from the income arising from the subject purchased a proportion year by year of the purchase-money. This would be to establish a distinction between temporary and permanent income in the mode of imposing the assessment to which the statute gives no countenance.

As already noticed, the contention of the appellants in the original case was that the expenditure in respect of pit-sinking was not outlay of capital at all, but the ordinary working expenses of the mine. For the reasons given in our former judgment, we thought that argument unsound, and in the amended case it is abandoned, and the expense of pit-sinking is admitted to be outlay or investment of capital. But the claim of the appellants, as made in the amended case, though thus differing in form, does not differ in any material respect from the claim made in the original case. Capital expended in the sinking of pits must necessarily become exhausted and lost sooner or later, and that is foreseen when the expenditure is made. The only distinction between the two claims is, that in the original case the deduction was asked of expenditure actually made in the year of assessment, while in the amended case the deduction is asked to be made in the year of assessment in which the pits created by the expenditure ceased to be useful. But it is not the less in the one case than in the other a deduction from annual profits of capital employed in the business of the appellants' company, which the statute expressly prohibits.

A certain appearance of plausibility is given to the appellants' argument by the number and variety of pits sunk and worked by them. The constant employment of capital year by year in such sinking, by reason of the great extent of their business, gives to this expenditure a certain similarity to ordinary working. But the likeness is merely on the surface. If a man buys an unwrought mineral field and sinks one pit, by means of which he works out all the minerals, he has converted the dormant, inaccessible, and unproductive subject into a going mine. He has made a new subject, which differs from the unwrought mineral field just as a railway or canal is a different subject altogether from what the ground on which it is constructed originally was. The miner has invested his capital in creating the subject, which consists partly of the minerals and partly of the access by which the minerals are approached and worked; but the cost of the one, equally with the cost of the other, is an employment of capital, and it would be quite as reasonable to ask for an allowance for the general exhaustion and loss of capital embarked in paying the price of the mineral as of that employed in sinking the pit.

The Court had occasion in the case of *Miller* v. *Farie* (Nov. 29, 1878, 6 R. 270) to decide that no allowance could be made for depreciation of the subject or the gradual extinction of the capital employed by the constant diminution of the quantity of minerals remaining to be won, and we have seen no reason to doubt the soundness of that judgment. But if these considerations are conclusive in the case of a small mine with a single pit, it seems impossible to dispute their equal applicability to a large subject of the same kind. Instead of 50 acres in the case supposed, the mineral field may extend to 1000 acres; but the extension of the area, and the multiplication of the strata worked, and of the pits sunk to reach them, do not alter the character of the subject or the nature of the trade, and cannot make that in the latter case working expenses which in the former is employment of capital.

Having regard to the express words of the statute, and the principle of assessment which runs through all its provisions, the Court are of opinion that the claim of the appellants ought to be rejected and the determination of the Commissioners ought to be affirmed.

As to the matter of expenses, we apprehend that we have no power to dispose of that question, at least at present.

The Court of new affirmed the determination of the Commissioners of the Middle Ward of Lanarkshire, dated November 7, 1878, and decerned; and appointed the Clerk to report this judgment to the House of Lords, in terms of the order to that effect of date August 1, 1879.

Counsel for Appellants—Asher—Mackintosh. Agents—Murray, Beith, & Murray, W.S.

Counsel for Respondents—Solicitor-General (Balfour, Q.C.)—Rutherfurd. Agent—D. Crole, Solicitor of Inland Revenue.

Friday, January 7.

FIRST DIVISION.

[Sheriff of Lanarkshire.

ROBERTSON *v.* FRASER.

Bankruptcy — Landlord and Tenant — Claim — Obligation for Rent by Bankrupt Tenant.

A tenant in an urban subject was sequestrated between terms. He remained on in the house for some months by the permission of his trustee in sequestration. F having paid the rent for him for the period from the date of his sequestration to the date of his leaving the house, raised an action, with concurrence of the landlord for his interest, against the bankrupt for recovery. *Held* that the rent for the current year being a debt for which the tenant was liable at the date of his sequestration, the claim should have been made against the trustee in sequestration, and was not good as against the defender personally. Action *dismissed* accordingly.

Question—Whether an action of ejectment would be competent to the landlord in such a case?

Duncan Fraser, residing at Brownlee, Blantyre, brought an action in the Sheriff Court of Lanarkshire, with consent of John Watson of Earnock, "for all right competent to him as landlord of the house in Clydesdale Street, Hamilton, occupied by the defender," against John Robertson, there residing, for payment of £27, 13s. 4d.

He averred, and it was admitted by defender, that "(Cond. 2) For several years the defender has been tenant of the dwelling-house in Clydesdale Street, Hamilton, presently occupied by him, and belonging to John Watson, Esq. of Earnock, at the yearly rent of £42 sterling. The estates of the defender were sequestrated on 21st October 1879, and since then he has occupied,

and continues to occupy, the said dwelling-house, and the proportion of the said yearly rent of £42 for the period from 21st October 1879 to 21st May 1880 amounts to £24, 10s. sterling."

He further averred—"(Cond. 3) The pursuer has paid to the landlord of the said dwelling-house the rent due to him by the defender for the same, and has acquired the landlord's whole right and interest in and to the said rent, and his claim against the defender for payment thereof. The pursuer has also been under the necessity of paying the taxes applicable to the said period, and payable by the defender, conform to account thereof herewith produced, and held as repeated herein *brevitatis causa*, amounting to £3, 3s. 4d. The said sums of £24, 10s. and £3, 3s. 4d. amount together to the sum of £27, 13s. 4d. sterling, being the sum for which decree is craved in the petition."

The defender answered—"Denied, and explained that defender was allowed by his trustee to remain in the said house."

The pursuer pleaded—"(1) No relevant defence having been stated, the pursuer is entitled to decree as craved."

The defender pleaded—"(1) The defender is not responsible to pursuer for the debt now sued for, it having been incurred by him prior to the date of his sequestration. (2) Any claim for rent should be directed against the trustee on defender's estate, in terms of the Bankruptcy Statutes, and the defender should be assoilzied, with expenses."

The Sheriff-Substitute (SPENS) repelled the defences as irrelevant, and under reference to note decerned as craved. This note was added:—"It is not disputed that the defender was sequestrated in October 1879. The rent claimed is the rent of the house occupied by defender since that period. Defender's agent seems to imagine that the sequestration bars decree. I know of no authority for this contention. It seems to me that pursuer is entitled to decree against the defender, even although he is an undischarged bankrupt, for the rent applicable to the period of occupation subsequent to bankruptcy."

On appeal the Sheriff (CLARK) adhered.

The defender appealed to the Court of Session, and argued—This claim ought to have been made in the sequestration, and not against defender personally. The sequestration took place on 21st October 1879, and the liability for rent as from that date devolved on the sequestrated estate; but the trustee was not called in this action.

The pursuer replied—This was a proper personal claim outwith the sequestration. So far as the bankrupt was concerned, the debt was not due at the date of sequestration, though as against his estate it was. Decree of constitution might in certain circumstances be obtained against a bankrupt, and so might an ordinary decree. The fact of sequestration virtually operated a change of tenancy, and made a new contract; the trustee might or might not take up the contract. As against the trustee the claim would have been really one rather of damage than of contract. As against the bankrupt the claim was one for a new debt due in respect of the occupancy after the sequestration.

Authorities—1 Bell's Comm., 5th ed., 80, M'Laren's ed. 76; 2 Hunter on Landlord and Tenant, 585; *Allan and Others* v. *M'Cheyne*, June 7, 1879, 16 Scot. Law Rep. 592; *Phosphate Sewage Company* v. *Molleson*, March 18, 1874, 1 R. 40.

At advising—

LORD PRESIDENT—It is almost an idle thing to talk of the facts in this case, for nothing has been proved, and scarcely anything is averred. If it were not an affair of about £27 I should be much inclined to order a new record, to enable us to understand the facts to which we are asked to apply the law; but I am unwilling to occasion additional expense in so trifling a case, and we must therefore endeavour to extricate the matter as it stands.

There is no objection on record to the pursuer's title to sue. The action is brought by a Mr Fraser, with concurrence of the landlord of the house occupied by the defender; and he, bringing the landlord with him, avers that he has paid the rent for a certain portion of the year from Whitsunday 1879 to Whitsunday 1880, and has acquired all the landlord's rights in respect thereof. The part of the rent so paid is that applicable to the period from 21st October 1879 to 21st May 1880. That is not rent for a term, but for a fraction of a year, and the reason why the pursuer's claim is thus limited is that 21st October 1879 is the date of the defender's sequestration, and 21st May 1880 is the date when the defender left possession of the house. The Sheriff-Substitute says the rent claimed is the rent of the house occupied by the defender since his sequestration; and he thinks the pursuer is entitled to decree, though the defender is an undischarged bankrupt, for the rent applicable to the period of occupation subsequent to the bankruptcy. Now, in the first place, it is a very curious obligation for a fractional part of the rent payable at two half-yearly terms by equal portions, and I do not understand exactly the ground why the Sheriff-Substitute thinks the claim should be made good against the bankrupt, for it is in respect of his possession of the house at a period beginning prior to his bankruptcy, and it would not be a sufficient claim unless it were for a debt contracted subsequent to that event. But there is no doubt that the debt was contracted prior to the sequestration. Whether the tenure was for a term of years or from year to year we are not told; that, like everything else in this case, is in a state of obscurity; but whether it was for the one or the other, the debt was contracted at the beginning of the year's occupancy, *i.e.*, at Whitsunday 1879. That debt was payable, half at the Martinmas following and half at the Whitsunday after that, but it was all contracted at Whitsunday 1879, and therefore this was a debt of the bankrupt contracted prior to his bankruptcy, and so his discharge will discharge him of all liability in respect of that debt, by the creditor having got a composition in respect of it or a dividend in the sequestration. How in the face of this the landlord can make him liable for a part of the time I fail to see. Mr Dickson ingeniously argued, that although that may be the nature of the debt, yet the occurrence of the bankruptcy introduced an element entitling the landlord to turn out the tenant or to come against

him for the rent applicable to the period subsequent to sequestration, on the ground that the lease was practically ended and the bankrupt had come under a new arrangement in consequence of his bankruptcy. I do not see how this can be. Bankruptcy does not bring a lease to an end. If the tenant has an existing lease, it belongs to his trustee, unless there is an express exclusion of assignees, legal and voluntary. This is the case of an ordinary urban subject, and whether the trustee here chose to take up the lease or not does not appear, but the bankrupt continued in possession of the house. Would he not be entitled under his lease, which began before bankruptcy, to continue in possession of it on condition of paying his rent and the other prestations exigible? I think he clearly would be, and the words of Professor Bell on this matter are well worth quoting. He says (1 Comm. 76, M'Laren's ed.)—"Bankruptcy does not of itself annul a lease. The tenant, though bankrupt, may still continue in the possession provided he pay the rent regularly and perform the other stipulations of the contract. All the landlord is entitled to do in case of his tenant's failure to pay the rent is to have recourse to the hypothec and the proceedings prescribed in the Act of Sederunt 1756." That is to say, the lease not being taken up by the trustee, vests in the bankrupt; he remains as tenant, and the landlord has the ordinary remedies at common law and under the Act of Sederunt. He may use his right of hypothec, or raise an action for his rent, or remove the tenant if he is in arrear with his rent, but nothing else. Now, what is the state of matters here? If the rent for the current year was a debt contracted before bankruptcy and sequestration, then it cannot be claimed against the bankrupt, but can only be made available by a claim in his sequestration. For future rents, of course, the bankrupt will be liable. But as regards every part of the rent for the period from Whitsunday 1879 to Whitsunday 1880 the landlord has no claim against the bankrupt tenant, for it was a debt contracted prior to his sequestration. On these grounds I am for sustaining this appeal and dismissing the action.

Lord Mure—I am of the same opinion. On this record I think it is clear that the judgments appealed against cannot stand. Those judgments repel the defence as irrelevant, that defence being simply a denial that the debt is due. The few facts stated by the pursuer are denied—there had been no proof, and *ex facie* of the averments the claim should have been made against the trustee, as the debt was undoubtedly contracted prior to the date of the bankrupt's sequestration. I see no ground on which the pursuer can have decree, and I think the proper course is to dismiss the action in default of any specific explanation. Had the amount it states been larger, I think it would have been advisable to allow the record to be opened up and give the pursuer an opportunity of showing any specialties which may be behind in this case to ground his claim as against the present defender. But as it is I am for dismissing the action.

Lord Shand—I agree in your Lordships' observations with regard to the record in this case. It is important to observe that the claim here made is for the rent due for part of the year which was current when the sequestration occurred, for I think a different principle might and would have applied if the circumstances had been different, and the rent claimed had been for a period beginning subsequent to sequestration. In that case there might have been room for holding that the fact of the bankrupt remaining as tenant implied a personal contract for payment of the rent. Keeping this distinction in view, it is to be observed, in the first place, that it is admitted that what is here asked is not merely decree of constitution, and, in the second place, that there is no averment of any special agreement as to this period; it is not said that any new bargain was made between the parties under which this rent is now sued for. Now, I think in a case of this sort, when the subject is an ordinary urban one, and when during the currency of the year's rent the tenant's bankruptcy occurs, and the trustee refuses to take up the lease, and the bankrupt stays on in the house, his obligation in return is for the year's rent, and that obligation was undertaken before the year began to run. There is no other contract in the matter. It was argued that the law will rear up an implied obligation, but I cannot think that is so. It is said the landlord might have brought an action of ejectment against the tenant; I doubt if such an action would have lain—I think it would not. The answer to it would have been—"I have got the occupancy of this house for the year under my obligation to pay the year's rent; that is a good obligation against my estate, and if my trustee does not take it up I shall remain on as tenant." But the case here is simply one where the bankrupt remains under an obligation for rent contracted before the year began, and I think his possession is to be attributed to that obligation which is good as against his estate, and not to any new or implied one.

Lord Deas was absent.

The Court recalled the interlocutor appealed against, sustained the appeal, dismissed the action, and decerned.

Counsel for Appellant (Defender)—Rhind—J. M. Gibson. Agent—W. Officer, S.S.C.

Counsel for Respondent (Pursuer)—Dickson. Agent—James Coutts, L.A.

Friday, January 7.

SECOND DIVISION.

[Lord Rutherfurd Clark, Ordinary.

M'BAIN *v.* WALLACE & COMPANY.

Contract—Sale—Ship on Stocks—Security.

R., who had incurred liabilities to W. & Co., entered into a contract with them by which he undertook to complete and deliver to them an unfinished vessel on the stocks in his building yard for a certain sum of money, power being given to W. & Co., in the event of R.'s failure to carry out his contract, to enter into possession of the yard and the vessel. R. became bankrupt, having received from W. & Co. advances equal to the consideration