to take trial of the petitioner's qualifications, fitness, and capacity to be admitted as a law agent, and to report." The petitioner is dissatisfied with that interlocutor, because he thinks he has a title to be admitted without examination. Now, the Lord Ordinary has himself suggested a difficulty which is worthy of consideration, viz., whether the statute intended the interlocutor of a Lord Ordinary to be subject to review. That depends on the 7th section of the Law Agents Act, which is—"Any person qualified as hereinbefore provided may present to the Court a petition praying to be admitted as a law agent, and the Court shall examine and inquire by such ways and means as they think proper touching the indenture and service and the fitness and capacity of such person to act as a law agent; and if the Court shall be satisfied by such examination, or by the certificate of examiners as hereinafter mentioned, that such person is duly qualified and fit and competent to act as a law agent, then and not otherwise the Court shall cause him to be admitted a law agent, and his name to be enrolled as such, which admission shall be in writing and signed by a Judge of the Court, and shall be stamped with the stamp required by law to be impressed on the admission of law agents." And then follows the portion which more immediately applies to this case—"The petition may be presented to any Judge of the Court officiating as a Lord Ordinary, and the proceedings under the same may take place and be conducted before the same or any other Judge, according to the judicial arrangements in the Court for the time being, and a single Judge shall be entitled to act as the Court with reference to all petitions for admission as a law agent under this Act." Now, the difficulty arises from the last member of that sentence—"a single Judge shall be entitled to act as the Court with reference to all petitions for admission as a law agent under this Act;" but notwithstanding the ambiguity raised by that form of expression, we are of opinion, and the Judges of the Second Division whom we consulted are of opinion also, that it is not incompetent to submit this interlocutor to review by the Inner House. Our view is, that the petition is in the first instance to be presented to a Lord Ordinary, and it may be presented to the Lord Ordinary who is officiating on the Bills in vacation, and the form of expression is probably due to the fact that it was intended to make it competent to present the petition to any Judge of the Court of Session who may be in that position. The power of review by the Inner House of all interlocutors pronounced by a Lord Ordinary cannot be taken away by implication, and there is nothing here like an express withdrawal of that power of review. It therefore becomes necessary to consider the merits of this application.

Lords Deas and Mure concurred.

Lord Ardmillan was absent.

The Court, after hearing further argument on the merits, pronounced the following interlocutor:—

"The Lords having heard counsel for the reclaimer on the reclaiming note for John Robertson, writer, Edinburgh, against Lord Young's interlocutor of 29th June 1876, Sustain the competency of the reclaiming note, but refuse the same on the merits, and adhere to the interlocutor reclaimed against."

Counsel for Petitioner—Begg. Agent—Party.

Tuesday, July 18.

SECOND DIVISION.

STARK *v.* DAVIE.

Lease—Condition—Rescission of Contract.

Missives of lease of a shop were entered into—the tenant stipulating that during his lease an adjoining shop should not be let to any person in his own trade. The landlord subsequently took possession of this adjoining shop himself, and carried on a business there under which he sold a number of articles similar to those dealt in by the tenant.—*Held* that a material condition of the contract had been violated, and (*dub.* Lord Ormidale) that the tenant was entitled to rescind the lease.

This was an appeal from the Sheriff Court of Edinburgh against a judgment of the Sheriff-Substitute. The action was at the instance of John Davie, boot and shoemaker in Edinburgh, against William C. Stark, clothier and outfitter there, and concluded for the sum of £50 sterling, being half-year's rent of shop and pertinents No. 92 High Street, Edinburgh, belonging to "the pursuer, due at Martinmas 1875 for the half-year immediately preceding, and which shop and pertinents were let to the defender on lease for seven years from Whitsunday 1872 to Whitsunday 1879, at the annual rent of One hundred pounds, payable at the usual half-yearly terms." The lease was negotiated in February 1872 by missive letters between the defender and Messrs M'Kellar & Swan, builders in Edinburgh, who were then proprietors of the subject. The offer made by the defender, dated 5th February, was as follows:—"I offer to take that new shop No. , lowmost shop, High Street, with cellarage below, for a period of seven years, at the yearly rental of One hundred pounds sterling, on conditions that it is fitted up with gas-fittings according to my instructions; that the two shops above, No. and High Street, are not let during the term of my lease to any person or persons in the drapery, clothing, or ready-made outfitting trade." On 6th February Mr Spalding, W.S., agent for Messrs M'Kellar & Swan, replied:—"Sir,—Messrs M'Kellar & Swan have handed me your letter of 5th current. They instruct me to state that they are willing to give you the lease you wish of their lowest shop in High Street on condition of your giving security to their satisfaction for the rents, and that as regards the gas-rods they are willing to bear half the expense—the rods becoming theirs at the end of the lease. They are willing to consent to the restriction you propose as to the shop next to the one you offer for, but they cannot consent to any restriction as to the uppermost of two shops above, to which you refer. Of course if you were to assign or

sublet it would need to be to tenants approved of by the landlords, and it would be necessary to provide that they should have the option of terminating the lease in the event of your becoming bankrupt or executing a trust-deed for behoof of creditors. I shall be glad to hear from you to-morrow, and if you are satisfied with the terms I shall send you the draft lease for revisal.—I am, &c." On 7th February Mr Stark wrote:—"Sir,—In reply to yours of the 6th, I agree to find security for the rent on the conditions that all the gas-rods are fitted up wholly and entirely at the expense of the landlords according to my instructions; that the shop next to the one I offer for be subject to the restrictions referred to in my last letter, and the smaller shop above that (being the second shop above the one I offer for) be not let during the term of my lease to a clothier, or any person or persons in the men's ready-made clothing trade.—I am," &c. And on 12th February Messrs M'Kellar & Swan replied:—"Dear Sir,—We hereby accept your offer of the 7th instant for the lowest shop in the tenements now erecting by us in High Street and Blackfriars Street, and that we give you possession by the 10th May 1872.—Yours," &c. No formal lease of the premises was received by the defender from M'Kellar & Swan. Considerable correspondence passed between them on the subject of the lease, and M'Kellar & Swan gave as their reason for not implementing the missives that the property had been sold to the pursuer, who objected to the restrictions agreed upon. With a view to obtain implement the defender by memorandum of 8th May 1872 agreed to submit his own business to a restriction of not selling hats, satin, silk, and felt. No lease was however obtained, but the defender obtained possession of the shop on 10th May 1872, and carried on his business there from that date. The pursuer Davie purchased the whole tenements of which the defender's shop and premises formed part, with entry at Whitsunday 1872. He entered himself into the occupancy of the shop No. 94 High Street, to which the restrictions applied, and exposed for sale various articles averred by the defender to form part of the ordinary stock of a draper, clothier, or ready-made outfitter. On 27th May 1872 the defender by letter by his agent to the pursuer required him to discontinue exposing the said articles for sale, as being in violation of the condition in the missives of lease, but this the pursuer refused to do. Some correspondence followed, and on 15th June 1872 the defender formally intimated by letter by his agent to the pursuer that he held that he was selling certain articles in contravention of his lease, and that he reserved to himself the right to proceed against him for enforcement of the lease, and held him liable in damages. The pursuer replied on 17th June that he did not admit that the defender occupied the premises under a lease at all, and that he reserved right to himself to put an end to his tenancy at the end of the year or when he should think proper. Acting on this repudiation of the lease, the defender gave notice on 1st February 1875 that he would cease to be tenant of the shop at the following Whitsunday. He received no reply to his letter making this intimation, and on 2d March he wrote to the pursuer stating that he held him to have acquiesced in it. To this letter he received the following reply from the pursuer's agent:—"Dear Sir,—Mr Davie has handed me your letters to him of the 1st ult. and 2d inst. Your first letter required no reply, as my client was at a loss to understand how you could propose to cease to be his tenant in the face of the missives of lease entered into between you and his authors Messrs M'Kellar & Swan, and your agents' subsequent letters to me insisting that you held the premises on lease, when my client proposed to question your position. You will therefore be good enough to understand that my client declines to relieve you of the lease, and any attempt on your part to get out of it can only involve you in expense. My client is selling the property under burden of the lease, and if you get the purchaser to relieve you, good and well, but with that Mr Davie has nothing to do.—Yours, &c." On 17th March 1875 the defender's agent wrote as follows to the agents of the pursuer:—"Dear Sir,—No doubt you will remember that in the months of May and June 1872 we had a correspondence with you in reference to the occupancy of the shop 92 High Street, belonging to your client Mr Davie, and occupied by Mr W. C. Stark. In that correspondence we drew your attention to the fact that Mr Stark's occupancy of the premises was coupled with certain conditions as to the trade to be carried on in the shop No. 94, and which also belongs to your client. We pointed out certain articles which were being exposed for sale in that shop in contravention of the missives of occupancy, and reserved Mr Stark's right to enforce the conditions, and also to claim damages for these conditions being violated. We are now instructed to intimate to you on behalf of Mr Davie, that from his having gone on for the last three years contravening the terms of occupancy of the premises, Mr Stark intends to insist for payment at the rate of £30 per annum in name of damages, and we are also instructed to intimate that unless a satisfactory arrangement is come to on the subject on or before Saturday first, proceedings will at once be taken for enforcing the claim, and also for interdict of Mr Davie's proceedings.—We are, &c." In reply the pursuer denied having contravened the stipulation in the missive letters. On 23d April 1875 the defender's agents wrote:—"Dear Sir,—Referring to our letter to you of the 17th, and your answer thereto of the 18th ultimo on this subject, we now beg formally to intimate to you, as acting for Mr Davie, that unless he discontinues on or before the 1st May 1875 infringing the terms of Mr Stark's lease, as already complained of, Mr Stark will hold himself entitled to renounce the lease in question, and vacate the premises, and he will do so at the term of Whitsunday first. Of course this proceeding does not in any way affect the question of damage already sustained by Mr Stark, and an action will at once be raised to enforce that claim.—We are," &c.

The pursuer however declined to make any restriction in the conduct of his business, and after repeating the intimation made by him on 23d April, the defender vacated and displenished the shop at Whitsunday 1875, and sent the keys to the pursuer. The pursuer then returned the keys, and intimated to the defender that he held him liable for the rent during the currency of the lease. Thereafter the pursuer made application to the Sheriff for warrant to let the shop, and to

apply the rent in payment *pro tanto* of the rent to become due by the defender under the lease, reserving his claim against the defender for the balance that might remain due. The warrant was obtained, but a tenant not having been found, the pursuer himself entered into possession of the shop in November 1875, and sued the defender for the rent between Whitsunday and Martinmas.

The Sheriff-Substitute (HALLARD) pronounced the following interlocutor, with note appended, dated 16th February 1876:—

"The Sheriff-Substitute having considered the closed record and productions, and heard parties' procurators thereon: Finds that in April 1875 the defender was tenant under the pursuer of the shop No. 92 High Street, the lease constituted by the missives produced, and possession following thereon, having then still upwards of four years to run: Finds that on the 23d of said month the defender gave notice that he was to renounce the lease and vacate the shop at the following Whitsunday 1875, unless effect were given to his complaint of violation of a condition of the lease hereinafter referred to: Finds that the defender did accordingly vacate the premises at said term: Finds that the pursuer did not recognise said renunciation, but endeavoured in September 1875 to let said shop by judicial authority, and that the same remained unlet from Whitsunday 1875 till Martinmas following, being the six months to which is applicable the rent now sought to be recovered by the present action: Finds that the ground on which the defender gave up his occupancy and lease of the said shop 92 High Street, was an allegation that the pursuer, as occupier and owner of the adjoining shop No. 94, had violated a condition of the lease under which the defender held the shop in question, No. 92, as tenant of the common authors of both parties, Messrs Mackellar & Swan, from whom the pursuer had in 1872 purchased the whole subjects under burden of the defender's lease: Finds that said alleged violation of the lease was that the pursuer offered for sale in shop No. 94 articles of the same kind as those offered for sale by the defender in shop No. 92: Finds that the defender was not entitled, on the ground so alleged by him, to put an end to the lease, and abandon possession as at Whitsunday 1875: Therefore Finds that the defender is bound to pay the rent concluded for, from Whitsunday till Martinmas 1875; decerns in terms of the conclusions of the libel: Finds the defender liable in expenses, of which allows an account to be given in, and remits the same when lodged to Mr Robert Barclay Selby, solicitor, or to the Clerk of Court, to tax and report; and decerns.

"*Note.*—On the assumption that the defender's complaint was well founded, it is thought that the remedy adopted by him was not a competent one. He might have sought redress for the past by damages, and protection for the future by interdict. But his right to break the lease is not clear, and required at all events to be ascertained by declarator.

"At the very interesting debate with which the Sheriff-Substitute was favoured, the pursuer relied on the case of *Dryburgh* v. *Dryburgh*, 21st May 1874. The defender justly pointed out the distinction between that case and the present. There the tenant remained in possession, and refused payment of his rent in respect of an unconstituted and illiquid claim for abatement of rent. Here the tenant ceased to possess. But it is thought that that authority applies here *a fortiori*. If the tenant remaining in possession is not entitled to oppose to a demand for rent an illiquid claim expressly contemplated in the lease, still less is he entitled at his own hand to break the lease, cease possession, and leave the premises without a tenant. A claim to abate rent is surely a smaller thing than a claim to void the lease. If decree of constitution be needed for the one, decree of declarator seems to be much more needed for the other."

The defender appealed to the Second Division of the Court of Session.

The Court ordered a proof, chiefly as to the extent of the contravention of the conditions contained in the missive letters; and thereafter heard counsel.

Argued for the appellant—Restriction in question was fundamental to the lease. Pursuer violated the condition seriously, persistently, and deliberately. Having violated the contract he cannot, while refusing implement on the one hand, demand implement on the other.

Argued for the respondent—Condition in question was not essential to the contract. Rescission is an ultimate remedy, and if interdict will do, it must not be resorted to.

Authorities cited—Stair i. 10, 16; *Turnbull* v. *M'Lean*, March 5, 1874, 1 Rettie 730; *Macbride* v. *Hamilton*, June 11, 1875, 2 Rettie 775; Addison on Contracts (last ed.) 266; *Johannso* v. *Young*, 32 L.J., Q.B. 385; Hunter on Landlord and Tenant (last ed.) 280; *Duncan* v. *M'Dougall*, Hume 792.

At advising—

LORD JUSTICE-CLERK—This is an action at the instance of John Davie, who is proprietor of the subject in question, concluding for the half-year's rent, due at Martinmas 1875, of the shop and pertinents No. 92 High Street, which was let to the defender Stark on lease for seven years from Whitsunday 1872. The defence is, that admitting that the defender entered into possession of the premises under a seven years' lease, he did so under a condition which the pursuer refused to implement, and that he was therefore entitled to rescind the contract. There is also a set-off of damages against the claim made by the pursuer. The Sheriff has found that the defender was not entitled to put an end to the lease and abandon possession as at Whitsunday 1875, and decerned against him for the rent concluded for. I am of opinion that the defender was entitled to rescind the lease, because there was a violation of an essential condition of the contract; and also that he is entitled to set off the damage suffered by him in consequence of that violation. In regard to the terms of the lease, the first offer was made to M'Kellar & Swan, who were then proprietors of the subject, on 5th February 1872, and is in these terms:—"I offer to take that new shop, No. , lowmost shop, High Street, with cellarage below, for a period of 7 years, at the yearly rental of One hundred pounds stg., on conditions . . . that the two shops No. and High Street

are not let during the term of my lease to any person or persons in the drapery, clothing, or ready-made outfitting trade."

On 6th February there is the following answer:—"Messrs M'Kellar & Swan have handed me your letter of 5th current. They instruct me to state that they are willing to give you the lease you wish of their lowest shop in High Street. . . . They are willing to consent to the restriction you propose as to the shop next to the one you offer for, but they cannot consent to any restriction as to the uppermost of two shops above to which you refer." On 7th February Stark writes agreeing to find security for the rent, &c., on condition "that the shop next to the one I offer for be subject to the restrictions referred to in my last letter, and the smaller shop above that (being the second shop above the one I offer for) be not let during the term of my lease to a clothier, or any person or persons in the men's ready-made clothing trade." No doubt, therefore, it was an essential part of the contract that the next shop should not be let to any person in the clothing trade. Mr Davie shortly afterwards purchased the premises. He professes not to have been aware of the lease, or of the condition contained in it. On 29th May Mr Wood writes on the part of Davie:—"My client was not aware that Mr Stark possessed the premises occupied by him under a lease, as he was applied to the other day to give his consent as purchaser of the premises to a lease in your client's favour containing some absurd provisions as to what your client was to sell, or rather not to sell, and which he declined to have anything to do with. I shall be glad, however, to be favoured with a copy of your client's lease, as my client has no wish to interfere with your client's rights. I presume you are aware, however, that my client does not possess the shop occupied by him as tenant, but as proprietor." Then follows a correspondence, which results in Davie refusing to be controlled regarding his occupation of the shop, or to be bound by the condition. The only other letters which it is necessary to refer to are those of 15th and 17th June. In the former of these the Messrs Donaldson, for Stark, write to Mr Wood:—"We have only to write and say that Mr Stark holds that Mr Davie is selling in his shop certain articles in contravention of the terms of Mr Stark's lease, but he has resolved in the meantime not to take proceedings with the view of preventing the exposure of such articles in the shop, but he reserves to himself the right to proceed against Mr Davie at any time for the enforcement of the terms of the lease, both in respect of the articles he is presently exposing for sale, and of any others he may expose against the terms of the lease. In fact, his wish to avoid litigation for the moment is not to form a bar to his afterwards taking any proceedings he may deem fit, and Mr Stark will hold Mr Davie liable in all damages incurred in respect of his contravening the lease." So the matter ends till February 1875. Mr Davie refuses to be bound by the condition, and denies that there is a lease at all. Accordingly on 1st February Stark writes:—"I beg to acquaint you that I will cease to occupy, after the term of Whitsunday first, that shop No. 92 High Street, as presently occupied by me, and held by me as your yearly tenant. You will therefore be pleased to accept this notice of my removal at that date." Some correspondence follows upon that, and then at last Stark writes on 23d April intimating to Davie that unless he discontinued on or before the 1st May 1875 infringing the terms of the lease as already complained of, he would hold himself entitled to renounce the lease and vacate the premises, reserving his claim for damages already sustained. The first question is, Whether there was a violation of the condition in the contract? The condition was an important one, because the intention of it was to secure to the defender a monopoly of the trade in which he was engaged in the immediate neighbourhood. We have had a proof as to the extent to which the violation went, and that has been the only difficulty which I have felt in the case. The violation was not large, but it was a persistent and intentional violation. The second question is, What was the result of the violation? I entirely adhere to the views expressed in the case of *Turnbull* v. *M'Lean*, and these were, that if the conditions of a contract are not implemented by one party, the other party can refuse implement and claim damages, or rescind the contract. It is a qualification of the general doctrine that the stipulation of which implement is refused must be a material one. If not material, a claim of damages is the proper remedy. What makes this case quite clear is that Davie indicated his intention of violating the condition for the future. I do not say that Stark would have been entitled to rescind had there only been the past violations to take account of, as these were so trifling, but the intention expressed to continue violating made it material, and I think that in the circumstances he was entitled to rescind.

Lord Neaves—I take the same view as to the rights of parties. The stipulation in the lease was a perfectly legal one. The prosperity of a shop depends on its vicinity, and on not being too close to a rival. It is a very reasonable stipulation that a person should say,—I take those premises for a shop or a hotel, provided you do not set up a rival which shall expose me to an undue and nimious competition; there must be a due distance between us. That was the stipulation here made in the offer by Stark, and the original proprietor agreed to it. The expression used is, that the adjoining shop was not to be "let" during the lease to any one in the same trade, but it is quite clear that under that stipulation the proprietor could not himself occupy it for the purpose of carrying on that trade. Davie comes in the place of the original proprietor, and repudiates the conditions which he had agreed to. He violates the contract by setting up himself in a competing business. Then arose a ground of complaint, and the question is, What is the remedy? I think Stark was entitled to rescind. In doing so he did not take advantage of an accidental violation merely, for the pursuer affirmed his right and intention to continue violating. Was Stark to go on under this disadvantage, which he had stipulated to be free from? I cannot hold that. Perhaps we do not require to determine the question of his right to rescind, because this action contains no declaratory conclusion, but is simply a claim for

rent. The rent was the consideration given by the defender for a guarantee that the condition in his lease was not to be violated. Freedom from competition is a thing of value, and that being violated damages lie, which are quite equal to the pursuer's claim. I am, however, prepared to hold that after Whitsunday 1875 the defender was free from his contract, and that no claim for rent can be made upon him after that date.

Lord Ormidale—This is an unfortunate strife between shopkeepers, and I fear that the expenses will be found much in excess of the value of the matter in dispute. I have given the case my best attention. Three questions arise—1st, Was there a violation by the pursuer of an essential condition of the lease? 2d, If there was a violation, was the tenant entitled to abate from the rent, or say that the damage sustained extinguished the claim for rent? 3d, Was the tenant not only entitled to do that, but also to desert the premises and rescind the contract?

1. Was the condition violated? There can be no doubt, and it was not disputed, that the condition was a perfectly legal one. Davie came into the position of the original landlords, and he took their place as if he had been landlord from the beginning. He put himself in that position in the debate. Observe the nature of the advertisement which Davie makes of the stock of his shop when giving up business:—"Boots and Shoes, consisting of a large and excellent assortment of front-lacing, gusset, buttoned, and fancy boots, suitable for ladies, gents, misses, and youths; slippers. Also a large number of gents' satin and felt hats, balmoral and cloth caps; shirts, mufflers, scarfs, ties, collars, handkerchiefs, umbrellas, stockings, braces, and other miscellaneous goods, belonging to a party giving up business." I think it is quite clear from this that there was an encroachment and a violation of the condition of the lease. It must have gone on to a considerable extent, and I think the damage due in consequence is quite sufficient to meet the claim made in this action.

2. I think that the defender's proper remedy was to claim abatement or extinction of the rent. The case of *Campbell* v. *Watt*, Hume 788, is a similar case to the present. In that case the tenant of an inn claimed successfully abatement of rent, because the landlord had erected another inn close by. I think that was a weaker case for the tenant than the present one.

With regard to the 3d question—the defender's right to rescind the contract—I doubt if it was competent for him to do so without an action of reduction or declarator. The argument of the pursuer is a strong one, that when he had the remedy of interdict and did not use it, he was not entitled to rescind. In the case of *Guthrie* v. *Shearer* the tenant rescinded because he had not got possession of a road necessary to the working of his quarry. He had not the remedy of interdict open to him. That case, I think, is not in point, and I doubt whether in this case the tenant could rescind.

I rest my judgment on the ground that the defender's counter-claim of damages extinguishes the claim for rent.

Lord Gifford—Although the amount of the pecuniary or patrimonial interest involved in this case is comparatively small, the case itself raises questions of some delicacy and of great importance in the law of mutual contract.

The appellant Mr Stark was lessee of a shop No. 92 High Street, Edinburgh, under missives dated in February 1872, and that for the term of seven years from and after Whitsuuday 1872, at the yearly rent of £100. The missives were entered into between the appellant as tenant, and M'Kellar & Swan, who were then proprietors, and the missives were followed by possession. Accordingly it is not now matter of dispute that a valid and effectual contract of lease was entered into for seven years, and although the present respondent Mr Davie is a singular successor of the original lessors, it is not now contested, and indeed could not well be, that he is bound by the missives of lease granted by his authors, and clothed with possession. It is true that in the correspondence both parties—first Mr Davie, then Mr Stark—took an opposite view, that the lease was only valid from year to year; but this is now given up—and rightly given up by both parties—and the validity of the seven years' lease is no longer disputed. But, whether disputed or not, I think there is no doubt whatever that a lease for seven years was validly constituted and subsisting, at least until the dispute arose which led to the present proceedings.

It was a condition of the lease, and in my view a very material and important condition, that the shop let to the appellant should have secured to it what has been called a locally limited monopoly, to this extent, that the adjoining shop, which belonged to the same proprietors, should not be occupied for the purposes of the same trade as that carried on by the appellant. The words of this condition in the missives are peculiar. They are as follows:—"On condition that the two shops above" (afterwards restricted to the shop immediately above) "are not let during the term of my lease to any person or persons in the drapery, clothing, or ready-made outfitting trade."

I am of opinion that this condition and stipulation was one which might legally and competently be made—that it was binding upon the contracting parties and on the singular successors of the lessors as an integral part of the appellant's lease; and the first question which arises is—Has this condition and stipulation of the lease been observed by the respondent, who is proprietor of both shops—that is, both of the shop let to the appellant and of the shop immediately above it—and upon this point a long and somewhat elaborate proof has been led under a previous order of Court.

I am of opinion that it has been sufficiently proved that the respondent, from the commencement of the lease down to and subsequent to Whitsunday 1875, has violated and contravened this stipulation in the lease, inasmuch as the respondent during that period has used and occupied the shop immediately above the appellant's shop for the sale of articles in "the drapery, clothing, or ready-made outfitting trade." It was originally contended that as the stipulation only was that the shop adjoining the appellant's should not be "let" for such a trade, this would not prevent the respondent from so occupying the shop himself. This view, however, which was obviously against the good faith of the con-

tract, was at once disclaimed and abandoned at the bar. It is perfectly obvious that the meaning of the agreement was to prohibit a particular trade in the adjoining shop, whether that trade should be carried on by a tenant or by the landlord himself.

As to the extent of the violation or contravention of the condition, it is true upon the proof that the contravention only went to a certain extent. The respondent did not carry on in the shop adjoining that of the appellant exactly the same trade as that carried on by the appellant. The appellant was a draper, clothier, and outfitter; the respondent was a hatter and bootmaker. But then it is abundantly proved that a great many articles which form a part of the appellant's trade as clothier and outfitter were also sold by the respondent although he was nominally a hatter. For example, although there was not much objection to the hats, cloth caps were sold by the respondent to a very large extent—ties, mufflers, scarfs, braces, woollen shirts, collars, socks, stockings, and other such articles, were all found in the respondent's shop, although many of these formed staple articles in the appellant's trade. I cannot doubt that all this was a contravention of the condition, and in my view it is a most important point. It was a contravention deliberately and resolutely insisted in by the respondent. He absolutely refused to modify his trade in any way. It may also be conceded that the amount of sales effected by the respondent in what I may call contraband articles is not very great, looking to the considerable period of time which elapsed. Still I think the sales were material, and the contravention was not a trifle which it can possibly be said the law will not consider. The extent of goods sold or turned over by the respondent is not the measure of the appellant's loss or prejudice. He had a competitor next door when his landlord had expressly guaranteed him against such competition. He may have had, as suggested in the proof, to lower prices, to press sales, and to submit to the annoyance of seeing possible customers seduced by his neighbour's window and his neighbour's display. And then the appellant could never tell to what extent the rivalry and competition might go—what sacrifices it might involve, and what classes or consignments of goods it might make useless. And so, upon the proof, and without going into details, which are minute and varied, I am prepared to hold that the respondent is chargeable with a gross and persistent violation of the stipulation in the lease, and that to a material and unjustifiable extent persisted in for three years, and this persistence is an all-important attribute of the contravention.

At last Stark puts himself in a very good position. On 23d April 1875 his agents inform Mr Davie that unless he discontinues on or before 1st May infringing the tenure of the lease Mr Stark would hold himself entitled to renounce the lease and vacate the premises at Whitsunday. Now, this was perhaps a little late; still it was the right ground to take. If the answer had been that Mr Davie regretted that there had been a breach of the lease on his part, and that the objectionable articles would be at once removed from his shop, Stark would have been obliged to continue the lease. But what is the answer of the pursuer's agent?—"As my client is not aware that he is infringing the terms of the lease, he declines to alter the conduct of his business." Defiance is thus thrown down. I cannot doubt the defender's right to renounce the lease after he got this answer. I do not think he was bound to resort to interdict—a possible but a troublesome remedy. The remedy of rescission of the contract was fairly open to him. It would be impossible to hold, for instance, that where a proprietor had let a hotel, guaranteeing that there should be no other hotel within a certain distance, if he were to proceed to build another within the distance stipulated, he could oblige the tenant to continue in possession, leaving the tenant to claim damages. The general rule of law is that if one party to a mutual contract will not fulfil a material condition of the contract, the other party is entitled to rescind the contract. Although, as has been observed, there are very few cases in the books in which this doctrine has been applied to the contract of lease, the reason is that a material condition of the lease is seldom violated by the landlord except where he does not give possession of the subjects let, and there are cases falling under this head. Suppose that a right of access to the subjects let were guaranteed by the landlord, could it be doubted that if this access were shut up, especially if it were shut up by the landlord himself, the tenant would be entitled to rescind?

I am therefore of opinion that the tenant was entitled to rescind the lease. I am also of opinion, with your Lordship, that in any view the damages due by the landlord are sufficient to extinguish the sum claimed.

The Court pronounced the following interlocutor:—

> "Find that the missives by which the lease libelled was constituted contained a valid and mutual obligation on the part of the landlord not to let the adjoining premises to anyone in the ready-made men's clothing trade, and that the obligation was enforceable against the respondent (pursuer) as a singular successor: Find that the respondent systematically violated this condition, and that to an appreciable extent, during two and one-half years, and that he maintained his right to continue his trade as formerly, and intimated his intention of doing so notwithstanding remonstrances from the appellant: Find that the appellant has suffered damage in consequence of the respondent's violation of this obligation to a greater extent than the sum sued for: Therefore sustain the appeal, recal the judgment appealed against, and assoilzie the appellant (defender) from the conclusions of the summons, and decern: Find the appellant entitled to expenses in both Courts, and remit to the Auditor of this Court to tax the same and to report."

Counsel for Appellant—Mackintosh—Laidlay. Agent—W. Donaldson, Solicitor.

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