ation, and the question is whether the suspension sets forth any good ground for setting aside the conviction and granting liberation. I am of opinion, in the first place, that the proceedings *ex facie* were regular. I think, secondly, that the conviction is unobjectionable on the ground of uncertainty; and thirdly, I am of opinion that the statement of facts discloses no case of oppression. The only question therefore is, whether the conviction is to be set aside because the complaint was defective in specification with respect to some matters upon which the accused was entitled to require the prosecutor to be more specific?

I concur with Lord Shand in thinking that this objection should have been stated before going to trial, and on the ground that this was not done, and that the accused having ample opportunity to state the objection declined that opportunity, and refused to go back on the plea of not guilty which he had stated on the first diet, I am of opinion that the objection should not now be entertained.

LORD JUSTICE-CLERK—I concur with both your Lordships in the judgment, and also in the ground of judgment. As regards form, I think the proceedings are unobjectionable. The Sheriff at the first calling of the case, on the parties not being prepared to plead guilty, adjourned the case most properly for a week, and therefore there was no surprise or failure to give the accused the opportunity of getting advice and preparing for defence. At the second calling they, under the advice of their agent, as appears from the record, declined again to plead, in respect the plea of not guilty had been already recorded. That means, translated into plain English, that their agent declined to take any steps whatever preliminary to going to trial. That was done intentionally, deliberately, and plainly with the object of keeping open any objection to the complaint should there be a conviction. I think that is a course which parties with an agent advising them are not entitled to take, and that the case is one calling for no favour. But notwithstanding that, if the proceedings upon the face of them had been radically and essentially bad, and if the complaint had been one having no real essence in it, and one upon which no verdict or sentence could possibly follow, I do not think that we could have upheld the conviction. But I concur in thinking that the complaint is not irrelevant. It is said, in the first place, that it does not specify which of the three offences enumerated in the Act of Parliament is alleged to have been committed, or state them alternatively, but simply says that the accused James Bolton "did open, keep, or use" his premises "for the purpose of betting," &c., or "did knowingly and wilfully permit said premises to be opened, kept, or used" by his son "for the purposes aforesaid." I am not clear that these words express three separate offences at all. My inclination is to hold that there are three ways of expressing how one offence can be committed. However that may be we are relieved of all difficulty, because the Sheriff has dealt with them as divisible, and has only convicted the accused of using the premises.

In the second place, it is said there is no specification of the persons who engaged in betting or of the acts of betting committed. I hold that not to be an objection to relevancy pure and simple, although it is often so called. I hold with both your Lordships that where a party has sufficient notice to consider his defence and is not without an agent, if he thinks the notice given by way of specification is not sufficient he is bound to state that before going to trial. He is not entitled to take his chance of an acquittal, and then if convicted object to the want of notice. I think therefore that we must sustain the conviction.

The Court refused the suspension.

Counsel for the Complainer — Comrie Thomson — A. S. D. Thomson. Agent —William Officer, S.S.C.

Counsel for the Respondent—Lord Advocate Robertson — M'Kechnie. Agent — Party.

COURT OF SESSION.

Friday, January 24.

SECOND DIVISION.

[Sheriff of Lothians and Peebles.

GILCHRIST AND ANOTHER *v.* WESTREN.

Landlord and Tenant—Urban Subject—Lease—Removal—Notice.

A tenant held an urban subject under a lease for seven and a-half years, which expired at Whitsunday 1889. The lease contained this provision—"Lastly, the said tenant binds and obliges himself and his foresaids to flit and remove from the whole premises hereby let at the termination of this lease without any warning or process of removing." In January 1889 the tenant intimated to a house-agent, who acted as factor for the proprietor, that his lease of the premises would expire in May, and that he would then quit them unless he received intimation that a reduced rent would be accepted. The factor communicated with the proprietor's agents, but no answer was given, and no communication sent to the tenant. In April he took other premises, and removed to them on May 28. In an action against him by the proprietor for a year's rent, on the ground that he was still tenant of the old premises by tacit relocation, *held* that the defender had given sufficient and timeous notice to his landlord of his intention to remove.

Peter Westren, goldsmith, was tenant of

27 Frederick Street, Edinburgh, at a rent of £120 sterling per annum, payable half-yearly at the usual terms, on a lease granted by the proprietor Charles Ramsay Gilchrist of Falla, Lanarkshire. The lease was for seven and a-half years from and after the term of Martinmas 1881, and contained this clause—"Lastly, the said tenant binds and obliges himself and his foresaids to flit and remove from the whole premises hereby let at the termination of this lease without any warning or process of removing." Upon 28th May 1889 Westren removed his stock, furniture, fittings, &c., to new premises at 70 George Street.

The proprietor and his factor and commissioner, C. B. Logan, W.S., presented a petition in the Sheriff Court at Edinburgh for warrant to carry back the stock, &c., to 27 Frederick Street, and to sequestrate the same in security, and for payment of a year's rent from Whitsunday 1889.

The pursuer averred that the defender was tenant of the premises for a year from Whitsunday 1889 by tacit relocation following upon the lease.

The defender averred that on 21st January 1889 he had given notice of his intention to remove at Whitsunday to the house-agent with whom he transacted all business relating to the premises.

The defender pleaded—"(2) The defender not being tenant of the premises in question for the year from Whitsunday 1889 to Whitsunday 1890, is not liable in the rent thereof, and the pursuers are not entitled to warrants of sequestration as craved. (3) The defender having removed from the said premises in terms of the obligation upon him to do so contained in said lease, and not having occupied the premises after the term of Whitsunday 1889, the pursuer is not entitled to plead tacit relocation."

The Sheriff-Substitute (RUTHERFURD) allowed a proof. From this it appeared that in 1888 the defender had fallen into arrears with his rent, and the pursuer sequestrated his effects in security and for payment of the rents falling due at Martinmas 1888 and Whitsunday 1889.

The defender deponed—"On 21st January 1889 I called at Queensferry Street, and saw Mr Robert Stewart Patterson, and told him my errand. I cannot swear that I told him then that the rent was too high, and that I did not think of remaining, but I had been talking about the rent before and grumbling at it. I intimated that my lease was out in 1889, and that I would be done with it in May. I said at the same time that I wished to know if I could have a new lease, and upon what terms. He said he would write to Mackenzie, Innes, & Logan, and lay the matter before them, and as soon as he got an answer he would send it to me. I expected to hear within the next few days, but did not. On 31st January I called again. I again saw Mr R. S. Patterson. I said I was disappointed at not having received an answer, and he said with a feeling of disappointment also, 'We have never received an answer to the letter we sent to Mackenzie, Innes, & Logan, but we shall write again to-day, and so soon as we get an answer we shall let you know in due course.' I never heard from him, and I eventually took premises in George Street. I made application for them on 23rd February, and they were finally taken about the 1st or 3rd April. The arrears of rent for the Frederick Street premises were fully paid up before I removed, but I cannot tell the date. It appears from the papers that it was on 28th May. I removed from the premises on the term day, the 28th May."

Patterson deponed—"He never gave us any written notice that he was going to leave at the end of the lease. I wrote two letters regarding the property to Mackenzie, Innes, & Logan, dated 21st and 31st January respectively. The defender called and saw me on the 21st, and wanted me to make interest with Mackenzie, Innes, & Logan to let him remain in the premises, and I said I would endeavour to do so. On the 31st he called again to ascertain if I had managed to do anything. I had seen Mr Macandrew, of Mackenzie, Innes, & Logan—the gentleman whom I was always in the habit of seeing—and he had told me there was no hope of the defender being allowed to remain while the arrears of rent were not cleared off. I told that to defender, and he said he was quite prepared to clear off the arrears, that he was just waiting for a statement from Mr Douglas, who had charge of the sequestration for rent, to clear them off. I accordingly wrote the letter of 31st January to Messrs Mackenzie, Innes, & Logan. I don't remember of anything more passing with defender at that time."

Upon 11th December 1889 the Sheriff-Substitute pronounced this judgment:—"... Finds (3) that the defender did not give the pursuers, or anyone acting on their behalf, explicit notice forty days prior to Whitsunday 1889 that he (the defender) would not continue in the occupation of the premises subsequent to that date; (4) that the defender having become tenant of other premises, quitted the said shop in Frederick Street on or about the 28th of May 1889: Finds in point of law that in the absence of due notice upon either side tacit relocation of the said shop No. 27 Frederick Street must be held to have taken place from Whitsunday 1889-90: Therefore repels the defences, and decerns and ordains the defender to make payment to the pursuers of the sum of £60 sterling, being the half-year's rent of said shop which fell due at the term of Martinmas 1889, with interest thereon at the rate of £5 per centum per annum from that date until payment: *Quoad ultra* continues the cause as regards the half-year's rent to become due at Whitsunday 1890, &c.

"*Note.*—. . . The only question in the case (if it be a question) is, whether the defender prevented tacit relocation by giving the pursuer due notice prior to the term of Whitsunday last? Now, Professor Bell says (Prin. sec. 1271) that no particular form of renunciation on the part of a tenant is required further than that it must contain a clear and explicit notice to the right party forty days before Whitsunday. Mr R. S. Patterson, the house-agent, says that he got

no such notice at either of his interviews with the defender on the 21st and 31st of January, and it is not alleged that any written notice was given. Assuming that verbal intimation might be sufficient, the defender himself admits that his purpose on calling on Mr Patterson was not to announce his intention of leaving the premises, but to try and effect an arrangement by which he might continue tenant after Whitsunday; but he says—'I cannot swear that I told him then that the rent was too high, and that I did not think of remaining, but I had been talking about the rent before and grumbling at it.' It is true he adds—'I intimated that my lease was out in 1889, and that I would be done with it in May;' but he does not explain in what terms he conveyed this information to Mr Patterson, and it is quite plain that no distinct and unequivocal notice was given even verbally of his intention to leave the premises."

The defender appealed, and argued—1. Sufficient notice was given to Patterson in January, and the knowledge was brought home to the landlord by the letters of 21st and 31st January—*Sutherland's Trustees* v. *Miller's Trustees*, October 19, 1888, 16 R. 10; *M'Intyres* v. *M'Donald, &c.*, December 11, 1829, 8 S. 237. 2. He was bound under his lease to leave the premises without any warning from the landlord. As he had heard nothing from the landlord with regard to his leaving, the lease made it imperative on him to leave the premises at the expiration of the lease—*Paxton* v. *Slack*, May 26, 1803, Hume, 568. If he had not removed when he did he would have been at the mercy of his landlord, who might have turned him out at any time, and have claimed violent profits. This was a particularly hard case if the contention of the pursuer was to prevail, because the landlord could turn his tenant out of the premises without giving him any warning, while the tenant had no corresponding advantage, but must give warning if he wished to leave—*Houldsworth* v. *Brand's Trustees*, May 18, 1875, 2 R. 683, and January 8, 1876, 3 R. 305.

The respondent argued — No sufficient intimation had been given. The clause of removal in the lease was in the landlord's favour, but there was no hardship, for under the Act 16 and 17 Vict. cap. 80, secs. 30 and 31, he was bound to give forty days' notice to his tenant before he could proceed upon the clause.

At advising—

LORD JUSTICE-CLERK—Some important and difficult questions of law have been discussed during the debate, but in my view it is unnecessary to consider these. Certain facts are practically decisive of the case. The defender had been tenant of a shop in Frederick Street for some years prior to May 1889. His rent had fallen somewhat into arrear, and he had been under sequestration for rent. In January 1889 he went to the factor—Patterson—and according to his own evidence, which there is no reason to disbelieve, intimated, after speaking about the amount of the rent, that "my lease was out in 1889, and that I would be done with the premises in May." If that were all that had passed I should have held that by that intimation the defender had given sufficient notice of his intention to leave. But he goes on to say—"I said at the same time that I wished to know if I could have a new lease, and upon what terms. He said he would write to Mackenzie, Innes, & Logan, and lay the matter before them, and as soon as he got an answer he would send it to me. I expected to hear within the next few days, but did not." It appears, then, that he distinctly intimated that he had no intention of staying on at the same rent, and wished easier terms, and he never got any answer to his request to know whether he could have a new lease or better terms. We are therefore left with matters in their original position, which was, that he expected to be "done with" the shop in May. Now, it is a question of circumstances whether a tenant has given sufficient notice of his intention to leave. Formal notice is not necessary, but only such notice as will satisfy a court that the landlord was made aware that the tenant did not intend to stay on on the same terms. The defender having made that statement to his landlord's factor, which I have read, was in this position. He was bound by the lease to remove "without any warning or process of removing" at the termination of the lease, and he did remove. In February, having had no answer from his landlord, he began negotiations for another shop, and in the beginning of April he took the other shop. In leaving the respondent's shop on 28th May he was fulfilling his obligation in his lease. If he intimated that he intended to leave and did leave under that obligation, I think it cannot affect his position that he received no notice from his landlord to remove. He only did what he was bound to do.

I think therefore that the Sheriff's judgment must be altered, and that the defender must be assoilzied.

LORD YOUNG—I am of the same opinion. I think that the defender after his interview with the factor was honestly under the conviction that if he heard no more on the subject he was to leave the premises. I think he had told the factor that the rent which was in arrear was too high, and that he could not pay it, and that if it was not to be reduced his connection with the place would be over in May. The factor gave him to understand that renewal of the lease would be hopeless unless the arrears were paid up. He was not in a position to comply with that condition before the period for giving notice expired. He could not then pay the arrears, and indeed they were not paid till 28th May. He took another shop, and indeed his whole actings can only be accounted for on the footing that he believed in good faith that he was not to remain. He received no further communication from the landlord. The factor Patterson cannot be blamed for that, for he seems to have written twice to the landlord's agents on the matter, and

got no answer to his letters. Well, then, no communication having been made to him when he came to leave, as he was entitled and bound to do, the landlord says to him, No, you must pay for another year. I cannot assent to that view, which would be a very harsh one even if the law were more favourable to it than I think it is. The landlord knew that the defender was not to remain at the old terms. I think we should find in fact that sufficient notice was given of his intention to leave.

LORD RUTHERFURD CLARK—I am of the same opinion. I proceed entirely on the facts, and I take no notice of the condition in the lease with respect to the obligation of the tenant to flit at the termination of the lease without any warning or process of removing.

LORD LEE—I also concur, and place my decision entirely upon the facts.

The Court pronounced the following interlocutor:—

"Find in fact (1) that on 21st January 1889 the defender intimated to the pursuer, through his factor or agent Mr Patterson, that his lease of the premises in question would expire in May following, and that he would then quit them, unless he received intimation that a reduced rent would be accepted; (2) that he received no communication; (3) that under his lease he was bound to quit without any notice from the pursuer; (4) that he did quit them accordingly on the 28th day of May 1889, and meanwhile on 3rd April preceding had taken other premises: Find in law that the notice given as aforesaid was timeous and sufficient: Therefore sustain the appeal; recal the judgment of the Sheriff-Substitute appealed against: assoilzie the defender from the conclusions of the petition: Find him entitled to expenses, &c.

Counsel for the Appellant—Dickson—G. W. Burnet. Agent—George M. Wood, S.S.C.

Counsel for the Respondent—Ure. Agents—Mackenzie, Innes, & Logan, W.S.

Friday, January 24.

SECOND DIVISION.

[Lord Kyllachy, Ordinary.

ANDERSON *v.* AINSLIE AND OTHERS.

Trust — Succession — Vesting — Entail — Entail Amendment Act 1848 (11 *and* 12 *Vict. c.* 36), *sec.* 27.

Trustees were directed (1) to make up titles to a testator's landed estate, and hold it for the liferent use of his widow and unmarried daughter Margaret and the survivor; (2) upon the death of the survivor to execute a strict entail of the lands in favour of the heirs of the body of Margaret, whom failing in favour of Mrs Anderson, a married daughter, and the heirs of her body, whom failing to his other daughters and the heirs of their bodies, whom failing to certain remoter relations and their heirs, and *inter alios* in favour of Archibald Ainslie and the heirs of his body; (3) to hold the whole residue of the estate for the liferent use of his married daughters in certain proportions; (4) notwithstanding these liferent rights to apply the residue of the estate "as opportunity offered," and "at such time or times and from time to time as they should consider proper," in the purchase of lands as nearly as might be contiguous to the testator's landed estate, it being declared that notwithstanding any such purchase or purchases the proportionate share or shares payable to any beneficiaries in the trust-estate should not be diminished; (5) the testator directed as follows—"On the residue of my trust-estate being realised and applied in the purchase of lands and other heritages as aforesaid, my trustees may, and I direct and appoint them to convey and make over the whole lands and other heritages then vested in them by a valid and effectual entail to and in favour of the institute or heir of entail then in possession, or who would then have been entitled in virtue of the deed of entail to be executed by my trustees to the possession of the lands and estate of Elvingston."

When the testator's daughter Margaret was aged fifty-eight and unmarried, Mrs Anderson presented this petition under the Entail Amendment Act 1848, sec. 27, to acquire Elvingston and the residue in fee-simple, and averred (1) that her sister Margaret could not now have issue; (2) that the petitioner was therefore the person who, if the direction contained in the testator's trust-disposition had been carried into effect, would be the institute of entail in possession of the said estates subject to the liferents of her mother and sister, and might by paying for the consents of next heirs in terms of the Entail Acts acquire the said estates and residue in fee-simple by executing and recording an instrument of disentail. She produced a minute of consent to the petition by her mother and sister Margaret, who bound themselves to grant discharges of their liferents of Elvingston on compensation, and she claimed that in respect of these consents her right to have the entail executed had vested. Further, the residue might at once be entailed.

Archibald Ainslie lodged answers maintaining that Mrs Anderson had not and might never have any vested interest as institute.

Held (1) that the time for executing the entail had not arrived; (2) that there was no presumption that there would be no heir of the body of the