not prepared to say that there might not be a case of individual hardship, especially where no power of compensation existed, in which the Commissioners might not be restrained. I do not think that a street could be so altered as to do material or irreparable damage to an owner. If any such case arises, it will be dealt with according to the well established principles of equity. Here I see no grounds for interfering with the discretion of the Commissioners.

Lord Deas—The question is, Whether the Police Commissioners had the power to do what they did? It was thought expedient that the statute should place large powers in the hands of the Commissioners for the purpose of improving the town. Section 334 empowers the Commissioners to require any building to be set back. Section 338 empowers them to allow any building to be set forward. I agree with your Lordship that the words "set back" and "set forward" unquestionably imply set back from the street and set forward upon the street. The Lord Ordinary seems to think that they cannot set back a building except on compensation, and that the setting forward cannot be done at all. If we read section 338, as I take it, the setting forward of a building necessarily implies the alienation of a part of the street to the owner whose property is set forward. The Lord Ordinary thinks that "a power to allow buildings to be set forward does not infer a power to alienate any part of the solum to the prejudice of those who have formerly enjoyed it." But surely it may be possible to "alienate a part of the solum of the street" without it being "to the prejudice of those who formerly enjoyed it." If the Commissioners are entitled to set back a building on a money compensation, can it be said that they are not entitled to set back a building in one part in consideration of allowing it to be set forward in another part? Does not that power expressly come under section 338? If the power is abused the Court would restrain it. I think we should very soon find out where it is to end. Because they may do a reasonable thing, it does not follow that they may do an unreasonable thing.

The question here is, Whether there was a fair and reasonable exercise of the power, or whether it was so injurious to one individual, although of benefit to the general public, that it cannot be allowed? For I admit that if the pursuers could show substantial injury to their property, it would not be a sufficient answer to say that it would be a public benefit. Is there any such substantial injury to the pursuers' property so as to entitle them to object? This is attempted to be made the subject of evidence. With a plan before us we are quite as competent to judge as to the injury as the pursuers' witnesses. I cannot hold that there is any such injury as to justify us in restraining the Commissioners in the exercise of their statutory powers.

Lord Ardmillan—I entirely concur with your Lordships. I remark, first, that if the Police Commissioners had the power to sanction the alteration, they certainly exercised that power. Then had they the power? This is a very fair question to try. I think they had. In the administration of the powers vested in them, it cannot be denied that in setting back a house they are really taking from an owner either the property or the beneficial enjoyment of a part of his property. On the other hand, if they permit a house to be set forward, they are necessarily occupying a portion of the street with the property put forward. This they are entitled to do on conditions. If these are extravagant or corrupt, they will be restrained. But if nothing but what is reasonable and fair appears, then they have the power. We are not to presume an abuse of power. If any of the things suggested were done, nay more, if the rights of one individual were so injuriously affected as to be beyond the limits of compensation competent to the Commissioners, it would be for this Court to interfere. In this instance I have no doubt that the Commissioners acted fairly and judiciously.

The Court recalled the interlocutor of the Lord Ordinary, and assoilzied the defender, with expenses.

Counsel for Pursuers — Watson and Asher. Agents—M'Ewen & Carment, W.S.

Counsel for Defender—Solicitor-General, Balfour, and Robertson. Agents—Tods, Murray, & Jamieson, W.S.

Saturday, November 9.

FIRST DIVISION.

CAROLINE MARY MACKIE, PETITIONER.

Minor—Curators—Allowance—Authority of Court.

Circumstances in which the Court exercised its authority over the curators of a minor to the effect of fixing the allowance to be paid for her maintenance.

Miss Caroline Mary Mackie and her curators *ad litem* presented a petition to the Court, praying them to ordain her trustees to fix her annual allowance for education, maintenance, &c. at £175 The trustees objected to have any specific sum fixed, but were ready to pay all reasonable expenses incurred by the young lady. The ground of their objection was the existing uncertainty as to the petitioner's ultimate fortune, which was still in doubt and subject to intricate questions of accounting, though it was certain not to be less than from £2000 to £3000, and might be as much as £8000. The Court held that a specific allowance ought to be given, and fixed the sum at £155.

Counsel for Petitioner—Asher. Agents—Jardine, Stodart, & Frasers, W.S.

Counsel for Respondents — Balfour. Agent—Charles S. Taylor, S.S.C.

Saturday, November 9.

SECOND DIVISION.

[Sheriff-Court of Ayr.

KILMARNOCK GAS COMPANY *v.* SMITH.

Lease—Rent—Retention—Sequestration—Relevancy.

A Gas Light Company granted a lease of certain premises adjoining their works, with right to the whole secondary products which should flow into the tenant's cistern. During the currency of the lease the tenant refused the rent for a certain half-year, and the Compaay raised a process of sequestration against him. The tenant's defence was, that

he was entitled to retain the rent, as the Company, by withholding part of the secondary products, had failed to place him in possession of a material part of the subject leased. *Held* that this was a relevant defence to a claim of rent.

In 1860 the Kilmarnock Gas Light Company let to Robert Smith, for a period of ten years, at a fixed annual rent of £130, a piece of ground adjoining their works at Kilmarnock, with right to the whole of the ammoniacal liquor and the tar produced and arising from the Company's works in their operations of making gas, which should flow into the tenant's cistern, and with the stipulation that the tar, after being distilled by the tenant, should be returned by him to the Company, and that the tenant should thereafter receive back again what the Company did not require for the heating of their retorts, or otherwise connected with their works. Robert Smith accordingly entered on possession of the premises, and continued to pay his rent until 1868. At Martinmas in that year, however, he refused to pay the rent for the preceding half-year, and in consequence of this the Gas Light Company presented a petition to the Sheriff, in January 1869, praying for sequestration of all the effects of the respondent Smith which were subject to the petitioners' hypothec, for payment and in security of the rent.

The respondent's defence was, that while in terms of the lease he was entitled to the whole of the ammoniacal liquor and tar produced in the operation of making gas, the Company had diverted, for purposes of their own, large quantities of the said ammoniacal liquor and tar. The respondent therefore pleaded that, not having received the ammoniacal liquor and tar to which he was entitled under the lease, he was not bound to pay the rent sued for.

The petitioners denied that under the terms of the lease the defender had right to the whole of the ammoniacal liquor and tar produced from the pursuers' works; and further, pleaded that the averments of the defender were not sufficient or relevant grounds for his refusing to pay the rent, and that the defender was not entitled to resist implement of his liquid and unambiguous obligation to pay the rent claimed from him on any of the grounds stated in defence, even though an action were raised by him for the purpose of constituting his alleged counter-claim.

The Sheriff-Substitute repelled the pursuers' plea that the allegations of the defender did not set forth any relevant ground for refusing to pay the rent, and allowed a proof. On appeal, the Sheriff recalled *hoc statu* this interlocutor, opened up the record, and remitted to the Sheriff-Substitute to amend and to readjust. The Sheriff-Substitute therefore adjusted and closed the record, and thereafter the defender's procurator consigned £65 sterling. The Sheriff-Substitute then allowed the parties a proof, before answer, and, upon consideration of the evidence, decerned against the respondent, in terms of the prayer of the petition. This interlocutor was sustained by the Sheriff, and the respondent appealed to the Court of Session.

The only question of law before the Court was as to the relevancy of the respondent's defence.

It was argued for the appellant that he had not received the subject leased, in respect that the pursuers had withheld part of the secondary products to which he was entitled, as a material part of the subject leased to him, and that therefore he had a right to retain the rent, and that without prejudice to his claim for damages, as the same might be ascertained by investigation; *Johnston* v. *Robertson*, March 1, 1861, 23 D. 646; *Young* v. *Mann*, 19 D. 785.

It was argued for the pursuers that this was not a case in which the tenant was entitled to withhold his rent. In order to entitle a tenant to relief of rent, there must be direct loss; but in this case, upon the defender's own showing, there was no proper *damnum*, but rather a lessening of the profits—*lucrum cessans*. In such a case the tenant is bound by the clearest evidence to prove wilful withholding of the subjects, in order even to substantiate a claim of damages. Further, the tenant's claim is not cut off by payment of rent; but having given, by his acceptance of the lease, a registrable decree for the rent, he has no claim unless he can also bring a decree or a document liquidating the debt. An illiquid claim cannot be pleaded to resist implement of a liquid obligation to pay rent, unless it be capable of immediate liquidation. Finally, want of beneficial possession may be pleaded as a set-off against a claim for rent; but in this case there was really and truly beneficial possession, and all that was complained of was, that on account of the want of something, the tenant had not made quite so much as he otherwise would have done. It was therefore argued that the defence should be repelled, the prayer of the petition granted, and the proof which had been led before the Sheriff held *pro non scripto*; *Catterns* v. *Tenant*, March 1, 1861, 23 D. 646.

At advising—

Lord Justice-Clerk—This is a petition for sequestration in security and for payment of rent, due under a lease of certain subjects. These subjects are premises adjoining the works of the Kilmarnock Gas Light Company, with right to all the secondary products which shall flow into the tenant's cistern. For these subjects the tenant agreed to pay a fixed rent of £130 a-year, and this uniform rent would seem to indicate that the supply of secondary products, which formed part of the subject for which the rent was paid, was also likely to be uniform, although there was no guarantee on the part of the Gas Company that any specified amount should be received by the tenant, but only that such amount as happened to be over should be conveyed to him. For payment and in security of the rent due under this lease for the year ending at Whitsunday 1869, this petition for sequestration has been presented. Now, in answer to this petition, the tenant Smith avers that there was a diversion or retention on the part of the Company of part of the secondary products to which he was entitled under the lease, and that he had thereby suffered loss to an amount which entitled him to retain the rent sued for. To this defence it is objected, on the part of the landlord, that the allegations of the tenant are not relevant or sufficient to entitle him to retain the rent. Now, seeing that the parties have joined issue on the main question, and gone to proof on the merits of the cause, I do not think that they are entitled at this stage of the proceedings to fall back upon this plea. But even if they had been entitled to do so, I do not think that it would have occasioned much difficulty. The landlord is as much bound to give and continue the tenant in possession, as far at least as his own action is concerned, as the tenant is to pay

his rent. It does not follow that every alleged deviation from incidental stipulations in the contract will entitle a tenant to resist the demand of the landlord for the liquidated rent; and questions have often occurred in regard to caution or consignation as the condition of allowing the tenant to defend or suspend the demand on such grounds. But by a series of decisions it is well fixed that if the lessor by his own act withhold from the tentant in whole or in any material part the subject of the lease, the tenant may resist payment, to the extent at least of what he has suffered. But, of course, the tenant's averments must be proved; and what we have now to consider is, whether the averments in this case have been proved or not.

LORD COWAN—It has been strongly pressed for the pursuers in this case that the defence is not relevant, and should not have been sustained, that therefore the Sheriff ought not to have allowed a proof; and that the interlocutor by which he did so was erroneous. But that interlocutor, which embraced all the allegations as to the withholding of the ammoniacal liquor, &c., was acquiesced in by both the parties, and thus what might otherwise have been a difficult question to deal with has been removed. I quite concur in the general views urged for the pursuers by Mr Watson. A liquid claim for rent is not to be met by an illiquid claim for damages, but there must be a liquid claim for damage, or at least a claim capable of immediate liquidation. But the defence, as I understand it, is not a counter and illiquid claim of damage, but the defence that the landlord has not maintained the tenant in possession of the subject leased, but has withheld from him certain subjects which under the lease he was entitled to; and this is a perfectly relevant defence to a claim of rent.

LORD BENHOLME and LORD NEAVES concurred.

The Court repelled the objections to the relevancy of the defence, and affirmed the judgment of the Sheriff.

Counsel for the Appellants — Solicitor-General and Moncrieff. Agents — M'Ewen & Carment, W.S.

Counsel for the Respondent — Watson and Guthrie. Agents—Duncan & Black, W.S.

Thursday, November 14.

SECOND DIVISION.

[Lord Gifford, Ordinary.

BURT *v.* ARNOTT AND DRYSDALE

Testament — Forgery—Signature of Witnesses—Record—Court of Session Act, 1868, § 29.

Circumstances in which *held* that a deed did not constitute the completed will of a testator.

Adam Wilson of Auchengownie and Tannerhall died unmarried, without issue, on 25th June 1871. He left two deeds of settlement, one dated 25th December 1865, with codicil dated 7th October 1870, the other dated 9th February 1871. The deed of 1865 was regularly signed and attested, and was kept in the custody of Messrs J. & J. Miller, solicitors, Perth, the law agents of Mr Wilson. The estate of Auchengownie was disponed by this deed to John Arnott, farmer, Hatchbank, and the estate of Tannerhall to David Drysdale, draper, Milnathort; and Arnott and Drysdale were nominated executors. The bequest to Arnott was burdened with a yearly annuity of £40 to Helen Wilson, sister of the testator, who survived him. The residue was destined by the codicil to James Hutton, overseer, Hallgreig.

The deed of 1871 conveyed the whole of the testator's property to Catherine Burt, who was appointed sole executrix and universal legatory, and it contained no provision for the sister of Mr Wilson. This disposition was drawn out by Mr Blair, writer, Dunfermline, from instructions given by Catherine Burt, and bore to be signed by the testator on 9th February 1871 before these witnesses—David Burt, farmer, Deuglie, and David A. Burt, physician and surgeon, Aberdour. This deed was produced by Catherine Burt on 4th August 1871, in consequence of Arnott and Drysdale having obtained confirmation as executors to Wilson. In these circumstances, and on 16th November 1871, Arnott, Drysdale, and Hutton raised a summons of reduction of the deed of 1871, and their original plea in law was that the subscriptions of Adam Wilson were false and forged.

On 16th January 1872, the Lord Ordinary pronounced an interlocutor closing the Record, and allowing a proof under the Evidence Act, 1866. This proof was accordingly taken, and was closed on 12th March 1872. On 2d March 1872, and during the course of the proof, the following minute was tendered by the Counsel for pursuer:—"Assuming the signatures to the disposition and settlement, dated 9th February 1871, to be the signatures of Adam Wilson, which is denied, the said disposition and settlement is null and void, not having been tested or executed according to law, or with the requisite solemnities. In particular, neither the said David Burt nor David Abercromby Burt, whose names appear on the said disposition and settlement as witnesses to Mr Wilson's signature, subscribed it in the capacity of witnesses to Mr Wilson's signature. They were neither called to act, nor did they act, as witnesses to Mr Wilson's alleged signature, nor were they intended by the said Adam Wilson to be witnesses to such signature. They did not sign their names to the disposition and settlement till a considerable time after Mr Wilson's death, and when they so signed their names, neither the said David Burt nor David Abercromby Burt knew or had the means of knowing that the document signed by them was the document alleged to have been signed by the said Adam Wilson at Deuglie on 9th February 1871."

On same date, the Lord Ordinary pronounced an interlocutor opening up the Record, and allowing the amendment, reserving all questions of expenses.

On 27th March 1872, the Lord Ordinary pronounced the following interlocutor:—"The Lord Ordinary having heard parties' procurators, and having considered the closed record as amended, proof adduced, and whole process, Finds that the pursuers have failed to prove that the deed under reduction, No. 19 of process, is false or forged, and assoilzies the defender from the conclusions of the action so far as laid on the ground of forgery; but finds that the said deed, No. 19 of process, was never completed by the deceased Adam Wilson, and was never intended by him to receive effect as his final and completed settlement; therefore reduces, retreats, rescinds, and annuls the said deed, No. 19 of process, and decerns and declares the same to have