the interlocutor of the Lord Ordinary is right. I think this is a weak case for ordaining a defender to find caution, and that the motion must be refused.

LORD DEAS and LORD MURE concurred.

Counsel for Pursuer — Scott. Agent — John Galletly, S.S.C.

Counsel for Defender—C. J. Guthrie. Agents —Boyd, Macdonald, & Lowson, S.S.C.

Tuesday, October 25.

SECOND DIVISION.

[Sheriff of Lanarkshire.

COLIN DUNLOP & CO. *v.* MEIKLEM.

Title to Sue—Lease—Burden of Proof.

Circumstances in which *held* that a subtenant in a yearly lease could not, in a petition for ejection, impugn the title of the principal tenant, his author, although it was not proved that the latter had continued in possession of the subjects beyond the year of lease.

Lease—Notice to quit—Rei interventus.

Where a tenant received an irregular notice to quit before Martinmas—circumstances in which *held* that the irregularity of the notice had been cured by his subsequent actings, and warrant to eject granted.

This was an appeal in a petition presented in the Sheriff Court of Lanarkshire, at the instance of Colin Dunlop & Co., coal and iron masters, Quarter Iron Works, near Hamilton, against James Meiklem, miller, residing at Newhouse Farm, Hamilton. The petitioners set forth that they were principal tenants of Thinacre Mill, with house, garden, and about 10 acres of land, and that they had let these subjects to Meiklem, the respondent, as sub-tenant for a year from Martinmas 1874 as to the land, and from Whitsunday 1875 as to the mill, houses, and garden; and that on 30th September 1875 they had intimated verbally to the respondent that the lease would not be renewed, and that the respondent said at that time that he would remove at the end of the year's lease. Further, the petitioners averred that a warning to remove was delivered by an officer of Court to the respondent, and that they had let the subject to a new tenant, Stewart, with entry to the land at Martinmas 1875, and to the mill, house, &c., at Whitsunday 1876. Stewart had manured the land and ploughed it, and had also worked the garden. The petitioners accordingly craved warrant summarily to eject Meiklem.

The respondent took a preliminary objection to the pursuers' title, whom he alleged, "if principal tenants, had not paid their principal rents;" and upon the merits *inter alia* denied—(1) the pursuers' principal tenancy, (2) the verbal notice of 30th September, (3) his own sub-lease from Dunlop & Co., (4) the alleged entry of Stewart, which Meiklem explained had been attempted but successfully resisted. Further, the respondent explained that he and his ancestors had occupied the land, mill, and house, &c. under the Dukes of Hamilton since 1709, and referred to certain disputes as to the water of the mill. In conclusion, the respondent stated that in 1874 the petitioners' manager alleged they had become tenants of the premises, and held the defender as their sub-tenant on same terms as he held under the Duke of Hamilton. That they sent him notice of 2d October too late, irregularly, and illegally. That a day or two after its receipt their manager called on defender, who, referring to the document, expressly asked if he was to flit at Martinmas 1875, and got for answer, "No, just work awa'."

In the Sheriff Court the Sheriff-Substitute (SPENS) found that the warning given was inept, and that it was unnecessary to consider the other defences, and dismissed the action. And in the note appended to this interlocutor he said that the warning was bad upon three grounds—(1) It should have been given forty days before Whitsunday 1875; (2) the notice was for Martinmas for both houses and lands, whereas in any view the removal from the houses should have been Whitsunday 1876; (3) the notice was not 40 but only 39 clear days before Martinmas. The Sheriff-Substitute also held that tacit relocation emerged at Whitsunday 1875, no warning being then given.

The petitioner appealed to the Sheriff-Depute (DICKSON) who allowed a proof before answer, which was taken before the Sheriff-Substitute on 10th July 1876. The result of the proof was substantially to sustain the averments of the petitioners.

The Sheriff-Substitute, on 18th July 1876, found that the petitioners had failed to prove their title to sue, and sustained that defence; further found it unnecessary to pronounce other findings.

Messrs Dunlop & Co. appealed, and the Sheriff adhered, adding the following note:—

"*Note.*—The defender challenges the pursuers' title as principal tenants for the period after the lease which he took from them terminated, viz., after Martinmas 1875 and Whitsunday 1876, as to the lands and mill, &c., respectively. It lay on the pursuers to prove their title so challenged, but they have not done so. The case is not within the principle urged for the pursuers, that a tenant may not challenge the title of the party from whom he has his lease, for the defender's lease was only up to the terms above mentioned; while the question is as to the pursuers' title after these terms.

"It is with considerable regret that the Sheriff has found himself obliged to sustain this technical defence; for there seems to be no real doubt that the pursuers are still principal tenants in the mill and land in question. It appears to have been through mere oversight that they have not proved their tenancy.

"The foregoing judgment precludes the Sheriff from entering into the other questions which were debated before him on the footing of his differing from the Sheriff-Substitute upon the question of title."

The petitioners appealed against this interlocutor to the Second Division of the Court of Session.

Argued for the appellants—First, on the question of title—It is not in Meiklem's mouth to

question our title, seeing that it is from us his own possession is derived. The possession now is on tacit relocation from the first lease; there is no different title this second year from what there was the first. The class of cases referred to by the Sheriff-Substitute is entirely different. In them (*Traill* v. *Traill*) the tenant says to his landlord, or the person claiming to be such, "you are not the person from whom my title flows," and of course the burden of proof then is thrown on the landlord.

Argued for the respondent—Possession was never interrupted; it had for many years been in the respondent's family. [Lord Justice-Clerk—The one year's verbal lease from Colin Dunlop & Co. interrupted the continuous flow of possession.] There is nothing to show that Messrs Dunlop's possession under the Duke extended to more than the year for which they let the mill; on the proof it is not clear that the tenancy went on.

At this stage their Lordships delivered their opinions on the question of title to sue—

Lord Justice-Clerk—The respondent is in one of two positions; either he has no title at all, or he holds by tacit relocation on the verbal lease. Now, I think he is in the latter position, and of course he cannot in that case question the pursuers' title.

Lord Neaves—I concur, and think that to hold otherwise would lead to gross injustice. The sub-tenant's position under the principal tenant is just what it was under the landlord.

Lord Ormidale—I am of the same opinion. It is clear there was no necessity here for a written title, and that did not exist betwen any of the parties. The pursuers prove their averments by the respondent's own admissions. At the end of the year, if there was no warning, tacit relocation came into play. This is in reality an attempt to challenge the author's title. I think the Sheriffs have been hasty in their judgment.

Lord Gifford—I agree entirely. The evidence is sufficient to show that Meiklem for the year 1874–5 held under the petitioners, and that is enough to sustain their title.

On the merits, it was argued for the respondent—The action has failed because there was no warning at all; what is called a warning, viz. the notice of October 2d, was utterly useless, for (1) under the Act 1555 the warning must be forty days before Whitsunday; (2) as it is thus bad for Whitsunday, it is so for Martinmas, not being forty days clear before the term-day.

Argued for the appellants—As to the Sheriff-Substitute's three objections to the warning, the first necessitates in a one year's lease warning before entry, the second is that the warning is bad only as regards the houses, and the third is not founded upon the Act, which merely says forty days, not forty "clear" days. The analogies of the appeal from the Circuit Court decisions, and of death-bed, are in point where the "clear" days are not specified. The whole objection comes to be that Meiklem was warned too soon out of the houses. The statutory warning does not apply to a small rural tenement let for one year. (3) There was waiver by the tenant, and *rei interventus*.

Authorities—Stair, ii. 9, 41; Erskine, ii. 6, 51; *Macnair* v. *Lord Blantyre's Trs.*, 11 S. 935; *Traill* v. *Traill*, 1 R. 61; Act 1555, § 39, "Anent the warning of Tennentes;" *M'Ritchie* v. *Thomson*, Arkley 270; Act of Sederunt 1839; Sheriff Court Act 1853, § 29; Smith on the Computation of Time; Hunter on Landlord and Tenant, ii. 50, 54; *Falconers* v. *Smith*, 5 Br. Supp. 569; *Brown* v. *Hill*, Hume's Decisions, 563; *Duke of Argyll* v. *Russell*, 1709, M. App. *v.* Removing, No. 9; *Blain* v. *Hunter*, 8th February 1840, 2 D. 546; *Forsyth* v. *Bruce*, 22d November 1827, 6 S. 101.

At advising—

Lord Neaves—I am of opinion that this case is to be determined not by a reference to technical rules as to how and when warning should be given, but by the actings of the parties. The question is whether it is not possible for the parties to agree that without a formal warning the possession is to come to an end. To hold that such an arrangement is not competent, where it has been followed by *rei interventus*, would be very dangerous. For a tenant to profess to be about to remove, and to allow an intending incoming tenant to plough and manure the farm, and then enjoy the fruits of that other's labour, is a proceeding not to be encouraged even *inter rusticos*. Here there was a communication between the respondent and those acting for the petitioners in the autumn of 1875, which was followed up by the subjects being advertised, and by various acts on the part of the incoming tenant. The respondent admits that he had at one time the intention of removing, and he allowed that intention to be known by his mode of dealing with the subjects.

It must be kept in view that the rights on the part of the lessor to remove the tenant, and the right on the part of the tenant to go, are co-relative. Tacit relocation can only come into operation by mutual consent. If there is no taciturnity—if the parties state to one another their intention of bringing the contract to an end—then it is the privilege of the tenant to go, and the privilege of the landlord to insist that he does go. It is quite plain that the parties were dissatisfied with each other, and that the tenant was told that he must go. The question is, whether the tenant's removing was so made matter of arrangement between the partles as to entitle the lessors to proceed upon that footing. Now, I think that the fair import of what the respondent said to those acting for the petitioners was—"Do as you like about formal warning. You may take that step if you think it necessary to preserve legal evidence; but between ourselves it is not necessary. I shall remove whether I am warned or not." I cannot think, after that conversation, if the tenant had wished to go he could have been prevented. This is followed by the tenant pulling up his gooseberry bushes as if preparing to remove. On the other hand, the petitioners enter into an agreement with another man, who makes himself publicly known as the new tenant; and in that character the neighbouring farmers give him a day's ploughing. In short, the respondent, having got a notice to quit which seems bungled in some way or other, makes no com-

munication or remonstrance for six months; but now, when he sees that the landlord has got into a scrape says—"I find you have done something that I can take hold of; I will reverse all that has been done since, and refuse to go." I think that it would be contrary to good faith to allow such a proceeding.

The difficulties and uncertainties which exist as to time of warning in the case of a subject of this kind are an additional reason for the parties taking the matter into their own hands and making their own bargain, and for our enforcing that bargain. I think that the respondent is barred by personal objection from founding on any flaws in the notice to remove; and therefore, without going into the abstract question how warning should be given in such cases, I think that the prayer of the petition should be granted.

Lord Ormidale—This is a case the decision of which requires caution, because it might become an authority of great importance, and that in matters of moment, but we do not require to decide the nice questions which have been argued in the course of the debate. It does not appear to me to be necessary for the Court to say whether a lease of the nature of that under dispute is governed by the statute of 1555 or not. I should rather incline, without deciding the point however, to hold that as in the case of *Forsyth* the facts and circumstances are more of the nature of a transaction than of a lease. In reality to admit of a precise and exact application of the statute, the warning would require to be given before the entry of the tenant, and perhaps even in some cases before the contract were entered into. Accordingly I have my doubts as to whether the statute applies.

If a warning had been given here one day sooner than it actually was given, and if such warning had been in all other respects regular and without objection, then Mr Lang, as I understood, was willing to allow the assumption that it would have been good. But I do not require to go into any further particulars, as I entirely concur in the views expressed by Lord Neaves, and, with reference to the special circumstances of the case, I am for giving effect to the prayer of the petition.

Lord Gifford—I agree in the opinions expressed by your Lordships, and also that it is not necessary in the present case to decide the elaborate questions of warning and so forth argued before us. I am content to put the judgment of this Court on the simpler ground of personal bar. All parties in September 1875 thought that everything was open, and so it really was. Then the tenant comes forward and says "I will not remain unless I get £15 off my rent." This negotiation goes on for some weeks, and then the landlord says "we cannot agree on this question of water damage, and you will have to go." We have the evidence of the pursuers' cashier, who depones, "after that I said to the respondent, 'Well miller, do you think it is necessary for us to serve you with a notice to leave by a Sheriff-Officer?' He said to that, so far as he was concerned it was all the same, but it remained with me whether I would serve him with a notice from Kemp or not." The meaning of that is I think that the defender did not want it, though the pursuers might give it him for their own satisfaction and to keep a record of it, but that he went any way. The next witness is even stronger "after that Mr Shaw said to him, 'Shall we give you a warning away?' and the respondent replied, 'Any way you like; it is all one to me.' I understood from what the respondent said that he was quite prepared, and was going to leave at the end of the year's lease which I had given him,"—I think there is no ambiguity there. Then we come to the ploughing, when it appears to me the least he could have said to the new man would have been, "you have ploughed my land and I mean to stay," but he still remained silent and never said a word. If we look at the matter from the opposite point of view, and ask whether the landlord could have compelled the tenant to remain on the farm whether he wished or not, I think it is apparent that he could not. Now there is no such thing as tacit relocation binding one side only; to be tacit relocation at all it must bind both parties. When the new tenant made his appearance the old tenant was not justified in remaining silent, he was bound to say something to the landlord. All this it is which constitutes the personal bar against Meiklem, and that is sufficient for the decision of this case.

Lord Justice Clerk—I agree entirely with the observations which your Lordships have made, and upon the grounds stated I am of opinion that the case is a very clear one. The conduct of the tenant Meiklem here was very scandalous, for he received a notice in October 1875, and did nothing after getting it to show that he intended to remain; on the contrary he allowed his landlords to let the farm to a new tenant, suffered this man to manure the land, and, though he knew it was to be ploughed by him, or his neighbours at least for him, permitted all to go on. Then at the very last moment he turned round and said he would not go, and called the notice in question. My Lords, I will say no more than to refer the bar to Mr Robert Bell's Treatise on Leases, vol. ii, p. 504, 2d edition. [His Lordship read the passage to which he alluded]. It appears to me clear that the circumstances of the present case fall within those remarks.

One question I must say has been raised upon which the Court does not express any opinion, and that question has reference to the necessity of warning in a lease of house and lands for a year. I may however observe that Mr Bell alludes to the matter in the paragraph which immediately follows the one I have quoted.

The Court sustained the title of the appellant, found on the proof that the respondent verbally undertook to remove and also acquiesced in the warning given, and accordingly sustained the appeal, and remitted to the Sheriff to grant the prayer of the petition.

Counsel for Petitioner (Appellant)—M'Laren —Moncrieff. Agent—A. Morison, S.S.C.

Counsel for Respondent — Asher — Lang. Agents—J. & W. C. Murray, W.S.