

for saying that because she is entitled to terce out of securities on Scots heritage, she is not entitled to share in what is moveable, and in which she is entitled to share by the law of the domicile of her deceased husband.

LORD YOUNG—I am substantially of the same opinion. I think it is too clear to be reasonably disputed that the succession to the moveable estate must be governed by the law of Ireland, where the deceased was domiciled at the time of his death. We are told that by the law of that country the deceased's widow is heir in moveables to the extent of one-half. I think that is so with reference to the bonds—that with respect to such of these sums contained in the bonds as are moveable estate she is entitled to one-half. But then part is not moveable, to this extent, that now, as before 1868, the widow is entitled to her terce. The law of Scotland governs Scots heritage, and the law of Scotland gives the widow terce out of bonds secured on the land in Scotland. She is entitled to that according to the law of Scotland, and she is entitled to her moveable estate according to the law of Ireland.

LORD TRAYNER—I agree. The heritable bonds in which Thomas Train was creditor are moveable as to his succession, but remain heritable in a question as to terce. The second party, his widow, is entitled to terce out of heritable bonds according to the law of Scotland, and that law must regulate the rights of parties in heritage in Scotland. But the balance of the creditor's right in the bonds is moveable property. The law of domicile must determine who is entitled to that. By that law (as it appears here, the law of Ireland) the widow is an heir in moveables, and is entitled to half the moveable property, which includes the balance on these bonds after deducting terce.

LORD MONCREIFF—I am of the same opinion. I think the leading purpose of the enactments in secs. 117 and 119 of the Act is to provide that after the date of the Act sums contained in heritable bonds are to be treated as moveable for the purpose of succession. It is declared that the sum in the bond shall belong to the heirs *in mobilibus* in the same manner and to the same effect as such security would, under the law and practice now in force, have belonged to the heirs of the creditor. If the clause stopped there the whole sums would have been divided according to the law of Ireland, but then the clause goes on to provide that such enactment shall not affect terce. That is a provision in favour of the surviving widow, and there is nothing else to exclude any right she may have as one of the heirs *in mobilibus* of her husband. Therefore I think that, though it seems as if she was gaining an undue advantage, she is only getting what is actually given to her by the enactment.

The Court answered the first question in the affirmative.

Counsel for the First Parties—Campbell, Q.C.—Cullen. Agent—F. J. Martin, W.S.

Counsel for Third and Fourth Parties—Sol.-Gen. Dickson, Q.C.—Younger. Agents—J. W. & J. Mackenzie, W.S.

Thursday, November 23.

FIRST DIVISION

(Without the Lord President).

[Sheriff of Renfrew.

ARMOUR v. M'KIMMIE'S TRUSTEES.

Landlord and Tenant—House Becoming Uninhabitable—Right of Tenant to Leave—Duty of Tenant if Defect Remediable—Lease.

If a house becomes uninhabitable the tenant is entitled to treat the contract of lease as rescinded, and to remove. If, however, the defect is one which could be remedied easily, and in a short time, the tenant is bound to give the landlord an opportunity of applying the remedy, and to await the event if the landlord proceeds to do so. Evidence on which *held* that a house had become uninhabitable, and that the landlord had failed to undertake such remedial measures as would lay on the tenant the obligation to continue the lease.

Thomas W. Armour, ship-chandler, became, in 1895, tenant of a house at No. 21 Queen's Crescent, Cathcart, belonging to the trustees of the late Mrs William M'Kimmie. He renewed his tenancy from year to year, and finally took the house from Whitsunday 1898 to Whitsunday 1899 at a rent of £28.

On 17th October 1898 Armour removed from the house. Prior to this the following letters had passed between him and the factor for the landlords:—

“21 Queen's Crescent, Cathcart,
“Mr Hitchcock, 16th Sept. 1898.

“c/ Mr D. Munro, Hope St.

“Sir—Re-letting house at above address—Not having heard from you if you have succeeded or not, and as the insanitary state of the house is getting worse, and you don't seem to be taking any steps to make it better, kindly grant me a letter that I can leave the house as soon before November term as possible, and if your intentions are to try and make the house right to live in, this will give you an opportunity and time for so doing—before an incoming tenant. I am quite willing to pay the rent and taxes up to November term, but after that I decline to do so.—Yours truly

“THOS. W. ARMOUR.”

“39 Hope Street, Glasgow, 19th Sept. 1898.
“Thos. W. Armour, Esq.,

“21 Queen's Crescent, Cathcart.

“Dear Sir—Yours of the 16th inst., addressed to Mr Hitchcock, duly received. I have not yet succeeded in sub-letting your house, but am doing the best I can. I would suggest the house should be adver-

tised. The cost would be trifling, 6d. or 9d. each insertion; and I will be glad to have your authority to do this. I cannot admit that the house is in an insanitary condition or unfit for habitation, as you try to make out. I have instructed my tradesmen to proceed at once to put in a few extra gratings at front and back to cause a stronger current of air under the floors.—Yours truly
“DANIEL MUNRO.”

“21 Queen's Crescent, Cathcart,
“D. Munro, Esq., Hope St. 21/9/98.

“Dear Sir—Your favour of 19th inst. duly to hand. With regard to certain statements therein, particularly your assertion that the house is not in an insanitary condition, I affirm it is, and also prejudicial to the health of myself and family. Your remarks are quite arbitrary, as I surely know better than you the condition that the house is in seeing I live in it. The house being damp is nothing new to me, but the fact is it is daily getting worse. My furniture is partially destroyed, and bears unmistakable indications of the insanitary condition of the house. An inspection of the house will be quite sufficient to prove this to any impartial individual. Your own servant can testify that my chairs were covered with green mould. I have brought in two professional gentlemen, and they pronounce the house unfit for habitation; and I certainly hold you responsible for any damage done resulting from the condition of the house.—Yours respect.,
THOMAS W. ARMOUR.”

M'Kimmie's trustees brought a petition in the Sheriff Court of Renfrewshire on the averment that Armour was removing his furniture, praying that the said furniture should be brought back and sequestered in security and for payment to them “(1) of the sum of £14 sterling, being the current half-year's rent of said premises, to become due and payable at the term of Martinmas next 1898, with the legal interest thereon from the said term till payment, and with expenses; and (2) of the like sum of £14 sterling, being the half-year's rent thereof, to become due and payable at Whitsunday next 1899, with interest as aforesaid from the said term of Whitsunday.”

Armour lodged answers, in which he stated that he had been compelled to remove owing to the damp and unhealthy state of the house; and pleaded—“(1) The pursuers having failed to keep the house tenanted by the defender suitable for his occupancy are debarred from suing for rent, and the defender should be assoilzied, with expenses. (2) The defender having been compelled to remove from the house owing to its condition, as condescended on, pursuers are not entitled to recover rent therefor, and defender should be assoilzied, with expenses.”

A proof was taken, the import of which is fully stated in the note to the interlocutor of the Sheriff-Substitute, *infra*.

On 14th February 1899 the Sheriff-Substitute (HENDERSON) pronounced the following interlocutor:—“Finds in fact (1) That the defender originally became tenant of the pursuers' house, No 21

Queen's Crescent, Cathcart, as at Whitsunday 1895, and that he renewed his tenancy from year to year, and at Candlemas 1898 he re-took the house until Whitsunday 1899; that some six months after entering into occupation of the house at Whitsunday 1895, the defender complained to Mr Hitchcock, the clerk in pursuers' factor's office who had charge of the letting and management of the house, that the house was damp and had a smell in it; (3) that certain slight operations in the way of supplying larger ventilating gratings than before existed, were carried out in the course of the following six months on behalf of the pursuers; (4) that matters continued much in the same way during the two subsequent years of the defender's occupation of the house, during which time defender, by himself or his wife, complained of dampness, smells and a defective vent in the parlour, to Mr Hitchcock, and also by writing to and calling upon Mr Munro, pursuers' factor; (5) that in February 1898, when he was retaking the house for another year, the defender again complained to Mr Hitchcock of dampness in the house, when a promise was given that the house would be put right, but that until the dates subsequently mentioned nothing was done; (6) that towards the end of August or beginning of September 1898 the defender and his wife became aware that the dampness and the offensive smell were becoming more marked in the house—particularly in the parlour where the defective vent was—and as both defender and his wife, but more especially his wife, had been suffering from illness, which their family doctor, Dr Murray Lyon, assured them was attributable to, or at all events aggravated by, the state in which the house was, the defender went to Mr Hitchcock and stated that unless the house was put in order at once he had resolved to leave it; (7) that on 9th September defender signed a printed form permitting the factor to endeavour to sub-let the house for the period between Martinmas and Whitsunday; (8) that on 14th September the house and space below it were visited and inspected by Mr Hitchcock and a mason on behalf of the pursuers and more and larger gratings put in below the flooring; (9) that on 19th September the house and cellars were inspected by Mr Ross, the sanitary inspector at Pollokshaws, who found ‘the house musty and damp, and I felt a distinct smell of dry rot,’ and stated that it was dangerous to health; (10) that subsequent inspections were made of the house by experts and others on behalf of the pursuers and defender respectively, including the Medical Officer of Health for Renfrewshire, and for the Cathcart Parish Council, the result of whose evidence—as explained in the subjoined note—is that, in my opinion, the house was not in a fit state for habitation in the end of September and beginning of October; (11) that the pursuers' factor having persisted in stating that after more and larger gratings had been put in and the vent in the parlour made to draw (which was not until after 29th September) nothing more

required to be done, and not expressing any intention of carrying out any more improvements on the house, the defender, on or about 17th October 1898, removed himself, his wife, and son from the house, under the advice of his family doctor—who had also inspected the space below the house: In these circumstances, and for the reasons given in the subjoined note, Finds in law that the defender was entitled to leave the pursuers' house, and that he is accordingly not liable in the half-year's rent from Martinmas 1898 to Whitsunday 1899 now sued for: Finds, however, that the defender is liable to the pursuers in the quarter's rent from Candlemas to Martinmas 1898, being £7 sterling: Grants decree against the defender for the said sum of £7 sterling: Finds the defender entitled to three-fourths of the expenses incurred by him in the action: Allows an account thereof to be given in, and remits," &c.

Note.—"This is a somewhat narrow case—at all events, I am not aware of any case where a tenant has been held justified in leaving a house in circumstances where although he and his family had suffered in health, it had afterwards been discovered that the condition of the house was remediable without great expense being incurred, or long delay necessary to carry out the improvements. The circumstances of this case, however, are peculiar. In the first place, it is proved, I think, by the defender, his wife, and Mrs Henderson (a tenant in the same crescent and under the same factor), that apparently complaints about houses made to Mr Hitchcock are seldom, if ever, listened to, and even if they are listened to, what is complained of is not attempted to be put right except after long and unreasonable delay. Secondly, there can be no doubt that it has been distinctly laid down in the Court of Session that where a tenant is aware of a defect of a serious nature in the house occupied by him he cannot recover damages for any loss or injury which he may incur through that defect unless he removes from the house—*Henderson v. Munn*, July 7, 1888, 15 R. 859, and *Webster v. Brown*, May 12, 1892, 19 R. 765.

"Assuming these two propositions to be correct, look at the extremely awkward position in which the defender was placed. He had an experience of upwards of three years to the effect that his complaints about defects in this house were either disregarded altogether or only the most perfunctory efforts made to remedy the defects. On the other hand, he finds his own health, and more particularly the health of his wife, affected while living in the house, and he is warned by his family doctor that it is the state of the house that thus injuriously affects their health. He and the doctor go down to the space below the house, and the doctor assures him it is in an insanitary condition. What is a man to do under such circumstances? He makes a renewed complaint and is met by larger gratings being inserted and a denial of any insanitary conditions.

"I must say that I think under the cir-

cumstances he had no choice except to take another house and move into it.

"It is argued for the pursuers that the defender was too hasty in leaving his house, as they were prepared to put everything right. But what confidence could he have in people who denied any fault and yet pretended to be ready to amend anything complained of?

"It must be borne in mind, also, that no serious steps were taken, in spite of defender's giving up the house on 9th September, until the sanitary authorities had reported against the house on 23rd and 29th September.

"Of course this view of the defender's rights in the circumstances depends entirely upon whether there were reasonable grounds for his doctor's opinion as to the state of the house and its effect upon the health of the family. I put aside in the meantime all question as to injury to furniture, for which at present nothing is claimed, but into the state of which some inquiry must be made in order to find out the truth of the evidence.

"As usual in cases of this sort, the evidence, especially of professional men and experts, is most contradictory.

"A little analysis of the evidence of the doctors, however, goes a long way to help to a satisfactory conclusion as to the true facts. Dr Murray Lyon had already diagnosed the cause of his patient's illness before he descended into the space below the house.

"Dr Chalmers and Dr Brown, who certainly take a most favourable view of the state of the house, never troubled themselves to go down below, and while they each admit a slight musty or damp smell, the one attributes it to open windows, while the other says it arose from shut ones. On this point a piece of real evidence comes in with rather striking effect to shake the optimistic view which these gentlemen take of the house. If the house was in the state of dryness and perfection to which they speak, how is it that, entirely unprompted, the vanman James M'Graw, who took away the carpets and rugs to be cleaned, added to his receipt for them 'damp and smelling?' This report is also supported by the letter from the laundry.

"Dr Campbell Munro's evidence is as carefully given as the statement of a professional man in such a responsible position as he holds ought to be; but uncoloured as it is, I cannot help thinking that he would have approved of the defender leaving the house when he did.

"The sanitary inspectors are all practically at one, and all diagnose dry rot, and believe dry rot to be injurious to health.

"The pursuers' witnesses, with the exception of Dr Campbell Munro and M'Kinlay, appear to me to have attempted to make out too good a case. According to them there was absolutely nothing to be said against the house.

"The witnesses for the defender on the other hand, who, unlike the pursuers' witnesses (exclusive of the medical men), are all independent, distinctly depone to an

extremely unpleasant if not actually seriously dangerous state of the house, such as would justify a tenant leaving it, if the objectionable elements were not at once removed.

"In these circumstances it appears to me that this case must be decided, not upon what has been done to the house while or after the defender was leaving it, but by what must be held to have been his reasonable belief at the time when he did leave.

"If I am right in thinking so, then my opinion is, that looking to the treatment which he had learned to expect from his factor, the discomfort and ill-health from which he and his wife were suffering, and the strongly expressed opinion of his family doctor, this defender was entitled to leave this house when he did.

"I cannot, however, liberate him from his original proposal to pay the quarter's rent up to Martinmas. This, unfortunately, affects the question of expenses. I doubt, however, if his position on record as regards the quarter's rent went far in making the pursuers go on with the action, and certainly it did not affect any of the evidence which was adduced.

"As, however, the defender has been unsuccessful as regards a third of the subject-matter of the action, it seems only just that he should be mulcted in some of his expenses.

"I have accordingly only found him entitled to three-fourths thereof."

On 17th April 1899 the Sheriff (CHEYNE) pronounced the following interlocutor—"Sustains the appeal: Recals the interlocutor of the Sheriff-Substitute of date 14th February last: Finds, in fact—(1) That in February 1898 the defender retook for a year from Whitsunday then ensuing, at the rent of £28 payable quarterly, a ground floor house at 21 Queen's Crescent, Cathcart, which he had occupied under the pursuers since Whitsunday 1895; (2) that while at various times during his tenancy the defender complained to the factor that the house was somewhat damp and had a bad smell, no serious inconvenience appears to have been felt by him till last summer, when the dampness and smell became, particularly in the parlour, more marked, and indeed intolerable; (3) that about the middle of last September, being advised by his doctor that his wife's health was suffering from the condition of the house, the defender intimated to the factor that he did not intend to pay rent beyond Martinmas, and authorised him to endeavour to sub-let the house as from that term; (4) that while willing to assist in finding a sub-tenant (which, however, he was unsuccessful in doing), the factor disputed the defender's right to abandon the house, and in the latter part of September and beginning of October he had some additional ventilating gratings put in below the house, and also had an obstruction which had been preventing the parlour chimney from drawing properly, removed; (5) that the operations just mentioned greatly improved the condition of the house, and would probably have obviated all ground of complaint; but

without waiting to see the effect of them, the defender removed from the house on 17th October; (6) that the defender has failed to prove that the house was at the date of his removal from it not in a tenable condition; (7) that this petition for sequestration was presented on 17th October, but by arrangement the sum concluded for being a year's rent, was consigned by the defender in the hands of the Clerk of Court, and in consequence of that the warrant to sequester was not executed; and (8) that it is admitted by the pursuers that they were in error in concluding for a full half-year's rent, the defender having on 19th August last paid the rent for the first quarter of the current year: And as the legal result of these findings—Finds that the defender is now liable for (a) The sum of £7 sterling, with legal interest thereon from the term of Martinmas last till paid, and (b) the sum of £7 sterling, with legal interest thereon from 15th February last till paid, and that he will, on 15th May next, be liable in another sum of £7 sterling, being the quarter's rent which will then become due: Grants warrant to and authorises the Clerk of Court to make payment to the pursuers or their agent in terms of the foregoing finding out of the consigned money: Finds the defender liable in the pursuers' expenses as these may be taxed on scale 1: Allows the pursuers to give in an account of their expenses framed in that scale; and remits," &c.

Opinion—"Owing to the extremely contradictory character of the evidence, the case is a most unsatisfactory one to dispose of, and it is impossible for me—especially as I have the misfortune to differ from the learned Sheriff-Substitute—to feel much confidence in the correctness of the opinion which, after full and anxious consideration, I have formed, and which is adverse to the defender.

"I may remark at the outset that I am with the defender up to a certain point, for I consider it to be proved that he had, in the middle of September last, serious and well-founded ground of complaint, and if nothing had been done to remedy matters before he left the house a month later, my verdict would certainly have been in his favour. The issue in the case, however, is whether the house was in an untenable condition at the date when he abandoned it, and that issue I find myself unable to affirm.

"In the view which I take of the case it is important to notice that the witness Hyslop, who rented the house from 1887 to 1890, and again for the year preceding the defender's entry to it in 1895, found no occasion to complain of it being damp; and it has further to be kept in mind that the defender, while now and again complaining of it being somewhat damp and having a musty smell, does not appear to have suffered any serious inconvenience, or to have thought much of the matter during the first three years of his tenancy, and that it was only during last summer that the damp and smell began to be intolerable. In these circumstances one is led to inquire

what it was that produced the access of dampness and increase of smell which suddenly manifested themselves at that time, and one is, moreover, inclined to suspect that they were produced by some special cause which did not exist previously. Now, the theory presented by the defender and his witnesses is, that the cause is to be found in the state of the ground below the house, which, it is stated, was damp and littered with rubbish, such as rotten chips of wood, and in the fact that a few of the uprights in the basement upon which the joists rested had a fungoid growth—called by some of the witnesses ‘dry rot’—visible upon them. The dry rot, however—if it was dry rot—appears to have been considerable in amount, and when I find Mrs Armour (defender's wife) candidly admitting that, though her carpets were damp, the wooden floors on which they had lain were apparently dry—a statement which is corroborated by Drs Chalmers and Brown—and observe that a well-known sanitarian like Dr Campbell Munro evidently attached little importance to the condition of the basement as seen by him on 28th September (by which time, however, the additional ventilators had been put in), I have a difficulty in holding that the damp and smell with which the defender was troubled last summer, and which were admittedly most felt in the parlour, came up to any material extent from below, more especially as the proof discloses, as it seems to me, another cause to which they may equally well be attributed, and which did not exist previously. The cause I refer to is the substitution by the defender of a coke fire for a gas fire in the parlour. It is certainly somewhat remarkable that this change, which was made because the gas fire did not give out enough heat, and which, I need hardly say, the defender was quite entitled to make, was nearly synchronous with the marked increase in the damp and smell, and keeping in view that the parlour vent was then obstructed, I believe that it is quite sufficient to account for that increase. But so far as attributable to that cause, the mischief would be cured by the removal of the obstruction which had, apparently for years, kept the parlour chimney from drawing, and from serving, as it should have done, as a ventilating shaft to the room, and we have it from Mr Armour that the men sent by the factor found that the obstruction was caused by a slate which was lying across the chimney-head, and which they of course took away. Mrs Armour says that the men were at the vent two or three days before she and her husband left the house, but Mr Hitchcock states that it was on 3rd October that the vent was put right, and if the latter be the true date one can quite understand how at their visit on 15th October Drs Chalmers and Brown found almost no sign of damp and not much smell in the house, and, in fact, the evidence of these gentlemen may be taken as confirmatory of the view that the nuisance experienced during the summer was due mainly to a temporary cause which had ceased, owing to the clear-

ing of the chimney, to operate. Altogether, the impression left upon my mind by a careful study of the evidence is, that the opening up of the parlour vent, assisted to some extent perhaps by the action of the additional ventilators which were put into the basement towards the end of September, was sufficient to restore the house to a tenable condition, and accordingly, while I say nothing against the view that the defender may possibly, as a husband, have been right in declining to allow his wife to remain in a house in which her health had suffered, I cannot hold it proved that the house was, on 17th October last, in such an insanitary or untenable state as to justify him, in a question with his landlord, in abandoning it.”

Armour appealed to the Court of Session, and argued—The obligation of the landlord was to provide a habitable house, and if he failed to do so the tenant was entitled to treat the contract of lease as rescinded, and to remove from the house and refuse to pay the rent—*Kippen v. Oppenheim*, Dec. 13, 1847, 10 D. 242; *Campbell v. Lord Wenlock*, 1866, 4 F. & F. 716; *Scottish Heritable Securities Company v. Grainger*, Jan. 28, 1881, 8 R. 459. Here both the Sheriff-Substitute and the Sheriff had found that the house was uninhabitable when the tenant left. That being so, the onus is on the landlord to prove that the defect was easily remediable, and that he was prepared to remedy it. Here he had not shown any such intention, in fact the factor's letter of 19th September 1898 (quoted *supra*) took up the position that there was nothing seriously wrong with the house. When that attitude was taken up on behalf of the landlord, and the tenant was advised by his doctor that it would be dangerous to his health to remain in the house, his only reasonable course was to remove. (2) There was no reason why the defender should not have the full expenses of process.

Argued for the respondents—On the facts it was not proved that the house was uninhabitable when the tenant removed. Even on the assumption that it was uninhabitable, it was clear that the defect was one which could be readily and easily cured, and the tenant was bound to have given intimation to the landlord, and to have waited a reasonable time to see if the matter would not be put right—*Allan v. Markland*, Dec. 21, 1882, 10 R. 383, *per* Lord Shand at p. 389; *Webster v. Brown*, May 12, 1892, 19 R. 765, *per* the Lord Justice-Clerk at p. 767.

LORD ADAM—In this case the appellant and defender was tenant under the pursuer of a house in Queen's Crescent, Cathcart. He left the house on 17th October 1898, and the question is, was he justified in so leaving? The action is one for rent, and the answer to it is that the defender was entitled to leave because the house was not in a tenable condition. Now, there can be no doubt that by a contract of lease a landlord is bound to provide a tenable house, and if on the facts it is established

that this house was or became not fit for habitation the tenant was certainly entitled to leave.

Now, although the Sheriff and the Sheriff-Substitute have differed in their opinion on this case, they are at one in this, that about September, or perhaps earlier, this house, which had always been damp and smelling, had got into such a condition that in the opinion of both Sheriffs it was no longer safe to inhabit it. The expression used by the Sheriff-Substitute in his interlocutor is that the result of the evidence of the experts examined "is that in my opinion the house was not in a fit state for habitation in the end of September and beginning of October." The finding of the Sheriff is in these terms—"That . . . last summer the dampness and smell became, particularly in the parlour, more marked, and indeed intolerable." Now, if the house was "not fit for habitation," and the dampness and smell had "become intolerable," the tenant was entitled to leave it, and from all that I have heard I am of the same opinion as the two Sheriffs, that by the end of September the house was not habitable.

The question then arises, what were the causes of this state of matters? and here apparently the Sheriff-Substitute and the Sheriff differ in the opinion that they take of the facts. The Sheriff-Substitute appears to adopt the defender's view that the cause was to be found in the state of things below the ground floor of the house, where there is a space of about 3 feet in height. That was filled with building debris which had never been removed—pieces of rotten wood and other rubbish which there can be no doubt at all were very damp. Fungus was found growing there, and the result was great dampness and smell. This was aggravated by the fact of the chimney of the parlour not ventilating properly. These, as I understand, are, according to the Sheriff-Substitute, the cause of the dampness and intolerable smell which rendered the house uninhabitable. The Sheriff, on the other hand, finds the cause of the increase of damp and smell in the substitution by the defender and his wife of a coke fire for a gas fire in the parlour, which was followed by such an intolerable amount of vapour that they could no longer use the room.

[After reviewing the evidence his Lordship proceeded]—These being the facts, I concur with the view taken by the Sheriff-Substitute, and do not think that the coke stove was the cause of the intolerable smell. That being so, the right of the tenant was to leave the house, and accordingly he left on the 17th October.

The question then is, what was the tenant's duty. He had been complaining all along in some degree. In February, when he took the house, he complained, and again he complained when the smell became aggravated in the end of September. The landlord should then, the house having become uninhabitable, have put himself in communication with the tenant in order to see what, if anything, could be done in the cir-

cumstances. But the landlord did not do that. He took up the position that there was nothing wrong "Everything is all right. Without admitting that you have any reason to complain I shall put in four ventilators, which will certainly remove all cause of complaint." But then the ventilation did not make things all right. The landlord then having taken up this position, was the tenant, having proved that the house was in its then state uninhabitable, and his wife having in consequence fallen into bad health, justified in leaving, or was the landlord entitled to say, "You must remain in the house and await the result of what has been done." I do not think that was a reasonable position. I do not see why the tenant of a house whose doctor has told him that it would be bad for his health to occupy it was bound to remain. It is always a question of circumstances. Here the tenant did not remove at once, and he tells us that while he remained the smells did not improve, and his doctor, who visited him, found the same state of things as before. Now, in these circumstances I cannot see that the tenant was bound to remain simply because the landlord said he was going to do something. It is said that the pursuers have proved that the house was perfectly right by the evidence of medical men who went to inspect the house. These men did not really inspect the house. It was known that the damp and smell were thought to be coming up from below, but they never tried to examine into the truth of that.

LORD M'LAREN — In this case, where almost everything is fluid, I agree with Lord Adam that it is satisfactory to find one piece of solid ground to go on, and that is that both the Sheriff-Substitute and the Sheriff on appeal are agreed in holding that in September 1898 the house in question was not in a habitable condition by reason of damp. There is a great deal of evidence to support that, and indeed it can hardly be controverted. We do not know what was the cause of the dampness. It may have been a bad site, or it may have been bad building, or it may have been the omission of some of the precautions which are very often taken to prevent damp, but we know that when a house is damp there are means of rectifying the evil. One was suggested, and possibly there may be other methods, but one of the things proposed, which is probably not a very difficult nor a very expensive operation, is a layer of asphalt or cement upon the basement. However that may be, I take it that when a tenant finds that his house is not in a habitable or tenable condition, he may either treat the mischief as a breach of a material condition of the lease, and claim to rescind the contract as from the date when the evil became intolerable, or he may found on the implied warranty in the contract a claim upon his landlord to put the building into a condition in which by the agreement it ought to have been when he took it. Now, in this case the tenant, after having made repeated applications to the landlord's fac-

tor, at last resolved to treat the case as a breach of contract, and he intimated that he was prepared to leave. No doubt in such circumstances a landlord would in general be disposed to meet the tenant, and to come to an understanding, or to appoint some neutral person in their confidence to see what was to be done to remedy the mischief. I think that if a landlord took that position, and the mischief was one that admitted of a remedy in a short time, it might very well be that the tenant would not be justified in persisting in terminating the contract. But then I fail to see that such a position was taken up by the landlord in this case. I think upon justifiable grounds it was for him to come forward and make some proposal. Instead of that he took up the position that he would only do what he pleased, and I do not think that anyone has said that the proposed remedies were sufficient to protect the house from the recurrence of damp. I think, then, that the parties having each held to his rights, and the tenant having offered proof that the house was in so insanitary a condition that he was obliged to give notice to leave, it lay upon the landlord to prove the contrary if he desired to retain the tenant. My opinion is that he has not proved that the house was in a tenantable condition. I agree with the observations Lord Adam has made on the evidence, which I think is altogether insufficient to establish a point of this kind. I am therefore of opinion that the action has failed, and that we ought to return to the judgment of the Sheriff-Substitute.

LORD KINNEAR—I quite agree with your Lordships, and I only add that I entirely agree with Lord M'Laren's observations, that if in the course of a tenancy a house has become uninhabitable from some emergent cause which was not known to the parties at the beginning of the contract, and if that defect be remediable, then if the landlord looks into the matter and ascertains what is the cause of the defect which exists, and if there is reasonable ground for believing that he honestly intends to set it right, then it would be improper for the tenant to say, "I will not give time to put matters right, but I will go at once." I do not know that there is any rule of law governing the relation of landlord and tenant at that stage except this, that both parties must be reasonable, and that if the landlord undertakes to put the house into a habitable condition, the tenant should give him sufficient opportunity to do so. But then I agree that that is not a condition of fact which we find established in this case, because the tenant having again and again complained, the landlord's agent writes, in the first place, that he does not admit that the house is in an insanitary condition or unfit for habitation as the tenant was trying to make out, and then says, "but I will put in a few extra gratings." And then the tenant replies repeating his complaint, and intimating the opinion that he had received from his doctor, that the condition of the house was prejudicial to

the health of his family, and the final answer to that was that there was nothing wrong with the house at all—that it was neither damp nor troubled with smells, and that it was not uninhabitable; and then the writer referred to the operations which had been carried through, of putting in new ventilators, and said that was all he was going to do. Now, I confess I agree with your Lordships that there is nothing to lay any duty upon the tenant to remain longer after he had been advised by his own medical attendant that his wife's health was being seriously injured, in order to give the landlord an opportunity of doing something which it was quite certain the landlord did not intend to do. I therefore agree that the view taken by the Sheriff-Substitute is the right one, and that we ought to revert to his interlocutor. There is, however, one point in that interlocutor upon which your Lordship has not made any observation, and that is that the Sheriff-Substitute finds the defender entitled only to three-fourths of the expenses incurred by him. Mr Kennedy, in opening, complained of that finding, and asked that we should find him entitled to the whole expenses of process; and so far as I am concerned, I agree with that; so far as my view goes, I am inclined to think that he must get the whole of the expenses.

LORD ADAM—I do not think there is any ground for modifying the expenses.

The Court pronounced this interlocutor—

"Recal the interlocutor of the Sheriff dated 17th April 1899: Find in terms of the findings in fact and in law of the Sheriff-Substitute dated 14th February 1889, except in so far as he finds defender entitled to three-fourths of the expenses incurred by him in the action, and decern: Find the defender entitled to the expenses incurred by him both in this and in the inferior courts.

Counsel for the Appellant—Kennedy—W. Thomson. Agent—Wm. Balfour, S.S.C.

Counsel for the Respondent—Campbell, Q.C.—M'Lennan. Agents—Cumming & Duff, S.S.C.

Thursday November 23.

SECOND DIVISION.

[Lord Stormonth Darling,
Ordinary.

GRAM (WALKER'S FACTOR) *v.*
CUMMING AND OTHERS.

Succession—Trust—Absolute Conveyance or Conveyances in Trust—Substitution.

A testator bequeathed his whole estate consisting of heritable and moveable property to his wife "and heirs and assignees, heritably and irredeemably," and proceeded—"But these presents are granted and shall be accepted