altered one of the lines from "The spear should be in my horse's side" into "The spur should be in my horse's side;" and it is said that to copy the ballad with this alteration, as Messrs Murray have done, is an infringement of copyright.

I cannot accede to this view. I cannot hold that the alteration of a single word, even though more important than this, would suffice to give copyright to a new edition. It is said that about the merits of the alteration opinions may differ. For my own part, I consider it so manifest an improvement that I doubt whether the original word was not a mere printer's error, and this nothing else than a simple correction of the press. But in any view I consider the alteration not to give copyright. Copyright in a single word is to me a legal novelty. If it ever can exist at all, it must be in something very different from this.

There remain for consideration the two alleged infringements marked Nos. 42 and 45; the first of which is a transference to Messrs Murray's book, at that part of it containing a ballad on the battle of Loudoun Hill, of a note from the copyright edition of the Waverley Novels, embodying a letter from Claverhouse, with an account of the battle taken from a publication by the Bannatyne Club. On the principle already referred to as governing the transference of notes, I am of opinion that this is a piracy. The note is substantially the same in Messrs Murray's book as in the other; and the discovery and application of Claverhouse's letter seem to me to form an act of authorship proper to be protected. The case is all the stronger that, in taking the letter from the Bannatyne Club book, the spelling has, in Messrs Black's publication, been largely modernised; and in this respect Messrs Murray do not copy from the Bannatyne Club book, but from the copy in Messrs Black's book subjected to this process, and, I have no doubt, subjected to it with considerable care and labour.

The other case referred to is the transference to Messrs Murray's book, at that part of it containing a ballad on the Massacre of Glencoe, of a note on the same ballad in the copyright edition of Scott's works, composed of an extract from an article in the Encyclopædia Britannica. This is just the kind of proceeding to which I have already alluded, in touching generally on notes. There is here a use made of the labour and skill expended in finding and applying a suitable quotation, which is justly held an infringement of copyright. The infringement here again is the more remarkable that the quotation is given in Messrs Black's book with very considerable alterations, justifiable on the ground that the Encyclopædia Britannica was itself their own publication. These alterations are all *verbatim* copied by Messrs Murray; and this makes the piracy unquestionable.

Lord Ordinary's interlocutor substantially adhered to.

Agent for Pursuers—James Finlay, S.S.C.

Agents for Defenders—J. A. Campbell & Lamond, C.S.

Friday, December 23.

THE DUKE OF HAMILTON'S TRUSTEES *v.* JAMES FLEMING.

Lease—Landlord and Tenant—Compensation—Loss—Damnum Fatale—*Insurance.* A lease of certain mills and other subjects was entered into between A and B. A, the landlord, bound himself to expend a sum of £380 upon the buildings at the commencement of the lease, and B, the tenant, undertook thereafter to maintain the buildings in good order, and so deliver them at the conclusion of his lease. On the other hand, B, the tenant, undertook to expend at the outset at least £800 upon replacing and repairing the old machinery of the mills, and thereafter to maintain the machinery, and deliver it over in good order and repair at the close of the lease, whereupon A, the landlord, was to repay him £400 of his original outlay. Farther, B was bound to insure the subjects for at least £1200, recovering half the premium from A, the landlord. In point of fact A effected the insurance, whereof £620 was allocated on the buildings of the mills, £200 on the machinery, and the rest upon the other subjects, and the tenant merely paid the half of the premium. The mills were destroyed by fire, without any fault of the tenant, about two years from the close of the lease, and the landlord recovered the sums insured, and also received, at the end of the lease, the remnants of the machinery, worth about £200. He declined to rebuild, but allowed a deduction from the rent, as effeiring to the subjects which had been destroyed. In an action for the balance of rent due, the tenant pleaded his counter claims (1) to the £400 agreed to be paid under the lease; (2) to share in the policy of insurance. *Held*, on the first point (*diss.* the Lord President)—The maxim *res suo perit domino* applied only to the interests of the different parties, and that that of the landlord was in the property, while that of the tenant was in his profits as miller, which were lost to him (as the property was to the landlord), but which did not contain his claim to the £400 due *ex-contractu;* and that he, having fulfilled all his obligations until the *damnum fatale* supervened, was entitled to recover that sum—*Held*, farther, that the obligation to maintain in good order and repair throughout the lease was not a condition precedent which must be fulfilled to the letter before a claim could be made to the £400, but that it was cancelled by the *damnum fatale.*

Held, on the second point, that the policy was purely for the benefit of the landlord, and secured only his right of property, and that the tenant had no title to participate in it, his paying half the premium being merely an additional item of rent.

The pursuers in this case were the trustees appointed under a trust disposition and conveyance of his estates by the present Duke of Hamilton in their favour. They brought the present action to recover the rent due by one of the Duke's tenants for the last year of his lease. They were met by a counter claim on the part of the tenant, and it was on this counter claim that the real question between the parties arose.

It appeared from the statements of parties that "By articles of agreement of lease entered into (Aug. 22, 1848) between his Grace the late Alexander Duke of Hamilton and Brandon, father of the present Duke, and the also now deceased Alexander Fleming, the defender's father, the said Duke let to the said Alexander Fleming and his heirs, whether of line or destination, the lands and farm of Rouseland, the mills of Kinneil, with the mill lands thereof, and the south part of Falcon House

farm, all as then possessed by the former tenant, Mrs Alison Ponton or Hardie, and all situated in the parish of Borrowstounness and county of Linlithgow, and that for the space of nineteen years, and crops from and after Martinmas 1848." The rent stipulated was partly in money and partly in victual, to be converted at the highest fiars prices of the county of Linlithgow, and was to be paid, the first £250 at Candlemas, and the balance, according to the fiars prices of the year, at the following Whitsunday. The rent was regularly paid for the first eighteen years of the lease, but in November 1865 the mills, which formed a material part of the subjects, were burnt down, and were not rebuilt. The tenant accordingly declined payment of the last year's rent, alleging certain counter claims, to be afterwards mentioned. The Duke's trustees were willing to allow a deduction of £90 from the year's rent in consequence of the destruction of the mills, and accordingly sued the defender for the full rent for the year, under deduction of that sum. The following was their statement as to the rent due:—"The rent payable by the defender for crop and year 1867, being the last crop under the lease, was in terms thereof as follows:—At the term of Candlemas 1868, £250, and at the following term of Whitsunday £228, 10s. 3½d., being the balance of the year's rent then due, after converting the victual rent into money, as directed by the lease, according to the highest fiars prices for Linlithgowshire for crop and year 1867. The defender is entitled to deduction from each of the said half-year's rents of the sum of £45, being the proportion of the said rent effeiring to the mills of Kinneil, forming part of the subjects let as aforesaid, which were destroyed by fire in November 1865, and were not rebuilt." The money conversion of the rent was admitted by the defender to be correct, and in the course of discussion he accepted the £90 offered, as the deduction to be made from the gross rent, being the estimated proportion applicable to the mills.

The defender stated that on the death of his father he succeeded him as his eldest son and heir in the lease referred to in the pursuers' condescendence, and previous to that date he had the sole management of the lands and others let by the lease, paying the rent and the premiums of insurance after mentioned, the receipts for which were granted as to the defender. The present Duke of Hamilton, in 1863, succeeded as heir to his father, the late Duke, to the farm and other subjects contained in the said lease. By the articles of agreement of lease the proprietor obliged himself in absolute warrandice of the lease and of the whole subjects thereby let. The clauses of the lease which are material to the defender's counter claim are as follows:—"And with respect to the houses, the proprietor agrees to expend a sum not exceeding £380 during the first four years of the lease in repairing and heightening the walls of the mills, building cattle-sheds, and otherwise improving the mason work of the houses, as also in repairing or renewing the roofs and lofts of the mills, all according to such a plan as he may approve of; and thereafter the tenant hereby agrees to accept of the whole houses on the premises as in good order and condition, and obliges himself and his foresaids to keep and maintain the same in the like good order and repair, and to leave them so at the end of the lease, or at his or their removal: Further, in regard that the greater part of the machinery in the said mills is old, imperfectly constructed, and not in good repair; therefore, and in consideration of the lease hereby agreed to be granted, the tenant obliges himself, within the two first years of the lease, to expend a sum of not less than £800 in repairing, renewing, and making additions to the said machinery, according to such plans as may be approved of by the proprietor, and to produce vouchers for at least that expenditure, and thereafter to keep up and maintain the whole in good and sufficient repair and working order; and on the tenant or his foresaids leaving the whole of the machinery so repaired, renewed, or added to in good working order and sufficient repair, the proprietor agrees to pay the tenant or his foresaids the sum of £400 at the end of the lease: Further, the tenant obliges himself and his foresaids to have the whole houses and machinery on the premises constantly insured in some respectable insurance office to the extent of £1200 sterling, the policy to be taken in name of the proprietor, and he relieving the tenant of one-half of the premium of insurance." The defender farther stated that his father entered to possession of the subjects of the lease, and implemented the whole obligations incumbent on him thereby, and, in particular, his expenditure in repairing, renewing, and making additions to the machinery of the mills much exceeded the £800 stipulated by the lease to be expended by the tenant for that purpose. He was also ready and willing to implement the obligation regarding the insurance of the houses and machinery, but the landlord, preferring to do so himself, effected the insurance with the North British Insurance Company, and kept up the same from year to year, until the mills were burned down. The landlord paid the whole premiums of insurance to the insurance office, and the tenant repaid to the landlord the tenant's half of these premiums. The sum for which the subjects let were insured was £1320, of which £620 was applicable to the buildings of the mills, and £200 to the machinery and wrights work. The said sum, or at least the amount of damage caused by the fire, was paid by the insurance office to the present Duke of Hamilton, or to the representatives of the late Duke. The landlord, although bound to do so at his own expense, did not renew or rebuild the said mills and machinery, or put them again in a condition for beneficial occupation and use by the tenant. In consequence of the destruction of the said mills and machinery, and the failure of the landlord as aforesaid to renew the same, it became impossible for the tenant to leave the machinery in good working order and sufficient repair at the end of the lease. The said machinery, at the time of the fire, was in good working order and sufficient repair, and exceeded in value the sum of £800. Accordingly, the foresaid sum of £400, payable by the landlord to the tenant at the end of the lease, or otherwise a portion of the foresaid insurance money of equal amount, became payable to the defender, or at least to the representatives of the defender's father, at Martinmas 1867, when the lease expired. The said sum of £400, or otherwise a portion of the said insurance money of that amount, with interest since that date, is still resting-owing by the said Duke, and by the pursuers, as coming in his place, and liable for his debts and obligations in virtue of the deeds libelled and their possession thereon, and operates as a counter claim or set off against the claim for the rent of the year 1867. Farther, before the burning of the mills,

the defender and his father carried on a lucrative business therein as millers, and by the failure of the landlord to restore the mills and machinery the defender and his father were prevented from carrying on their said business. They in consequence sustained great loss and damage, their loss of profit alone for two years of the lease to run after the burning of the mills exceeding £100 a year, but the defender restricts this branch of his claim to the sum of £200. The present Duke of Hamilton and the pursuers, as aforesaid, are liable for this loss, which is an additional ground of counter claim against the present action for the rent of the year 1867." After the destruction of the mills the defender had several communications and certain correspondence with the landlord's factor about the rebuilding of the mills and about his claim under the lease, but was unable to get from him any satisfactory answers, and a settlement was never come to. Accordingly, the present action was raised for the rent, and the defender then judicially stated his counter claims as above mentioned.

The defender pleaded—"(1) The sums sued for are compensated and paid by the larger counterclaims owing by the pursuers to the defender. (2) At least the defender is entitled to have his counter-claims on account of the machinery and mill rent given effect to in this action, as a set-off against the pursuers' claims."

The Lord Ordinary (MACKENZIE) pronounced the following interlocutor:—

"*Edinburgh, 8th July* 1870.—The Lord Ordinary having heard the counsel for the parties, and considered the proof—Finds that under the articles of agreement of lease, dated 22d August 1848, No. 6 of process, the defender, as tenant, became indebted to the pursuers in the sum of £250 at Candlemas 1868, being the first half-year's rent of crop and year 1867, due at that term for the lands and farm of Rouseland, the mills of Kinneil, with the mill-lands thereof, and also the south part of Falconhouse farm, but under deduction of the sum of £45, being the proportion of the said rent effeiring to the mills of Kinneil, which were destroyed by fire during the currency of the said lease in November 1865, with interest on the balance at the rate of five per cent. per annum from 3d February 1868 until paid; and also in the sum of £228, 10s. 3½d. at the term of Whitsunday 1868, being the second half-year's rent of crop and year 1867, due at that term for the said subjects, but under deduction of the sum of £45, being the proportion of the said rent effeiring to the said mills of Kinneil, destroyed by fire as aforesaid, with interest on the balance at the rate of five per cent. per annum from 15th May 1868 until paid: Finds that the defender's father implemented the obligation undertaken by the tenant by the said articles of agreement of lease, to expend, in consideration of the lease, a sum of not less than £800 in repairing, renewing, and making additions to the machinery in the said mills: Finds that the whole machinery was kept up by the tenant in good and sufficient repair and working order, in terms of the said articles of agreement of lease, down to November 1865, when the said mills were destroyed by fire, and that the said machinery was, when the fire broke out, of greater value than £800: Finds that the whole of the machinery so repaired, renewed, and added to was destroyed by the fire, with the exception of two water-wheels and one pit-wheel, which were worth from £150 to £200, and that it was not thereafter renewed or repaired during the currency of the lease in any way: Finds that as the defender, as tenant, did not leave the whole of the machinery so repaired, renewed, or added to in good working order and sufficient repair on the expiry of the lease at Martinmas 1868, the Duke of Hamilton, and the pursuers as his trustees, are not bound to pay the defender the sum of £400, which the proprietor agreed, by the articles of agreement of lease, to pay the tenant in that event at the end of the lease: Finds that in implement of the obligation in the articles of agreement of lease, the whole houses and machinery were insured at the time of the fire against loss by fire by the policy of insurance, No. 34 of process, granted in name of the landlord by the North British Insurance Company for the sum of £1250, the proportion whereof, as specified in the said policy, applicable to mill-wright's work and machinery in the mills was £200, and that the landlord and defender paid, as provided by the lease, the premiums of insurance equally between them: Finds that the landlord received from the North British Insurance Company under said policy, on account of the mill-wright's work and machinery destroyed by fire, the sum of £200 on 20th November 1865: Finds that the defender has right to £100, being one-half of said sum of £200, with interest from 20th November 1865, and to that extent sustains the defences: *Quoad ultra*, repels the defences: Therefore decerns against the defender in terms of the conclusions of the summons, and under the deductions therein set forth; and also under the further deduction of the said sum of £100, with interest at the rate of five per cent. per annum from 20th November 1865: Finds neither party entitled to expenses, and decerns."

Against this interlocutor the defender reclaimed.

HORN and NEVAY, for him, relied upon *Bayne* v. *Walker*, 3 Dow 233, and *Reddie* v. *Mailler*, 3 D. 488; and argued that the obligation of the tenant to maintain the subjects was cancelled on their destruction by a *damnum fatale*, while that of the landlord remained *ex contractu*, the subjects having perished to him as *dominus*.

MILLAR and KEIR, for the respondents, admitted the tenant's right to get some of the policy money, as found by the Lord Ordinary, but insisted upon the continuance of his obligation under the lease to maintain the mills as a condition of his receiving the stipulated £400, and that notwithstanding the *damnum fatale*. They referred to the *Scottish Insurance Co.* v. *Mackintosh*, 9 S. 310, and *Clark* v. *Glasgow Insurance Co.*, 1 Macq. 668.

At advising—

LORD PRESIDENT—This is a case of a somewhat novel and peculiar character, and its chief difficulty lies in determining what principle of law is applicable to the circumstances. It is a case between landlord and tenant. The lease under which the case arises was granted by the late Duke of Hamilton, the father and predecessor of the present Duke, to Alexander Fleming, the father of the defender. It was granted for nineteen years from and after Martinmas 1848, and to this lease the defender succeeded in 1866. The subjects let were the lands and farm of Rouseland, the mills of Kinneil, with the mill lands thereof, and the south part of Falconhouse farm; and the rent of these subjects, though varying year by year with the value of grain, may be taken at from £500 to £600. The

lease went on without any remarkable occurence for the first seventeen years. But in October 1865 the mill of Kinneil was consumed by fire. The landlord declined to rebuild it, and he was fully entitled to do so if he chose, the only consequence being that he was bound to grant the tenant an abatement of rent. The parties were not, at the date when this action was raised, agreed as to what that abatement should be, though the defender now seems to accept the £90 per annum offered by the pursuer. The action, then, is for the balance of rent due, being the rent for the last year of the lease, under deduction of this £90 of abatement. While, on the one hand the tenant admits that the rent is due as stated, on the other hand he makes a counter-claim of £400 in respect of the machinery which was consumed. This claim is supported upon two grounds.

1, That there is a clause in the lease which entitles the tenant to it.

2, That at all events the landlord is bound to pay the sum out of the policy of insurance which it was stipulated should be effected over the subjects.

It appears to me that these two grounds must be considered quite separately, and that much confusion has been introduced into the case by the failure to distinguish them. The question whether, independently of the policy of insurance, the defender has a claim in respect of the machinery destroyed, is one which cannot be affected by the fact that either party had an insurable interest. It depends upon one clause of the lease, namely, that in which the parties arrange the way in which the machinery is to be dealt with; but that one clause must be taken in connection with the rest. The first clause of that part of the lease with which we are more particularly dealing relates to the houses and buildings. The proprietor undertakes to lay out £380 in putting them in good condition, and the tenant undertakes to maintain them and leave them in such condition. The second clause relates exclusively to the machinery of the mill. The tenant undertakes to lay out £800 at least in renewing the machinery, and to maintain it during the lease, and the landlord undertakes to pay £400 at the end of the lease upon taking over the machinery in good order.

The first clause, that about the building, is not expressed in any unusual terms, in fact, though applying in part to the buildings of the mills, its general scheme is that which is ordinarily found in agricultural leases. But the clause regarding the machinery is a very peculiar clause; it is quite separate from the former, and requires peculiar attention.—*(Reads clause quoted supra.)* In this clause the tenant not only puts himself under the obligation to maintain, and repair, and leave the machinery in good order at the end of his lease, but he is absolutely taken bound to create the subject which he is bound thus to maintain in good repair. So that the subject which the tenant is to maintain is one which he himself is to provide. The landlord provides the buildings of the mills, the tenant the machinery. This he is bound to do at an outlay of at least £800, and at the termination of the lease he is to receive back from the landlord one-half of that minimum sum on handing over the machinery in good condition. He himself pays for it out and out at the beginning, and it is estimated that he will get half the value out of it during the currency of his lease, or otherwise that it will be depreciated to the extent of one-half by wear and tear, and he is, therefore, to receive back one-half the value at the termination of the lease. Now there would have been no difficulty in this case if, instead of agreeing to pay a fixed sum, the landlord had bound himself to take it over at a valuation; and I am of opinion that the £400 agreed upon here is just a rough estimate at a valuation, previously agreed upon to save trouble and disputes in the end. I am not able to see that the defender as tenant stands in any different position than he would have done had he undertaken during the currency of his lease to make any additions to the subject—for example to a mansion-house, or stable, or any subject of that sort, and the question is, when the subject including this addition comes to be consumed, what is the principle of law applicable? Now, I apprehend that to a certain extent at least, we are guided to the decision of this case by the maxim *res suo perit domino*—and we must next ask who is or was the *dominus* of this machinery. I feel myself constrained to answer—the tenant. For it must be observed that in the application of this rule, *dominus* has no strict sense of proprietor attached to it. Whoever has an interest in a subject is to the extent of that interest *dominus* of it. For an exposition of this principle I need only refer to the House of Lords decision in the case of *Rannie* v. *Walker*. Now, who had the chief interest in the machinery? I say the tenant. He is to bring it into existence, to maintain it in working order, and to have the use of it during the currency of his lease, and is to exchange it at the termination of that lease for a sum of £400. That appears to me a much larger interest than that of the landlord; for what is he to receive at the end of nineteen years? A subject originally worth £800, but worn by nineteen years' use, and that only upon paying for it what was probably at least its full worth. Not only, then, is the tenant's interest at the date of the fire much the most important, but, what is of more consequence, the landlord's interest has not then emerged, and does not emerge until the conclusion of the lease. The whole present interest at the date of the fire was in the tenant. That the tenant had an insurable interest no one, I think, will doubt, though that is not conclusive on the point; but independently of this, I am very clearly of opinion that the interest was his, and that the machinery accordingly perished to him. If the parties—the fire having taken place at an earlier period of the lease—had agreed to rebuild and restore the subjects, they would have had to do so according to their interest. They must have proceeded upon the footing of each restoring what he had originally furnished—the landlord the buildings, the tenant the machinery. If the opposite view were taken—viz., that the landlord must, in the event of a catastrophe such as the present, restore both buildings and machinery, what would be the position of matters then? Why, the landlord would have no interest or object in setting up the lease again, and carrying it to a conclusion. If he is to replace not only the destroyed house, but the burnt machinery also, how would the interests of parties under the lease stand. Why the landlord would have provided the whole, both house and machinery, and then I suppose it would be maintained after all that the tenant was entitled to his £400 upon delivering up the machinery at the close of his lease. This view would not tend to restore matters under the lease to their former position at all, and would be, in my opinion,

to put a most inequitable construction upon the contract. I am therefore clear that the subject must be held to have perished to the tenant, and I am the more so from the terms in which he is bound to maintain and deliver over the machinery. If he fails to comply with the conditions on this matter he cannot claim his £400. If, for instance, he had allowed the machinery to fall into disrepair and decay, he could not have done so, and if it is accidentally consumed it is just the same, he cannot fulful his part of the contract, and I apprehend that he cannot in that case demand of the landlord to fulfil his. On this ground alone I should have been ready to hold that he was wrong in his contention here.

It remains now only to consider the second ground of the claim, or the demand as founded on the insurance which was effected over the subjects, and kept up under the clause in the lease relating to insurance. Now, it appears to me that this is an insurance effected, and intended to be effected in the interest of the landlord only. The clause referring to it is one very common in leases, particularly in agricultural leases, and it is always construed as being intended to secure the landlord's interest and not the tenant's, and the obligation on the tenant to pay the whole or part of the payments under the policy is only an addition to his rent, and purposely laid upon the tenant in that form, because as the occupant he would be most concerned in the occurrence of a fire. I am therefore of opinion that there is no claim under the policy any more than under the lease itself. If the parties had agreed to rebuild, as I think they might have done, the question would have arisen, Whether, seeing that part of the sum insured under the policy effeired to the machinery, that part when recovered should not be laid out in restoring the machinery? That question, however, does not arise here, and under the circumstances of the case I cannot arrive at any other opinion than that the tenant must bear the whole burden of the loss.

Lord Deas—As I take in some material respects a different view from that just stated by your Lordship, I shall begin by stating precisely what circumstances I consider important to the case. A lease was granted by the late Duke of Hamilton to the defender's father of certain agricultural subjects, including a mill, at a slump rent for the whole. It was agreed by the parties to this lease, as appears from its terms, that in the course of the first four years of its currency the landlord should expend the sum of £380 in renewal and repairs of the buildings; and that these buildings should then be accepted by the tenant as in good and sufficient condition, and should be so maintained by him during the currency of the lease, and so delivered over at its conclusion. It was farther agreed, on the other hand, that as some of the machinery of the mills was old, of imperfect construction, and out of repair, the tenant should expend a sum of not less than £800 in repairing, renewing, and making additions to it, and should thereafter maintain it in good and sufficient repair, and so leave it at the conclusion of the lease, and on doing so, should be entitled to recover from the landlord the sum of £400, being half the stipulated minimum outlay. The lease likewise contained an obligation upon the tenant to insure the whole buildings and machinery to the amount of £1200, he paying the whole premiums, and being entitled to recover one-half from the landlord, the effect of which was just to add the amount of the premiums to his rent. The tenant was himself an experienced miller and mill wright, as well as agriculturalist, and he expended (as his son says) upon the machinery several hundred pounds over and above the £800 stipulated. Mr Boyd, the Edinburgh millwright, who has habitually repaired the machinery, estimates the tenant's expenditure at £1300; and Mr Wilson, another witness, estimates it at between £800 and £1000. The work was done by days wages, under the superintendence of the tenant himself and his son, and the men employed on the farm assisted in the work, all to the full satisfaction of the landlord and his factor. In place of the insurance being effected upon the buildings and machinery by the tenant as stipulated in the lease, the landlord took it into his own hands, and merely recovered half the premiums from the tenant. Of the whole sum secured under the policy, £200 only was allocated to the machinery of the mills, and £620 to the buildings of the mills, the remainder effeiring to the other buildings about the farms. In November 1865 the mills were burnt down, and the whole machinery was destroyed, with the exception of some large wheels worth about £200, which of course go to the landlord, and one of which is now in use by the present tenant for his thrashing mill. Besides these there was saved only about £15 or £20 worth of iron, which likewise goes to the landlord. The tenant had, up to the time of the fire, fulfilled his obligations entirely, for not only had he put the machinery in order originally, but during the five years preceding the fire he had been spending at the rate of £40 per annum in maintaining it in repair, and in 1865, at the time of the fire, it was worth a great deal more than £800. After the fire the landlord received from the insurance office, in virtue of the policy which had been effected, the sum of £820, that is to say £620 for the mill buildings, and £200 for the machinery. In February 1866 the present defender, who had succeeded to the lease, wrote to the landlord's factor as to the course to be pursued in restoring the mills, and as to his claims in consequence of their destruction. To this and other applications no answer was returned, and the mills were never restored. It appears indeed that the affairs of the Duke were then in an embarrassed condition, and did not admit of the requisite outlay being made. In place of that, the landlord has allowed a deduction of £90 a-year from the rent since the fire, as compensation for the loss of the mills; and the question now is, whether at the conclusion of the lease in 1867 the tenant was, or was not, entitled to recover from the landlord the £400 agreed to be paid by the landlord in terms of the lease. The terms of the clause containing this obligation on the landlord are as follows—(*reads the clause retating to the machinery, quoted supra*). The Lord Ordinary has found that the tenant is not entitled to the £400 stipulated to be paid him, on the ground that he did not, in consequence of the fire, leave the machinery in good and sufficient order: but that he is entitled to one-half of the £200, the sum secured by the policy over the machinery and wright-work in the mill. The landlord in this way would get the other half of the £200 recovered from the insurance company, and the remnants of the machinery, and also his rent, under deduction of a small allowance made during the last year of the lease. Now I agree with your Lordship that there has

been some confusion introduced into this case, in consequence of mixing up the rights of parties under the policy of insurance, with their rights under the clause of the lease relating to the machinery.

We have, I think, three questions to determine in deciding the case—First, To whom did the property of the mill and machinery belong? second, Who maintained it during the lease? and third, For whose benefit was the insurance effected? The answers to the first two are alone sufficient, I think, to dispose of the question whether the tenant is entitled to the £400 claimed.

On the first point, I am of opinion that beyond all doubt the property of both mills and machinery during the lease belonged to the landlord. The tenant did agree indeed at the outset to put in the machinery, and the landlord, on the other hand, to expend a certain sum upon the buildings—the reason for that arrangement being that the tenant was an experienced miller and wright, and that it was expedient for both parties that he should undertake the replacing of the old and worn out machinery. But although all this was the case, although the tenant agreed to lay out money upon one part of the subjects, and the landlord upon the other, I can still see no distinction introduced thereby into the right of property in the two parts which were thus differently dealt with. I can see no doubt about that at all. The tenant furnished the machinery on no other footing than he maintained it. He both furnished and maintained it as the property of the landlord, and the property of it never for one moment belonged to himself. This answers the first and second questions sufficiently. But, on the other hand, however decidedly the property in the machinery always was in the landlord, there is no doubt that during the currency of the lease the tenant had a great if not the main interest. This interest, however, was a totally different one from the right of property. The tenant's interest was in the profits he was likely to make during the lease, and that interest was an insurable one—he might have gone to an insurance office and insured it. But did he do so? We have come to the third question, and we see clearly that, so far as the policy of insurance, effected under the clause of the lease, goes, the landlord's interest was the only one secured. If there were any doubt about that the terms of the policy would set it at rest. Consequently, the half of the premium which the tenant undertook to pay was merely an addition to his rent. The policy was entirely for the benefit of the landlord, because it was the landlord's interest in the property which was secured, and not the tenant's interest in his profits. What the tenant loses is what he did not insure, namely, his profits during the remainder of the lease. Now the fire might have happened at any time—near the beginning, for instance, instead of near the end of the lease—but that would not have mattered; the subjects under any circumstances would have perished to the proprietor, that is, to the landlord. He had insured his property, and recovered the amount insured for from the company; the tenant had not insured his interest, and had not any right to share in the proceeds of the landlord's policy. Had the landlord chosen to restore the machinery, the tenant would have had to maintain it till the conclusion of the lease, and would have had his profits. Now, could it be said that if the landlord had insured the machinery for its proper value, viz., £800 or £1000, and had recovered that sum, he would have been entitled to put the whole of that into his pocket, and not pay the tenant his £400? I cannot think so. It was the landlord's own doing, insuring the machinery only for £200. The tenant had no title to insure the property of it. The landlord puts in his pocket the £200 for which he has insured, and recovers what is saved from the wreck of the machinery, and he is bound, in my opinion, to pay the tenant his £400. This is *ex contractu*, and it must not be looked upon as in any way a valuation. I have no doubt that if the landlord had rebuilt, and the tenant maintained the machinery to the conclusion of the lease, the tenant would have been entitled to his £400; and if so then, why not now? The only question that presents any difficulty is, Whether the maintaining and handing over the machinery in a good and sufficient state is a condition precedent, a condition which must be fulfilled to the letter, if the tenant is to have right to the stipulated £400—and failing which he forfeits it. The construction required by the affirmative answer to this question would be a most extraordinary one, and one which the agreement will not bear. It was with the machinery just as with the houses. Had they been burnt down, would it have been reasonable to say that the tenant was bound to continue maintaining them in good and sufficient repair to the end? Most certainly not, and the same applies to the machinery. The tenant fulfilled his obligation so far as it was possible, and a *damnum fatale* prevented him continuing to do so to the end. The whole matter then resolves itself into the question, to whom did the subject perish? I have answered that; and in my humble judgment the £400 claimed is due both in law and justice to the tenant.

Lord Ardmillan—In this case I have the misfortune to differ from your Lordship in the chair. I have not been able to arrive at the same conclusion as the Lord Ordinary; nor do I think that the ground on which he has proceeded, and in respect of which he has divided between the pursuer and defender a sum of £200, contained in a policy of fire insurance on the machinery of Kinneil Mills, is sufficient to sustain a decision on the law of the case, or to meet the equity of the tenant's claim.

The facts of the case have been already explained; and I am not aware that there is any material difference of opinion in regard to them.

I shall not repeat the statement of them. But I shall briefly explain my views of the principles which, with reference to these facts, ought, in my opinion, to govern the decision.

The action is for rent, under deduction of £90 a-year, as the agreed on proportion of rent effeiring to the mill which was destroyed by accidental fire.

The tenant pleads a counter claim, in respect of an obligation by the landlord to pay the tenant £400 at the end of the lease.

It is on the construction and effect of this obligation, with reference to the facts of the case, that the decision of the Court must depend.

The tenant fulfilled honourably and entirely his obligation. He expended on the machinery of the mill above £800; and when the mill and machinery were destroyed by accidental fire in November 1865, the machinery was the property of the landlord, and is proved to have been worth more than £800. This has been expressly found by the Lord

Ordinary; and I think that the finding is according to the facts as appearing on evidence. The tenant thus fulfilled both his obligation to expend and his obligation to maintain in repair. The fire —for which neither landlord nor tenant was to blame—was a misfortune—a *damnum fatale*. But for that misfortune, the landlord's obligation to pay the £400 would have been beyond all doubt. The real question is, the effect of this fire, which arose from accident, and not fault, on the respective rights of these parties.

I agree with your Lordship, and with Lord Deas, in thinking that the question has been needlessly complicated by introducing the subject of fire insurance. The case may be most safely and satisfactorily decided apart from that circumstance. Neither landlord nor tenant was bound to rebuild; and, apart from special obligation, neither party was bound in law to insure. The obligation to insure contained in the lease is in favour of the landlord; the payment of half the premium by the tenant was just an additional rent. The whole subjects insured, including the machinery, did, in my opinion, belong to the landlord. The insurance was entirely on his property; the policy of insurance was his,—effected in his name, and retained in his hands; and the sum in the policy was recovered by him after the fire. I am of opinion that the landlord is entitled to the whole of that sum, and also entitled to such machinery as was left undestroyed.

But, viewing the case, as I think it ought to be viewed, apart from the specialty of the fire insurance, I am of opinion that the landlord has not been released from his undoubted obligation to pay to the tenant at the end of the lease £400,—the tenant having expended £800 at or near the beginning of the lease in erecting machinery on the mill. The machinery so erected, and representing £800 of the tenant's money, became at once and entirely the property of the landlord. But that was qualified by an obligation by the landlord to pay the tenant £400 at the end of the lease, not to buy the machinery, but in terms of the contract. The only thing that could free the landlord from that obligation to pay £400 was the tenant's failing to keep the machinery in good repair. That did not occur. The fire was an accident. The tenant failed in no duty. When the fire occurred the landlord's obligation to pay £400, and the landlord's right to the machinery, or to the sum in the policy as a surrogate *pro tanto*, was in full force. The effect of the fire was to destroy the property on which the tenant's £800 had been expended, and to give to the landlord the surrogate in the policy. *Res perit suo domino*. The landlord was not bound to restore. The tenant was not bound to continue to pay rent for a subject which had perished.

But I cannot discover any rule of law, and still less can I discover any principle of equity, on which the landlord can be held released by the accident of fire from an unquestionable obligation resting on him,—a pecuniary obligation, being the counterpart of the tenant's pecuniary obligation to expend £800,—and not having been discharged by any failure on the part of the tenant to keep the machinery in repair.

I do not think this a case of an anticipated valuation, at which the landlord engaged, at the end of the lease, to take over the machinery. On the contrary, I think the machinery was the landlord's from the beginning. The pecuniary obligation of the landlord is separate, and is, in my opinion, now exigible from the landlord, because the tenant fulfilled the counterpart, and did not fail to keep in repair what he had erected at a cost of £800.

It has not been pleaded that the tenant was bound to restore or to do anything more than he did. I think he was not.

It is asked, Was the landlord bound to restore the machinery? I think not. He might do so if he thought fit, but he was not bound. If there was an insurance, the sum in the policy would enable or assist him to restore, if he wished to restore. If there was not an insurance, the restoration would at least revive his right to rent, and the tenant would be bound to maintain in repair the restored machinery.

But all this would leave untouched the outstanding obligation on the landlord to pay the tenant £400 at the end of the lease, in respect of the tenant having actually expended £800 on machinery, which, as soon as erected, became the property of the landlord.

I have nothing more to add, than to express generally my concurrence in the opinion of Lord Deas.

Lord Kinloch—I am of opinion that, in regard to the sum of £400 claimed by the defender, the interlocutor of the Lord Ordinary is erroneous; and that the defender Fleming is entitled, in right of the tenant, to claim against the landlord and his trustees the sum of £400 sought by him.

The position of the parties under the lease I consider to be substantially this. It was agreed that good machinery, to the value of £800, was to be put into the mill at the joint cost of landlord and tenant, each advancing £400. The tenant was to pay £400 out of his own pocket, this being just part of the consideration he paid for the lease, exactly as he might have paid a *grassum* to that amount. The landlord's £400 the tenant was to advance for his behalf, and to receive repayment at the end of the lease. This was just in substance a loan by the tenant to the landlord, bearing no interest during the lease, and repayable at its termination. The machinery which this advance was to purchase became, I think, entirely the landlord's. It could not have been touched by the creditors of the tenant, nor made over by him to a third party. It was by express stipulation to be delivered over to the landlord in good condition at the end of the lease.

A fire occurred in the seventeenth year of this nineteen years' lease, by which the mills and machinery were nearly altogether destroyed—certainly rendered wholly unserviceable. The question now raised is whether this cancelled the obligation of the landlord to repay to the tenant the sum of £400 advanced for the landlord's behoof? I am of opinion that it had not this effect. The destruction of the mill and machinery was simply the destruction of so much of the landlord's property. The loss fell on the landlord according to the well-known maxim, "*Res perit domino.*' But I do not think that this affected the landlord's obligation to repay to the tenant the advance on his behalf by which the property was acquired. One man lends to another a sum of £400 to buy or build a house. The house is destroyed by fire, and the owner suffers the loss. But this does not relieve him from his obligation to repay to the

lender the sum of £400 which he borrowed. It would be extravagant to say that it did. So, I think, exactly in the present case.

It is true that, by the lease the tenant was bound as to the machinery "to keep up and maintain the whole in good and sufficient repair and working order, and on the tenant or his foresaids leaving the whole of the machinery so repaired, renewed, or added to, in good working order and sufficient repair, the proprietor agrees to pay the tenant or his foresaids the sum of £400 at the end of the lease." It was maintained that to leave the machinery on the premises at the end of the lease was a condition precedent of the tenant obtaining this £400. In this contention I think a great deal more than its just effect is attributed to the phrase "to leave." I do not think the obligation to leave is different from or anything additional to the obligation to keep up and maintain. If the machinery was kept up and maintained it would be necessarily left in good order at the end of the lease. The obligation on the tenant I consider no greater than it would have been had he simply been taken bound to keep and maintain the machinery during the currency of the lease, which, I think, implies merely an obligation to maintain it in repair whilst it exists. I think the tenant clearly not bound to leave the machinery, in all circumstances, on the ground. He is only bound to keep it in repair whilst it is there. He is not bound to replace it if destroyed by accident. This would be a very serious obligation, of which there is not a vestige in the lease. If the landlord replaced the machinery, the tenant's obligation to maintain it would revive, and he would have no claim for abatement of rent. If the landlord did not replace it, no obligation to maintain lay upon the tenant, because the subject of the obligation was gone. It is not said that the tenant failed in his obligation to keep up and maintain the machinery so long as it existed. When the machinery perished by the fire the obligation fell to the ground from the very nature of the case. But all this did not interfere with the landlord's obligation to repay to the tenant the sum of £400 he had borrowed from him in order to purchase the machinery.

I cannot look upon the tenant's claim for this £400 as involving anything else than a personal debt by the landlord. It was not a debt secured over the machinery; though I do not think that, if it had been, the case would be different; as the destruction of the security would not involve the loss of the debt. Far less was it a claim made dependent by the contract on the continued existence of the machinery in all circumstances. To attach such a condition would have been a serious matter for the tenant, requiring a very special covenant; and I consider none such to have existed. The machinery was wholly the landlord's. The tenant was not *dominus* of any part of it. He had merely a right of use in it during the subsistence of the lease. This might undoubtedly cease, and the lease, if no other subject was comprised in it, might come to a termination through the fire. And this, indeed, it was made substantially to do to a certain extent, by an abatement of rent corresponding to the value of the mills and machinery being allowed to the tenant. But the machinery, considered as property, perished wholly to the landlord. The tenant was not the less entitled to claim from the landlord the personal debt incurred by him in order to secure its original acquisition.

I have hitherto regarded the case apart from all consideration of the insurance effected on the machinery. I have now only to say that I think the legal relation of the parties in no way affected by the insurance. The insurance of the subjects to the extent of £1200 provided for by the lease (of which the landlord chose to allocate £200 to the machinery), was entirely an insurance for the landlord's benefit. Though half the premium was to be paid by the tenant, this was in substance nothing more than so much additional rent, just as the payment of so much of the landlord's taxes might be. The policy was to be taken in the name of the landlord; and he, and he only, was entitled to recover on the policy. The tenant was not entitled to receive a single farthing of the sum paid by the insurance office. I consider the whole arrangement of the insurance to have been nothing else than an arrangement by the landlord for his own security. It was in his power to make the security greater or less at his pleasure. If he had insured the machinery at its full value of £800, he would have recovered from the insurance office enough to satisfy the tenant's claims, and to put £400 into his pocket—in other words, would have placed himself in his originally proposed position, of getting, in money's worth, the sum of £800, *minus* the sum of £400, which he required to expend to gain it. That he did not so arrange the insurance cannot affect the claim of the tenant against him. The landlord only recovered from the insurance company the sum of £200, in consequence of his own limitation of the sum placed on the machinery. I think he is not bound to communicate to the tenant any part of this recovery. But I consider him clearly bound to pay to the tenant, or the tenant's heir, the sum of £400 for which he had become personally obliged; and his liability for which I do not think he has stated any sufficient ground for shaking off.

Agents for Defender and Reclaimer — Scott Moncrieff & Dalgetty, W.S.

Agents for the Pursuer and Respondent—Tods, Murray & Jamieson, W.S.

Saturday, December 24.

ALEXANDER FERGUSON *v.* KENNETH MACKENZIE (JOHN FERGUSON'S JUDICIAL FACTOR).

Process — Summons — Relevancy — Reparation — Issues — Mora. Circumstances which were found irrelevant to sustain an action of damages, at the instance of a surviving partner, against the judicial factor upon the estate of his deceased co-partner.

Held that mere questions of disputed management and general disagreement were not sufficient to ground an action of damages between partners, especially where there had been manifest *mora* on the part of the pursuer.

This was an action of damages brought by Alexander Ferguson, one of the partners in a sugar refinery in Leith, against the judicial factor upon the estate of his deceased brother, John Ferguson, the other partner in the said firm.

The pursuer's condescendence set forth that he and his brother had carried on business in Greenock up to the year 1852, and that in that year they had, under the firm of J. & A. Ferguson, taken a lease of the Leith Sugar Refinery, which