up trade. It had struck no balance-sheet in that year, but the amount to which it was assessed to income-tax was adjusted without dispute. The year ending 5th April 1913 became the company's second year of assessment; and when called upon (on 20th April 1912) to make a return for that year the company replied that it had only recently started operations and that "the profits will not be ascertained till the end of this year," *i.e.*, the end of the calendar year 1912. It actually struck its first balance-sheet on 20th November 1912 (this was about the middle of its second year of assessment) and thereafter made a return. This first balance-sheet covered a trading period of fourteen months, of which only six belonged to the year preceding the second year of assessment. In these circumstances the Commissioners not unnaturally used this balance-sheet as the only evidence presented to them by the taxpayer of his "annual profits," and fixed them as 12/14 of the amount shown. This was sustained notwithstanding that the company objected to it as being contrary to the retrospective method of assessment prescribed by the Income Tax Acts. But the company put forward no alternative except a voyage account which, as the Lord President pointed out, was not itself brought to a balance until some three or four months after the commencement of the year of assessment. It will be seen that there was in that case no question of any claim by the Revenue authorities to be entitled to hold over an assessment in order to await the striking of a second balance-sheet at some date within the year of assessment; and the supposed option upon which the controversy in this case turns played no part, indeed was never suggested, in either the argument or the opinions. Great stress was laid in the judgment of the majority—very properly, as I venture to think—on the fact that there was no balance-sheet, and therefore no profits ascertained, until after the commencement of the second year of assessment; and where that is the case, I desire to say nothing against the view that a first balance-sheet, though struck within the second year of assessment, may—at any rate in circumstances such as were present in the *Glensloy* case—be used evidentially in order to ascertain the "average of the profits for one year from the period of the first setting up" of the trade. I frankly admit that there are some observations in the opinions of the majority which seem to go further than this, but they were not made in reference to any claim of the kind which has been advanced on behalf of the Revenue in the present case, and if they should be considered in their own terms wide enough to cover such a claim, then I desire respectfully to express my disagreement with them.

I think the second question should be answered as regards its first alternative branch in the affirmative, and as regards the second in the negative.

LORD SKERRINGTON concurred.

LORD CULLEN—I think the natural reading of the statutory enactment in question is that where the period of trading antecedent to the year of assessment is shorter than three complete years the materials for computing the artificial amount of profit for the year of assessment consist of the results of the trading for such shorter antecedent period. Thus if that period had been 2½ years, the *cumulo* profits made during that period fall to be divided by 2½, similarly as would the profits of three complete years' antecedent trading be divided by three. And if, as here, the antecedent period of trading has been less than one complete year, I think that the profits made during it are to be expanded by rule of three as for a complete year. The course proposed by the Crown, which is to take into account profits made in the year of assessment itself, has no direct warrant in the words of the enactment, and seems to me to be inconsistent with the normal statutory programme of annual assessment under which returns fall to be given in and assessments made *currente anno*, when the results of the current year's trading have not been ascertained. It is merely an accidental circumstance in the present case that there was a provisional assessment, and that the assessment for the year came to be finally adjusted when the end of the year had come and the results of the trading during it were to hand.

With these general observations I entirely concur in the opinion of your Lordship in the chair.

LORD SANDS was not present.

The Court answered the first question, of consent, in the negative, and the second question as regards its first alternative branch in the affirmative, and as regards the second in the negative. The third question was withdrawn.

Counsel for the Appellants—Macmillan, K.C.—Keith. Agents—Simpson & Marwick, W.S.

Counsel for the Respondent—Solicitor-General (D. P. Fleming, K.C.)—Skelton. Agent—Stair A. Gillon, Solicitor of Inland Revenue.

Friday, February 9.

FIRST DIVISION.

[Sheriff Court at Kirkcaldy.

GATES *v.* BLAIR.

Landlord and Tenant — Lease — Urban Subjects Embracing Dwelling-house and Shop—Inclusive Rent—Notice to Remove from Shop—Whether Notice Effective to Terminate the Tenancy as a Whole — Tacit Relocation.

The tenant of urban subjects which consisted of two parts, a house and a shop, separated from each other structurally except for a door communicating between them, and which were held

under an annual tenancy for an inclusive rent, was served with a notice to remove from the shop premises alone. *Held* that the notice to remove, being limited to only a part of the subjects of the let, was not effective to prevent tacit relocation of the tenancy as a whole.

Henry Gates, publican, Kirkcaldy, *pursuer*, raised an action in the Sheriff Court at Kirkcaldy against Mrs Thirza Blair, eating-house keeper, 371 High Street Kirkcaldy, *defender*, in which the pursuer craved the Court to ordain the defender to remove from the shop at No. 371 High Street, Kirkcaldy, of which, together with a dwelling-house attached thereto, the pursuer was the proprietor.

The pursuer averred, *inter alia*—"(Cond. 1) The pursuer is proprietor of a property situated at the corner of Coldwell Wynd and High Street, Kirkcaldy. The property consists of two portions—one portion is a shop and the other portion is a dwelling-house. The property consists of a ground storey and two storeys above. The ground storey forms part of the shop No. 371 High Street. The rest of the shop forming No. 371 High Street consists of a room on the storey above the ground storey, which room is to the front. There is an internal stair leading from the ground storey of the shop to the room above. The ground storey and the said room above form one shop, which is No. 371 High Street, Kirkcaldy. The dwelling-house consists of the back part of the first storey and of the whole of the second storey. This dwelling-house enters from Coldwell Wynd and has a separate staircase. It is entirely self-contained and has no connection with the shop. . . . (Cond. 2) The defender is the tenant under the pursuer of the said house and the said shop at an inclusive rent of £45. The defender's tenancy is an annual one. It runs from Martinmas to Martinmas. The yearly value of the shop is more than one quarter of the yearly value of the house. (Cond. 3) On 22nd September 1922 the pursuer served a notice on the defender calling on her to remove from the said shop at Martinmas 1922. (Cond. 5) The shop and the house are physically separate and independent, although they have been let for one inclusive rent. If the defender removes from the shop she will have undisturbed possession, as at the present time, of the dwelling-house and all its accessories. There is at present a door of communication on the ground storey between the staircase leading to the dwelling-house and the shop. This doorway has been formed simply to facilitate the defender, who is the occupier both of the shop and the dwelling-house, passing from the dwelling-house to the shop without going into the street. This door will be shut up. . . ."

The defender averred, *inter alia*—"(*Ans.* 5) Admitted that at present there is a door on the ground storey and a passage leading to the house. *Quoad ultra* denied. Explained and averred that there is a covered passage leading from Coldwell Wynd to the house with a door at the mouth of the passage which is locked at night. This passage leads only to the shop and the house and is 11 feet long. The door leading from said passage to the back kitchen of the shop is only 6 feet 6 inches from the mouth of the passage. The stair to the house is just at the mouth of said passage. Said shop and house form a single three-storey tenement, and the whole tenement is included in the let to the defender. There is a door from the back kitchen of the shop into the passage, and the defender can get from the shop to the house without having to go to the street. This doorway had been formed before the defender went into the premises about nineteen years ago. . . ."

The pursuer pleaded—"1. The defender's statements are irrelevant. 2. The shop and the dwelling-house being physically separate and independent, the pursuer is entitled to have the defender removed from the shop at Martinmas."

The defender pleaded—"1. The action is irrelevant and insufficient to support the conclusions of the writ and should be dismissed, and the defender found entitled to expenses. 2. The shop and house having been let as one, the Increase of Rent and Mortgage Interest (Restrictions) Act 1920 applies, and the pursuer is not entitled to put the defender out of any part of the subjects let so long as said Act or any extension thereof remains in force."

On 6th November 1922 the Sheriff-Substitute (STUART) pronounced an interlocutor in which he repelled the first plea-in-law for the pursuer, sustained the pleas-in-law for the defender, and dismissed the action.

Note.—"The subjects let to the defender consist of a self-contained building of three floors, viz., ground floor and two upper floors. The ground floor and part of the first floor are shop premises. The rest of the first floor and the whole of the second floor form the dwelling-house. The whole subjects are let as one at a rent of £45. The pursuer seeks to regain possession of the shop and has served notice on the defender to remove therefrom. He does not desire the defender to vacate the house. The question is whether he is entitled to the order craved. The defender maintains that she is entitled to the protection of the statute in respect that the whole subjects fall to be regarded as a house let as a separate dwelling, and further that it is not competent to warn a tenant out of part of the subjects let. The answer is that the premises are separable and can be separated (although at present they are used as one) by merely closing a door which gives access from the shop to the house. This is not disputed, and in point of fact the house has a separate entrance from the lane at the side of the building. The arrangement of the premises is clearly shown on the plan produced. I have reached the conclusion that as the Act has been interpreted the whole subjects fall within the definition of a 'house or part of a house let as a separate dwelling (section 12 (2)).' It was so held in the *Epsom Grand Stand* case ((1919) W.N. 170), where premises let as a public-house, but of which about seven rooms were used as a private

residence, were held to be a dwelling-house within the meaning of the statute; and in *Callaghan* v. *Bristowe* ((1920) W.N. 308) a similar result was reached in the case of a motor garage with living rooms on the upper floor. It was thus decided that premises which served a purpose besides that of a dwelling-house were still to be regarded as a dwelling-house and within the protection of the Act. These cases were decided on the terms of the Act of 1915, which are repeated in the present statute. But the Act of 1920 contains this further declaration, viz.—That its application 'shall not be excluded by reason only that part of the premises is used as a shop or office, or for business, trade, or professional purposes.' What was previously matter of judicial interpretation is now enacted by statute. It seems to me that the premises here in question fall directly within the provision quoted and that the whole must be regarded as a dwelling-house within the meaning of the Act. It was said for the pursuer that the circumstances here were distinguishable from those to which the Act had been held applicable, in respect that the defender's house and shop are separate or at least easily separable. The reports do not show whether this argument would have been available in the cases above referred to, as no sufficient details are given. But it would seem to be in any view an unsubstantial ground of distinction. The broad fact is that the premises whether physically separable or not were let as *unum quid*. The case I think is just such a case as is provided for in the sub-section above quoted, which impresses the character of dwelling-house upon the whole subject of the let. If this view be sound the pursuer's case fails on relevancy, for he does not aver that the premises are required for his own occupation. All he says is that he desires possession of the shop. On the question of competency I have little doubt that—whether under or apart from the statute—a landlord is not entitled to warn a tenant to remove from a part of the subjects let. No authority was cited for such a proceeding, and it would seem on principle to be indefensible. There is, moreover, authority in England for holding that a partial notice is incompetent—*Bebington* v. *Wildman*, 28th January 1921, 37 T.L.R. 409. I am of opinion therefore that the application must be dismissed."

The pursuer appealed to the Sheriff (FLEMING, K.C.), who on 11th December 1922 refused the appeal.

Note.—"I agree with the Sheriff-Substitute in holding (1) that the whole subjects let are to be regarded as a house let as a separate dwelling, and (2) that it is incompetent to warn a tenant out of part only of the tenancy. I need add nothing to what he has said. . . ."

[The Sheriff then dealt with a point under the statute with which this report is not concerned.]

The pursuer appealed, and argued—Due notice of removal prevented the operation of tacit relocation—Bell's Prins., sec. 1265. Provided that the landlord made his intention to alter materially the terms of the lease sufficiently clear to the tenant, to whom the choice of going or staying was given, it was not an absolute necessity that the notice given should be a formal notice of removal—*M'Farlane* v. *Mitchell*, 1900, 2 F. 901, 37 S.L.R. 705. An informal notice by a tenant had also been considered sufficient to interrupt the process of tacit relocation—*Gilchrist* v. *Westren*, 1890, 17 R. 363, 27 S.L.R. 273. The landlord had here in most explicit terms renounced the lease to the tenant, in which case there was no possible room for the operation of tacit relocation.

Argued for the defender—Any notice terminating a contract should refer to the exact subject of the contract. The notice in the present case, being a notice to remove from a portion of a building let as a whole, failed to fulfil that requirement, and was accordingly really no notice at all. That being so, there was no interruption of tacit relocation and the pursuer's action ought to be dismissed.

LORD PRESIDENT—This is an action of removing brought by the proprietor of a tenement at the corner of High Street and Coldwell Wynd in Kirkcaldy against the present tenant. The tenement consists of two parts. One of them, a shop, enters from the High Street, in which thoroughfare it is No. 371; the other, a dwelling-house, enters from Coldwell Wynd. With the exception of an internal door on the ground or street floor of the shop premises (which communicates with the entrance from Coldwell Wynd leading to the staircase by which the dwelling-house is reached) the shop and the dwelling-house are separate from each other structurally and are adapted for separate occupation. The conclusion for removing is limited to the shop premises.

The matter is presented to us on relevancy, and the point turns on two of the pursuer's averments in particular, those, namely, in condescendences 2 and 3. In condescendence 2 the statement is that the defender's tenancy under the pursuer is an inclusive one, comprehending both the said house and the said shop at an inclusive rent of £45, the tenancy being an annual one from Martinmas to Martinmas. Then in condescendence 3 we are told that forty or more days before the term of Martinmas 1922 the pursuer served a notice on the defender calling on her to remove from the said shop at Martinmas 1922. No written lease is produced, but its terms, as just explained, are admitted. Nor is the notice alleged to have been served produced, but it is also admitted by the defender, subject to the explanation that, as has been seen, there was only one let, and that the shop was only part of the subjects comprehended in it.

The defender pleads (1) that these statements are irrelevant to support a conclusion for removing from the shop, and (2) that the shop and dwelling-house having been let as one, the Increase of Rent and Mortgage Interest (Restrictions) Act 1920 protects the tenant from removal from any part of the subjects let. Under the first of

these pleas the defender maintains that the notice to remove—limited as it was to a part of the subjects of the let, namely, the shop—was ineffectual to prevent and did not prevent tacit relocation of the subjects as a whole. The point thus raised is perhaps rather one of competency than of relevancy, but if well founded it makes it unnecessary to consider the plea founded on the Act. For if in respect of the absence of a good notice terminating the tenancy as at November 1922 the premises comprehended in the let have become the subject of tacit relocation, the defender will have right to possession for another year—apart altogether from any statutory right of tenancy under the Act of 1920—in accordance with the interpretation of that Act adopted in *Kerr* v. *Bryde*, 1922 S.C. 622, [1923] A.C. 16.

I therefore ask myself whether the notice of 22nd September was effectual to bring the conventional tenancy to an end at Martinmas 1922. I know of neither principle nor authority for the proposition that a single tenancy for a single rent can be brought to an end by serving a notice to remove from a part only of the subjects held under it. If the pursuer was right, the effect of such a partial notice would apparently be to create as against the tenant a new contract for a part only of the premises which had been the subject of the hitherto existing tenancy—the part, namely, not comprehended in the notice. I think that if a tenancy is to be brought to an end it must be by a notice which in terms or by clear implication requires the tenant to remove from the whole premises let. In the present case it is clear that in terms—and in intention also for that matter—the notice was not given for the purpose of bringing the tenancy as a whole to an end. On the contrary, its purport was that the tenant was to quit only the shop and was to remain in the dwelling-house. In my opinion such a notice was inefficient to effect an interruption of the process of tacit relocation. The result is that the yearly let averred in condescendence 2 is not by anything averred in condescendence 3 brought to an end, and the tenant remains entitled to possession under it for another year from Martinmas 1922.

If that be so, it is unnecessary to deal with the defender's plea on the Act of 1920, or to consider whether the views of the Sheriff and his Substitute with regard to the Act are or are not well founded. The proper course in these circumstances will be to recal their interlocutors, and sustaining the defender's first plea-in-law to dismiss the action.

LORD SKERRINGTON—I agree with your Lordship and with the Sheriffs in thinking that it is incompetent to warn a tenant out of a part only of the tenancy. As the Sheriff-Substitute says, no authority was cited for such a proceeding, and it would seem on principle to be indefensible. It follows that we ought not to express any opinion upon the important question as to the construction of the Rent Restriction Act of 1920 which is discussed by the Sheriffs. That question was never properly before the Court, seeing that the contractual tenancy had not been brought to an end by proper notice.

LORD CULLEN—I am of the same opinion. At the date of the notice to remove mentioned on record the defender was tenant under a lease of the premises in question, which embraced a dwelling-house and a shop, at an inclusive rent of £45. The dwelling-house, if regarded separately from the shop, was within the class of dwelling-houses to which the Act of 1920 applies. Having this in view, the pursuer gave the said notice, which applied only to the shop, his conception being, apparently, that no notice was required to terminate the lease *quoad* the house, and that in respect of the notice to remove from the shop the defender would be bound to remove therefrom, while *quoad* the house she would be in a position of being in possession thereof as a statutory tenant.

I think that the pursuer's procedure was faulty. As there was only one lease at an inclusive rent, the proper procedure at common law for bringing the lease to an end at the instance of the landlord was to give a notice to remove from the whole subjects so let. If such notice had been given and the lease terminated, there would have been room for the question which the Sheriff-Substitute and the Sheriff have dealt with, as to whether under the Act the whole premises as a *unum quid* formed a subject to which the protective provisions of the Act applied in favour of the tenant. As matters stand, however, the position is that no notice of removal effective at common law to terminate the lease has been given, with the result that tacit relocation has taken place. I am unable to find in the statute any provisions superseding the common law requirements so as to render the partial notice to remove which was given effective to terminate the lease.

I accordingly agree in thinking that the action should be dismissed.

LORD SANDS was not present.

The Court dismissed the appeal.

Counsel for the Pursuer — Maclean. Agents — Adamson, Gulland, & Stuart, S.S.C.

Counsel for the Defender—Dykes. Agent—John N. Rae, S.S.C.