED.

Landlord and Tenant—Lease—Resumption of Lands—Notice to Tenant of Intention to Resume.

A farm lease reserved to the landlord "the right to sell or resume possession of any part or parts of the lands hereby let at any time, . . . the tenant to receive a proportionate deduction from his rent and surface damage to crops as, failing agreement, the same may be fixed by arbiters mutually chosen." It contained no provision with regard to notice to the tenant by the landlord of his intention to resume. On the landlord's selling a portion of the lands so let, the tenant brought a note of suspension and interdict against the purchasers to interdict them from entering on any portion of the lands let to him, on the ground that, as he averred, the landlord had not given him notice of his intention to resume them. The Court *refused* the note, *holding* that even if notice had not been given, the provisions in the lease for a deduction from the rent and compensation for damage caused by resumption impliedly excluded any right in the tenant to notice.

George Ogilvie Kininmonth, Gedsmiln, in the parish of Burntisland and county of Fife, *complainer*, brought a note of suspension and interdict against The British Aluminium Company, Limited, London, *respondents* (*reclaimers*), for interdict against the respondents entering on any portion of certain farm lands tenanted by him.

The complainer averred that the landlord had sold a portion of the lands to the respondents without having given to the complainer definite and sufficient notice that he intended to resume them; and pleaded, *inter alia*—"(3) Interdict should be granted in respect (*a*) that no valid notice of resumption has been given to the complainer; (*b*) that the said subjects cannot be resumed until after the expiry of a reasonable period of notice."

The respondents pleaded, *inter alia*—"(1) The complainer's averments being irrelevant, interdict should be refused.

The lease reserved to the landlord "the right to sell or resume possession of any part or parts of the lands hereby let at any time, . . . the tenant to receive a proportionate deduction from his rent and surface damage to crops as, failing agreement, the same may be fixed by arbiters mutually chosen." It contained no provision with regard to notice to the tenant by the landlord of his intention to resume.

On 31st January 1914 the Lord Ordinary on the Bills (ANDERSON) passed the note, and on 13th May 1914 the Lord Ordinary (CULLEN), before whom the case had come to depend, allowed a proof before answer.

The respondents reclaimed, and argued—The landlord had given reasonable notice, and it had been accepted by the complainer. In any event the complainer was not entitled to notice, for apart from the lease there was no agreement between him and the reclaimers as to notice, and the lease itself did not provide for it. *Sharp* v. *Clark*, January 24, 1807, Hume 577, was referred to.

Argued for the complainer—The landlord had not given the complainer definite and sufficient notice. The complainer was entitled to reasonable notice in order that he might have time to look out for and get other land to take the place of the land which was to be resumed. The necessity of notice was implied in the resumption clause, which was susceptible of construction, and it should be construed equitably. *Trotter* v. *Torrance*, May 27, 1891, 18 R. 848, 28 S.L.R. 651, was referred to.

At advising—

LORD SALVESEN—The first question in the case is whether the landlord's right to resume possession required as a condition-precedent that he should give notice to the tenant of his intention to do so. There is no provision in the lease itself with regard to notice, and I cannot see any ground for the view that the absolute right for which the landlord stipulated should be subject to an implied limitation. In the ordinary case it would no doubt be in the landlord's interest not to resume possession until the crop had been reaped, for he has to pay surface damage to crops as the condition of his right to resume; and I think that this provision in favour of the tenant impliedly excludes any right to notice. Whatever the state of the land may be at the time