speed ahead" is not *per se* in practice recognised in the engine-room as an emergency order; and I have therefore come to concur with your Lordships that no fault is proved against the engine-room staff. If so, the pursuers have altogether failed to prove fault, and though I do not entirely accept his reasoning, I come to the same result as the Lord Ordinary, and agree that the defenders are entitled to be assoilzied.

LORD MACKENZIE—I concur with your Lordship in the Chair. I think the pursuers have failed to prove fault on the part of the defenders, or on the part of anyone for whom they are responsible.

The Court pronounced this interlocutor—

"Recal the finding in said interlocutor 'that the collision was caused by an error in judgment of the pilot, and that there was no fault on the part of either the pursuers or the defenders': In place thereof, find that the pursuers have failed to prove that the collision was caused by the fault of the defenders, or of anyone for whom the defenders are responsible: *Quoad ultra* adhere to the said interlocutor, and decern. . . ."

Counsel for Pursuers (Reclaimers)—Horne, K.C.—Hon. W. Watson. Agents—J. & J. Ross, W.S.

Counsel for Defenders (Respondents)—D.-F. Scott Dickson, K.C.—Murray, K.C.—D. P. Fleming. Agents—Webster, Will, & Company, W.S.

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*Thursday, May* 18.

## SECOND DIVISION.

[Sheriff Court at Wigtown.

## EARL OF GALLOWAY *v.* M'CONNELL.

*Landlord and Tenant—Lease of Farm—Counter Claim—Obligation on Landlord to Put Buildings, Fences, and Gates into Tenantable Repair—Claim of Tenant to Retain Rent against Failure to Implement—Relevancy.*

In a lease of a farm entered into in 1906 the landlord bound himself to put such of the buildings as were necessary for the farm as a grazing farm, and also the fences and gates, into a tenantable state of repair. In an action by the landlord against the tenant for the term's rent due at Whitsunday 1910 the defender pleaded that he was entitled to retain the rent sued for until fulfilment by the pursuer of the above obligation, and averred that the pursuer was in breach thereof in respect that buildings alleged to be necessary for a grazing farm, and fences, were and had been since the commencement of the lease in a state of dilapidation and disrepair in certain respects. *Held* that this defence was relevant, and proof allowed.

The Earl of Galloway, *pursuer*, raised an action in the Sheriff Court at Wigtown against James M'Connell, *defender*, for £187, 10s., being the half-year's rent due at Whitsunday 1910 of the farm of Maidland, of which the pursuer was proprietor and the defender tenant under a lease for twelve years from Martinmas 1906.

The lease provided, *inter alia*—"And the proprietor binds himself to put such of the buildings on the farm as are necessary for the farm as a grazing farm, also the fences and gates on the farm, into a tenantable state of repair so far as necessary, the tenant performing all carriages of materials free of charge; and in respect of said obligation the tenant hereby accepts the whole houses, dykes, gates, fences, ditches, and drains on the farm as being in good tenantable condition and sufficient for the farm."

The defender averred, *inter alia*—"(Stat. 2) The pursuer has entirely failed to implement the obligation . . . although the defender has since the commencement of the lease persistently urged him to do so. . . . (Stat. 3) The farm buildings are, and have been since the commencement of the lease, in a state of great disrepair and dilapidation, and quite unsuitable for the purposes of a grazing farm. In particular, the roofs require in many parts to be reslated and the woodwork renewed, the walls also require to be rebuilt in part and repointed. The steading is insufficiently lighted, and the sewage arrangements are insanitary and defective. It was built for a dairy farm, and in order to make the buildings of use and available for a grazing farm for the wintering of cattle, which is incidental to and necessary for such a farm, they require in many instances extensive repairs. (Stat. 4)—[*After specifying various repairs required in terms of his obligation above quoted*]—The condition of matters narrated in this article has existed since the commencement of the lease, and still exists. The defender has thus not been put in possession and enjoyment of the full subjects let in terms of the said lease. (Stat. 5) The fences on the farm also require to be attended to and repaired, and in particular the sunk fence between Jedderland field and Quay field requires to be put into a proper state of repair. Since the commencement of the lease the fences have been in a state of great disrepair, and in particular they were in such state of disrepair during the period for which the rent in question is sued for. (Stat. 6) The whole of the work detailed in the preceding articles requires to be done, and is absolutely necessary in order to make the buildings and fences suitable for the use of a grazing farm."

The pursuer pleaded, *inter alia*—"(2) The defences are irrelevant"

The defender pleaded, *inter alia*—"(1) In respect the defender has not got possession of the entire subjects let to him under the

said lease, he is entitled to retain the rent now sued for until such possession is given to him."

[Proof had already been allowed in two other actions between the same parties, one at the instance of the tenant to enforce the above obligation, and the other at the instance of the landlord for damages for a contravention of the lease. The defender had consigned the sum sued for in the hands of the Clerk of Court.]

On 24th November 1910 the Sheriff-Substitute (WATSON) pronounced an interlocutor repelling his defences as irrelevant and granting decree as craved.

*Note*—". . . . What is now to be decided is, whether the defender is entitled to retain the rent due for the half-year ending last Whitsunday until the pursuer shall have executed the repairs demanded. I am of opinion that he has no such right. He has for four years enjoyed full possession of the subjects let, and has paid rent half-yearly, without reservation. The obligation which he now founds on is illiquid and is disputed. It is not essential, but merely collateral to the principal obligation to give full possession of the subjects. In these circumstances the defender is not, in my opinion, entitled to withhold payment of rent. See Rankine on Leases, 305-8, and cases there cited; also *Christie* v. *Birrells*, July 19, 1910, 47 S.L.R. 853."

The defender appealed to the Sheriff (FLEMING), who on 3rd February 1911 adhered.

*Note*—". . . . The defence is a claim of the right to retain the rent due under the lease until the landlord shall have put the tenant into possession of the whole subjects let, and this is founded on averments of failure to make alterations and repairs of buildings practically similar to those made in the first action above referred to. The Sheriff-Substitute repelled this defence, and I think he is right. The right of retention is not given by the law of Scotland whenever any claim is stated by a defender. It is given when the claim is instantly verifiable, or there is equity in giving the defender the security of retaining the sum sued for until the amount of his counter claim is ascertained. In the case of landlord and tenant such a right is given when the landlord fails to give the tenant possession of any material part of the subjects agreed upon to be let, and the further concession has been made to tenants that, although the claim may not instantly be verifiable as to its amount, retention will be allowed until there is an opportunity of proving the money value of an admitted claim. But I have been unable to find any case in which, when the existence of the claim and its money value are both disputed, the right of retention has been allowed."

The defender appealed, and argued—The defender here had averred with sufficient specification failure to give possession of the subjects let in the condition contracted for during the half-year to which the rent sued for was applicable. The tenant was clearly entitled to a proof of these averments, because if true they gave him a right to retain the rent — *Munro* v. *M'Geoghs*, November 15, 1888, 16 R. 93, 26 S.L.R. 60; *Graham* v. *Gordon*, June 16, 1843, 5 D. 1207, *per* Lord Fullerton; *Sivright* v. *Lightbourne*, June 11, 1890, 17 R. 917, 27 S.L.R. 718; *M'Donald* v. *Kydd*, June 14, 1901, 3 F. 923, 38 S.L.R. 697. This was not a question of liquid or illiquid at all, nor was it a question of abatement or of money value, but simply of a right of retention. Nor were there any equitable considerations against the exercise of such a right, for the tenant had consigned the rent. The cases of *Stewart* v. *Campbell*, January 19, 1889, 16 R. 346, 26 S.L.R. 226, and *Christie* v. *Birrells*, 1910 S.C. 986, 47 S.L.R. 853, were distinguishable. In the former the tenant sought an abatement of or alternatively compensation against the rent due for the last term in respect of failure to fulfil obligations on the part of the landlord during previous years. In the latter the tenant sought to set off a similar claim of damages, and also a claim of damages in respect of breach of a verbal obligation external to the lease.

Argued for the pursuer (respondent)—Retention of rent was an equitable remedy, which it was in the discretion of the Court to grant or not, and that depended on the particular circumstances of each case — *per* Lord Fullerton in *Graham* v. *Gordon*, *cit.*—and the circumstances here did not justify retention. Not every breach of obligation incumbent on the landlord entitled the tenant to retain, but only a breach of a material one —*per* Lord Cowan and Lord Neaves in *Guthrie* v. *Shearer*, November 13, 1873, 1 R. 181, 11 S.L.R. 70. Further, the right to retain could be exercised only where the obligation of which the pursuer was in breach was reciprocal to and commensurate with that which he was seeking to enforce —*Lovie* v. *Baird's Trustees*, July 5, 1895, 23 R. 1, 33 S.L.R. 208, as distinguished from *Sutherland* v. *Urquhart*, December 13, 1895, 23 R. 284, 33 S.L.R. 210. Retention would never be allowed where, as here, no obligation of which breach was averred was ambiguous, or where a money estimate of the breach or breaches averred was, as here, trifling—*M'Rae* v. *M'Pherson*, November 19, 1843, 6 D. 302; *Dods* v. *Fortune*, February 4, 1854, 16 D. 478. In any event, if the right were to be exercised here, the Court might restrict it to a reasonable estimate in money value of the breaches averred—*Bowie* v. *Duncan*, December 2, 1807, Hume 839.

LORD DUNDAS—This is an action by a landlord against his tenant for payment of a half-year's rent due at Whitsunday 1910. The defender resists payment on the plea that, as he has not got possession of the entire subjects let to him under his lease he is entitled to retain the rent sued for until such possession is given to him. As appears from the averments, the plea might perhaps be more accurately expressed by saying that the defender claims to be entitled to retain this half-year's rent

until the landlord has fulfilled his obligation under the lease by putting the buildings and fences into the condition into which he is alleged to have contracted to put them. The learned Sheriff and his Substitute have held this defence to be irrelevant, and repelled it accordingly. I think that view is wrong. The lease contains the following stipulations:—"The proprietor binds himself to put such of the buildings on the farm as are necessary for the farm as a grazing farm, also the fences and gates on the farm, into a tenantable state of repair so far as necessary, the tenant performing all carriages of materials free of charge; and in respect of the said obligation the tenant hereby accepts the whole houses, dykes, gates, fences, ditches, and drains on the farm as being in good tenantable condition and sufficient for the farm." *Prima facie* I do not see that there is much room for dubiety about the meaning of that clause, but I say no more about it, as there was some suggestion from the bar that it might be open to various interpretations.

As this is a question of relevancy, I turn to see what the defender as pursuer in this issue says upon the record. In article 1 of his statement of facts he sets forth the clause of the lease which I have already quoted. In article 2 he states—"The pursuer has entirely failed to implement the obligation incumbent upon him set forth in the immediately preceding article, although the defender has since the commencement of the lease persistently urged him to do so." Then he says in statement 3—"The farm buildings are, and have been since the commencement of the lease, in a state of great disrepair and dilapidation, and quite unsuitable for the purposes of a grazing farm." Statement 4 gives a number of details of the alleged failures on the part of the landlord to perform his obligation, and says that "the condition of matters narrated in this article has existed since the commencement of the lease and still exists. The defender has thus not been put in possession and enjoyment of the full subjects let in terms of the said lease." Then statement 5 refers to the fences, and the defender says that "since the commencement of the lease the fences have been in a state of great disrepair, and in particular they were in such state of disrepair during the period for which the rent in question is sued for." Finally, in statement 6 the defender avers that "the whole of the work detailed in the preceding articles requires to be done, and is absolutely necessary, in order to make the buildings and fences suitable for the use of a grazing farm."

It does seem to me that these statements, which we must take in the meantime as true, are perfectly relevant statements. I say so simply on the ground expressed by Lord Trayner in the case of *M'Donald* v. *Kydd* (1901), 3 F. 923, where he says—"I am disposed to put my judgment simply upon the application of the general rule that where a person seeks to enforce the terms of a contract against another, he is excluded from doing so if it can be shown that he is in default himself in the obligation that the contract puts on him." Lord Trayner was dealing with the facts before him upon a concluded proof. I am merely expressing a view on the relevancy of statements which may or may not be capable of proof.

There is a long train of authority dealing with the general law affecting cases of this sort, but I do not propose to go into the cases in any detail. They have quite properly been cited to us from the bar. I remind your Lordships, in a word, of the case of *Graham* v. *Gordon* (1843), 5 D. 1207. The facts of that case seem to resemble, in some respects at least, the facts averred by the defender in the present case. I see the lease was for nineteen years from 1832. It provided—"That the whole houses and buildings upon the farm are to be put into good tenantable condition, and the fences round the farm are to be put in good order and made fencible, betwixt and the term of Whitsunday next 1833." In 1838 the tenants brought an action against the landlord for fulfilment of his obligations and for damages. They continued to pay rent till 1840, after which they refused payment. While the tenants' action was still pending the landlord brought an action of removing in respect of non-payment of rent, in which he obtained a decree. The tenants brought a suspension, in which they were successful. In that action Lord Fullerton, in the course of giving judgment, used words which have subsequently been quoted again and again with approval. His Lordship said—"Rent is not liquid in the sense that a sum due by bond is. It is matter of contract in consideration of something to be done. It is paid for possession of the subject let. If the tenant says he has not got entire possession, that is a good answer to the claim for rent." Here in effect the tenant says—"I am not going to give this half-year's rent until the landlord has performed what I say he has not done, the stipulations incumbent on him in respect of which, among others, I engaged to pay the rent." The words which I have just quoted from Lord Fullerton were expressly approved by Lord President Inglis in *Munro* v. *M'Geoghs* (1888), 16 R. 93; by Lord Kinnear in the First Division in *Lovie* v. *Baird's Trustees*, 1895, 23 R. 1; and by this Division of the Court still more recently in *Christie* v. *Birrells*, 1910 S.C. 986. The case of *M'Donald*, 3 F. 923, seems to be also very much in point upon this matter. It is true, as is pointed out in that case, that the general rule is not inflexible, and that the Court would not necessarily feel itself compelled to grant a proof upon averments if they appeared to be quite unsubstantial and trivial in nature. But reading the averments here, I cannot say that they are unsubstantial or trivial. Whether they are well founded or not is of course another matter. It is said, and it may be, that there are cases in the books not wholly easy to reconcile with those to which I have referred; but however that may be,

it seems to me that those to which I have referred form a chain of doctrine which it would be impossible to disregard. I am unable to find in this record anything in the averments of such a nature as to take them out of the application of the general rule. In particular, I do not think it can be held to be necessary for the defender to state, as a condition of relevancy, the value or the estimated value in money of the landlord's failure to perform his obligation. It seems to me that the averments here are relevant, and disclose a substantial case which the defender undertakes to prove.

Where I think the learned Sheriff and Sheriff-Substitute have gone wrong is in treating this case as one of set-off of an illiquid claim of damages against a claim by the landlord for his rent. According to the averments, this is not a claim of damage at all, but a claim that the landlord shall do his part of a contractual agreement before the tenant is called upon to pay the rent, which is his part of the bargain.

It seems to me, therefore, we ought to sustain the appeal, recall the interlocutors of the Sheriff and Sheriff-Substitute, and remit to the Sheriff-Substitute to allow the defender a proof of his averments in common form. I think that proof should proceed along with the proof already ordered in the Sheriff Court, and so far as I see it would be well to conjoin the actions; but these matters should probably be left to the discretion of the Sheriff-Substitute.

In conclusion, I should like to say that it is to my mind a satisfactory element in this case that the rent has been consigned.

LORD SALVESEN — I agree with the opinion which has just been delivered. I think the Sheriffs, while correctly enough stating the point at issue, have come to an erroneous conclusion as to the law applicable. The Sheriff-Substitute, for instance, puts his ground of judgment in two sentences. He says—"He," that is, the tenant, "has for four years enjoyed full possession of the subjects let, and has paid rent half yearly without reservation." Now it is obvious that he has not enjoyed full possession of the subjects let, because full possession of the subjects let means full possession of the subjects let in the state contracted for, and the averment of the defender is that he has not had possession of the subjects let to him in the state into which the landlord was bound to put them as a condition of exacting the rent stipulated in the lease. Then the Sheriff-Substitute goes on to say — "The obligation which he now founds on is illiquid, and is disputed." How an obligation can be said to be illiquid I do not understand, nor does it appear to be disputed, because it is in the lease to which both parties appeal. Whether it has been fulfilled or not is a question of fact, but the obligation is clear and unequivocal.

As regards the Sheriff's ground of judgment, I think that also betrays a certain misapprehension of the authorities. He says — "The right of retention is not given by the law of Scotland whenever any claim is stated by a defender." So far he is right, but he proceeds — "It is given when the claim is instantly verifiable, or there is equity in giving the defender the security of retaining the sum sued for until the amount of his counter claim is ascertained." Neither of these propositions appears to me to be sound in law. If the right of retention exists, it does not matter whether the claim in respect of which it is made is instantly verifiable or not, provided it is relevantly averred. In the second part of the sentence which I have quoted, the Sheriff seems to depart entirely from the circumstances of this case and to treat it as if it were an attempt by the tenant to set off a claim of damages against a liquid claim of rent. That is not the nature of the tenant's defence at all, as Lord Dundas has pointed out.

An argument was founded on some observations of Lord Fullerton in the case of *Graham*, 5 D. 1207, in which he says that the Court will consider the circumstances of each case, and expresses the view that the right of retention which was then recognised may be dangerous, that is to say, may be liable to abuse. In some circumstances I think it might, but I do not see how it could be liable to abuse in a case where the tenant consigns the whole amount of the rent sued for. I think the Court can guard against abuse, if they suspect that there is an attempt to abuse the right of retention, by compelling consignation; and probably in a proper case would do so where they thought the defence, although relevant, disclosed an unsubstantial claim and was intended *merely* to enable the tenant to remain in possession without ultimately paying any rent at all. But when the tenant, as here, consigns the rent, there does not seem to me to be any ground for saying that the remedy of retention which he claims is open to any serious abuse.

I quite fail to follow the view that we are entitled in a question as to the relevancy of the defence to assess the amount of the rent which the defender might legitimately retain. That is a matter in regard to which the Court may have an equitable power when an application is made, but the argument based upon that view has nothing to do with the relevancy of the defence, which is the only matter upon which the learned Sheriffs have pronounced.

On these grounds I concur entirely in the result at which your Lordships have arrived.

LORD JUSTICE-CLERK—I agree with what has been said by both your Lordships. I think that sometimes in these cases the error arises from confounding the matter of liquid and illiquid claims. It has been expressed by Lord Fullerton, who was perhaps more competent than most judges to express an opinion on the subject, that rent was not absolutely or necessarily a liquid claim. With regard to the other

side of the question, I am clearly of opinion that the claim of the defender with respect to which he retains the rent is not an illiquid claim. I do not think the matter turns on liquid or illiquid at all. The position of a landlord and tenant is different from that of people entering into a bargain for the exchange of commodities, a particular quantity of goods being exchanged for a particular sum of money. A tenant is necessarily in a different position with his landlord. A tenant may have difficulty in making up his mind not to accept the subjects because something has not been put right. It might be hard upon the landlord if he did so, and might place the tenant himself in embarrassing circumstances and render him unable to get another farm. Therefore he may accept the subjects in the hope that if there are things to be done the landlord will do them, and on that footing he may be content to take up the lease. We know there are cases in which strong representations are made by the tenant to get things done, and in which there is considerable dilatoriness on the part of the landlord, or perhaps more often on the part of the landlord's chamberlain or factor. Therefore I do not think the tenant is to be prejudiced by having paid rent for some years—he is always hoping to get the things done. But there comes a point at which he takes up the position—"I have waited these two years, and in this position of affairs I cannot go on unless I get these things done. I am not going to pay my rent until they are done." In these circumstances it has been held in certain cases, especially in *M'Donald* v. *Kydd* (3 F. 923), that a tenant may have ground for taking up such a position.

In this case I am of opinion that the tenant is in the position in which he may take up that ground. He has consigned the rent, and therefore, as Lord Salvesen has pointed out, this is not an attempt on the part of the tenant to evade his obligation. He has parted with the money, but he says he will not consent to it being paid to the landlord unless the landlord fulfils the obligation incumbent upon him in the lease. The question of the character of a grazing farm is of course a question of fact and not of law, and can only be answered upon evidence of the customs and knowledge of those who are engaged in agricultural pursuits. But in the meantime we are in this position that the parties are in dispute as to the practical meaning of the obligation contained in the lease. That being so, the condition of matters is this. In the Sheriff Court at present there is an action by the present tenant against his landlord, and here we have an action by the landlord against the tenant for payment of the rent. In these circumstances it seems to be, that if ever there was a case where the decision in *M'Donald* v. *Kydd* should apply, it is this case. No question arises here as to whether the obligation which is claimable against the landlord will cost as much as the amount of the rent which is consigned in Court. There have been cases in which the Court has seen fit, after making a cursory examination of the proceedings, to set free a certain part of what has been consigned and hand it over to the landlord. We have no materials to do anything of the kind here; it may be done in the Sheriff Court. I cannot help holding that the defender here has not gone beyond his rights looking to the allegations he makes, because if his allegations are well founded he has been put to considerable loss and trouble. I hold that this case is ruled by the case of *M'Donald* v. *Kydd*, and accordingly the Sheriff's interlocutors should be recalled and the case remitted back to the Sheriff Court. Both parties will consider the suggestion of Lord Dundas, whether, when the case goes back, it would not be advisable that the two cases should be conjoined and proceed together. We will find the appellant entitled to expenses since the date of the interlocutor of the Sheriff-Substitute, ordain the Auditor to report to the Sheriff, and grant authority to the Sheriff to decern for amount.

LORD ARDWALL was absent.

The Court recalled the interlocutors appealed against, and remitted to the Sheriff-Substitute to allow a proof.

Counsel for the Pursuer (Respondent) Constable, K.C. — MacRobert. Agents — Cowan & Stewart, W.S.

Counsel for the Defender (Appellant)—Macmillan—Jameson. Agents—Langlands & Mackay, W.S.

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*Friday, May* 19.

## FIRST DIVISION.

(SINGLE BILLS.)

## PEARSTON, PETITIONER.

*Company—Process—Winding-up—Liquidation—Death of Liquidator—Note for Appointment of New Liquidator—Companies (Consolidation) Act* 1908 (8 *Edw. VII, c.* 69), *secs.* 135, 149 (7), *and* 285.

A note for the appointment of a new liquidator falls to be presented to the Lord Ordinary in the liquidation, and not to the Division.

The Companies (Consolidation) Act 1908 (8 Edw. VII, c. 69) enacts — Section 135 — "The Court having jurisdiction to wind up companies registered in Scotland shall be the Court of Session in either Division thereof, or, in the event of a remit to a permanent Lord Ordinary, that Lord Ordinary during session, and in time of vacation the Lord Ordinary on the Bills." Section 149, sub-sec. (7)—"A vacancy in the office of a liquidator appointed by the Court shall be filled by the Court." Section 285—"In this Act, unless the context otherwise requires, the following expressions have the meanings hereby assigned to them