ties? We thought the best we could do would be to bring the matter as far as we could to a point by asking the railway companies to put in specific form what they were prepared to admit. They have done so. We asked the applicants, in view of that minute of admissions, to say what they still proposed to prove, what facts they asked a proof of. The railway companies, through their counsel, have pressed upon us the position that they have admitted everything necessary and that no proof should be allowed. I do not think we can go that length, for the reason which Lord Kinnear stated that you cannot force people to agree to a so-called Special Case, and I think still less can we go that length when the question is not entirely before us, but is a question in which the Railway Commissioners have said they want a certain inquiry.

I propose that we should send the case back to the Railway Commissioners, and with these remarks tell them to allow a proof, in face of the minute of admissions, of the facts averred by the applicants and minuters in their minute, but with these alterations—", . . [*His Lordship here dealt with various articles of the minute*] . . ." and I think it would be for the Railway Commissioners, in the conduct of the proof, and with that due regard which I have no doubt they will have to avoid waste of time and pleonastic repetition, to consider each article of evidence as it is proffered, first of all in the light of what is already admitted by the minute of admissions, and second, in the light of the averment that is made over and above this minute of admissions.

LORD KINNEAR—I agree with your Lordship on all points.

LORD JOHNSTON—I also agree.

LORD SALVESEN—I also agree. I desire to add one observation, and that is as regards the form of the order of the Railway and Canal Commissioners allowing proof. Your Lordship has pointed out that the Railway and Canal Commission sitting in Scotland is a Scottish Court, and I see no reason why that Scottish Court should not adopt the simple and well-settled forms of interlocutors in use in Scotland, in place of the long and cumbrous equivalent used in this case, which is obviously borrowed from English practice.

The Court pronounced these interlocutors—

"Repel objections to the competency of said appeal: Remit the cause to the Railway and Canal Commissioners to proceed with the proof allowed to the parties, but that always holding in view the said minute of admissions No. 17 of process, and restricting the proof allowed to the applicants to the matters whereof proof is asked in the specification of facts contained in said minute No. 18 of process as adjusted by this Court: *Quoad ultra* refuse the appeal, and decern."

"Recal the interlocutor of the *ex officio* Commissioner appealed against, dated 31st May 1910, and in lieu thereof grant diligence for citing havers at the instance of the respondent and applicant traders respectively, as craved, for the recovery of the documents and others in terms of the specification of documents No. 2 of process as now adjusted between the parties, and commission to James Adam, Esq., Advocate, to take the oaths and examination of havers and to receive their exhibits, to be reported *quam primum* to the Railway and Canal Commission."

Counsel for Respondents (Appellants)—Clyde, K.C.—Cooper, K.C.—Macmillan—Hon. W. Watson. Agent—James Watson, S.S.C.

Counsel for Applicants — D. F. Scott Dickson, K.C. — Murray, K.C. — Horne, K.C. — Strain. Agents — Drummond & Reid, W.S.

Tuesday, July 19.

SECOND DIVISION.

[Sheriff Court at Cupar.

CHRISTIE *v.* BIRRELLS.

Sheriff—Process—Counter Claim—Liquid and Illiquid—Landlord and Tenant—Action for Rent—Illiquid Claim of Damages—Sheriff Courts (Scotland) Act 1907 (*7 Edw. VII, c.* 51), *Sched. 1, Rule* 55.

The Sheriff Courts (Scotland) Act 1907, First Schedule, Rule 55, enacts—"Where a defender pleads a counter claim, it shall suffice that he state the same in his defences, and the Sheriff may thereafter deal with it as if it had been stated in a substantive action, and may grant decree for it in whole or in part, or for the difference between it and the claim sued on."

Held that this provision did not make it competent to set off illiquid claims of damages in an action for a liquid debt, and that therefore a tenant, sued for payment of rent, was not entitled to set off claims of damages in respect of (1) the landlord's delay in fulfilling an obligation under the lease, (2) operations on the part of the landlord causing damage to the subjects let, and (3) breaches of collateral obligations alleged to have been undertaken by the landlord.

Macnab v. *Nelsons*, 1909 S.C. 1102, 46 S.L.R. 817, *considered* and *distinguished.*

In July 1909 Robert Maitland Christie of Durie, Fifeshire, raised an action in the Sheriff Court at Cupar against Alexander Birrell and William Birrell, farmers, Banbeath, Fifeshire, concluding for, *inter alia*, (1) the half-year's rent due at Whitsunday 1909 of the farm of Banbeath and Cottown of Durie; (2) additional payment in respect of new cottages there for the period from

Martinmas 1907; and (3) one-half of the fire insurance premiums paid by the pursuer since Martinmas 1905, all in terms of lease between the parties dated 16th October 1905.

The lease provided, *inter alia*—"And the said Robert Maitland Christie has agreed, and hereby agrees, within the period of six months after being requested by the said tenants, to erect at the steading of said farm an implement shed with a poultry-house on end of same, and also to erect at such convenient place as may be mutually agreed upon two additional cot-houses for farm servants similar to the present cot-houses; and in respect of said additional buildings the said Alexander Birrell and William Birrell bind and oblige themselves and their foresaids to pay to the said Robert Maitland Christie or his foresaids during the currency of this lease the sum of ten pounds sterling annually, and that half-yearly, along with and in addition to the rent as before stipulated, commencing at the first term after the erection of the said additional buildings: And the said Alexander Birrell and William Birrell hereby take and accept the whole farm and other buildings (including dwelling-house, and also including the said implement shed, poultry-house, and additional cot-houses when completed), and also the whole fences, gates, roads, drains, ditches, and water-courses on the said lands, as in sufficient tenantable condition and repair, and also accept the farm as sufficiently fenced, and shall be bound to uphold and keep the said whole buildings, fences, gates, roads, drains, ditches, and water-courses in like condition and repair at their own expense during the currency of this lease, and so to leave them at the expiration or earlier termination thereof, ordinary tear and wear excepted."

The defenders averred that they called upon the pursuer by letter dated 28th May 1906, in terms of the above obligation, to have the additional buildings completed by 28th November 1906, but that the said buildings were not properly completed and fit for occupation until the autumn of 1907. "(Stat. 4) In consequence of the want of the said cottages the defenders were put to serious inconvenience, and incurred considerable loss in not being able to make suitable arrangements for their servants. They were obliged to engage a different class of servant from what they would have been enabled to do had the cottages been ready for occupation at the term of Martinmas 1906. In like manner the defenders suffered great loss and inconvenience through the want of the implement shed and poultry-house, and to make room for the shed they were obliged to be at the expense of removing a stack of oats. They were prevented from keeping the head of poultry which they would have done had the poultry-house been erected and ready for occupation, and similarly the implements on the farm were left outside exposed to the weather and seriously deteriorated in consequence of the want of a proper shed in which to store them against the inclemency of the weather. That loss and damage the defenders moderately estimate at the sum of £30, which covers the cost of removing said stack, and which they maintain they are entitled to compensate and set against the sums claimed from them by pursuer under the present action. (Stat. 5) . . . . The pursuer was bound prior to the entry of the defenders to said farm at Martinmas 1905, or at anyrate immediately thereafter, to switch and cut the hedges and deliver them to the defenders in a proper tenantable condition. The pursuer failed to perform that operation although repeatedly called upon to do so, and the hedges were only cut by the pursuer in December 1908. The result to the defenders has been that they have suffered much inconvenience and loss through the hedges remaining uncut from the date of their entry down to the spring of 1909. This loss and damage the defenders moderately estimate at the sum of £20, which they claim as a deduction from the sums claimed by the pursuer under this action. (Stat. 6) At or before the term of Martinmas 1905 the fences on the farm had also become dilapidated from ordinary tear and wear, and many of the fences and gates required not only extensive repairs but considerable renewals. This was pointed out to the pursuer prior to said term by the defender Alexander Birrell. In like manner the roofs, floors, and windows of the farm dwelling-house were not in a habitable and tenantable state at the term of Martinmas 1905, and extensive repairs to replace ordinary tear and wear were also required upon the farm buildings themselves. The pursuer was bound at or before the term of Martinmas 1905, or immediately thereafter, to renew and repair such portions of the fences and gates on the farm as had got into disorder through ordinary tear and wear, and he was also bound to repair and make thoroughly tenantable and habitable the farm dwelling-house and the farm buildings on the farm. *In any event, the said fences and gates, as also the roofs, floors, and windows of the farm dwelling-house, have become so dilapidated from ordinary tear and wear that the said fences and gates are practically of no use to the defenders, and the said dwelling-house is unfit for the ordinary and comfortable use of the defenders.* The defenders have repeatedly called upon the pursuer to perform these obligations, and he has repeatedly promised to do so, but he has not yet fully fulfilled any of these obligations, and in consequence the defenders have suffered serious loss and damage in their use and occupation of the subjects let to them. They estimate the amount of that loss and damage at the sum of £50. . . . (Stat. 9) The pursuer has also in connection with the formation of the curling pond obstructed or stopped up a ditch at the east side of Cottown of Durie Field, and until a few weeks ago he dammed back the water upon the lands let, at same time bringing the field drains into a condition

which prevented them from working and properly draining the fields. The result of this has been that a considerable portion of the field in question has been seriously damaged for cropping purposes by the operations of the pursuer, and the defenders claim that from his operations in this respect they have suffered loss and damage to the extent of £20, which they claim to be entitled to deduct from the sums in the present action.... (Stat. 10) The pursuer has also in connection with his building operations taken down and removed a w.c. upon the farm, which he refuses to replace. The defenders claim that in doing so he has deprived them of part of the subjects let to them, and that he is not entitled to claim the full rent of the farm until the said w.c. has been restored and replaced." [The passage in italics was added at amendment mentioned *infra*.]

The defenders further averred that at various meetings between the parties the pursuer verbally agreed to all the defenders' requirements as hereinbefore condescended on; that they paid rent on the faith of this agreement; and that at one meeting, on 14th June 1907, the parties signed the following memorandum:—"We, Alexander and William Birrell, have handed to Mr Christie to-day deposit-receipt for £249, 17s. 5d. with the Royal Bank of Scotland, Leven, dated 12/11/06. This is handed to Mr Christie on the understanding that when he comes home we will meet and arrange our matters ourselves. . . ."

The defenders also averred (Stat. 20) that by letter dated 21st May 1909 addressed to the pursuer's agent they tabulated the claims which they made against the pursuer, and which he had undertaken to satisfy, as follows:—"1. The roof of Banbeath farm-house is in a very bad state, as it admits the rain, which has destroyed the ceilings, and considerable repairs must be done upon the roof. In like manner the floor in more than one of the rooms is rotten and must be substantially repaired or renewed, and none of the windows will either go up or down. 2. The roof lights and windows in the farm steading and granary all require to be repaired and reputtied. The door of the straw-house is also practically done and must be renewed. . . . 4. The gutters between the roofs of the steading appear to have subsided, but in any case they are not carrying off the water and must be repaired. 5. Mr Christie has done nothing towards repairing the fences and gates on the farm, and these, from ordinary tear and wear, are quite out of order. . . . 8. As you are aware, Mr Christie dammed back the water in the ditch on the east side of the Cottown of Durie field, with the result that a portion of land has been damaged and the drains choked. This must be put right and suitable compensation fixed. 9. Through Mr Christie's delay in cutting the hedges damage has been inflicted upon us which must be paid for, and in like manner he has failed to cut the overhanging branches of the trees, which has also damaged our field, and this must be settled for. . . . 11. Mr Christie also removed a w.c. from the steading, and it must be replaced."

The defenders pleaded, *inter alia*—"(4) The pursuer having failed to implement and fulfil the obligations undertaken by him to the defenders, he is not entitled to sue for payment of rent until these obligations are fulfilled. (5) The defenders having suffered loss and damage to the amount condescended on through the failure of the pursuer to implement and fulfil his obligations to them, they are entitled to compensate and set against any rent due the amount of the damages claimed by them."

On 15th November 1909 the Sheriff-Substitute (ARMOUR) repelled the defences as irrelevant and not sufficiently specific to be remitted to probation (subject to an allowance of proof with regard to another part of the action), found that the defenders had no right to retain rent past due in respect of their claims against the pursuer, and granted decree.

The defenders appealed to the Sheriff (MACFARLANE), who on 12th March 1910 pronounced an interlocutor allowing the record to be amended to the effect indicated *supra*, recalling the interlocutor of the Sheriff-Substitute, and allowing proof.

Note.—". . . With regard to the rest of the case, I do not come to the same conclusion as the Sheriff-Substitute, though I agree with much of his reasoning. The action is in the main one for rent. The principal ground for refusing to pay it is that the landlord has failed to put the buildings and fences into a tenantable state of repair. There is of course an implied obligation on a landlord to do so at the entry of a tenant, but here the defenders, by the terms of the lease, relieved him of that obligation by accepting the buildings and fences as in sufficient tenantable condition and repair, and bind themselves to keep them in the like condition and repair, and so to leave them, ordinary tear and wear excepted. Accordingly the defenders' averments so far as contradictory of the lease would not in the ordinary case be a relevant defence, and in any event could only be proved by the writ or oath of the pursuer. Only so far as the fences and buildings are said to have become unfit for use from ordinary tear and wear are the averments relevant, and such a statement was added on amendment (*Johnston* v. *Hughan*, 1894, 21 R. 777, 31 S.L.R. 655). But there are also statements by the defenders to the effect that at several meetings which they had with the pursuer, when they had refused to pay the rent due at the time, the pursuer had admitted his obligation to execute repairs both on the buildings and the fences, and had undertaken to execute them, and that in consequence of this admission and promise the rent had been paid. A writing is referred to under the hand of the pursuer and the defenders which, while it may not in terms bear out the defenders' statements, shows at least that some agreement had been arrived at with reference to the matter in dispute, and later on the hedges were put in order

by the pursuer, in part fulfilment, according to the defenders, of the admission and undertaking. The pursuer's failure to carry out the agreement has on the defenders' averments resulted in damage to them to the extent of £50 *quoad* buildings and fences and £30 *quoad* hedges, sums which they claim to be entitled to deduct from the sums sued for. There are sundry other items of damage connected with the cot-houses, &c., mineral workings, damming of certain drains, and failure to restore a water-closet set forth by the defenders. No claim for damage is made with respect to certain ground said to have been resumed by the pursuer. Any claim in respect of that is reserved. Now undoubtedly all the averments to which I have referred as founding claims for damages are somewhat vague and indefinite, but on the whole I think that stated in a separate substantive action they would have been relevant to infer liability to pay compensation on the pursuer. The question is, Can they be maintained in this action. Under the old law and practice I do not think they could. I was referred, however, to the Sheriff Courts (Scotland) Act 1907, First Schedule, Rule 55, which is as follows:—[*The Sheriff quoted the rule, v. supra in rubric.*] It appears to me that the language of that rule is wide enough to cover the counter claims for damages made by the defenders even in answer to a liquid claim for rent. The rule has been considered in the case of *Macnab* v. *Nelson*, 1909 S.C. 1102, 46 S.L.R. 817, and the conditions there held to be necessary for the application of the rule appear to me to be present here."

The pursuer appealed, and argued—(1) The construction put by the Sheriff on Rule 55 of the First Schedule of the Sheriff Courts (Scotland) Act 1907 (7 Edw. VII, cap. 51) was too wide. The object of the rule was merely to simplify procedure and obviate multiplicity of actions. It was not intended to affect the right of a creditor in a liquid debt to instant decree, or make relevant an otherwise irrelevant defence, *e.g.*, compensation founded on illiquid claims of damages. The question was the same as the question of conjunction, supposing the defenders had raised a counter-action, and that was always within the discretion of the Court—Mackay, Manual of Court of Session, p. 273. The case of *Macnab* v. *Nelsons*, 1909 S.C. 1102, 46 S.L.R. 817, was not inconsistent with this view. (2) The defences were clearly irrelevant. It was not every breach of a contract which brought the contract to an end. If the breach were of an immaterial part of the obligation, that only involved damages—*Wade* v. *Waldon*, 1909 S.C. 571, 46 S.L.R. 359. The question was whether the obligations of which breach was alleged were material or immaterial. In the first case the defenders would no doubt be entitled to retain the rent in whole or in part—*M'Donald* v. *Kydd*, June 14, 1901, 3 F. 923, 38 S.L.R. 697; Rankine, Law of Lease in Scotland, 2nd ed., pp. 302-3, 306, 308. In the latter case the breaches only resulted in damages, and such claims of damages could not be set off against the claim for rent—*Bowie* v. *Duncan*, 1807, Hume 839; *Thomson* v. *Coventry*, June 15, 1833, 11 S. 725; *M'Rae* v. *M'Pherson*, November 19, 1843, 6 D. 302; *Dryborough* v. *Dryborough*, May 21, 1874, 1 R. 909; *Stewart* v. *Campbell*, January 19, 1889, 16 R. 346, 26 S.L.R. 226; *Sutherland* v. *Urquhart*, December 13, 1895, 23 R. 284, 33 S.L.R. 210. In *Lovie* v. *Baird's Trustees*, July 5, 1895, 23 R. 1, 33 S.L.R. 208, the two claims were held to be equally liquid. The case of *Johnston* v. *Hughan*, May 22, 1894, 21 R. 777, 31 S.L.R. 655, did not deal with compensation at all. The breaches founded on by the defenders here were all breaches of immaterial obligations, some of which were not even contained in the lease, and they therefore only gave rise to illiquid claims of damages. In any event the averments of the defenders were irrelevant for want of specification.

Argued for the defenders (respondents)—(1) The wording of Rule 55 of the First Schedule of the Sheriff Courts (Scotland) Act 1907 was wide enough to allow such counter-claims as were made here to be dealt with in the action raised by the pursuer. The rule was imperative, and under it a good counter-claim was one that could be stated in money—*Macnab* v. *Nelsons*, *cit.* This view had been taken of a similar provision in England—*Beddall* v. *Maitland*, 1881, 17 Ch. Div. 174, at p. 181; *Stooke* v. *Taylor*, 1880, 5 Q.B.D. 569, at p. 582. (2) Apart from Rule 55, the defences were relevant. The pursuer's claim was only liquid if he had performed his obligations under the lease. He was in breach of these obligations, and his claim was no more liquid than the defenders' claims, and they were therefore entitled to set off their claims against the demand for rent—*Lovie* v. *Baird's Trustees*, *cit.* There was no distinction between material and immaterial obligations. Further, the pursuer's failure to make good ordinary tear and wear and put the premises in tenantable condition was a good answer *pro tanto* to his demand for rent—*Johnston* v. *Hughan*, *cit.* The defenders were entitled in view of the pursuer's breach of his obligations under the lease, his obligation to make good ordinary tear and wear, and the obligations he had specifically undertaken, either to retain the rent or compensate the demand for rent by their claims of damages in respect of these breaches. The averments of the defenders should therefore be remitted to probation.

At advising—

LORD MACKENZIE—The pursuer's claim for past-due rent is met by the defence that the tenants have claims of damages for the alleged breach of obligations on the part of the landlord. Some of these obligations are said to be contained in the lease, others admittedly are not.

The Sheriff-Substitute granted decree (subject to an allowance of proof as regards one small matter) holding that the defenders must constitute their claims in a

separate action. The Sheriff states that under the law and practice prior to 1907 the claims put forward by the tenants could not have been maintained in this action. The effect of the Sheriff Court Act 1907, First Schedule, Rule 55, is, however, in the opinion of the Sheriff, to make the defence a competent one in the present proceedings.

Before adverting to the terms of Rule 55 it is necessary to consider the nature of the claims put forward by the tenant, irrespective of what is said to have been done by the recent statute.

I take first the claim of £20 damages for failure on the part of the landlord to implement an obligation which is thus expressed in Stat. 5—"The pursuer was bound prior to the entry of the defenders to said farm at Martinmas 1905, or at any rate immediately thereafter, to switch and cut the hedges and deliver them to the defenders in a proper tenantable condition." Under their lease, however, the tenants accepted the whole fences as in sufficient tenantable condition and repair, and came under an obligation to uphold and keep them in like condition and repair at their own expense during the currency of the lease, ordinary tear and wear excepted. It was suggested in argument that "fences" did not cover "hedges," but that is plainly untenable. The terms of the lease seem to me to supply a conclusive answer to this claim.

The next claim is the one for £50 damages contained in Stat. 6. As the record originally stood the averment was that "At or before the term of Martinmas 1905 the fences on the farm had also become dilapidated from ordinary tear and wear, and many of the fences and gates required not only extensive repairs but considerable renewals. This was pointed out to the pursuer prior to said term by the defender Alexander Birrell. . . . In like manner, the roofs, floors, and windows of the farm dwelling-house were not in a habitable and tenantable state at the term of Martinmas 1905, and extensive repairs to replace ordinary tear and wear were also required upon the farm buildings themselves." This is an averment as regards the state of matters at the term of entry. There could, however, under the lease, be no obligation upon the landlord as at the term of entry to do more than hand over the fences and buildings in their then existing state. By the express terms of the lease the tenants accepted the whole farm buildings as then in sufficient tenantable condition and repair (including the dwelling-house), just in the same way as they accepted the fences. They came under the same obligation of maintenance, ordinary tear and wear excepted. The tear and wear here mentioned of course refers to deterioration supervening after the term of entry. It could not refer to what had happened prior to that date. Accordingly, as originally stated, the answer which, as I have indicated, I consider conclusive as regards the fences (including the hedges), I regard as equally fatal to the claim in respect of the dwelling-house and buildings. The claim for £50 damages (of which there is no attempt at apportionment between fences and buildings) cannot be supported on the averments as originally made. The question is whether it can be supported on the amendment. The amendment is in these terms—"In any event the said fences and gates, as also the roofs, floors, and windows of the farm dwelling-house, have become so dilapidated from ordinary tear and wear that the said fences and gates are practically of no use to the defenders, and the said dwelling-house is unfit for the ordinary and comfortable use of the defenders." It is no doubt the right of a tenant to retain his rent if there is a failure on the part of a landlord to fulfil a material part of the obligations incumbent upon him under the lease. In the present case, however, the tenant must be held to have entered into possession of a habitable house at Martinmas 1905. The effect of the lease is to say that he did. In order, therefore, to make a relevant case against the landlord it would be necessary to aver that since the date of entry certain things had happened through ordinary tear and wear, and that in consequence thereof the house had become unfit for habitation. It is because I have been unable to find such a case made either in statement 6 or 20, to which we were referred as containing the necessary specification, that I am unable to hold the defenders' averments as regards the fences and dwelling-house relevant.

The next claim is for £30 damages, and arises on the averments in stats. 2, 3, and 4. It is set forth that by the lease the landlord became bound within six months after being required by the tenants to erect an implement shed with a poultry house; that the tenants called on him to have these additional buildings ready for use by 28th November 1906; that they "were not properly completed and fit for occupation until the autumn of 1907;" and that in consequence the defenders suffered loss and inconvenience in the manner detailed. The averment of the defenders is not that they are entitled to retain their rent, but that they estimate their damage at £30, which they say they are entitled to "compensate and set against" the sums claimed in this action by the pursuer. The defenders cannot therefore found on such cases as *M'Donald* v. *Kydd*, 3 F. 923. There the tenant was held entitled to retain the rent until the landlord had fulfilled his obligation to put the farm buildings into habitable condition and repair. Here, according to the defenders' averments, the landlord has fulfilled his bargain. They however, say that there was delay on his part in doing so which caused them damage. They therefore maintain that they are entitled to extinguish the claim for rent at least to the extent of £30 (for that would be the effect of sustaining their fifth plea) by this unconstituted and therefore illiquid claim of damages. This is just what it has been decided by a series of decisions they cannot do. Even if the

tenants' claim had been stated as based on a right to retain (which it is not), I think the landlord would have had a forcible answer in the fact that the failure to implement the obligation to erect these buildings, which gives rise to the claim of £30 damages, refers to the period between Martinmas 1906 and Martinmas 1907, and what the tenants are refusing to pay is the half-year's rent of £249, 17s. 5d. due at Whitsunday 1909. If the principle which entitles a tenant to retain his rent be that which applies to all contracts, viz., 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, it will be seen how essentially this £30 claim is one of damages, which cannot be pleaded against a liquid claim for rent. In using the term "liquid" I do so in the same sense as Lord Fullerton does in *Graham* v. *Gordon*, 5 D. 1207. This dictum is referred to in *Lovie* v. *Baird's Trustees*, 23 R. 1, by Lord Kinnear, who says that "a claim for rent is not liquid in the same sense as a sum in a bond, because it is a payment in consideration of something to be done under a contract, and therefore if the obligations in respect of which the payment is to be made have not been performed, the demand for payment cannot be said to constitute a liquid claim." The landlord's obligation was implemented here eighteen months before the half-year's rent in question became due.

The defenders have another claim of damages for £20 against the pursuer, because he is said to have interfered with their field drains in forming a curling pond. They claim to deduct this £20 from the rent. There is no specification of extent or of date in stat. 9, and without these the averment cannot be regarded as relevant. Even if made relevant, it could not, in my opinion, be pleaded in this action. It is based on an allegation of fault totally unconnected with the lease. The nature of the claim is such that it might have been made against any third party, and if it were held relevant, then any claim against the landlord founded on his fault might be pleaded in defence to an action for rent.

There are other minor matters on record which were not insisted in as against the present claim, with the exception of the removal of a w.c. in connection with the building operations in 1907, to which the principle *de minimis* may, so far as the present action is concerned, fairly be applied.

The averments in stats. 13 to 20 set out that the pursuer on different occasions verbally "agreed to all the defenders' requirements as hereinbefore condescended on"; they say they paid rent on the faith of this, and a written memorandum is quoted on record as evidencing this. The defenders ask a proof of these statements. The way, however, in which these averments must be regarded is that they set out several contracts which are independent of the lease. The alleged claims under them cannot be pleaded as a set out against obligations constituted by the lease itself.

I am accordingly of opinion that under the law as it stood in 1907 the defenders have stated no relevant defence to the claim made against them.

The question then is whether the Act of 1907, which professes to alter procedure only, has effected a change in the law. In my opinion it has not. The Sheriff Court Act 1907, First Schedule, Rule 55, provides —" . . . [*His Lordship quoted the rule, supra in rubric.*] . . ." This rule was intended, in my opinion, to provide a remedy against multiplicity of actions, and to enable the Court to give decree in favour of a defender. It was not intended to take away the right of the creditor in a liquid debt to get decree, or to impose on him the obligation of waiting until the decision is given as regards disputed claims of damages such as those raised by the defenders here.

Reference is made by the Sheriff to the case of *Macnab* v. *Nelson*, 1909 S.C. 1102, and it was contended on behalf of the defenders that it was there recognised that the valuation of damages due to a tenant might give rise to a counter claim in the proper sense of the word, under Rule 55. No doubt in circumstances which entitle a tenant to retain his rent on account of the failure of the landlord to implement a material part of the obligations in the lease, the tenant's claim, though substantially a claim for abatement, may be measured by the damage caused to him. A reference to *Munro* v. *M'Geoghs*, 16 R. 93, and the observations of Lord Shand in *Stewart* v. *Campbell*, 16 R. 346, shows this. There is not, in my opinion, any such counter claim relevantly stated here.

I therefore come to the conclusion, agreeing with both the Sheriff and the Sheriff-Substitute, that no relevant defence is stated apart from the point raised on Rule 55. I am unable to agree with the effect given by the learned Sheriff to this rule, and am therefore of opinion that the judgment of the Sheriff-Substitute is right.

LORD DUNDAS—It appears that but for the provisions of Rule 55 of the Act of 1907 the Sheriff would, like the Sheriff-Substitute, have considered the defences to this action to be irrelevant, except as to the allowance of proof upon one small matter —the cottage at Mountfleurie—in regard to which it seems that proof is admittedly necessary. I agree with the Sheriffs in that view, for I think (*a*) the defenders have no relevant or sufficient averments in support of their fourth plea-in-law to the effect that they are entitled to retain their rent because the landlord has failed to implement material obligations, *e.g.*, to give full possession of the subjects; and (*b*) that the defenders' fifth plea and its relative averments, viz., claim to "compensate" or "set off" illiquid demands for damages, could not (apart from Rule 55) be entertained

as a defence to the action for rent. I need say no more upon this aspect of the case, because I agree entirely with the detailed exposition of it contained in the opinion just delivered by my brother Lord Mackenzie, which I had an opportunity of reading.

The only question, therefore, seems to be as to the application and effect in this case of Rule 55 of the Statute of 1907. That Act is, *prima facie* at least, one of procedure only. Rule 55 seems to me to be designed (*a*) to avoid needless multiplicity of actions, and (*b*)—a new and probably useful result—to enable the Sheriff, if justice so demands, to decern in the pursuer's action for payment of money to the defender. The test of a proper "counter claim" would, I apprehend, be that if stated as the condescendence in a cross action by the defender it would warrant the conjunction of the actions. It is to my mind a strong thing to say that Rule 55 goes by implication much further, and really abrogates the previously existing law—as apart from mere procedure—as to the incompetency of setting off illiquid claims of damages against a liquid demand for rent or the like. It may be said that in this case the counter claims are for damage alleged to have arisen out of the relationship between the parties of landlord and tenant; and that to admit such would not, perhaps, be a very violent alteration of the law. But the learned Dean of Faculty was constrained to admit that on his construction of Rule 55 all claims of damage, whether arising out of the same contract or relationship or not (*e.g.*, damages for a slander or an assault), must be admitted as counter claims if stated in the defences to an action for rent due. I cannot accept so violent a result if I can avoid doing so, but it is not easy to see where one can stop if one once enters the path which leads logically to that conclusion. Again, I am not aware of any instance (unless Rule 55 has introduced it), where the law—not merely the procedure—of the Sheriff Courts is different from that of the Court of Session. Still the language of the rule is very wide. And I have felt doubt and difficulty on account of certain *obiter dicta* in the case of *Macnab* (1909 S.C. 1102), which is referred to in the learned Sheriff's opinion. *Macnab's* case decided no more than that a counter claim for a pecuniary sum cannot be entertained as against a declarator of irritancy and a conclusion for ejection of a tenant. The Lord President (p. 1109), after quoting Rule 55, says it makes it "perfectly clear that a counter claim in this sense must be a claim which can be set off pecuniarily against the claim sued for, and that therefore there is no such thing as raising in defence a counter claim for which you could have decree, where the conclusions of the action itself are not pecuniary at all but are merely declaratory." So far, therefore, as the decision of the case is concerned no difficulty arises, and *Macnab's* case as decided seems to be, if one may respectfully say so, absolutely correct. But some *obiter dicta*, both by the Lord President and Lord Kinnear, seemed to me at first sight to support the defenders' argument in this case. I have come, however, to think that these *dicta* were not intended to mean anything more than that if a tenant, in answer to his landlord's claim for rent due, avers by way of defence or counter claim that he is entitled to retain his rent in respect of his landlord's failure to give him full possession of the subjects, or claims an abatement of rent stated at some figure in name of loss thereby sustained, the claim may be entertained in the Sheriff Court without the necessity of bringing a cross action. But in this case I think we have no such averments, and I am therefore of opinion that we ought to revert to the interlocutor of the Sheriff-Substitute.

LORD JUSTICE-CLERK—I entirely concur in what has been said by my brother Lord Mackenzie as to the nature of the counter-claims made by the defender in this case. The claims as regards the fences and hedges and the dwelling-house and buildings appear to me to be quite untenable on the grounds which he has stated. The claim for £30 in respect of the delay in completing the implement shed and the poultry house I cannot hold to be a relevant claim as against the claim for rent. It is plainly nothing but a claim of damages, and therefore cannot competently be set against a claim for past-due rent, and, in any view, as stated it is a claim to retain rent of a term during which the tenant has the implement shed and poultry house, in respect that he did not have them during a term two years before, the rent of which has been paid. The averment on which a claim of £20 for injury to field drains is made is plainly irrelevant, for there is no specification whatever of the facts or of the time at which they occurred if they ever happened. And, as has been pointed out, the matter is one wholly separate from any question under the lease.

As for the allegations of verbal contracts, any such contracts, if made, were entirely outside the lease, and cannot be founded on as against the lease obligations.

Upon the contention raised by the defenders on the 55th Rule of the First Schedule of the recent Sheriff Courts Act of 1907, I also concur with your Lordships. It is a rule of value for the prevention of multiplicity of actions, by enabling the Court to give a decree in favour of a defender for a claim stated by him as against the pursuer's claim. But that such a rule, even if equivalent to statutory enactment, should be held to deprive a creditor of instant satisfaction for a liquid claim, until a defender had the opportunity of establishing by proof illiquid claims of damages, there seems to me to be no ground for holding. Whether in any case a counter-claim which might give a tenant a right to retain rent as against it could be dealt with and decerned for under Rule 55, can be decided when such a case truly arises, but there being in this case no relevant case stated by the defender for such a counter-claim the Sheriff-Substitute was

in my opinion right in not giving effect to it. I concur with your Lordships in what has been said as to the cases referred to by the Sheriff. I am of opinion that the Sheriff erred in the conclusion to which he came, and that his interlocutor should be recalled and the interlocutor of the Sheriff-Substitute affirmed.

LORD LOW was absent, and LORD ARDWALL was taking a proof.

The Court recalled the interlocutor of the Sheriff and reverted to that of the Sheriff-Substitute.

Counsel for Pursuer (Appellant)—Murray, K.C.—Christie. Agents—Mylne & Campbell, W.S.

Counsel for Defenders (Respondents)—Dean of Faculty (Dickson, K.C.)—Lippe. Agents—Guild & Guild, W.S.

Saturday, July 16.

FIRST DIVISION.

[Lord Salvesen, Ordinary.

"GUNFORD" SHIP COMPANY, LIMITED, AND LIQUIDATOR *v.* THAMES AND MERSEY MARINE INSURANCE COMPANY, LIMITED.

Insurance — Marine — Warranty of Seaworthiness — Total Loss — Competence of Master.

Circumstances in which *held* that a sailing ship which became a total loss was not unseaworthy in respect of the alleged incompetence of the master.

Insurance — Marine — Facts Material to Risk—Master's Record—Non-Disclosure—Warranty—Marine Insurance Act 1906 (6 *Edw. VII, cap.* 41), *secs.* 18 (3) (*d*), 33 (3), *and* 39 (1).

Held that a policy of insurance on the hull of a sailing ship was not voided by non-disclosure to the insurers of the fact that the master had not been at sea for twenty-two years, and on the last occasion on which he had acted as master had lost his ship and had his certificate suspended for six months, in respect that these were matters which were covered by the warranty of seaworthiness.

Insurance — Marine — Facts Material to Risk—Non-Disclosure—Over Insurance.

Held that a valued policy on the hull of a sailing ship was not voided by non-disclosure to the insurers of concurrent policies on freight and disbursements, and of honour policies taken by the managing owner in favour of himself as an individual.

The Marine Insurance Act 1906 (6 Edw. VII, cap. 41) enacts—Section 17—"A contract of marine insurance is a contract based upon the utmost good faith, and if the utmost good faith be not observed by either party the contract may be avoided by the other party."

Section 18—"(1) Subject to the provisions of this section, the assured must disclose to the insurer, before the contract is concluded, every material circumstance which is known to the assured, and the assured is deemed to know every circumstance which in the ordinary course of business ought to be known by him. If the assured fails to make such disclosure the insurer may avoid the contract. (2) Every circumstance is material which would influence the judgment of a prudent insurer in fixing the premium, or determining whether he will take the risk. (3) In the absence of inquiry the following circumstances need not be disclosed, namely—(*a*) Any circumstance which diminishes the risk; (*b*) any circumstance which is known, or presumed to be known, to the insurer. The insurer is presumed to know matters of common notoriety or knowledge, and matters which an insurer in the ordinary course of his business, as such, ought to know; (*c*) any circumstance as to which information is waived by the insurer; (*d*) any circumstance which it is superfluous to disclose by reason of any express or implied warranty. (4) Whether any particular circumstance which is not disclosed be material or not, is in each case a question of fact."

Section 32—"(1) Where two or more policies are effected by or on behalf of the assured on the same adventure and interest, or any part thereof, and the sums insured exceed the indemnity allowed by this Act, the assured is said to be over-insured by double insurance. (2) Where the assured is over-insured by double insurance—(*a*) the assured, unless the policy otherwise provides, may claim payment from the insurers in such order as he may think fit, provided that he is not entitled to receive any sum in excess of the indemnity allowed by this Act; (*b*) where the policy under which the assured claims is a valued policy, the assured must give credit as against the valuation for any sum received by him under any other policy without regard to the actual value of the subject-matter insured. . . ."

Section 33—". . . (3) A warranty . . . is a condition which must be exactly complied with whether it be material to the risk or not. If it be not so complied with, then, subject to any express provision in the policy, the insurer is discharged from liability as from the date of the breach of the warranty, but without prejudice to any liability incurred by him before that date."

Section 39—"(1) In a voyage policy there is an implied warranty that at the commencement of the voyage the ship shall be seaworthy for the purpose of the particular adventure insured. . . ."

The "Gunford" Ship Company, Limited, in liquidation, and Thomas Greig Hardie, shipowner, Glasgow, the liquidator thereof, raised an action against the Thames and Mersey Marine Insurance Company, Limited, for payment of a sum of £2000, being the amount underwritten by the defenders