instituted to the share, is satisfied, seeing that Mrs Richter was so instituted. In the second place, it appears to me that the other requisites for the application of the *conditio*, as explained, especially by Lord President Inglis, in *Bogie's Trustees* v. *Christie*, 9 R. 453, and, by Lord M'Laren, in *Waddell's Trustees* v. *Waddell*, 24 R. 189, are complied with in the present case. The testator directed the division of the residue to be made among no fewer than thirteen nephews and nieces, the children of one brother and two sisters, and it does not appear that he had any other nephews or nieces. Under these circumstances the reasonable inference appears to me to be that he had placed himself *in loco parentis* to these nephews and nieces in the sense that he made the bequest to them, primarily at all events, in consideration of their relationship to him.

The remaining question is, whether Miss Richter is entitled to participate in the thirteenth share which lapsed by George William Rome having predeceased the testator, and the first fatal objection which seems to me to stand in the way of that claim being sustained is that her mother was not instituted to that share. If her mother had survived the period of division specified in the settlement, she would, by virtue of the ulterior destination of the shares of predeceasing nephews and nieces therein contained, have been entitled to participate in the share bequeathed to George William Rome, but she did not survive to fulfil the condition of such participation. It appears to me to have been settled by a long series of decisions that the *conditio si sine liberis* does not apply to such a case. On this subject I may refer to the judgment of the Lord Chancellor in *Young* v. *Robertson*, 4 Macq. 337, and authorities there cited. The rule has not, as the Lord Ordinary appears to think, been limited to devolved shares, but has in a number of cases been applied to lapsed shares. Thus in *Graham's Trustee* v. *Graham*, 6 Macph. 820, it was held that the right to participate in the lapsed share of one of the beneficiaries was by the terms of the deed limited to brothers and sisters (also beneficiaries), to the exclusion of the issue of one of them who had predeceased. In giving judgment Lord President Inglis said—"I think that the question as to the application of the *conditio si sine liberis* to a lapsed share is very important. Where a father has divided his estate among his children, without specially providing for the event of any of them predeceasing the period of vesting, or the time of payment, leaving issue, then the rule applies. But suppose that the child so predeceasing and leaving issue is himself predeceased by a brother or sister who had no children, and whose share in the father's succession had therefore lapsed, and would have accresced in part to the second deceaser had he survived the term of payment or of vesting, I think that the child of the second deceaser would not be entitled to participate in that lapsed share." If in this *dictum* the words "uncle who has placed himself *in loco parentis*" be substituted for "father" and "nephew or niece" for "child," it would be directly applicable to the present case. Similar views were expressed in *M'Nish* v. *Donald's Trustee*, 7 R. 96; *Henderson's Trustees* v. *Henderson*, 17 R. 293; and *Cumming's Trustees* v. *White*, 20 R. 454. In the case of *Henderson's Trustees* v. *Henderson* the *condition si sine liberis* was expressed, and Lord President Inglis said that he could see no distinction in principle between the case in which the *conditio* is expressed, and that in which it is implied. "The principle in both cases is simply this, whether the *conditio* is implied or expressed, that the share of the predeceasing parent goes to his or her issue—that is the original share of the parent—and not any further provision that may come to the parent by the lapse of a legacy to some predeceasing legatee in virtue of any other provision in the deed."

Miss Richter's counsel relied especially on the cases of *Aitken's Trustees* v. *Wright*, 10 Macph. 275; *M'Culloch's Trustees*, 19 R. 777; and *Muir's Trustees* v. *Muir*, 16 R. 954, but it does not appear to me that there is anything in these cases at variance with the views now expressed.

LORD ADAM and LORD KINNEAR concurred.

LORD M'LAREN was absent.

The Court pronounced this interlocutor:—

"The Lords having considered the reclaiming-note for the claimants Mrs Henrietta E. Bowman or Adams and others against the interlocutor of Lord Kyllachy, dated 17th June 1899, Recal the said interlocutor: Sustain the alternative claim for said claimants, and prefer them on the fund *in medio* in terms thereof: *Quoad ultra* sustain the claim for the claimant Fredericke Amalia Richter, and rank and prefer her to the balance of the fund *in medio*, and decern: Find no expenses due to or by either party since the date of the Lord Ordinary's interlocutor, and remit to the Lord Ordinary to proceed with the cause."

Counsel for the Reclaimers—Chree. Agent—J. Knox Crawford, S.S.C.

Counsel for the Respondent—A. S. D. Thomson—Kemp. Agent—A. C. D. Vert, S.S.C.

Friday, February 16.

FIRST DIVISION.

[Lord Low, Ordinary.

GLEBE SUGAR REFINING COMPANY v. PATERSON, *et e contra.*

Lease—Granary—Fitness for Purpose for which Let—Reasonable Use—Custom of Trade.

A sugar refining company took a lease of a sugar store for a year, and proceeded to store therein sugar in bags. Within a month the store fell. An action was raised by the company

against the proprietor of the store for the loss which they had sustained through its fall, which they maintained was due to defects in the foundations.

The proprietor, on the other hand, brought an action of damages against the company for overloading the store and thus causing its fall.

The Court, after a proof, *assoilzied* the proprietor of the store in the action against him at the instance of the company, and found that he was entitled to damages in his action against them, holding that while the building must be reasonably fit for the purpose for which it was let, it must, on the other hand, be reasonably used by the tenant, the criterion of such use being the general and recognised practice of the trade, and that it had in fact been loaded by him in excess of what was recognised as safe in the trade.

In February 1898 the Glebe Sugar Refining Company, Greenock, took a lease of a sugar store in Argyll Street, Greenock, from Alexander Paterson, provision merchant, Greenock. An advertisement had been inserted by Mr Paterson in the *Greenock Telegraph* in the following terms —"Store to let, 5 flats, with hydraulic lift, 4 Argyll Street (West); best in town. Apply 39 Hamilton Street."

After sundry negotiations and the execution of some alterations and repairs of a minor character, the company agreed to take the store on lease. The following letter, the only writing which passed between the parties, was written on behalf of the company:—

"*Greenock, 28th Feb.* 1898.

"Dear Sir—We confirm agreement made with you on 16th inst. for occupancy of your store at No. 4 Argyll Street, for one year from date of entry (19th inst.), at a rental of £50 (say fifty pounds per annum); store and hoist to be kept in good condition by you, we paying for water used and man required for working hoist. Plan enclosed.—Yours truly,

"Glebe Sugar Ref. Co.,
"*p.* R. R. Crawford."

The company proceeded to store refined sugar in bags in the store, and upon the 22nd March the store fell.

The Glebe Sugar Company thereafter raised an action against Mr Paterson concluding for payment of £1500 as damages for the loss which they had sustained through the fall of the store. A counter action was raised against the company by Mr Paterson concluding for payment of £5000 as damages for loss sustained by him through the destruction of the store in consequence of the alleged fault of the company in having overloaded the floors.

The pursuers in the first action averred that in the course of the negotiations which preceded the conclusion of the bargain the defender was made fully aware of the purpose for which the store was hired and gave his consent to the formation of "shoots" for sugar in all the floors, and that he did not suggest any limit to be observed in the quantity of sugar to be stored.

The pursuers further averred—"(Cond. 5) The defender is liable to make good said loss to the pursuers. It was his duty in leasing said premises for the storing of pursuers' sugar to provide a building that would safely hold such weight as might reasonably be stored upon the floor space. He was bound to do so apart from special knowledge of the purpose for which said store was to be used. In the present case, however, the defender had such special knowledge from conferences with the pursuers' representatives prior to the letting of said store, and the defender was not justified in letting said premises to the pursuers for a store, owing to their weak and defective condition. He nevertheless did so, and the pursuers were induced to lease the premises in the belief that they were sufficient and secure. In point of fact the said premises were structurally unfit for the purpose of storing sugar in considerable quantities owing to the weakness of the building. In particular, the foundations which carried the iron columns in the centre of the building were of a slight and insufficient construction, and the sole-plates were wanting in strength and area. In consequence of said deficiency in the sole-plates and foundations, which was known or ought to have been known to the defender, the columns, owing to the weight of sugar stored, were driven through said foundations to a distance of 6 or 7 feet. The pursuers believe and aver that said defects were the main cause of the fall of said store, and no properly founded building would have collapsed under the weight which said store was carrying at the time. Further, the main beams at the gables and the joist ends at the wall-head on the several floors were much decayed, and to such an extent as to seriously weaken the the building. The defender knew in letting the building as a sugar store that it would be subjected to heavy weights, and he was in fault in letting for said purpose a building which he knew or ought to have known to be defective in the above-mentioned particulars. The loss to the pursuers above stated was the direct result of the defender's said fault."

The defender denied these averments of the pursuers and averred that "(Ans. 5) The store was well-built, secure, and substantial, and the foundations were sufficient, and if it had been properly used in the condition in which it was let by the defender no accident could have taken place. The defender believes and avers that the store fell in consequence of the pursuers' fault in overloading the various floors, and in distributing the weight improperly, more especially after they had weakened the floors by cutting holes in them for the shoots, which they constructed for their own purposes."

The pursuers pleaded—"(1) The defender being bound under said lease to provide a safe and sufficient building for storage of the pursuers' sugar, and having failed to do so, is liable to pay the loss the pursuers have suffered by said failure."

Similar averments were made by the parties in the second action.

The pursuer pleaded—"(1) The said store belonging to the pursuer having been destroyed through the fault of the defenders as tenants thereof, or of their servants, for whom they are responsible, the pursuer is entitled to decree for the loss thereby sustained by him."

On 25th October 1898 the Lord Ordinary (Low) conjoined the two actions.

By joint-minute for the parties it was stated that while reserving all claims of relief competent for expenses incurred or damages paid to third parties who might have suffered loss from the fall of the store, they had adjusted the amount of damages claimed as follows, viz., the damages sustained by the company at the sum of £1460, 8s. 4d., and those by Mr Paterson at the sum of £1834, 19s. 11d.

A proof was allowed, the result of which fully appears in the opinion of Lord M'Laren, *infra*.

The Lord Ordinary on 19th January 1899 pronounced the following interlocutor:—"The Lord Ordinary having considered the conjoined causes (1) in the action at the instance of the Glebe Sugar Refining Company and partners against Alexander Paterson — Assoilzies the defender from the conclusions of the summons, and decerns; (2) in the action at the instance of the said Alexander Paterson against the said Glebe Sugar Refining Company and partners — Decerns against the defenders for the sum of £1834, 19s. 11d. sterling, with interest as concluded for; and in the conjoined actions decerns; and in the separate and conjoined actions finds the party Paterson entitled to expenses," &c.

Opinion.—"In February 1898 the Glebe Sugar Refining Company took a lease of a sugar store in Argyll Street, Greenock, from Alexander Paterson, in which they proceeded to store refined sugar in bags, and upon the 22nd March the store fell. The Glebe Company then brought an action against Paterson for the loss which they had sustained through the fall of the store, and Paterson brought an action of damages against the Company for overloading the store and bringing it down. The actions have been conjoined, and I shall refer to the Glebe Company as the pursuers, and to Paterson as the defender.

"The store was an old sugar store, built probably some fifty years ago. It consists of a ground floor with five floors (including an attic floor) above. The store was 61 feet 6 inches in length, and 36 feet in breadth, inside measurement. The floors were supported in the centre by two beams running from end to end of the building, which were carried by five iron pillars. The pillars upon the ground floor were rested upon iron sole-plates 15 inches square. Each sole-plate was bedded into a block of sandstone about 28 inches square, and 12 or 13 inches thick. Below that stone there were either two or three courses of dressed sandstone resting upon boulder clay. After the collapse of the store the three central pillars were found to have been driven through all the stone foundations and into the clay, having gone down altogether a distance of between 6 and 7 feet. The two end pillars went through the foundations but not into the clay. I think that the result of the evidence is to show that the store was a good store of its class, and was well built and of good materials.

"Two theories have been put forward to account for the fall of the store. The pursuers maintain that owing to defects in the foundations the pillars sank and brought down the store. The defender's case on the other hand is that certain of the floors were overloaded and fell, bringing down practically the whole building with them."

[*After examining the evidence his Lordship proceeded*]—"The case therefore appears to me to stand thus: On the one hand it is proved that the second and fifth floors were in parts overloaded to an extent which made it highly probable, if not certain, that these floors would sooner or later break. Then what might be expected to happen from such overloading actually occurred. For the greater part of a day before the store fell the joists were splintering, the floors were bending, and the sounds of cracking and breaking of wood were heard. Finally all the floors came down with a run, and the pillars of the ground floor were found to have been driven perpendicularly through the stone foundations into the clay, and a round piece was found to be punched out of the centre of each sole-plate.

"On the other hand the pursuers' theory depended upon their being able to prove two very unlikely things. In the first place they required to prove that at some unknown time, and from some unknown cause, all the sole-plates had long ago been broken in the way which I have described. In the second place they required to prove that the pillars had sunk gradually through the solid stone foundations upon which they rested. I am of opinion that the pursuers have failed to prove that either of these things occurred.

"I am therefore of opinion that it is established that the store was brought down by overloading, and the next question is, whether the pursuers were in fault in so overloading the store.

"The pursuers contended that when a store is let for the storing of sugar, and no limit is put upon the amount which may be put into it, the tenant is entitled to fill the whole available space from floor to ceiling.

"The pursuers attempted to prove that that was in accordance with recognised custom in the trade, but I do not think that the evidence goes further than this, that modern stores for refined sugar are built so strongly and with so short a span that the whole available space can be filled. But, as the pursuers were aware, the store in question was not a modern store, and when it was built the sugar trade was carried on under different conditions from those now existing. The sugar was imported in hogsheads, barrels, or baskets, and the invariable practice seems to have been to put upon the upper floors of a

store one row of hogsheads or two tiers of barrels or baskets. For such storage the store in question was of ample strength, but any practical man could have seen that it was not fitted to carry bags of sugar piled up from floor to ceiling. But that is what the pursuers were proceeding to do, without ever considering the capacity of the store to bear so great a weight. In so acting I am of opinion that they were in fault. I think that anyone taking a store is bound before filling it from floor to ceiling with heavy material, to ascertain whether that can be done with safety, and to see that no more weight is put upon each floor than it may reasonably be expected to carry.

"I am therefore of opinion that Paterson is entitled to decree against the Glebe Company in the action at his instance, and to be assoilzied in the action at the Company's instance."

The Glebe Company reclaimed, and argued—The store had been let as a sugar store for a specific purpose, and further, it was described in the advertisement as "best in town." There was accordingly no obligation upon the tenant to make a thorough scientific investigation of it, but he might after a superficial examination safely assume that the store was fit for the purpose for which it was let—*Manchester Bonded Warehouse Company* v. *Carr*, 1880, L.R., 5 C.P. 507, at p. 511. If there were something to warn the tenant that if he did a certain thing risk would follow, it would be at his own risk if he proceeded, but failing such warning there was no fault—*Sauer* v. *Bilton*, 1878, L.R., 7 Ch. Div. 815; *Francis* v. *Cockrell*, 1870, L.R., 5 Q.B. 501. The only restriction on the tenant was that there must be reasonable use of the store having regard to its purpose and appearance. There was no criterion by which he was to decide the exact amount of the store's capacity. He was therefore entitled to assume he might load it to its utmost cubical capacity from floor to ceiling. In point of fact, however, it was clear from the evidence that the reclaimers had put less weight in it than had previously been put. The landlord on the other hand was bound to supply a proper building for the purpose for which he was letting the store. There was an implied warranty or condition of the contract to that effect—*Reid* v. *Baird*, December 13, 1876, 4 R. 234; *Goskirk & Son* v. *Edinburgh Railway Station Access Company*, December 19, 1863, 2 Macph. 383; *Kippen* v. *Oppenheim*, December 13, 1847, 10 D. 242, June 30, 1846, 8 D. 957; *Barclay* v. *Neilson*, June 12, 1878, 5 R. 909, Bell's Pr., sec. 1253. The case of *Paterson* v. *Kidd's Trustees*, November 5, 1896, 24 R. 99, was essentially different, the person claiming damages being a stranger under no contract with the landlord. Moreover, by the terms of this contract as embodied in the letter there was an express obligation on the respondent to keep the store in good condition. That implied that at the beginning of the lease he must put it in good condition, that is to say, in good condition as compared with other buildings of that class—*Payne* v. *Haine*, 1847, 16 L.J., Ex. 130; *Sauer* v. *Bilton*, 1878, L.R., 7 Ch. Div. 815. Having once established that the fall of the building was not due to their fault, it was unnecessary for the reclaimers to prove the specific cause, but the evidence showed that the fall was due to the causes to which they had attributed it.

Argued for respondent—The building had been let as a store, but no express or implied warranty was given as to its capacity for quantity of any particular goods. No term of the contract warranted it fit for a sugar store in the sense that the tenant was entitled to put as much sugar therein as was usual in the most modern sugar stores. The reclaimers' contention implied that they were entitled to load the store to its utmost cubical capacity, which was manifestly an unreasonable contention. The tenant was bound to use the store in a reasonable manner, and not abuse it by overloading, as had been done in the present case. He must as an ordinary business man consider the capacity of the store, taking it as he found it, viz., as an old store, and make a corresponding use of it—*Manchester Bonded Warehouse Company* v. *Carr*, *supra*. There had been no fault on the part of the respondent. There was no patent defect in the building; all that they could aver was a latent defect in the foundations. But, in point of fact, if properly loaded, the store could have borne the weight put on it, and it was quite properly let as a store. In the absence of fault there was no liability upon a landlord —*Paterson* v. *Kidd's Trustees*, *supra*.

At advising—

LORD M'LAREN—In the conjoined actions which we are considering, the question is, whether Mr Paterson, the landlord, or the Glebe Sugar Refining Company, the tenants, are responsible for the fall of the sugar store in Argyll Street, Greenock, which took place on 22nd March 1898. The Glebe Company sue Paterson for the loss which they have sustained through the fall of the store, and Paterson has brought a cross-action against the Glebe Company for overloading the store and bringing it down. In the first action the Lord Ordinary has assoilzied Mr Paterson, and in the second action his Lordship has found that the store was brought down through fault or breach of contract on the part of the Glebe Company in putting an excessive weight into the store. The amount of the damages is fixed by agreement, and judgment has been given for the sum of £1834, 19s. 11d. In the Lord Ordinary's opinion the Glebe Company are referred to as the pursuers and Mr Paterson as the defender, and I shall use the terms pursuers and defender in this sense.

To save repetition, I may begin by referring to the Lord Ordinary's description of the store and its construction. In brief, it was a store of six storeys in height, measuring 61½ feet by 36 feet inside measurement. It was divided longitudinally by a row of pillars, five in number, carrying a beam in

two pieces, on which the first floor was supported. Above the beam were placed five other pillars, carrying a beam for the support of the second floor, and so on to the fifth floor. Nothing is said in the evidence as to diagonals or lateral supports, and I understand there were none. This does not suggest a very high degree of stability in the construction; but it was an old store built about fifty years ago, when it was not considered necessary to make provision for great weights.

The question, as it was argued to us, is, whether the store came down because the foundations on which the pillars rested were insufficient, or because the store was overloaded; but it is desirable to put the point a little more definitely. The fall of the store is proof that when loaded by the defenders it had more weight put upon it than it was fit to carry; but it may very well be that the foundations were suitable to a building of the construction described, and were sufficient to carry any weight which it would be reasonable to put into such a building. Again, it is possible that, with stronger foundations for the base pillars, the store, although strained by an unusual or excessive load, might not have fallen.

It was maintained by counsel for the pursuers that every tenant who rents a store is entitled to fill it from the basement to the roof, putting in as much material as he can pack into the space, without reference to the specific gravity of the goods stored, or to the customary manner of loading in his trade, and especially without reference to the apparent stability and bearing capacity of the building. In this view, the landlord, by contracting to give the use of the building for the purposes of a store, is supposed to give an unconditional guarantee of stability for any weight that can be put into it. If this be the true view of the landlord's obligation, it was certainly not fulfilled in the present case. The store undoubtedly fell because it was incapable of bearing the weight which the pursuers put into it, and from their point of view it does not seem to be material whether the foundations or the superstructure were at fault.

But in my judgment the pursuers' criterion of responsibility is quite inadmissible. A building may be properly constructed and reasonably fit for the purposes of a store, and may yet fall as a consequence of being overloaded. In my opinion, when the sufficiency of a building is considered, the true question is, not the relation of stability to capacity or cubic contents, but the relation of stability to weight, that is, to the weight which, according to the ordinary usage of trade, would be put into such a building. According to the best evidence we have on the subject, a building should be made strong enough to bear a much heavier weight than is likely to be put upon it, and in general it should not be loaded to the extent of more than one-fifth, or at most one-fourth, of the breaking strain. And as the landlord is not bound to provide a store which shall be capable of bearing an extraordinary load, if it be proved, as I think it is in this case, that the building was loaded in excess of what is recognised as safe in the trade, this is evidence from which it may be inferred by a court or jury that the building fell through the fault of the tenant.

Coming now to the facts of the case, from my point of view the first question is, what is the proper way of loading a sugar store. It has also to be considered as an element in the case that this was an old store not constructed in accordance with modern requirements. On this last point I shall only quote the Lord Ordinary's statement of the case in the last paragraph of his Lordship's opinion, in which I concur—"The store in question was not a modern store, and when it was built the sugar trade was carried on under different conditions from those now existing. The sugar was imported in hogsheads, barrels, or baskets, and the invariable practice seems to have been to put upon the upper floors of a store one row of hogsheads, or two tiers of barrels or baskets—(M'Wharrie's evidence). For such storage the store in question was of ample strength, but any practical man could have seen that it was not fitted to carry bags of sugar piled up from floor to ceiling. But that is what the pursuers were proceeding to do, without ever considering the capacity of the store to bear so great a weight."

On this point I will only further observe that while we do not expect engineering skill from a storekeeper or a storeowner, every man who carries on a business must be credited with the ordinary knowledge on matters necessary for the conduct of his business which is found in the trade, and a storekeeper who rents an old store less strongly constructed than such as are now built, must be assumed to know that it would not be right to load it as heavily as a newer and stronger store. He is bound, I think, in justice to his landlord, to leave a fair margin of safety.

But it is not necessary to elaborate this point, because it is proved to my satisfaction that the second and fifth floors of this store were loaded to an extent exceeding what custom prescribes in the case of a sugar store of the most approved construction. As a matter of fact, sugar in bags is not piled higher than five tiers of bags unless upon the ground floor. This is the general practice in Greenock as spoken to by the defender's witnesses, M'Wharrie, Campbell, Macdonald, and King. Of the pursuers' witnesses who speak to this point, two of them, Paton and Richardson, admit that the practice is so, but account for it by the fact that under the porter's tariff there is an extra charge for piling bags beyond five tiers in height; while a third gentleman denies the generality of the practice, but admits that he has found it necessary to have a limit in his own experience. Now, the four witnesses I have named all explain the practice by saying that five tiers of bags is as much as a floor will carry with safety. But the two reasons are not inconsistent, for it is quite

natural that an extra charge should be made for doing something that is unusual or is attended with risk. But in my opinion the decisive proof of the *ratio* of the practice is found in the fact as to which all the witnesses are agreed, that in practice there is no restriction as to piling on the ground floor. Where the solid earth is the support the bags may be and sometimes are piled to the height of ten tiers, and it is only in reference to the upper floors, where there is a question of strength of material, that the restriction exists. In what I have said about the customary way of loading a sugar store, I wish to guard myself against being supposed to refer to "custom of trade" in the technical sense. There is no question here of an arbitrary custom imported into the contract. When I refer to the customary manner of loading I do so only as evidence of what in the experience of the trade has been ascertained to be safe loading; and I credit the pursuers, as storekeepers, with that general knowledge of the conditions of safety which is common to this trade.

Now, it is admitted by Mr Macmillan, the pursuers' sub-manager, who directed the loading of the store, that in the second, third, and fifth floors the bags were stored partly five and partly seven high; and in cross-examination Mr Macmillan says that he intended to put in as much sugar as the store would hold, and that he had given directions to the porters to store seven high on all the floors. It may therefore fairly be assumed that in the floors referred to a considerable part of the floors were filled seven tiers high, and this is confirmed, as regards the second and fifth floors, by the note of fillings furnished by the pursuers, and printed in the appendix to the reclaiming-note. There is indeed no controversy as to the fact, because Mr Macmillan justifies the filling of the store by an alleged guarantee which in my opinion is not proved. Mr Macmillan admits that in his own company's store the bags were only generally piled five high, and occasionally in some places six high, explaining that there was not head-room for more. But this only proves that in stores specially constructed for storing sugar, and where space is economised, it is considered useless to give more head-room than is sufficient to carry five tiers of bags, because that is the proper and sufficient weight to be put upon a floor.

I come, therefore, without difficulty, to the conclusion, that the store was systematically overloaded, having regard to the practice of storekeepers and the known conditions of safety in relation to storing sugar. If I am right in this conclusion, a cause has been established sufficient to account for the fall of the store, and according to the ordinary principles of induction this must be held to be the true cause, unless the inference is displaced by the discovery of a more efficient cause.

This brings me to the question, which is considered with great care and fulness by the Lord Ordinary, whether the conditions preceding the fall of the store and the state in which the foundations were found when the wreck came to be examined are consistent with a fall due to overloading, or are more consistent with the theory of a fall due to the defective construction or insufficient condition of the foundations of the pillars. The pillars were found (with I think one exception) to have been driven right through the cube-stones and the substructure of masonry, an approximately circular hole having been cut through the stones by the pillars. The Lord Ordinary is of opinion that this must have been the result of a sudden impact upon the pillars, due to the weight of the mass of the falling material, and that the phenomena are inconsistent with the supposition that the foundations gave way under mere structural pressure acting on foundations insufficient to support the weight. This I confess is to me a very difficult question, and if I were to act upon my unaided judgment I should think it next to impossible to attain to any reliable conclusion as to the precise manner in which a building loaded to the breaking point would or did in fact gave way. It would rather seem to me that when the equilibrium of the building is destroyed, and when, as in this case, the flooring and joists are cracking in different directions, and one of the pillars perhaps beginning to pierce its foundation, the displacement of any part of the structure high or low would immediately bring about the collapse of the building. I have difficulty in coming to a clear opinion as to where the initial displacement begun, whether in the region of the upper floors or at the foundations. The mechanical evidence which bulks so largely in the proof does not remove my difficulty, because as is usual in such cases each theory is supported by the opinions of competent witnesses, based on calculations from known data.

I do not feel that I can add anything to the reasoning of the Lord Ordinary on this branch of the case. My opinion is in accord with his, but only to the extent that I think the more probable explanation of the position in which the pillars were found, is that they were driven through these foundations by the sudden impact of the falling mass. If this probability could be raised to reasonable certainty, it would of course be conclusive of the fact that the fall was due to overloading. But I do not think that it is necessary to the decision of the case that we should find in fact that the fall of the store took place in this way.

As already said, I consider it to be proved that the store was in fact overloaded. But we have also the fact that for some hours before the fall of the store the material of the floors was strained and cracked in all directions, and that the fall of the building was known to be imminent. I do not refer to the evidence on this point, because it is not in dispute. I think it is clear that whether the foundations were strong or weak, the upper floors would have given way from the excessive weight which was resting upon them, and that by their fall they would have brought down the building. Then as to the sufficiency of the

foundations, there is a certain presumption in favour of the building from the fact that it had been used as a store for a long time (latterly as a sugar store loaded in the usual way), and that until the day when the building fell there were no indications of unsoundness. If the foundations were originally insufficient, one would expect that in the course of years this would manifest itself by the subsidence of one or more of the pillars at least to a small extent. But there is no evidence that any sign of weakness in the foundations had been observed.

But again, a foundation may be strong enough to bear the weight that it is designed to carry, and yet not strong enough to bear an abnormal weight. If so, it is quite conceivable that when the building is overloaded the foundation may begin to yield to the statical pressure, and that a pillar may subside one or more inches, and may be seen in that condition some hours before the actual fall of the building. A witness, Tosh, a contractor, who came to inspect the building when the floors were found to be giving way, speaks to having seen one of the pillars in this condition. There was very little light to see by, and the Lord Ordinary is of opinion that Tosh was mistaken as to what he though he saw, the other evidence being inconsistent. I do not wish to intimate a doubt as to the Lord Ordinary's conclusion in this matter of fact. But assuming, for the purposes of argument, that the pillar in question was found to have subsided, this to my mind only proves that the foundation of this pillar had given way under an improper load, and I fail to see how this circumstance can have the effect of shifting the responsibility for the fall of the building from the tenant to the landlord. At most it can only be said that the foundations ought to have been strong enough to bear a load which though excessive was not extravagantly greater than the building was designed for. This may be quite sound from the point of view of an architect or builder who is designing a new building, but this building has served the purposes of a store for a long time, and if on this occasion it had been used in the ordinary way, there is no reason to believe that the foundation would not have remained secure. If the building was in fact brought down by overloading, it is not, in my judgment, a legal defence that the foundations were not sufficient to support a weight which they were not intended to bear. Some reference was made to legal authority in the course of the argument, but I do not see that there is any legal principle involved in the case except that the building must be reasonably fit for the purposes for which it was let, and must be reasonably used by the tenant; the general and recognised practice of the trade being, in my opinion, the criterion of reasonable use.

I have written at greater length than I intended, because I should have been content to found on the Lord Ordinary's opinion. But the case was argued with great anxiety on both sides, and I have dealt chiefly with certain points which are less fully divulged in his Lordship's judgment. In my opinion the interlocutor should be adhered to.

LORD ADAM and LORD KINNEAR concurred.

The LORD PRESIDENT was absent.

The Court adhered.

Counsel for the Pursuers—Dean of Faculty (Asher, Q.C.)—M'Clure. Agent—Hugh Patten, W.S.

Counsel for the Defender—Salvesen, Q.C.—Crole. Agent—W. B. Rainnie, S.S.C.

Tuesday, February 13.

SECOND DIVISION.

[Lord Kincairney, Ordinary.

DRUMMOND *v.* MUIRHEAD AND GUTHRIE SMITH.

Agent and Client—Hypothec—Law-Agent's Lien—Law-Agent Acting for both Borrower and Lender.

Where a law-agent acts for both borrower and lender in negotiating a loan on the security of heritable subjects owned by the former, his lien against the borrower is not affected except to the extent that it cannot be pleaded against the lender.

A purchased a house, and on the same date borrowed a sum of money from B and granted him a bond and disposition in security over the property containing a clause of assignation and delivery of writs. The same law-agents acted for A and B, and the seller delivered the title-deeds to these agents. Thereafter A became bankrupt, and on a trustee being appointed on his estate the law-agents refused to give him the title-deeds till a debt due to them by A, for professional services, had been paid.

A's trustee thereupon raised against the law-agents an action seeking declarator that they had no right of lien over the deeds, on the ground that the deeds were in their possession, not as agents for A but as agents for B.

Held (*aff.* decision of Lord Kincairney) that in a question with A or his trustee the agents had a right of hypothec over the title-deeds for payment of their accounts.

Arthur Drummond, C.A., Edinburgh, as trustee on the sequestrated estates of James F. Waldie & Company, coal merhants and exporters, Glasgow, and of James Francis Waldie and George Kirk Goalen, the individual partners thereof, conform to act and warrant of the Sheriff-Substitute of Lanark dated 18th February 1898, raised an action against James Muirhead and John Guthrie Smith, as trustees for their firm of Muirhead & Guthrie Smith, writers, Glasgow, in which he asked the Court to declare that at the date of granting, or at least