Argued for the claimants—The obligation in the leases was a personal one and therefore the executor was liable. A man's representatives were bound by his obligations, unless an intention to the contrary was clearly expressed or implied. If the obligations in question had become prestable during Sir Rodney's life, all his estate would have been liable. The terms of the leases showed that the obligation to take over the stock was a personal one, and that being so, it was binding on the grantor's executors—*Moncrieff* v. *Tod & Skene*, May 27, 1825, 1 W. & S. 217; *Fraser* v. *Fraser*, May 29, 1827, 5 S. 722 (673); *Gardiners* v. *Stewart's Trustees* (*cit. supra*). Moreover, in all the leases the contract was between Sir Rodney on the one hand and the respective lessees on the other. It was, in short, a personal obligation between individuals, and at common law such obligations were binding on the grantor's representatives.

At advising, the Court (the LORD PRESIDENT, LORD KINNEAR, and LORD PEARSON) answered questions 1, 2, and 3 by declaring that the whole of the heritable estate of the late Sir Rodney Riddell held by him in fee-simple, as also his whole moveable estate, was liable to make good the obligations contained in Milligan's lease, Moir's lease, and the Ranachan lease, to take over and pay for the stock of sheep on the farms comprised in these leases at the term of Whitsunday 1909 in the case of Milligan's lease, and at their expiration or sooner determination in the case of the other two; and question 4 by declaring that the whole heritable estate held by the late Sir Rodney in fee-simple, as also his whole moveable estate, was liable to make good to Charles Gordon Gillespie the loss, if any, which he had sustained by the stock of sheep on the farm contained in the Ardery lease not having been taken over and paid for in terms of the lease.

Counsel for Petitioners—Morison, K.C. —Chree. Agents—Hamilton, Kinnear, & Beatson, W.S.

Counsel for Claimants (Milligan's Trustees)—Constable, K.C.—Jameson. Agents —Morton, Smart, Macdonald, & Prosser, W.S.

Counsel for Claimants (Gillespie and Moir)—Constable, K.C.—Jameson. Agents —Macrae, Flett, & Rennie, W.S.

Friday, June 4.

FIRST DIVISION.

[Sheriff Court at Kirkcaldy.

MACNAB *v.* NELSONS.

Sheriff — Process — Prorogation — "Prorogate" — Lodging Production or Pleading — Implementing Order — Sheriff Courts (Scotland) Act 1907 (7 *Edw. VII, cap.* 51), *First Schedule, Rule* 56.

The Sheriff Courts (Scotland) Act 1907, First Schedule, Rule 56, enacts—"In a defended action (including a jury cause), when any production or pleading has not been lodged or order implemented within the time required by statute or ordered by the Sheriff, or where in a defended action either party fails to appear by himself or his agent at any diet, or fails to make payment of any Court dues or deposit, the Sheriff may grant decree as craved, or of absolvitor, or may dismiss the action with expenses, but the Sheriff may, upon cause shown, prorogate the time for lodging any production or pleading or implementing any order. If all parties fail to appear, the Sheriff shall, unless sufficient reason appear to the contrary, dismiss the action."

Held that the power of the Sheriff to "prorogate" the time was not restricted in its exercise to the period of the currency of the time, but that after the time had expired the Sheriff had power to allow further time.

Sheriff — Process — Counter Claim — Competency of Counter Claim when No Pecuniary Conclusion in the Action — Sheriff Courts (Scotland) Act 1907 (7 *Edw. VII, cap.* 51), *First Schedule, Rule* 55.

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

Held that a "counter claim" must be a claim which could be set off pecuniarily against the claim sued for, and that when the conclusions of the action itself were not pecuniary, but merely declaratory, there could be no such thing as raising in defence a counter claim.

The Sheriff Courts (Scotland) Act 1907 (7 Edw. VII, cap. 51), First Schedule, enacts—Rule 43—"Within six days of the condescendence being lodged, the defender shall lodge his defences."

Rules 55 and 56 are quoted in the rubric.

John Macnab of Kinglassie, Fifeshire, heritable proprietor of the farm of Parknook, raised an action in the Sheriff Court at Kirkcaldy against John Nelson and David Nelson, both farmers, residing at

Parknook aforesaid, tenants of the said farm, for declarator that an irritancy of the lease had been incurred.

The defenders entered into possession of the farm of Parknook at Martinmas 1904 at a yearly rent of £60. The lease, which was for nineteen years, and was dated 25th and 28th November 1904, *inter alia*, provided that "if the said John Nelson and David Nelson, or either of them or their foresaids . . . shall allow one half-year's rent to remain unpaid when the next half-year's rent shall have become due, it shall be in the power of the said John Macnab and his foresaids . . . to put an end to this lease and resume possession of the lands hereby let without any declarator or process of law to that effect." The lease also contained a clause whereby the tenants accepted the dwelling-house, steading, &c., and the fences, &c., as in sufficient tenantable and fencible order and repair.

The pursuer averred—"(Cond. 3) A half-year's rent was due and payable at the term of Martinmas 1907, and is still unpaid. Another half-year's rent was due and payable at Whitsunday 1908, and is still unpaid."

The defenders denied these averments as stated. In a statement of facts for them they averred that in offering to rent the farm they stipulated with the pursuer, and the stipulation was agreed to, that the dwelling-house, steading, and other houses and offices on the farm were to be put in a good and sufficient tenantable order and repair, and that the whole fences should also be put in a good and sufficient tenantable and fencible condition and repair. They referred to the following letter from their agent to the pursuer's agents, dated 9th November 1904—"Dears Sirs,—I have received the lease of Parknook in favour of the Messrs Nelson, which appears in order, but with regard to the undertaking on page fourth as to keeping houses and fences, &c., in good condition, Messrs Nelson agree to do so; but before signing they would require an undertaking that these are to be put in good condition. I am to see them on Monday"—and to the reply, dated 16th November, viz.—"Dear Sir,—*Parknook—Kinglassie*—With reference to your letter of 9th inst., the proprietor will take steps to put the house and steading in order so soon as he can get access thereto. Kindly let us have the lease duly signed in course." Their statement of facts then continued—"(Stat. 5) . . . On the faith of this letter . . . the defenders signed the lease containing the acknowledgment and obligations before referred to, and forwarded same to the agents for the proprietor. The said lease was so signed by the defenders on the faith of the said letter granted by the pursuer's agents, but notwithstanding its terms the pursuer has not yet fully put the house and steading or the fences, &c., on the lands in good order and repair."

They further averred—"(Stat. 8) The disrepair of the houses and steading and the defects in the fencing of the lands let to the defenders have caused and are causing them serious loss, inconvenience, and damage, and the defenders have been damnified, through the pursuer's breach of his agents' undertaking contained in their said letter and of his common law obligations, to the extent of at least £100, for which sum they crave the Court to decern against the pursuer. . . . (Stat. 11) As the defenders could obtain no redress from the pursuer, and as he persistently declined to fulfil the obligations which were and are incumbent upon him as their landlord under said lease and at common law, they were reluctantly compelled to withhold payment of the rents stipulated to be paid by them to him. They have accordingly declined to pay the rents of which payment was asked at Martinmas 1907 and Whitsunday 1908, and they claim that they are entitled to decree against the present pursuer for £100 sterling in respect of the loss, injury, and damage sustained by them in consequence of his persistent failure to implement the obligations incumbent upon him as their landlord under the said lease and at common law, to put the dwelling-house, steading, and other houses and offices, and also the whole fences, gates and gate-posts, roads, drains, ditches, and water-courses on the said farm of Parknook (including the Sauchie Burn) in good and sufficient tenantable and fencible condition and repair."

The pursuer pleaded, *inter alia*—"(1) The defenders having allowed one half-year's rent to remain unpaid when the next half-year's rent became due, the pursuer is entitled to put an end to the lease and resume possession of the lands thereby let. (3) The defence is irrelevant. (4) The defenders' counter claim is incompetent."

The defenders pleaded, *inter alia*—"(1) The pursuer being himself in breach of the obligations incumbent upon him under said lease and at common law, is not entitled to enforce the provisions of the same against the defenders. (2) The subjects let not having been put in a good and sufficient state of repair at the defenders' entry thereto . . . (*in various particulars*) . . ., and he having delayed and refused to do so, the defenders are entitled to compensation for the loss and injury they have thereby sustained."

The condescendence for the pursuer was lodged on 3rd June 1908, the defenders having on 22nd May intimated that they intended defending the action.

On 10th June the Sheriff-Substitute (HAY SHENNAN) pronounced this interlocutor—"The Sheriff-Substitute on cause shown allows defences to be lodged by Friday first."

On 11th July he allowed parties a proof before answer.

Note.—"This is an action of declarator of irritancy of a lease founded on a stipulation in the lease that when two half-years' rents are due and unpaid the landlord may put an end to the lease. The defence is that the tenants are entitled to withhold the rent on the ground that the landlord has failed to give full possession of the subjects let. It is true the tenants accept the buildings as sufficient in the lease, but they

signed the lease on the stipulation that notwithstanding this clause the landlord was to do the necessary repairs. In this respect the case resembles *M'Donald* v. *Kyd*, 13th June 1901, 3 F. 923, 38 S.L.R. 697.

"I am not quite so certain of the relevancy of some of the defenders' averments as to the fences as founding a right to retain rent. But as a proof is necessary, it is desirable that the whole matter should be gone into at one time. And this seems to receive added force from rule 55 of the Sheriff Courts Act 1907, which appears to justify dealing with all defenders' counter claims. At first sight there is something in pursuer's argument that a pecuniary counter claim is not competent in an action of declarator. But in substance this is an action for rent, because the irritancy depends exclusively on the question whether the whole rent is due. I do not see how by adopting this form of action the landlord can be allowed to prevent the tenant from getting a decision on the real merits of the dispute between them.

"I have, however, made the proof before answer, because all the questions on the merits will be best dealt with when the facts are ascertained."

The pursuer appealed to the Sheriff (CULLEN), who on 29th September 1908 pronounced this interlocutor—"Recals the interlocutors of the Sheriff-Substitute of 10th June 1908, 17th June 1908, 24th June 1908, 1st July 1908, and 11th July 1908; and in respect of the failure of the defenders to timeously lodge defences to the action, decerns against the defenders in the terms craved in the initial writ: Finds the defenders liable to the pursuer in his expenses of the cause and of the appeal," &c.

Note.—"In this case the condescendence for the pursuer was lodged on 3rd June 1908. The defences were due on or before 9th June thereafter according to the terms of the 43rd rule contained in the first schedule of the Sheriff Courts (Scotland) Act 1907, which provides that 'within six days of the condescendence being lodged, the defender shall lodge his defences.' The defenders did not lodge their defences within this statutory period, nor did they during its currency apply to the Sheriff-Substitute for an extension of it. On 10th June 1908, however, the Sheriff-Substitute pronounced an interlocutor whereby, on cause shown, he allowed defences to be lodged by Friday first thereafter, and they were lodged within that period.

"The pursuer, in support of his appeal, challenges the competency of the interlocutor of 10th June, maintaining that, while the Sheriff-Substitute under the Act of 1907 had power, on cause shown, to extend the statutory period for lodging defences during its currency, he had no power after its expiry, and when the defenders had incurred a default, to appoint a new term for lodging defences, and that in respect of the defenders' failure to lodge their defences timeously the pursuer is entitled to decree against them in the terms craved in the initial writ.

"The question thus raised depends on the construction of rule 56 of the first schedule of the Act of 1907, which is in these terms—". . . [*Quotes, supra, in rubric*]. . . ."

"The Sheriff is here given power to 'prorogate' the time for lodging any production or pleading or implementing any order. The view maintained by the pursuer is that, according to the correct use of language, it is only an unexpired term which can be prorogated, and that to allow overdue defences to be lodged by a defender who is in default is a different thing from prorogating the original period. The question at issue is a very important one as affecting Sheriff Court procedure under the new Act. If the pursuer is right, a Sheriff has no power under any circumstances to allow the reception of overdue pleadings, however excusable may be the failure to lodge them within the normal period prescribed by the statute; and no provision is made for reponing a party against the consequences of his default. It is with considerable hesitation, and with reluctance, that I have reached the conclusion that the pursuer's construction of the rule should be sustained. To prorogate a term is to prolong or continue it or lengthen it out to a more distant date. Properly, therefore, the act of prorogation should take place while the original period is still current. To appoint a new term for the reception of a pleading after the original one has expired is also a mode of giving a party further time, but there is this difference, that in such a case the party has incurred a default, while a prorogation duly obtained during the currency of the original period involves no default. There is, I think, no doubt that in practice the word 'prorogate' is not uncommonly used so as to include the case of appointing a new term after the original one has expired. By way of illustration I may refer to the case of *Weild* v. *Weild* as reported in 6 Shaw at page 247. The question therefore comes to be, whether the word as used by the Legislature in rule 56 of the Act of 1907 is to be construed in this way or in the more strict sense maintained by the pursuer; and it is, I think, relevant and highly important to ascertain in what sense it has been used in former legislation affecting the Sheriff Court. Prior to the passing of the Act of 1907 the Sheriff's powers in this connection were regulated by section 6 of the Sheriff Court Act of 1853, which was in these terms—'Where any condescendence or defences, or revised condescendence or revised defences, or other paper, shall not be given in within the periods prescribed or allowed by this Act, the Sheriff shall dismiss the action, or decern in terms of the summons, as the case may be, by default, unless it shall be made to appear to his satisfaction that the failure to lodge such paper arose from unavoidable or reasonable causes, in which case the Sheriff may allow the same to be received on payment of such sum in name of expenses as he shall think just, provided always that the periods appointed for lodging any paper, or for transmitting any process to the Sheriff, or for closing a record, may

always be once prorogated by the Sheriff without consent on special cause shown . . .; and in every interlocutor prorogating on special cause shown the time for lodging any paper, the nature of such cause shall be set forth, and a definite time shall be therein fixed within which the paper is to be lodged.' Here the reception of overdue pleadings from a party in default on the one hand, and the prolongation of the normal periods for lodging them on the other hand, are dealt with as distinct acts of procedure, the word 'prorogate' being used to denote the latter according to what I take to be its primary and more accurate meaning The Sheriff was empowered by this enactment to allow the reception of overdue pleadings on payment of such sum in name of expenses by the party in default as he should think just, while, separately, he was empowered to grant a prorogation of the normal term on special cause shown. The 6th section of the Act of 1853 has been repealed by the Act of 1907, but when one finds in the latter Act a power to prorogate the time for lodging pleadings, I think it should be taken *prima facie* that the word prorogate is used in the same sense attached to it in the antecedent legislation. This result seems to me to receive corroboration from rule 68 of the 1907 Act, which confers power on the Sheriff to permit, upon conditions, the reception of productions not timeously lodged, a provision which would appear unnecessary if the reception of overdue productions had been already provided for under rule 56. There is no corresponding express provision for the reception of overdue pleadings.

"It has to be observed on the terms of rule 56 that on the occurrence of any of the cases of default mentioned in the first part of it, the rule enacts that the Sheriff '*may* grant decree as craved, or of absolvitor, or *may* dismiss the action with expenses,' and then goes on to say '*but* the Sheriff may, upon cause shown, prorogate the time for lodging any production or pleading or implementing any order.' It is maintained by the defenders that the use of the word 'may' and the structure of the enactment show that what is intended is that on the occurrence of any such cases of default the Sheriff is to have a discretionary power to grant decree in one form or other, or, alternatively, to exercise his power to prorogate, and that such prorogation must therefore take the form of an allowance of the reception of the overdue papers or the fixing of a new term for lodging them. There is force in this view, but I do not see my way to accept it as sound. In the first place, the use of the word 'may' is capable of being explained by the varying form of the decree which it will fall on the Sheriff to pronounce. In the next place, the power of prorogation which is given to the Sheriff does not seem to me to be a proper alternative to the power of granting such decree. The latter power applies 'when any production or pleading has not been lodged or order implemented within the time required by statute or ordered by the Sheriff, or where, in a defended action, either party fails to appear by himself or his agent at any diet, or fails to make payment of any Court dues or deposit'; while the power to prorogate is not one calculated to meet all these cases of default, but applies only to the lodging of pleadings or productions or implementing of orders. Again, if the inductive words of the rule were to be accepted as conditioning the power of prorogation, and if that power were therefore taken as an alternative provided to the granting of decree in the cases of default figured in the rule, the rule so construed would fail to confer on the Sheriff power to prorogate a term in the primary and strict sense of extending it during its currency when no such default had occurred.

"On the whole, while I think the result at which I have arrived is an unfortunate one in respect that it involves the withholding from the Sheriff of an important discretionary power which he formerly possessed, and the adoption of a hard and fast rule which at times will operate very harshly, I do not feel able by legitimate construction to read rule 56 in such a way as to authorise the Sheriff-Substitute's interlocutor of 10th June 1908.

"On the assumption that the Sheriff-Substitute had a discretionary power under rule 56 to allow the reception of the overdue defences in this case no objection was stated by the pursuer to the interlocutor of 10th June 1908.

"The pursuer alternatively contended that the defences were irrelevant so far as founded on the letters mentioned in answer No. 5, and I should have difficulty in holding that these letters varied the rights and obligations of the parties as expressed in the formal lease subsequently executed. On the view, however, which I take of the question as to the competency of the interlocutor of 10th June 1908 it is unnecessary to consider this line of argument."

The defenders appealed to the Court of Session, and the case was heard on 21st May 1909, but before the hearing the defenders had removed from the farm.

Argued for the defenders and appellants —(1) The Sheriff was wrong in holding that power to "prorogate" did not include power, after the expiry of the period for lodging defences, to grant further time. The word had been used in various statutes as well as in opinions of Judges as signifying not merely extension of time when the original period was still current but also extension of time or allowance of further time when the original period had expired —Judicature Act 1825 (6 Geo. IV, cap. 120), section 12; Court of Session Act 1850 (13 and 14 Vict. cap. 36), section 4; Act of Sederunt (Court of Session), 12th November 1825, section 47; Act of Sederunt (Sheriff Court), 12th November 1825, cap. 9, section 14; Act of Sederunt, 11th July 1828, sections 5, 80, 108, and 109; Act of Sederunt, 10th July 1839, sections 59 and 81; *Weild* v. *Weild*, December 14, 1827, 6 Sh. 247; *Mitchell* v. *Mitchell*, January 29, 1856, 28 S.J. 160;

Nicol v. *Johnston*, November 17, 1888, 26 S.L.R. 61. The wording of rule 56 of the Sheriff Courts (Scotland) Act 1907, especially the use of "may" instead of "shall" in the earlier part followed by "but," pointed to prorogation being an alternative to decree in one form or other. Conflicting decisions on the interpretation of the rule had been given in the Sheriff Courts in *Davies* v. *Blake*, June 24, 1908, 16 S.L.T. 263; *Lawrence* v. *Gray*, November 9, 1908, 16 S.L.T. 466; *Cuthbertson & Company* v. *Todd*, November 12, 1908, 16 S.L.T. 597; *Brown* v. *Cormack*, 1909, 1 S.L.T. 247, the last three being in favour of the interpretation they contended for. (2) They were entitled to retain the rent as the pursuer had not implemented the undertaking to put the subjects in proper tenantable condition. Even apart from the express undertaking in the letters, this was an implied condition of the lease. The action being in effect to compel payment of rent, they were entitled under rule 55 of the Act to counterclaim for the loss they had incurred through pursuer's breach of his undertaking.

Argued for the pursuer and respondent—The Sheriff was right in granting decree and holding that the Sheriff-Substitute had not power to allow the defences to be received. Extension of time could not be given after the expiry of the six days. Prorogation meant extension of a term not yet reached; it could not be properly applied to the granting of a new term. The construction contended for by the defenders would make rule 68 of the Act, which allowed the production, under conditions, of documents not timeously lodged, superfluous, for he would already have that power under rule 56. Rules 56 and 68 repeated the powers given under the repealed section 6 of the Sheriff Courts (Scotland) Act 1853 (16 and 17 Vict., cap. 80), except that of giving, subsequent to the expiry of the statutory period, further time for lodging pleadings. As pointed out by the Sheriff, the two parts of rule 56 were not properly alternative. (2) The defences were irrelevant. The agreement alleged to have been broken was not the lease, but an alleged antecedent agreement. The pursuer having in a formal lease accepted the premises as in good condition, could not contradict that condition by parole evidence, nor in answer to a liquid claim for rent was he entitled to retain it because of an illiquid claim of damages—*Drybrough* v. *Drybrough*, May 21, 1874, 1 R. 909.

At advising—

LORD PRESIDENT—This is an action in the Sheriff Court where the pursuer, the proprietor of an estate, prayed the Court to find and declare that in respect of the defenders having allowed one half-year's rent to remain unpaid when the next half-year's rent had become due, they had caused an irritancy of the lease which they held of a certain farm, and asked the Court to ordain the defenders "at the term of Martinmas next"—that is to say, Martinmas now past—to flit and remove. The irritancy is so expressed in the lease.

The defence was that the pursuer had never given to the defenders proper possession of the subjects, in respect that the houses, steading, and fences were not in a proper state of repair, and on 11th July 1908 the Sheriff-Substitute, before answer, allowed a proof.

There was this peculiarity in the case, that the lease, under which of course the irritancy was declared and which was signed by the defenders, contained, *inter alia*, a clause accepting the buildings as in proper repair. At the same time a correspondence is produced in which there is a letter of 9th November 1904—that being the year of entry—in which the law agent for the tenants writes thus—"With regard to the undertaking on page fourth" (*i.e.* of the lease) "as to keeping houses and fences, &c., in good condition, Messrs Nelson agree to do so, but before signing they would require an undertaking that these are to be put in good condition." The pursuer's agents replied undertaking to put them in order, and the averment is that that undertaking was never fulfilled.

Now the Sheriff-Substitute allowed a proof, but at the same time he expressed a doubt as to the relevancy of some of the defenders' averments as founding a right to retain rent. It was admitted that they had never paid rent, and that rent was due. The Sheriff-Substitute says—"But as a proof is necessary it is desirable that the whole matter should be gone into at one time. And this seems to receive added force from rule 55 of the Sheriff Courts Act 1907, which appears to justify dealing with all defenders' counter claims." That means that the defenders, having stated that the premises were not in proper order, counterclaimed for a certain sum and asked for decree.

An appeal was taken to the Sheriff, but before the Sheriff a new point was taken, which was this:—The defenders had not lodged their defences within the proper number of days, *i.e.*, six days, nor during the currency of the six days had they applied for an extension of the time for lodging, but a few days after the expiry of the time the Sheriff-Substitute, on cause shown, had allowed the defences to be lodged at a later date. Now the point taken before the Sheriff was that this enlargement of the time was outwith the powers of the Sheriff-Substitute, and that he had no option in the circumstances but to pronounce decree. The Sheriff gave effect to that argument, and therefore recalled the interlocutor allowing a proof and granted decree *de plano*.

Now all this depends on the 56th rule of the First Schedule of the Sheriff Courts Act 1907, and, as the Sheriff said, it is an important point of practice in the Sheriff Court, and its importance is increased by the fact that there are contradictory decisions on the point in different sheriffdoms. The 56th rule is as follows—[*His Lordship quoted the rule, v. sup. in rubric*].

Now the learned Sheriff has based his judgment really entirely upon what may be called the strict view of the word "prorogate." He has held that the proper meaning of prorogate is to extend the term which has not yet expired, and that it cannot be applied to allowing a new term after the term has expired. I do not know that as a rule very much is to be gained by a strict inquiry into the original etymological meaning of a word, and therefore I do not think that it is of very much use to inquire as to the precise meaning of the Latin word *prorogo*, or its English derivative "prorogate." The learned counsel have made a very diligent search and they have discovered the word "prorogate" used by eminent judges, and they were certainly able to establish that, rightly or wrongly, it had been used in both senses. But I am not really much moved even by that. I think the matter chiefly to be considered is what is the natural meaning of the section which I have just read, and I cannot say that has given me much trouble. It is to be noticed that the sentence in which the word "prorogate" finds itself is introduced by the word "but"; that is to say, it is to be as an alternative to something that has gone before. Now the thing that has gone before is, that if there is a default of any sort, the Sheriff may grant decree as craved or may dismiss the action. But then he may also, upon cause shown, prorogate. It seems to me that all that naturally points to an alternative which is to be exercised then and there—that is to say, in other words, that the Sheriff is to have two courses of action open to him. He is either to grant decree of some sort or another appropriate to the case, or he is to do something else, viz., to extend the time for lodging defences. That seems to me the common sense of it, and I am not myself to be taken away from the common sense of it by a very strict view of the proper meaning of the word "prorogate." The truth is, that if you run strictness to excess I think that you would find that "prorogate" is equally improper for both, because after all I do not know how you can extend a period of time. A period of time always remains the same, and nothing you can do will alter it. You can substitute a new and longer period of time for the old one, but to extend the original period of time, I think, is beyond the powers of any judge, sheriff or otherwise. Accordingly, I cannot help thinking that that is a very plain view of the section; and one is certainly helped to that interpretation by finding that there is no provision in the Act afterwards for what is commonly known as reponing. We are familiar in other Acts, notably in the Court of Session Acts, with provisions for reponing where a period has, through some innocent default, been allowed to lapse. Here they are not found; and it is at least, I think, very unlikely that a more cast-iron rule should be introduced by this Act for the Sheriff Court than exists in the Court of Session. Upon the whole matter I have come to the conclusion—and I must say without any difficulty—that the Sheriff-Substitute was within his rights when he extended the time, and that the judgment of the learned Sheriff was wrong.

Now comes the question of what is to be done with the action. We were told at the hearing that Martinmas having long ago passed, and the tenants having gone out, the action really remains for nothing at all except for the declarator, which of course the pursuer is still to get, and the question of expenses. Now as far as the declarator and removing is concerned, it seems to me that the tenant by going out really owns himself confessed that he had no proper defence to that part of the action. The only thing that the action will be useful for to the tenant—if he can utilise it—will be for this so-called counter-claim of £100. But I am of opinion that there the learned Sheriff-Substitute rather confused two things which ought to be kept separate. Counter-claims are dealt with in rule 55 in these terms—"Where a defender pleads a counter-claim . . . . the Sheriff may thereafter deal with it as if it had been stated in a substantive action, and may grant decree for it in whole or in part, or for the difference between it and the claim sued on." That seems to me to make it perfectly clear that a counter-claim in this sense must be a claim which can be set off pecuniarily against the claim sued for, and that therefore there is no such thing as raising in defences a counter-claim for which you could have decree where the conclusions of the action itself are not pecuniary at all but are merely declaratory.

I say that I think the learned Sheriff-Substitute confuses the matter a little, because I do not think he was wrong at that time in allowing the proof, for it was a good defence—if true—to say—"I was entitled to retain my rent because you had not performed your obligations towards me," and if he was entitled to retain his rent, then, of course, there was no irritancy incurred. Therefore it would be necessary to go into the question of whether he had been refused possession or not. Again, there would have been a question to inquire into, whether the effect of the letter that I read was really the same as if the lease had had a *notandum* appended to the approval of buildings clause, to the effect that the expression of satisfaction with the house and buildings was only signed on the understanding that they were first of all to be put right. But the point is that the inquiry would have been as to the fact of the bad condition of the house as let by the landlord, and not as to the valuation of damage which was thereby caused to the tenant; and it is only the latter, of course, that gives rise to a counter claim in the proper sense of the word.

Accordingly, I think this action cannot be utilised for the purpose of evaluating any damage which the landlord is due to the tenant, if, in fact, any such damage is due. There is, therefore, nothing left except the declarator, and the decree to remove. The decree to remove, of course,

is quite useless, because the tenant is gone, and as far as the declarator is concerned I think that by his action the tenant has held himself confessed. The result of all this is that what I propose to your Lordships to do is to recal the whole of the interlocutors of the Sheriff and of the Sheriff-Substitute; to find and declare in terms of the prayer of the petition; to make no order, of course, as to the removing, because that is unnecessary; to find the landlord entitled to the expenses of the process up to the date of the Sheriff's interlocutor of 11th July, and to find the tenant entitled to the expenses of process since the date of 11th July.

LORD KINNEAR—I agree upon all the points which your Lordship has stated. The question of procedure is of some importance, because it may more or less frequently arise, and we are told that the learned Sheriffs in different counties have given different decisions upon the construction of the statute. I have considered all the cases that have been cited to us, and I have given great attention to the reasons expressed by the Sheriff in this case and by the Sheriffs who agree with him. It appears to me that these learned Sheriffs proceed upon an erroneous method of construction, inasmuch as they lay too much stress upon what they think to be the true significance of a particular word, and seek to apply it with an exact logical precision which, in the ordinary employment of language, is impossible to observe. The learned Sheriff says, and it is perfectly true, that there is a difference between extending the time when defences or other papers may be received beyond the period originally fixed while that period is still current, and allowing them to be received after that period is passed, and he goes on to say that the first process is properly described by the word prorogate, and the second is not, because you cannot prorogate a period that has already run out. I think the learned Sheriff quite right in saying, as he does in another part of his judgment, that "prorogate" means to continue or to extend a time; and I suppose his argument would have been equally applicable if the Act of Parliament had used one of these synonyms, such as "may continue the time," or "may extend the time," in preference to the actual word used, viz., "prorogate." I think, therefore, that we are relieved from considering what presents to my mind no difficulty, whether there is any technical meaning attached to the word "prorogate." Then the Sheriff says you cannot extend or continue a time that has elapsed; but I think the answer is that which has been given by his Lordship in the chair, that if you are to use language with that amount of logical precision you cannot extend a fixed period at all, whether you attempt to do so during its currency or after it has expired. But yet, if you describe the process of allowing a paper to be received at a date later than that originally fixed for lodging it by saying that the judge has "continued" the time for lodging, or "extended" it, or "altered" the time by fixing a later date, or "prorogated" it, I think in all these forms of expression you are using perfectly intelligible and idiomatic English—if, indeed, the word "prorogate" be idiomatic English, as the others all are. If there be any question about it, then it is to be solved by use, which, according to the classical dictum, is the only competent authority, and the learned Sheriff says that the practice is against the strict view, for he says there is no doubt that in practice the word "prorogate" is not uncommonly used to include the case of substituting a new term after the original period has expired. Counsel brought under our notice a variety of cases in which the word had been so used. It is so used in the previous Act of Parliament, and it has been so used by two Lords President in this Court, for Lord President M'Neill says in one case—"The Lord Ordinary could have granted a prorogation, and he could have granted it after the expiration of the time on paying expenses"; and Lord President Inglis says—"A sheriff has discretion of prorogation, provided the party in default offers a reasonable excuse for his delay." Now that is the exact statement of the Sheriff's discretion as your Lordships find it to be expressed in the rule now under construction.

If I had any doubt as to the use of the word which the learned Sheriff challenged being legitimate, I should have come to the same conclusion, because I think the learned Sheriff has adopted an erroneous method in his construction of the Act of Parliament. It is an unusual method of critical analysis to begin by pulling to pieces a particular word taken separately, instead of reading it along with its context and trying to get at the substantial meaning of the whole clause in which it occurs. When the word is taken in its place I for my part can see no reason for doubt as to the meaning. The rule says that when any production has not been lodged, the Sheriff may grant decree as craved, or may dismiss the action with expenses; but, it goes on to say, the Sheriff may—that is, instead of taking the procedure which has been previously pointed out as open to him—it says he may, upon cause shown, "prorogate" the time for lodging any production or implementing any order. But that refers to the time when he is asked to apply his mind to the question whether there has or has not been a reasonable ground for delay, and that it applies, whether that time occurs during the currency or after the the lapse of the period originally fixed, seems to me to be quite clear. I think it is all the clearer when it is found to be in accordance, not only with the practice previously fixed by former Acts of Parliament for the Sheriff Court—I mean, found to be in fact in accordance with these Acts—but also with the former practice of this Court. The learned Sheriff says that, according to his view, no provision was made for reponing a party against the

consequence of his default if his pleading is not in and the time has expired before he has asked for delay. That appears to me to be conclusive against the construction adopted by the learned Sheriff, because it requires us to assume that Parliament, taking into account that there may be a reasonable ground for failing to lodge a paper in a prescribed time, has nevertheless laid down an arbitrary rule by which the validity of an excuse presumed to be sufficient is to depend upon an accident of date which may not be within the control of the party. If a paper has not been lodged, for example, because of the illness or death of a person charged with the duty of lodging it, there seems to be no reason why that should be a good excuse for default if that occurs towards the beginning of the period, but not if it occurs so late that an application for delay cannot be made before the period has run out. Therefore, reading the section as it stands, and considering its effect in the light of the existing state of the law before the Act was passed, and the state of the law regulating our own procedure, I confess, if I agreed with the learned Sheriff in thinking that to call this process of allowing a new date for lodging new papers a "prorogation" is a misuse of language, I still should not hesitate to give effect to what I thought was the substantial meaning of the enactment. If it is a misuse of the language, we must allow language to be misused, for I cannot think there is any dubiety as to the real intention of the statute.

If that be so, and the ground of the Sheriff's judgment is displaced, I agree with your Lordship that nothing else remains in the action. If it had been an action concluding for payment of a sum of money by way of rent, it may well be that a question of accounting would have arisen, if the defender had pleaded as a counter-claim that he was entitled to money by way of reduction of the rent or by way of damages; but the only conclusion here is for removal. That conclusion is now unnecessary, and would be fruitless, because the tenant has removed himself, and I do not think it is material to consider whether he did so because he knew that he had no right to retain the subjects, or because, for any reasons sufficient for himself, he chose to remove from possession. In any case he cannot come back and insist on re-entering the farm, and the conclusion for removing is therefore unnecessary—it has served its purpose.

I quite agree with your Lordship that the provision which allows the Sheriff Court to consider the counter-claim necessarily implies that the original claim is a money claim—that there is a question of accounting raised in the action. If there is no claim, there can be no counter-claim, and in this case there is no claim except one of removing against a tenant who is no longer entitled to maintain that he should not be removed from the ground. I therefore agree with the judgment your Lordship proposes.

LORD GUTHRIE—I concur. There are two general questions of importance raised in the case, both under rules contained in the schedule of the 1907 Sheriff Courts Act, the one being under rule 55, the question as to the counter-claim, and the other being under rule 56, the question as to the meaning and effect of the clause about "prorogation." On the first question I concur in the view which your Lordships have taken, that here, there being no claim, there cannot, on a sound construction of section 55, be a counter-claim. On the other question, namely, the question of "prorogation," two things seem clear. The first is that there is no presumption in favour of the Sheriff's view, and the result would be, that in the ordinary working of Sheriff Court procedure occasions would arise when gross injustice would have to be done. The other is that in previous Acts of Parliament special provision has been made for the very case that has arisen here. That being so, suppose the words had been capable of two constructions, as I think is admitted, one would have been inclined to give the construction that was in accordance with previous practice, and that was in accordance with manifest justice. But further, I think that, apart from any question of ambiguity, on a sound construction of the section, the only difficulty that might arise would be as to whether there is any power under the section for the Sheriff, while the time is running, to prolong the time. Looking to the alternative or antithesis, it would rather appear as if the Sheriff can only exercise the discretion given to him when the matter is brought before him on an application for decree as craved, or for absolvitor or for dismissal. By that time the period, of course, has elapsed, and the only express provision in the section is for his dealing with the matter then, because it says that he may then on cause shown "prorogate" the time. I do not, however, suggest that there is any doubt, apart from any express provision, that while the time is running the Sheriff can "prorogate" the time. In my opinion to "prorogate" merely means to give additional time or to prolong the time, and therefore I do not think the view that the Sheriff has taken is in accordance with the sound construction of the sentence as framed. But even if there were ambiguity in the matter, I think that the proper result would be to hold that both cases are covered.

LORD M'LAREN and LORD PEARSON were sitting in the Extra Division.

The Court recalled the interlocutors of the Sheriff and Sheriff-Substitute, dated respectively 29th September 1908 and 11th July 1908; found and declared in terms of the declaratory conclusion of the action; *quoad ultra* dismissed it and decerned, and found the pursuer entitled to expenses up to and including said 11th July 1908, and found the defenders entitled to expenses subsequent to said date both in the Court of Session and in the Sheriff Court.

Counsel for the Pursuer (Respondent)—Constable, K.C.—Black. Agent—Thomas Liddle, S.S.C.

Counsel for the Defenders (Appellants)—Macmillan.—J. A. Christie. Agent—Henry Bower, S.S.C.

Friday, June 4.

FIRST DIVISION.

[Lord Skerrington, Ordinary.

QUINN *v.* EADIE AND OTHERS.

Licensing Laws—Hotel—Confirmation—"New Certificate"—Renewal of Certificate—Holder of Six-Day Certificate Granted a Seven-Day Certificate—Necessity of Confirmation—Personal Bar to Claim, No Confirmation Required—Licensing (Scotland) Act 1903 (3 *Edw. VII, cap.* 25), *secs.* 13 *and* 107.

The Licensing (Scotland) Act 1903 enacts—Section 13—"A grant of a new certificate by any Licensing Court shall not be valid unless it shall be confirmed by the Court of Appeal from such Licensing Court." Section 107—"... Unless there be something in the subject or context repugnant to such construction ... 'new certificate' means a certificate granted to any person in respect of any premises which are not certificated at the time of the application for such grant, but shall not apply to the rebuilding of certificated premises which have been destroyed by fire, tempest, or other unforeseen and unavoidable calamity.

Held that where an unrestricted certificate for his hotel is granted by the Licensing Court to the holder of a six-day certificate, the unrestricted certificate is not a "new certificate" within the meaning of the Act, and consequently does not require confirmation.

Circumstances in which *held* that the holder of a six-day licence had barred himself from maintaining that an unrestricted certificate granted to him by the Licensing Court did not require confirmation.

Licensing Laws—Hotel—Six-Day Certificate—Time for Limiting Application to Six-Day Certificate—Licensing (Scotland) Act 1903 (3 *Edw. VII, cap.* 25), *sec.* 38 (1).

The Licensing (Scotland) Act 1903, enacts—Section 38 (1)—"Where on the occasion of an application for a new certificate or transfer or renewal of a certificate for an inn and hotel, the applicant at the time of his application applies to the Licensing Court to insert in his certificate a condition that he shall keep the premises in respect of which such certificate is or is to be granted closed during the whole of Sunday, the Licensing Court shall modify such certificate by the omission therefrom of the words 'and travellers.'"

Opinion by the Lord President that it was not necessary to state in the application for an hotel certificate that the crave was for a six-day licence, but that the restriction was timeously brought before the Court when it was disposing of the application.

The Licensing (Scotland) Act 1903 (3 Edw. VII, cap. 25), sections 13, 38 (1), and 107, are sufficiently quoted *supra* in the rubric.

George Quinn, Globe Hotel, Paisley, raised an action against Peter Eadie and others, the Magistrates of Paisley attending the Licensing Court for the burgh of Paisley, held on 14th April 1908, Francis Martin, town clerk of Paisley, and William Walker, burgh prosecutor in Paisley, for declarator "that the certificate granted on 14th April 1908 by the said Burgh Licensing Court in favour of the pursuer for an inn and hotel, for the said Globe Hotel, was not a 'new certificate' within the meaning of the Licensing (Scotland) Act 1903 (3 Edw. VII, cap. 25), and did not require confirmation by the said Court of Appeal, and that the said certificate made out by the defender second called and delivered by him to the pursuer in terms of the Act, is valid"; and "that the pursuer was and is entitled to traffic in exciseable liquors under said certificate in said hotel, and in terms of said Licensing Act."

The pursuer pleaded, *inter alia*—"(2) The certificate granted in favour of the pursuer by the Licensing Court not being a 'new certificate' within the meaning of the Licensing (Scotland) Act 1903, the pursuer is entitled to decree of declarator in terms of the conclusions of the summons."

The defender William Walker pleaded, *inter alia*—"(3) In respect the pursuer holds no valid certificate within the meaning of the Licensing (Scotland) Act 1903, this action is incompetent and should be dismissed. (4) The certificate granted to the pursuer by the Licensing Court not being valid without the confirmation of the Appeal Court, and such confirmation having been refused, this defender is entitled to absolvitor. (5) The certificate founded on by the pursuer being a 'new certificate' within the meaning of said Licensing Act, and as such requiring confirmation, and such confirmation not having been granted, this defender is entitled to absolvitor." [Similar pleas were stated for the Magistrates and town clerk.]

The pursuer was proprietor of the Globe Hotel, Paisley, and up to 28th May 1908, he held what is described in the Licensing Act as a six-day certificate for his hotel, *i.e.*, a certificate having the words "and travellers" deleted, which required him to keep his hotel closed during the whole of Sunday. On 30th March 1908 he presented two applications to the Licensing Court. The one application set forth—"That the applicant is desirous to obtain a Certificate for Licence for an inn and hotel at No. 92 High Street, in the burgh of Paisley and county of Renfrew, for the ensuing year, in terms of this Act, and refers to the answers which are truly made to the subjoined queries." And in reply to the