ferred from any act short of cohabitation.

George John Hunt raised an action concluding for decree of divorce against his wife Mrs Hester Black or Hunt on account of her adultery with John Campbell Mackenzie, and also for damages against the co-defender.

Both defender and co-defender lodged defences denying their guilt.

The defender also pleaded—"(3) The pursuer having on 16th or 17th February 1893 condoned the conduct of the defender and resumed cohabitation with her, cannot obtain decree of divorce on facts and circumstances alleged to have taken place prior to these dates."

On 18th July 1893 the Lord Ordinary (STORMONTH DARLING) pronounced the following interlocutor—"Finds facts, circumstances, and qualifications proved relevant to infer the defender's guilt of adultery with the co-defender: Finds the defender guilty of adultery with the co-defender accordingly: Therefore divorces and separates the defender from the pursuer and from his society, fellowship, and company: Finds, decerns, and declares in terms of the conclusions of the summons for divorce: . . . Decerns against the co-defender for payment to the pursuer of the sum of £50 sterling in name of damages, with interest thereon as concluded for: Finds the co-defender liable to the pursuer in expenses as well for those incurred by the pursuer himself as for those for which the pursuer may be liable in respect of the expenses of the defender: Further, finds that the pursuer is liable to pay the expenses incurred by the defender," &c.

"*Note.*—. . . I therefore think that on the night of 16th February he was in a state of mind which made it very likely that he would condone his wife's offence, but I do not think it is proved that he ever actually did.

"That being so, it is unnecessary for me to come to any conclusion on a question which has never been conclusively settled in our law, whether there can be condonation without cohabitation. The canon law says there can, the law of England says there cannot. The opinion of the Judges who decided the case of *Ralston*, 8 R. 371, are rather in favour of the English view though the point was left open, and Lord Watson, in the case of *Collins*, 11 R. (H.L.) 39, 9 App. Ca. 205 (p. 257), speaks as if the resumption of cohabitation were necessary to constitute *plena condonatio* according to the law of Scotland. I should not like to say that condonation might not be constitututed in certain circumstances by a distinct and deliberate declaration of forgiveness though no cohabitation followed. But I am clearly of opinion that, to have the effect of remitting the injury, the declaration of forgiveness would require to be very deliberate and quite unequivocal. I do not think it could be inferred from any act short of cohabitation. In the present case I think there is no sufficient evidence of express condonation, and there is admittedly no cohabitation from which it can be inferred." . . .

The defender reclaimed, but on 21st December 1893 the Court adhered to the interlocutor of the Lord Ordinary without calling on the pursuer's counsel.

The defender thereafter moved that the pursuer should be found liable for the expenses incurred by her since the date of the Lord Ordinary's interlobutor. The defence raised a difficult question concerning the law of condonation which the defender was entitled to submit to the review of the Court—*Donald* v. *Donald*, March 30, 1863, 1 Macph. 141; *Hoey* v. *Hoey*, June 6, 1884, 11 R. 905.

Argued for the pursuer—He should not be found liable to pay the expenses of his wife since the date of the Lord Ordinary's interlocutor. No reclaiming-note should have been brought, and the case was so plainly made out that the Court had adhered to the Lord Ordinary's interlocutor without calling for a reply—*Montgomery* v. *Montgomery*, January 21, 1881, 8 R. 404.

At advising—

LORD YOUNG—We think no expenses in connection with this reclaiming-note ought to be allowed to the wife. That is the opinion of the Court.

The other Judges present were Lord Rutherfurd Clark and Lord Trayner.

Counsel for the Pursuer—Jameson—Maclennan. Agent—Snody & Asher, S.S.C.

Counsel for the Defender—Younger—Lyon Mackenzie. Agent—P. J. Purves, S.S.C.

Counsel for the Co-Defender—Grainger Stewart. Agents—Dalgleish, Gray, & Dobbie, W.S.

Friday, December 22.

FIRST DIVISION.

[Sheriff of Orkney and Shetland.

SMITH *v.* HUTCHEON (HARRISON & COMPANY'S TRUSTEE).

Bankruptcy—Trust-Deed for Creditors—Compensation—Balancing Accounts in Bankruptcy—Landlord and Tenant.

A tenant who had erected certain buildings on ground leased to him became bankrupt and granted a trust-deed for behoof of his creditors while the lease had still some years to run. The buildings erected were of the nature of tenant's fixtures, removable by the tenant at the expiry of the lease. After the bankruptcy it was agreed between the landlord and the tenant's trustee that the latter should renounce the lease, and that the former should take over the buildings, the loss of rent sustained by the landlord and the value of the buildings being ascertained by valuators mutually chosen. The agreement was silent as to whether the loss

of rent and the cost of the buildings might be set-off against one another.

Held that as the landlord could have objected to the buildings being removed until the tenant's obligations under the lease were fulfilled, he was entitled to set-off their cost against the sum due to him for loss of rent, and to rank on the tenant's estate for the balance still owing to him.

Taylor's Trustee v. *Paul*, January 24, 1888, 15 R. 313, *distinguished.*

William Spence Smith let four pieces of land to A. H. Harrison & Company, fish-curers, upon one of which the latter put up certain buildings.

On 30th November 1889 Harrison & Company granted a trust-deed for behoof of their creditors in favour of James Hutcheon. At this date the leases in Harrison & Company's favour had each several years to run.

On 13th January 1890 Hutcheon, who wished to surrender the leases, wrote to Smith as follows—"Referring to our conversation of Saturday, what I have to propose is that—(1) The loss to the end of the respective leases on the three stations I intend to give up be estimated by two valuators mutually chosen, and if no agreement can be arrived at, let the matter be referred to an oversman. (2) That the erections and improvements on the fourth station be taken over by you at mutual valuation, with reference to oversman, if need be." . . .

Smith replied on 23rd January, agreeing to the above proposal on condition that the loss or gain on the fourth station should also be determined by the valuators, and this condition was accepted by Hutcheon.

Valuators were accordingly appointed to value the buildings erected by Messrs Harrison & Company, and to estimate the rents probably obtainable for the stations during what remained of the various leases.

The valuators issued their award on 1st November 1890. They found that the loss on the leases amounted to £406, 17s. 6d., and that the value of the buildings on the fourth station was £175. They deducted the latter of these sums from the former, and stated that the amount for which the proprietor would rank was £231, 17s. 6d.

Smith thereafter brought an action in the Sheriff Court at Lerwick against Hutcheon, craving the Court to find (1) that the loss sustained by the pursuer on the respective leases renounced by the defenders amounted to £406, 17s. 6d.; (2) that the value of the erections taken over by the pursuer was £175, as the same had been fixed by the valuators, and to grant decree ordaining the defender to pay the pursuer £231, 17s. 6d., or otherwise to rank him therefor as a creditor on the estate of Harrison & Company.

The pursuer averred that £231, 17s. 6d. was the sum due by the defender under the agreement.

The defender stated, *inter alia*—"The defender, as trustee foresaid, was entitled, subject to any right of hypothec competent to the landlord, to sell and dispose of the buildings, and rank the pursuer as an ordinary creditor for the present value of the loss of future rents under the leases subsequent to the date of abandonment of the leases taking effect. He, as trustee foresaid, entered into negotiations with the pursuer, with the result that it was agreed that . . . in place of his (the defender) selling and removing the buildings, the pursuer undertook to take them over and pay for them the sum which the arbiters might fix as their value. It was also thereby agreed that the arbiters should fix the estimated amount of the future rents which the subjects let might be expected to bring during the currency of the leases." He offered the pursuer a ranking for £406, 17s. 6d., but objected to his imputing the value of the buildings. viz., £175, *pro tanto*, in extinction of the debt due to him for loss under the leases.

He pleaded that the arbiters had acted *ultra vires* in setting off the one sum against the other.

After protracted proceedings in the Sheriff Court, in the course of which the parties lodged revised pleadings by order of the Sheriff (THOMS), the Sheriff-Substitute (SHENNAN) on 4th October allowed parties a proof of their respective averments.

The defender appealed, and argued—1. The pursuer's case was laid on the agreement, and the Court was excluded from considering the question of compensation on its merits. As the agreement gave the pursuer no right to set off his claim for loss of rent against the trustee's claim for the value of the buildings, his case failed. 2. If the question of compensation were to be considered on its merits, the pursuer's claim to compensate could not be given effect to. The landlord's claim for loss of rent arose out of the lease owing to the tenant's failure to fulfil his obligations. But the debt by the landlord arose subsequent to the bankruptcy, and was due to the trustee, who was under no obligation to transfer the buildings to the landlord, but might have removed them and realised them elsewhere. If the parties had not transacted, therefore, the one would and the other would not have been an existing claim. The result was that the *concursus debiti et crediti* necessary to found the right of compensation did not exist—*Taylor's Trustee* v. *Paul*, January 24, 1888, 15 R. 313; *Davidson's Trustee* v. *Urquhart*, May 26, 1892, 19 R. 808.

Argued for the pursuer—The Court were not debarred by the form of the pleadings from considering the real question between the parties, namely, the question of compensation, on its merits. The agreement provided for the ascertainment of the amount of the landlord's loss and the value of the buildings, but was silent as to whether the one sum might be compensated by the other. The legal rights of parties consequent on the agreement must be decided by a consideration of their antecedent rights, and the case might be taken on the footing that the buildings

were of a kind which the tenant was entitled to remove. In any case, however, being called buildings by the defender, they must have become *partes soli*, and the landlord had the right to retain them until the tenant's obligations under the lease were fulfilled—*Brand's Trustees* v. *Bain*, 1876, L.R., 1 App. Cas. 762. A *concursus* therefore existed between the claim for loss of rent and the counter claim for the buildings, and the landlord was entitled to set-off the latter against the former. The case of *Taylor's Trustee* was different, for there the debt due by the landlord arose from his taking over various articles from the trustee, to whom they belonged not as representing the bankrupt but as himself tenant.

At advising—

LORD PRESIDENT—There has been an immense amount of procedure in this case, and I am only glad to be of opinion that there need not be more.

The whole question turns on the agreement contained in the two letters of 13th and 23rd January 1890. As regards the report and award of the men of skill it is perfectly plain that the men of skill had nothing to do but to value the buildings under article 2, and the loss under article 1 of the first letter. The other part of their award, in which they purport to fix the sum ultimately due, has no legal effect on the question which we have now to determine.

That question is whether the pursuer is entitled to set off the ascertained value of certain buildings erected by his tenant on his land against the loss sustained by him through the tenant having gone bankrupt, and failed to pay rent for the unexpired term of his lease, the pursuer's claim being to rank for the balance?

The agreement in question was entered into between the landlord and the trustee for the creditors of the bankrupt. It is elliptically expressed, but its import so far is sufficiently clear, especially read in connection with the defender's record. It was arranged that instead of being removed by the tenant, certain buildings are to remain on the ground and be kept by the landlord, he giving value for them at a figure to be fixed by valuators; while on the other hand the amount of the admitted liability of the estate for the bankrupt's failing to pay the rents, is to be determined by the same valuators.

As to the mode in which those values were to be made good the letters are silent. Their silence leaves this to be determined, as I consider, according to the nature of the rights, the pecuniary amounts of which are thus ascertained. I agree with Mr Murray, therefore, that it is necessary to consider what were the antecedent rights of the parties, and I may add that I think the account he gave of them was perfectly accurate.

To begin with, the landlord had right to damages for the tenant's confessed default in fulfilling his obligations for the years of the current lease which were yet to run. This may now be taken as amounting to between four and five hundred pounds.

On the other hand it is to be assumed that this tenant would have had right at the expiry of his lease to take away certain buildings. This right, however, was not absolute. We do not know exactly what those erections are, but it is enough for the argument that they are described by the defender as "buildings." Of all buildings it is certain that they are *partes soli*, of some buildings erected by the tenant it is true that they may be removed by the tenant on his leaving at the expiry of his lease. But then this is the right of the tenant as tenant, and can only be asserted on his fulfilling his obligations to the landlord. Until the tenant fulfils those obligations the landlord has a right of retention of those *partes soli* which the tenant may claim to remove.

Well, then, when this tenant declared his inability to meet his obligations, what was the right of his trustee regarding those buildings? He would only remove them upon paying the landlord what was still due. He could not remove and sell them to anyone unless and until the landlord's claims were satisfied. Practically, therefore, as the landlord's claims were upwards of £400, and the value of the buildings some £175, the value of the buildings to the bankrupt estate was dormant, the landlord being master of the situation.

On the other hand, the landlord might very well say, "I am losing £400 by this man going bankrupt; on the other hand I am gaining £175 worth of buildings which but for his bankruptcy he would have taken away. I am willing to reduce the stated amount of my loss by the amount of my gain, and rank for the balance." This is, to say the least, a reasonable view for the landlord to take of his own interests, and points to a sensible solution of the difficulty for both parties. It is, in my opinion, the proper construction to place upon the agreement. To suppose that the landlord went beyond this, and agreed to pay for the buildings exactly as if he had no right over them, seems to me a most unnatural and unsupported conjecture. We are, as I have said, by the scheme of the agreement thrown back upon the antecedent rights of parties, it being natural to hold that no further inversion of the rights of parties was intended than what is stated.

This being my view of the case, it is hardly necessary to say that the decision which I propose in no way conflicts with the principle of such cases as *Taylor's Trustees* v. *Paul*. This case is not one in which the trustee was free to sell articles forming part of the bankrupt estate on his own terms and to whom he chose.

My opinion is that we ought to recal all the interlocutors in the case subsequent to the original interlocutor closing the record on 22nd March 1893, when the case was perfectly ripe for judgment, on the grounds which I have now stated, and to ordain the defender to rank the pursuer as a creditor on the estate of A. H. Harrison &

Company for the sum of £231, 17s. 6d., with legal interest from 1st November 1890, the date of the valuation.

LORDS ADAM and KINNEAR concurred.

LORD M'LAREN was absent.

The Court recalled all the interlocutors in the Sheriff Court subsequent to the original interlocutor closing the record, and ordained the defender to rank the pursuer as a creditor on the estate of A. H. Harrison & Company for £231, 17s. 6d., with interest from 1st November 1890, the date of the valuation.

Counsel for the Pursuer—Graham Murray, Q.C. — Galloway. Agents — Carmichael & Miller, W.S.

Counsel for the Defender—C. S. Dickson —Morison. Agent—Alex. Morison, S.S.C.

Friday, December 22.

FIRST DIVISION.

[Lord Kyllachy, Ordinary.

WAUGH *v.* THE "AYRSHIRE POST" LIMITED.

Reparation—Slander—Imputation of Inciting to Bloodshed and Violence—Issues.

A newspaper having published an anonymous letter, in which the writer expressed his own desire and that of other Orangemen for the chance of letting out the Papist blood once more, an action of damages was brought against the proprietors of the newspaper by a person who averred that the letter falsely pointed to him as its writer. *Held* (*rev.* Lord Kyllachy) that the pursuer was entitled not merely to an issue of verbal injury but to one of slander.

The following paragraph appeared in the *Ayrshire Post* newspaper, published in Maybole, on 28th July 1893:—"Halt! Who goes there?" "An Orangeman."

"*Belemont Terrace,*
"*Maybole, July 17th* 1893.

"Mr Oculeus (or whatever they may call you),—I don't often lower myself with buying your *Ayrshire Post*, as I am more of a gentleman than read such rubbish of news as what is gathered up from your low scum of reporters, as your staff is made up of nothing but midden-rakers and chimney-sweeps. Mr Oculeus, I think you are some mean, low scamp, when you are afraid to give your name. But I don't suppose you have a father. But you might give us your mother's name, and then we will have a chance of knowing your proper character. But I have a good idea what you are when you attack a respectable man like Mr Toner. But he is neither afraid to show his face nor to come from Glasgow to silence a mob of Radicals like Mr Thompson, John James, and the Chimney Sweep, the *Post's* respectable reporter. Mr Oculeus, you must be a mean coward, like all the rest of your bloodthirsty crew, when you did not come to Irvine last Saturday and tell us about our long tile hats there. I know your reason. Mr Wallace of Cloncaird would have put his Orange sword down your throat, same as we have done at Boyne Water. I only wish we may have the chance to meet you and your Radical crew. We will give you what we gave some of your Radical friends at Girvan in 1831, as we Maybole heroes is just thinking long for the time to come when we will have the chance of letting out the Papish blood once more. Mr Oculeus, I did not intend to lower my name with such trash as chimney-sweeps and midden-rakers, but if you don't appologise for speaking about God-fearing, law-abiding people like what belongs to our Orange Order, as nothing but a good Protestant would be admitted into our ranks. But I suppose, Mr Oculeus, you are angry that Dr Moir, or the boy doctor, as you had the impudence to call him, is left your ranks. We knew that a gentlemen like Dr Moir would scorn to be among you when he could get his equals in Mr Gilmour's, Mr Toner's, and Mr Smith's company—gentlemen you would be afraid to speak to. I will speak to Mr Wallace of Cloncaird, and see what can be done, as you are no gentleman, when you cannot give us your name. I am a coward, are you? Because I do not give my name. Yet, while accusing me of that, you do not give your own name. Sook in with the Wallaces, my nameless one, and you are all right. That's the straight tip—from one of them. . . . H. R. Wallace is president of a lodge of these fire-eating blitherers. Really I feel ashamed of my kinsman. Fancy Hugh sprawling over the heads of these poor fanatical Orangemen to raise himself into a little power, to which he cannot attain through any other source. He stoops to conquer! A descendant of the Scottish patriot — my much-respected great (6 greats) grand-dad—processing with these fanatical, fire-eating, blustering, and bombasting Orangemen with their obsolete tiles! Still, I must say, I think more of his conduct than that of Mr Smith of the Castle or Mr Gilmour. They appear to be ashamed of their connection with the Orangemen. Yet they *are* Orangemen though they never process. My readers will now see for themselves why Toner, Smith, Gilmour, &c., are down on the *Post*. I would like to give my readers a little more information, but space forbids me this week."

Thereupon Samuel Waugh, shoemaker, 2 Belmont Terrace, Maybole, Secretary of the County Grand Orange Lodge of Ayrshire, raised an action of damages for £500 against *The Ayrshire Post*, Limited proprietors of the said newspaper for slander, on the ground that the letter contained in the above paragraph purported to have been written and sent by him although he had nothing to do with it. He averred that "The said letter is wholly false and calumnious, and, *inter alia*, attributes to the pursuer sentiments of the most odious and