were residing with an ice-cream vendor in Broxburn, and further averred as follows—"The respondent is a person of immoral character and of violent and ungovernable temper, and incapable of taking charge of a child. The petitioner believes that it was her intention to destroy herself and the said child when she last threatened to do so, and he has reason to believe that there is danger of the threat being carried out unless the said child is instantly removed from her custody."

Counsel for the petitioner when moving for intimation and service moved the Court in the same interlocutor to grant warrant in terms of the prayer of the petition quoted *supra*, and referred to the case of *Hutchison* v. *Hutchison*, December 13, 1890, 18 R. 237. He stated that the petitioner was on his way to this country, and that arrangements had been made for placing the child in neutral custody to await his arrival.

LORD PRESIDENT—Great caution is required in dealing with an application of this kind, but I think that in the very special circumstances of the case we should grant an order that the child should be delivered to the petitioner or to some one having his authority until the case can be considered after answers are lodged. In some of its *prima facie* aspects the case is an extraordinary one. It is alleged that the respondent disappeared after posting letters to the petitioner and other persons, stating that by the time the letters were received she and the child would be dead. She left America, where she had been resident with her husband, and it is stated that she is now residing at the house of an ice-cream vendor at Broxburn. A person of her temperament might disappear again, or do violence to the child, upon hearing that this petition had been presented. When the petition is considered with answers, if the respondent lodges any, she may be able to get the order for custody altered. Meanwhile, however, it appears to me that we should grant the order asked.

LORD ADAM, LORD M'LAREN, and LORD KINNEAR concurred.

On 21st May 1901 the Court ordered intimation and service, and granted warrant in terms of the prayer of the petition quoted *supra*.

Mrs Marchetti lodged answers, in which she made averments of cruel and harsh treatment on the petitioner's part towards herself and her child, and alleged that blows and threats were a daily experience, and that the child lived in extreme terror of his father. She also averred that although she had gone through a form of marriage with the petitioner in Italy, their marriage was illegal by the law of Italy, as well as by the general consent of Christendom, the parties being uncle and niece.

At the hearing in the Summar Roll on 6th June, counsel for the petitioner moved the Court to proceed by way of remit to find out the wishes of the child.

Counsel for the respondent maintained that the child was illegitimate, and that the respondent was consequently entitled to the custody.

The Court declined to consider the question of status involved in this defence.

One of their Lordships saw the child, and ascertained that he had a great affection for both his parents, and would prefer to remain with both. The petitioner, who had arrived in this country, was willing to take his wife back to America with him, but she declined to go.

The parties having failed to come to any arrangement, the Court, following the course adopted in *Hutchison*, *supra*, pronounced this interlocutor :—

> "The Lords having resumed consideration of the petition, with the answers thereto, and heard counsel for the parties, in respect that the custody of the child Thomas Marchetti has been recovered by the petitioner, Find it unnecessary to pronounce any further order: Dismiss the petition and decern," &c.

Counsel for the Petitioner — Dewar. Agents—Cornillon, Craig, & Thomas, S.S.C.

Counsel for the Respondent—A. J. Young. Agents—Robertson & Wallace, S.S.C.

Friday, June 14.

SECOND DIVISION.

[Sheriff of Aberdeen.

M'DONALD *v.* KYDD.

Landlord and Tenant—Lease—Failure of Landlord to Put Subjects in Tenantable Repair—Right of Tenant to Retain Rent.

A lease for 19 years of certain agricultural subjects bore that in respect the proprietor had put the buildings thereon in habitable condition and repair, the tenant bound himself to keep and leave them in the like condition at the expiry of his lease. During the currency of the lease the subjects were sold, with entry at Whitsunday 1899. The new proprietor intimated to the tenant that he would not take the buildings over from him as in habitable condition in terms of his obligation. The tenant thereupon retained the half-year's rent due to the original proprietor at Whitsunday 1899. In an action at the instance of the latter against the tenant, the pursuer admitted that the repairs contemplated by the parties had not in fact been carried out at the date of the lease, and it was proved that since that date the landlord had not put the buildings into habitable condition and repair. *Held* that the tenant was entitled to retain the half-year's rent in question until the landlord's obligation to put the buildings in habitable condition and repair had been fulfilled.

Archibald M'Intyre M'Donald, as commissioner for the Earl of Crawford, brought

an action in the Sheriff Court at Aberdeen against William Anderson Kydd, in which he craved decree for the sum of £40, 15s., being a half-year's rent of the farm of Tillyboy, occupied by the defender.

By lease dated in April 1897, the pursuer, as commissioner for the Earl of Crawford, proprietor of the lands of Echt, let to the defender the farm of Tillyboy, part of said lands, for a term of nineteen years, at the yearly rent of £81, 10s. The lease contained the following clause:—"Further, in respect the proprietor has put the roof of the barn and the whole other buildings on the farm in habitable condition and repair, the said William Anderson Kydd binds and obliges himself and his foresaids to keep the whole houses during the currency of this lease in habitable condition and repair, and to leave them in the like condition at the expiry thereof, ordinary tear and wear excepted."

In 1899 the Earl of Crawford sold the lands of Echt, including the defender's farm of Tillyboy, to Mr Pirie, with entry at Whitsunday 1899. Mr Pirie entered into possession at that date, and intimated to the defender that he would not take over the farm as in habitable condition and repair in terms of his obligation under the lease, and the defender thereupon retained the half-year's rent due to the pursuer at Whitsunday 1899, amounting to £40, 15s., on the ground that the repairs to the barn and farm buildings mentioned in the lease had not been executed.

The pursuer thereupon raised the present action, and averred that he had implemented all his obligations under the lease.

The defender denied this, and averred—"That although the said lease of the said farm of Tillyboy bears that 'the proprietor has put the roof of the barn and the whole other buildings on the farm in habitable condition and repair,' these repairs had not, as a matter of fact, been then performed, but were to be performed before or at defender's entry to the said farm, nor, with the exception of certain repairs on the roof of the byre, have any of them been done yet. Averred, in particular, that the roof of the barn and stable on said farm—which are one continuous building—is so dilapidated, and the floors of the lofts of said premises are so worn, as to render the said premises unfit for occupation or use; and averred further, that the hen-house and water-closet on said farm are also so dilapidated as to be practically of no use to the defender. The pursuer has been called upon to carry out the repairs necessary to put the buildings on the farm into habitable condition and repair, but he has failed to do so. The defender has all along expressed his willingness to pay the rent now sued for on these repairs being executed, and has consigned the sum sued for in the hands of the Clerk of Court."

The defender averred further that he had during his tenancy made repeated applications to the pursuer to execute the said repairs, but that the pursuer had failed to do so.

The pursuer averred, and it was not disputed, that the defender had regularly paid all the rents due under the lease except the half-year's rent now sued for.

The pursuer pleaded—"(1) The sum sued for having become due by the defender in terms of his lease at Whitsunday last, the pursuer is entitled to decree as craved."

The defender pleaded—"(1) In respect the defender has not got possession of the entire subjects let to him under the said lease, he is entitled to retain the rent now sued for until such possession is given to him. (2) The pursuer having failed to implement his obligations under the said lease, is not entitled to insist on the performance by the defender of the counterpart of these obligations."

After sundry procedure, the pursuer lodged a minute in which he admitted that the repairs contemplated by the parties had not been carried out at the date of the lease, but stated that he had, after that date, put the buildings into habitable condition and repair so far as he was bound to do. He further offered to execute certain other repairs which he had promised the defender to do in addition to those which he was bound to do under the lease.

The defender lodged answers to the pursuer's minute, in which he refused to accept the pursuer's offer of repairs, which he averred would not suffice to put the buildings in habitable condition and repair in fulfilment of the pursuer's obligations.

Proof was allowed and led. The import of the evidence, so far as material, is set forth in the interlocutor of the Sheriff.

On 16th October 1900 the Sheriff-Substitute (ROBERTSON) pronounced this interlocutor:—"Finds (1) that defender is tenant of the farm of Tillyboy, which up to Whitsunday 1899 was the property of the Earl of Crawford, the pursuer being the said Earl's factor and commissioner, with power to sue for rent due; (2) that the half-year's rent of said farm due at Whitsunday 1899 amounted to £40, 15s., and that the said half-year's rent is still unpaid by defender; (3) that defender avers and pleads, but has failed to prove, that for the period to which the said half-year's rent is applicable he did not get possession of the subjects let to him, or that the proprietor failed to implement his obligations to him under his lease: Finds therefore that said rent is due and payable, and decerns therefor with interest in terms of the conclusions of the action," &c.

The defender appealed to the Sheriff (CRAWFORD), who on 18th December 1900 pronounced this interlocutor:—"Sustains the appeal: Recals the interlocutor appealed against: Finds in terms of the first and second findings in the said interlocutor: Finds (3) that the lease is for nineteen years from Whitsunday 1897; (4) that by the lease the pursuer was bound to put the roof of the barn and the whole other buildings in habitable condition and repair; (5) that the defender was bound, on this being done, to keep them in the same condition and repair during the currency of the lease, and leave them in the like condition at the expiry thereof; (6) that the barn and stable wing and hen-house and earth-closet were

not in habitable condition and repair at the defender's entry, and that nothing has been done to put them in repair; (7) that the pursuer has offered to execute certain repairs mentioned in the minute of tender; (8) that the said repairs would not be sufficient to put the buildings into habitable condition and repair; (9) that the estate has been sold, and the new proprietor has intimated to the defender that he holds him responsible for those buildings not being in habitable condition and repair: Finds in law (1) that the pursuer is bound to put the said buildings in habitable condition and repair; (2) that the defender is entitled to retain the said rent until that is done: Therefore dismisses the action, and decerns: Finds the defender entitled to expenses," &c.

The pursuer appealed to the Court of Session, and argued—The judgment of the Sheriff was wrong. A tenant was not entitled to retain his rent unless he could establish a claim of damage of an amount equal to the sum retained, and the defender had established none—*Munro* v. *M'Geochs*, November 15, 1888, 16 R. 93; *Stewart* v. *Campbell*, January 19, 1889, 16 R. 346; *Kilmarnock Gas Company* v. *Smith*, November 9, 1872, 11 Macph. 58; *Broadwood* v. *Hunter*, February 2, 1856, 17 D. 340; *Hardie* v. *Duke of Hamilton*, February 2, 1878, 15 S.L.R. 329. In any view, the defender had paid his rent without complaint for over two years, and must be held to have discharged any claim he might have had.

Argued for the defender and respondent —The defender did not rest his right to retain his rent on the ground of damage, but on the ground that the landlord had failed to implement his part of the contract, viz., to put the subjects let in habitable condition. The tenant's right to retain the rent on that ground was recognised by the later decisions—*Munro*, *supra*; *Stewart*, *supra*; *Gray* v. *Renton*, December 10, 1840, 3 D. 203; *Guthrie* v. *Shearer*, November 13, 1873, 1 R. 181; *Johnston* v. *Hughan*, May 22, 1894, 21 R. 777, *per* Lord Adam. The evidence established that the pursuer had not fulfilled his obligation. The defender maintained further that the evidence did not show that he had discharged his claim to have the buildings put in tenantable repair.

Lord Justice-Clerk — The case we are dealing with here is the case of a written lease under which stipulations are made by both sides, and one of the stipulations made by the landlord contains various things, and among others, and principally, that a certain rent shall be paid to him at certain terms. There are, on the other hand, in the lease certain obligations which he undertakes towards the tenant. Certain of these obligations which he has undertaken towards the tenant, I think it is plain have not yet been fulfilled—that is to say, the commissioner of the gentleman who was the landlord has not fulfilled during the time the property was held by him those prestations which had been made in favour of the tenant in the lease. I think he has failed in fulfilling his part in these respects.

Now, the real question comes to be, not whether the tenant is entitled to demand damages for the failure of the landlord to fulfil his obligation to him, but whether or not the landlord, who directly and at once enforced the prestations in his favour in the lease, while he has failed, and is still failing to fulfil the prestations in favour of the other party, is entitled to demand payment of the rent. I think he is not, and that is a sufficient ground on which this case may be decided, and I would decide it accordingly. I ought to point out that, of course, here the landlord is in no danger as to the amount of the rent, for the money is consigned and perfectly safe, and the only question is, whether he is entitled to insist on receiving that money while he is in the position of not having fulfilled the conditions he undertook.

Lord Young—I concur. The facts of the case are simple enough. The relation of the parties is that of landlord and tenant. When the tenant entered into possession, the leasehold premises were not in a tenantable condition—not in the condition in which the landlord was bound by his obligation as landlord to put them. That is admitted in a minute which was given in for the purpose of overcoming a difficulty arising from an expression in the contract of lease itself, that the farm premises had been put into proper condition. The minute acknowledges on the part of the landlord that they had not been put into that condition, and that the landlord was accordingly bound, notwithstanding the expression in the lease that they had been put into that condition. He proceeded to put them into a better condition, but according to the tenant they had not at Whitsunday 1899 been put into the condition into which the landlord was bound to put them. The tenant had paid his rent notwithstanding up to that term, but, his attention being then particularly directed to the matter by the purchaser of the property, he intimated to the landlord that he would not pay the rent until they were put into that condition. Upon that this action is brought, and a general question is raised as to whether rent can be withheld by a tenant upon an illiquid claim of damages against the landlord for omitting to do something which by the lease he was bound to do. Now, many cases may occur in which a tenant would not be allowed to retain his rent until it is decided whether something under the lease which the landlord was bound to do had been done or not. But here the simple question is, whether by the operations which the landlord had directed to be made, and which had been paid for prior to Whitsunday 1899, the premises, which were not in the condition into which he was bound to put them prior to these operations, had then been put into that state or not. There is no other question; and I agree with the Sheriff and with your Lordship that according to the

evidence the farm premises have not been put into the condition into which the landlord was bound to put them. I therefore concur with the judgment of the Sheriff, and think that this appeal ought to be refused, and that with expenses.

LORD TRAYNER—I am of the same opinion. The claim which is sought to be enforced by this action is a claim for rent, and payment of rent is the obligation on the defender under the contract of lease. But the contract imposed obligations on both parties—the landlord and the tenant. The tenant's obligation is to pay the rent—the landlord's obligation is to give a tenantable subject. Now, I am disposed to put my judgment simply upon the application of the general rule, that where a person seeks to enforce the terms of a contract against another he is excluded from doing so if it can be shown that he is in default himself in the obligation that the contract puts on him. I think the case has been a little embarrassed by the introduction of the fact that there has been a change in the proprietorship of the subject. I think this case must be decided without reference to that change of proprietorship at all. It suggests, no doubt, a reason why the defender should set up this plea now which he did not set up six months or twelve months ago; but I think it does not affect the question to be determined nor the judgment to be pronounced on it. I think the pursuer's case has failed, and the Sheriff has properly dismissed the action on the ground that the pursuer cannot enforce a contract, the obligation in which, binding on himself, he has failed to fulfil.

LORD MONCREIFF—The Sheriff finds in point of fact that the barn and stable wing and hen-house and earth-closet were not in habitable condition and repair at the defender's entry, and that nothing has been done to put them in repair; that the pursuer has offered to execute certain repairs mentioned in the minute of tender, and that the said repairs would not be sufficient to put the building into habitable condition and repair. I think the evidence establishes these findings in fact. The findings in law are—"(1) that the pursuer is bound to put the said buildings in habitable condition and repair; (2) That the defender is entitled to retain the said rent until that is done: Therefore dismisses the action." Now, I think that is a sound ground in law for the decision of the case. It is simply this, that the landlord has not fulfilled his obligation under the lease, and therefore is not in a position to demand payment of the rent. Mr Blackburn maintained that in order to a good plea of retention of rent it was necessary that the tenant should establish damage to the amount of the rent retained. I do not agree in that. I have no doubt that the Court is entitled to take cognisance of the kind and amount of damage alleged by the tenant, and that they will not allow retention of rent where the damage complained of by the tenant is trivial. But where the damage sustained is solid and substantial then I do not think it essential that the tenant in order to make good a plea of retention should prove what specific amount of damage he has sustained. What he demands is not damages but that the landlord should fulfil his obligation to put the buildings in order before he can demand payment of the rent.

There is only one other point that requires to be noted, namely, the plea of acquiescence. It is maintained that this tenant by occupying for three years and paying rent discharged the landlord of his obligation. I think the explanation of that is very simple, and that is that the landlord very properly had been recognising his obligation, and had been fulfilling and discharging it bit by bit till the time came when he sold the property. Now, very likely, if the property had not been sold the tenant would have waited the landlord's time and have given him an opportunity of completing the work as he was doing. But the property having been sold, I think that was a proper time for the tenant to bring things to a point, and to call on the landlord to fulfil his obligation. Therefore I have no hesitation in agreeing that the decision of the Sheriff should be affirmed.

The Court dismissed the appeal, found in fact and in law in terms of the findings in fact and in law in the interlocutor appealed against, and dismissed the action.

Counsel for the Pursuer and Appellant—W. Campbell, K.C.—Blackburn. Agents—Dundas & Wilson, C.S.

Counsel for the Defender and Respondent—Salvesen, K.C.—W. Brown. Agents—Tawse & Bonar, W.S.

Friday, June 14.

SECOND DIVISION.

[Lord Pearson, Ordinary.

EASSON'S TRUSTEES *v.* MAILER.

Expenses — Trust—Trustees Found Liable in Expenses—Expenses not to be Paid out of Successful Defender's Share.

In an action by testamentary trustees for recovery of a sum of money, which the defender alleged had been given to her by the testator during his lifetime, the Court held that the alleged donation had been proved, assoilzied the defender, and found her entitled to expenses. The defender, who was one of the testator's residuary legatees, moved the Court to find that no part of the expenses of the litigation should be paid out of her share of the residue. The Court *granted* the motion.

William Hazell and another, the testamentary trustees of the deceased Thomas Easson, Dundee, brought an action against Mary Mailer, in which they concluded for payment of £500, received by the defender from the testator during his lifetime, which the pursuers averred was part