the last year the tenant should pay the extra rent stipulated for in the lease for every acre of land miscropped. I think, however, with your Lordships, that if the landlord allowed this mode of cropping, and thus allowed the farm to get into such a state that it could not be put right in the last year of the lease, he must be held to have waived all claim for pactional rent.

Lord Shand—If it had here been proved that there had been a verbal arrangement between Lyall, the factor, and the tenant that the five and six-shift rotations of cropping might be varied, then the case would be ruled by the case of *Duff's Trustees*, where it was held that after verbally assenting to an alteration of the shift for a period of years the landlord was not entitled to have the farm laid out in the last year as stipulated. Here there is no agreement, but I agree with the Sheriff-Substitute that the acquiescence is so clear as to amount to an agreement. In the case of *Duff's Trustees* one of the findings in Lord Kinloch's interlocutor was to this effect:—"Finds it proved as matter of fact that by the terms of his lease the pursuer was bound to observe a six-shift rotation of crops, but that in the course of his possession under the said lease the pursuer changed to a five-shift with the consent and acquiescence of his landlord and continued to prosecute the same;" and here it has been proved that there was assent and acquiescence. Lyall says in that part of his evidence given in the Sheriff-Substitute's note that he presumed the granting of receipts in full meant acquiescence in the system of cropping. He says:—"There was neither remonstrance, protest, nor reservation on my part nor on that of the landlord;" and he gives his reason—"I thought that the defender had a very dear bargain; and being otherwise satisfied with him, I took no exception to anything that was going on;" and so he purposely allowed the system to continue.

Now, if there had been a deviation for only one or two years, I could not hold that the landlord would be bound to allow it to go on; but he would be bound to tell the tenant that what had become a system would not be allowed. I think that the Sheriff-Substitute is right when he says that "although no actual consent has been proved in the present case, the long continued acquiescence which has been proved comes so very near to it, that the Sheriff-Substitute cannot bring himself to think, either in equity or fair dealing, that the present claim can now be sustained. I agree with your Lordships that the interlocutor of the Sheriff should be recalled.

Lord Deas was absent on Circuit.

The Court recalled the interlocutor appealed against and assoilzied the defenders.

Counsel for Appellants—Mackintosh—Jameson. Agents—Henry & Scott, S.S.C.

Counsel for Respondents—J. P. B. Robertson. —Dickson. Agents—Webster, Will, & Ritchie, S.S.C.

Friday, February 23.

SECOND DIVISION.

[Sheriff of Ross, Cromarty, and Sutherland.

HUMPHREY *v.* MACKAY.

Lease—Mutual Obligation—Retention of Rent by Tenant in respect of Illiquid Claim of Damage.

The tenant of an arable farm let on a nineteen years' lease paid the rent regularly for twelve years. Thereafter, the rent not being paid, the landlord applied for sequestration. The tenant consigned the rent and found caution for expenses, but claimed right of retention of the rent on the ground that the landlord had not implemented his part of the contract in various particulars, especially in failing to secure him an adequate water-supply for his thrashing-mill. *Held* that, looking to the conduct of the tenant, and the absence of specific averment of failure on the part of the landlord to implement the lease, the defence was irrelevant.

John Humphrey, heritable proprietor of the estate of Bayfield, in the county of Ross, let to Murdo Mackay the Mains farm of Bayfield on a nineteen years' lease from Whitsunday 1868 at a yearly rent of £450, payable half-yearly at Martinmas and Whitsunday. Mackay entered into possession of the farm and paid the rents down to Whitsunday 1880. The rent payable at Martinmas 1881 and Whitsunday 1882 not having been paid, Mr Humphrey presented a petition for sequestration in the Sheriff Court of Ross, Cromarty, and Sutherland at Tain. The defender averred that the pursuer had failed to fulfil the obligations undertaken by him in terms of the conditions of let—(1) by withholding possession of a substantial portion of the subjects, that portion consisting of a house known as the Carse, and a piece of ground extending to one acre or thereby; and also by depriving him of a field, 6 acres in extent, which he had been led to believe, at the time he offered for the farm, belonged to the farm; (2) by failing to put the farm-buildings and offices into proper tenantable repair, as provided by the conditions of let; and (3) by failing to supply to the defender the necessary water-power for the working of his thrashing-mill. His averments on this point were as follows—"The pursuer has failed to supply to the defender the necessary water-power for the working of the threshing mill as existing and used during the proprietor's occupation of the subjects as at December 10, 1867. The said water-power is stored in a dam on the Bayfield estate, from which it runs through the subjects occupied by defender, and by the said thrashing-mill down to a meal-mill held or leased from the pursuer by Robert Munro, miller, Bayfield. A due and available supply is necessary for the defender's proper working of the subjects, but from his entry down to the present date the defender has been unable to obtain a suitable supply, even when the dam was full, as he has been prevented from exercising any right or control over it by the pursuer or his said tenant, and the pursuer or his tenant have latterly locked the upper dam and deprived the defender of all con-

trol over the water. In consequence, he has been unable to make use of the thrashing-mill, and has been frequently compelled to stop work, which has caused great delay and inflicted serious injury on his stock. During September and October of last year, in particular, the defender was almost entirely deprived of all water supply, and intimated that he estimated his claim of damages against the pursuer at the sum of £1000." In the conditions of let exhibited at the time the lease was entered into it had been stipulated that the defender should pay to the pursuer the value of the thrashing-mill, and should at the conclusion of his lease be entitled to its value from the incoming tenant. The defender averred that in consequence of the uncertain supply of water to his thrashing-mill he had suffered loss to the extent of £1000. He estimated his loss arising from damage to his crops by overflow, due to the pursuer's actings in opening and shutting the sluices, at £500; from failure on the part of the defender to put him in full possession of the subjects, at £280; and from failure to put the farm-house and offices into tenantable repair, at £500—in all £2280. This sum the defender claimed to set off against the rent, amounting to £450. He consigned the rent and found caution for expenses in the action, in respect whereof the interim sequestration which had been granted was recalled.

He pleaded, *inter alia*—"(3) The pursuer having violated or failed to implement his obligations under the agreement founded on, has disentitled himself from enforcing the same against the defender. (4) In the circumstances the defender having retained the rents sued for as the only means of enforcing the pursuer's counter-obligations which he refuses to perform, the action should be dismissed with expenses."

The Sheriff-Substitute (HILL) found, *inter alia*, that "the defender had stated no sufficient reasons for retaining the rents admittedly due," and decerned against him for the same, and granted warrant to the clerk to pay them to the pursuer out of the consigned fund.

"*Note.*— . . . With regard to the merits, the only grounds stated by the defender for retaining the rents in question which have the least appearance of relevancy are contained in the statement in the revised defences—'In particular, he (the pursuer) has withheld and withholds from the defender possession of a substantial portion of the subject described in conditions of set, being a house known as the Carse or Schoolhouse, and a piece of ground extending to one acre or thereby;' and in the statement—'Further, the pursuer failed to supply to the defender the necessary water-power for the working of the threshing-mill mentioned in art. 7, as existing and used during the proprietor's occupation of the subjects let, and at December 10, 1867.'

"The Sheriff-Substitute thinks that this last statement is too vague to be admitted as a relevant defence against the pursuer's claim. It is not expressly stated that the pursuer either was under an obligation to supply water-power, or that he prevented the defender from getting it. And it rather appears, from some of the letters produced by the defender that the water was a subject of dispute between the defender and another party who had a joint right to it, and that the pursuer did what he could to get the matter settled so as to accommodate the defender.

"The statement about the house is more precise. And it is, no doubt, the rule that if a tenant has not got the whole subjects of his lease he cannot be required to pay his full rent. In judging, however, whether a statement of this kind is to be admitted as a relevant ground for withholding rent, some regard must be paid to the circumstances in which it is made. Now, here the tenant has been in possession of the farm for about 12 years; during that time complaints, as appears from the correspondence in process, have from time to time been made by the defender to the pursuer as to matters connected with the subjects let, but not a word seems to have been said, until the present defences were given in, about this house and piece of ground having been withheld from the defender. He would have been in a more favourable position if he had claimed them throughout. As matters at present stand, the Sheriff-Substitute thinks the defender must constitute his claim against the pursuer on this as well as the other grounds he alleges in a separate action. He will then be in a proper position for claiming compensation out of future rents, and as there are still some years of the lease to run, he can run no risk by so doing."

The defender appealed to the Sheriff (MACKINTOSH), who adhered.

"*Note.*—The Sheriff is of opinion that this is a question of some delicacy, and he quite recognises the force of the argument which the appellant in his able pleadings deduces from certain recent decisions.

"There can be no doubt of the general rule of law that a tenant is not entitled to retain his rent in respect of illiquid claims of damages; and even where the damage arises from the withholding of a part of the subject let, it was formerly considered that the rent could not be retained unless the tenant proposed to throw up his lease, and the subject withheld was sufficiently essential to justify him in doing so. Nor was this doctrine at all infringed upon by the decision in the case of *Davie* v. *Stark* referred to by the appellant, because there the tenant had quitted possession, and the question was as to his right to rescind the lease.

"But undoubtedly it has now been held (in the cases of the *Kilmarnock Gas Light Company*, 11 Macph. 58, and *Guthrie* v. *Shearer*, 1 R. 181) that where an essential part of the subject let is withheld from the tenant, the landlord is barred from sequestrating for rent, even although the tenant is unable or unwilling to rescind the lease or to quit possession; and accordingly the question in the present case must be held to be, whether the nature and extent of the subjects alleged to be withheld are such as to assimilate the present case to the case of the *Kilmarnock Gas Light Company* and *Guthrie* v. *Shearer*, above referred to, or whether the landlord's alleged default falls short of the withholding of an essential part of the subjects let. So viewing the question, however, the Sheriff is of opinion that on the defender's own statement his case fails.

"As regards the water-power, his lease does not appear to warrant any particular supply of water. And as regards the few acres of carse land, as to which the parties are at issue, it can-

not, the Sheriff thinks, be held that, looking to the size of the farm and the rent paid, these acres form so essential a part of the subjects let as to entitle the defender to withhold the rent. The question is necessarily one of circumstances and degree, and it is probably enough to say that in any view the circumstances of the present case fall far short of those with which the Court had to deal in the two cases referred to. Besides, the Sheriff agrees with the Sheriff-Substitute, that it is not to be left out of view that the present case is raised after twelve years of the lease have run. On the whole, the Sheriff has come to be satisfied that the judgment of the Sheriff-Substitute is right."

The defender appealed, and argued—A landlord is barred from using sequestration when he is not in a position to say that he has performed his part of the contract. Here the pursuer was said to have failed to implement his part of the contract, by withholding part of the subjects let, and by not furnishing a sufficient water-supply. A defence which claimed retention of the rent till the landlord's obligations were fulfilled was relevant.

Authorities—*Kilmarnock Gas Light Co.* v. *Smith*, Nov. 9, 1870, 11 Macph. 58, *supra; Gordon* v. *Suttie*, July 13, 1826, 4 Mur. 86; *Guthrie* v. *Shearer*, Nov. 13, 1873, 1 R. 181; *Davie* v. *Stark*, July 18, 1876, 3 R. 1114.

Argued for pursuer—The defendant paid rent for fourteen years. It was not said, with regard to the water-supply, that the meal-miller had any further right granted to him by the landlord during the continuance of the lease of controlling the water-supply than he enjoyed at the beginning of the lease. The lock was put on in 1875, and no complaint arose about the water-supply till 1880. The whole circumstances and the conduct of the tenant must be considered as instructing his compliance.

At advising—

Lord Justice-Clerk—Had it appeared from the statement on this record that it admitted of being made more specific as to the subject let, I should have been disposed to have given parties opportunity to amend it or to produce additional documents. But this case does not fall under the category of the cases which have been referred to.

It has been decided over and over again that if the landlord withhold any material part of the subject of the lease, he cannot force the tenant to pay the rent in full; but that part of the landlord's obligation which he has failed to implement must be clearly averred, that the tenant may be justified in withholding the rent. This is clearly established by the cases cited.

What is here said to have been let was the farm and offices as described in the advertisement on the faith of which he entered on possession.

The words of the advertisement with regard to the thrashing-mill describe it as a thrashing-mill driven by water-power. I do not see that there was here a warranty that there should always be a supply of water sufficient to drive the mill, or that the tenant should have sole right to the water supply. It seems that there was an old mill lower down, and what the tenant alleges is, not that he did not get the water-power, but that owing to the interference of the tenant of the old mill he did not get the water. This interference incommodes him to a certain extent only in the use, but does not deprive him of the water. I am consequently of opinion that he is not justified in withholding payment of the rent. Further than this I am not inclined to go. If it turned out that the landlord during this tenancy had in any way tied his hands, or had voluntarily given some right to a third party, the case might be different. But there is no statement of this kind upon record. I am therefore of opinion that we should adhere to the judgment of the Sheriff.

Lord Young—I am altogether of the same opinion, and I have very little to add. Towards the close of the discussion, and indeed substantially from the first, the defender's case was put upon the deficient supply of water to his thrashing mill; and it is said, not that he had no use, but that he had been impeded in his use by the competition of the tenant of the meal mill. He says —"He has, however, been every season stopped at intervals from working the thrashing mill on account of the water having been drawn away by the meal miller. Up to the year 1875 the defender could have to some extent remedied this evil by supplying his own dam from the upper store of water on the estate, but in that year the sluice in that upper dam or store was locked by the pursuer, and he, the defender, deprived of all control over that water."

The rent sequestrated for is for the crops of the year 1881-1882, and the question is, whether the defender has stated any good ground for withholding that rent? If he has a good ground, the pursuer cannot obtain decree, and the Sheriff's judgment cannot stand. This is the simplest way of putting the question. Now, the only ground which the defender has is that which I have just read, viz., that he has been stopped working by the water being drawn away; and since 1875 the meal miller has put a lock upon the upper dam, and thus hindered the defender from drawing water. Here there is no statement entitling the party to withhold his rent. He may have claims of damage against his landlord for damage suffered in time past, but we have no sufficient statement of that upon record.

Lord Rutherfurd Clark—I am entirely of the same opinion. From a very early period of this discussion I thought that the only point which we could determine was whether the rent under the terms of this lease is or is not legally exigible. I do not think that the statements regarding the lands and house are of much importance. Accordingly, the only remaining matter is the allegation as to the water power by which the mill is driven. I can only say that I do not see any relevant statement of this on record, and accordingly the defender cannot withhold the rent.

Lord Craighill was absent.

The Court dismissed the appeal and affirmed the judgment of the Sheriff.

Counsel for Appellant — Trayner. Agents—Morton, Neilson, & Smart, W.S.

Counsel for Defender—J. P. B. Robertson—Pearson. Agents—Tods, Murray, & Jamieson, W.S.