Here was a case which had been very fully investigated in the Court below; a large number of witnesses were called, and very important evidence was given by many of them. The learned Judge, in his reasons, ignores the evidence of all the witnesses with the exception of two—Bayne and Fletcher. The question which had to be determined was, what were the original beacons of the west boundary of this block of claims, and upon that point the evidence of two of the witnesses, E. Farrer and Vickers, was of the greatest importance. They were the original peggers of these blocks. Their evidence was that they deliberately—intentionally—drew the west boundary between the two old workings which were upon the ground. And they state their reason for doing so—that each block might have a certain commercial value. That is not evidence which could be ignored. If it was true, it was conclusive on the case; and the learned Judge says not one word about the evidence of these two witnesses. He does not say he does not believe them; on the contrary, in his reasons, he says he does not cast any imputation upon the *bona fides* of any of the witnesses. And the difficulty which I felt about the case arose, from that fact—that here were these two witnesses, giving very strong, direct evidence upon this point—evidence which was ignored by the learned Judge in the Court below. But after hearing the argument which has been addressed to us by Mr. *Russell*, I am satisfied that we cannot act upon the testimony of these two witnesses. There is the strong point in the case, regarding the line drawn on Fletcher's plan from old beacon S to Farrer D, which on the original plans registered with the claims was a straight line; whereas if we accept the case which has been made on behalf of the appellant, on the west boundary, there would be two lines making an angle of about 122 deg. That seems to me to be entirely inconsistent with the evidence of the plans originally drawn by the two witnesses I have mentioned. Moreover, their evidence is in direct conflict with that given by Bayne, upon which I think the learned Judge very rightly relied. Bayne's testimony is extremely strong, because Edwin Farrer pointed out to him the western boundary of this block of claims, and Bayne

at the time drew a plan based upon the information given to him by Edwin Farrer, showing that the two old workings fell entirely to the right of the line drawn from Farrer D to old beacon S. And Fletcher, upon whose evidence the learned Judge also relies, says that the beacons which are now on the ground are substantially the same as those marked on Bayne's plan. Mr. *Russell* has pointed out how extremely unsatisfactory in many other respects the evidence of Edwin Farrer and Vickers is. I come to the conclusion, therefore, that the learned Judge was perfectly right in not acting upon their evidence, and in accepting in preference the evidence given by Bayne and Fletcher. Therefore, any difficulty which I originally felt about what our decision should be in this case, has now been entirely removed, and I agree that the appeal should be dismissed.

MAASDORP, J., concurred.

The appeal was accordingly dismissed, with costs.

[Appellant's Attorneys, ROBERTS & LETTS.
Respondent's Attorneys, COGHLAN & WELSH.]

PIETERMARITZBURG. CAPE TOWN.]

POYNTON *vs.* CRAN.

Lessor and lessee.—Construction of agreement of lease.—Covenant to put in repair.—Remedy of lessee in case of lessor's failure to put in repair.—Rent without deduction.—Certificate of architect.

By written agreement of lease the plaintiff let to the defendant a certain hotel with the trade and other fixtures and fittings at a certain rental "without any deduction whatever." Among the fittings so let was a water-heating apparatus which was not in repair when the defendant took possession, and which the Court found that the plaintiff ought in terms of the agreement to have put in repair. The defendant had

the repairs effected, and in an action against him for two months' rent he claimed in reconvention for the cost of repair, which was less than the rent claimed. Held *by the Court* (SOLOMON, J., dissentiente), *that as the repairs were necessary for the proper use of the hotel, the defendant was entitled to counterclaim for the amount reasonably expended by him, notwithstanding the words "without any deductions whatever" in the agreement of lease.*

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This was an appeal from the decision of DOVE-WILSON, J., sitting as a Court of Appeal, in the Circuit Court holden at Durban.

The plaintiff, now appellant, had entered into a lease with defendant, now respondent, on May 25th, 1909, whereby plaintiff let to defendant the hotel known as Ocean View, together with the trade and other fixtures and fittings, at a rental of £540 *per annum*, "without any deduction whatsoever." *Inter alia* defendant agreed (2 C.) "To keep the exterior and interior of the demised premises (after the same shall have been put in thorough order and repair by the landlady) and all additions thereto and the water apparatus thereof in good and tenantable repair and condition; (2 D.) to replace any of the said fixtures and fittings, which may become worn out, lost or unfit for the purposes for which the same are now used, by substituting other fixtures or fittings of a like nature and equal value; (P.) on determination of the tenancy, to yield up the premises, fixtures and fittings in good repair and condition." Among the fixtures and fittings was a "water-heater with connections to bathroom."

Plaintiff agreed, *inter alia*, (3. 3), "To put the premises, inside and out, in thorough order and repair forthwith, the certificate of Mr. Street Wilson of such repair to be conclusive."

In the Magistrate's Court, Durban, the plaintiff sued the defendant for £90, being two months' arrear rent. The defence was that plaintiff had failed to put the hot water apparatus in proper repair, that after due notice to plaintiff the defendant had effected repairs himself at

a cost of £52 18s. 9d., which amount he set off against the rent due, and tendered £37 1s. 3d., with costs to date. Alternatively, if he was not entitled to set off this amount, he claimed the sum of £52 18s. 9d. in reconvention. Plaintiff replied that the premises had been put in thorough order and repair, and relied on Mr. Street Wilson's certificate, in terms of sect. (3, 3) of the lease.

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The Magistrate held that the word "premises" in sect. (3, 3) referred to the buildings only, and that defendant's contention must consequently fail.

On appeal, DOVE-WILSON, J., reversed this decision, and in his reason stated:

The hot water apparatus was specially included in the fixtures let. Even if they were not, a lease of premises includes all things necessary for the proper enjoyment and occupation thereof. *McNeill* vs. *Eaton* (20 S.C., 507; 13 C.T.R., 600) *Pistorius* vs. *Abrahamson* (1904 T.S., 643). The apparatus was necessary for the efficiency of a first-class hotel. It had been argued that 'premises,' in terms of section 2c of the lease, was used restrictively and referred to the buildings only. This was not so. Section (3. 3) merely embodied the common law obligation of plaintiff. See *Voet* 19, 2, 14; *Grotius*, 3, 19, 12; *Van der Linden*, 1, 15, 12; *Bensley* vs. *Clear* (*Buch.* 1878, p. 89); *Assignees Kaiser Bros.* vs. *Continental Caoutchouc Co* (23 S.C., 736; 16 C.T.R., 1078); *Stewart and Co.* vs *Executors of Staines* (4 S., 152). If it was desired to vary the landlord's common law obligations, there should have been an express stipulation in the lease. To agree that the tenant should maintain the premises in good repair was a departure from the common law. The express mention of fixtures and other adjuncts in the clause which expressed the tenant's obligations, did not limit the word 'premises' to the buildings; it was merely surplusage as appeared from the lease as a whole. If a tenant is to relieve a landlord of his obligations and maintain in good repair the thing let, as well as replace any subjects that might become worn out, the landlord should first place everything in good repair, especially if the previous tenant was obliged to leave them in good condition.

The learned Judge then examined the lease to show that the word 'premises' was not used consistently in the lease to mean buildings only; as it was used in sect. (3. 3) without restriction it must include all the subjects let. In case of ambiguity, as the lease was prepared by plaintiff, it must be construed against the plaintiff. *Voet*, 18, 1, 27; *Spencer* vs. *London and Lancashire Insurance Co.* (5 N.L.R., 37). By the terms of the lease, plaintiff was bound to carry out the common law obligation to

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put into good repair, as from the commencement of the lease, the premises, including the hot water system.

But the lease provided that the architect's certificate as to the repairs should be conclusive. The certificate, however, had application to the buildings only, and not to fixtures and fittings. The architect, on representations made by plaintiff's solicitor, abstained from inspecting the hot water apparatus. The certificate could consequently not be taken as final in reference to the subjects in question.

On the authority of *De Waal* vs. *Pollock* (16 N.L.R. 154) it was said that the lessee, who has agreed to keep and lease premises in tenantable repair, must himself, if the premises are not in repair at the commencement of the lease, put them, keep them, and deliver them in tenantable repair. But in that case the alleged promise by the landlord to put the premises in repair was not proved, and following *Moreland* vs. *Dent* (1876, N.L.R., 2) it was held that a tenant entering premises in a state of disrepair had only himself to blame. From *dicta* in the judgments of GALLWEY, C.J., and BEAUMONT, J., it might be argued that it was immaterial that the landlord should have specially contracted to put the premises in repair, if the repair did not take place previous to entry; but that was not so. Those judges, without qualification, followed *Moreland* vs. *Dent*, and *De Waal* vs. *Pollock* did not detract from its authority. *Moreland's* case closely resembled the present case, and it followed the older case of *Henwood* vs. *Brown* (1869, N.L.R., 70). It was argued that the agreement to pay rent "without any deduction whatever" excluded the defendant's counterclaim. A similar condition was in the lease in *Moreland* vs. *Dent*, but the tenant was held entitled to claim a remission of rent. *Digest*, 19, 2, 54 (1).

The duty of the plaintiff was to put the hot water apparatus in thorough repair for defendant. The apparatus was not in order. Judgment must be given for defendant in terms of his tender.

From this judgment plaintiff, having obtained special leave (p. 96), now appealed.

Tatham, K.C. (with him *Poynton* and *Sisson*), for appellant, referred to the evidence at length, and said the inquiry was not what were the rights of the parties under the Common Law, but what were their rights under the lease. In the lease "premises" could not be construed to mean "hot water apparatus." Throughout a distinction was drawn between "premises" and "fittings." *Moreland* vs. *Dent* was not as analogous as the learned Judge held. That was a case of remission of rent. Remission of rent was one thing; deducting the amount of

a claim from rent due was another. Although there was a claim in reconvention, the distinction was practically unimportant. By the architect's certificate both parties were bound. See *Voet* (19, 2, 23), *Wheeler* vs. *Van Reenen* (2 S.C., 269), *Goodyear* vs. *Weymouth Municipality* (25 L.J.C.P.,12), *Bateman* vs. *Thompson* (2 Hud., 166), *Hansen and Schrader* vs. *Deare* (3 E.D.C., 36), and also the authorities referred to in the judgment.

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Wylie, K.C. (with him *Calder*), for respondent: The architect's certificate, and the authorities dealing therewith, did not apply, as it dealt merely with the building, The rights of the parties under the Common Law must be given effect to, and the landlord must put the whole premises in suitable repair for a first-class hotel business. In doubt the lease must be read against the landlord who made the covenants. Counsel then discussed the meaning of "premises," and referred to the authorities quoted. Rent was paid, not for the building alone, but for the whole premises as they stood with all fittings and fixtures, as set out in the lease.

Tatham, K.C., in reply, said the hot water apparatus was not a fixture.

Postea on October 11th.

Lord DE VILLIERS, C.J.: By a lease executed on May 25th, 1909, the plaintiff let to the defendant the hotel known as Ocean View, situate at Durban, with the trade and other fixtures and fittings therein for a year and 11 months at a rental of £540 *per annum*, "without any deduction whatsoever," with certain rights of renewal. The defendant covenanted, *inter alia* (2, C.) "To keep the exterior and interior of the demised premises (after the same shall have been put in thorough order and repair by the landlady, as hereinafter provided), and all additions thereto . . . and water apparatus thereof . . . in good and tenantable repair and condition": (2, D.) "to replace any of the said fixtures and fittings specified in the schedule hereto, which may, during the said term, become worn out, lost, or unfit for the purposes for which the same are now used, by substituting therefor other fixtures or fittings of a like nature and equal value";

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(2, p.) "on the determination of the tenancy to yield up the demised premises, and any additions thereto, with the fixtures and fittings specified in the schedule hereto . . . . in good and tenantable repair and condition." Among the fixtures and fittings specified in the schedule was a "water-heater, with connections to bathroom." The plaintiff covenanted, *inter alia*: "(3, 3) To put the premises, both inside and out, in thorough order and repair forthwith, the certificate of Mr. Street Wilson of such repair to be conclusive." The main question to be determined on this appeal is whether the Court below was right in holding that the water-heating apparatus was intended to be included in the premises which the plaintiff was bound "to put in thorough order and repair forthwith." The action was brought in the Court of the Resident Magistrate at Durban for £90, being two months' rent. The defence was that the plaintiff had failed to put the apparatus in thorough order and repair, and that, as the defendant had effected the necessary repairs himself, after due notice to the plaintiff, at a cost of £52 18s. 9d., the defendant was entitled either to deduct that amount from the plaintiff's claim, or else to claim the amount by way of claim in reconvention. The plaintiff's reply to this defence was that he had put the premises in thorough order and repair, and that a certificate to that effect had been given by Mr. Street Wilson. The Magistrate held that the term "premises," as used in section 3, contemplated the buildings only, and that consequently the defendant was not entitled to succeed in his claim in reconvention. The Circuit Court for Durban held on appeal that the term "premises" included the apparatus, and that consequently the defendant was entitled to succeed on his claim in reconvention, and against that judgment the plaintiff has appealed to this Court.

The evidence satisfies me that on June 1, 1909, the water apparatus was not in a fit state for use, and that although the defendant, through his agent, Mrs. Hay, took occupation of the hotel on that day he did nothing to waive his right, if he had any, to have the apparatus put in repair. The fact is that at that time several repairs had admittedly to be done by the plaintiff, and Mrs.

Hay, rightly or wrongly, believed that the water apparatus would also be put in repair. This was not done, and when Mrs. Hay found that she was losing visitors, because the baths could not be properly used, she employed a plumber to effect what were considered to be necessary repairs, and paid him by a cheque, which was sent to the plaintiff's agent. This was done, with the apparent object of enabling the plaintiff to recover the amount from the former tenant, who had given a guarantee to the plaintiff that the apparatus was in order. The apparatus, however, continued to be in bad order, and when it did heat the water, the result was that the water was too dirty for the baths. It was found that, to make the apparatus fit for use, it was necessary to renew the boiler, the cylinder, and the pipes connected to the same. Mrs. Hay informed the plaintiff's agent of the condition of things, and upon his repudiating liability, she had the work done at the defendant's expense. At the trial a certificate of Mr. Street Wilson, the architect, was put in, which the plaintiff contends is conclusive in her favour. The certificate is in the following terms: "Durban, June 21, 1909.—I beg to certify that I have from this date taken over this work from the contractor—Mr. S. P. Smith—so far as the main building and the works under this contract are concerned, as the premises are now in thorough repair both inside and out." The contract referred to was a contract between the plaintiff and Smith, for the execution of certain specified repairs (not including any repairs to the hot-water apparatus), which had to be done to the satisfaction of the architect, and the certificate in question was given under that contract. It makes no reference whatever to the lease, and amounts to no more than that the premises which the contractor had undertaken to repair, were then in thorough repair, both inside and outside. It certainly is not such a certificate as the defendant was entitled to have under the third clause of the lease, and its production can afford no reply to the defence that the hot-water apparatus had not been placed in thorough order and repair if it was the plaintiff's duty to put it in that condition. The real question is whether or not the lease imposed that duty on the plaintiff. Clearly

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the "premises" referred to in the third clause are the premises which formed the subject of the lease. It is not the hotel building alone that was leased, but also the trade and other fixtures and fittings therein which at the date of the lease belonged to the plaintiff. Included in those fittings was the hot-water apparatus now in question. It would follow that the third clause imposed on the plaintiff the obligation of putting the hot-water apparatus in thorough order and repair. Against this view it has been urged that the words "both inside and out" tend to show that the building and not any portion of the fittings had to be put in order and repair. I consider, however, that these words mean no more or less than "both indoors and out of doors." Everything included in the lease must be placed in thorough order and repair whether it be inside the buildings or outside. Another argument strongly relied upon on behalf of the defendant is that the collocation in the second clause, sub-section C, after the words "demised premises" of the words in brackets, "after the same shall have been put in thorough order and repair," shows that the things subsequently mentioned as having also been leased were not to be put in thorough order and repair by the plaintiff. There is considerable force in this argument, but it does not outweigh the argument in favour of the opposite construction. The words "demised premises" are wide enough to include the hot-water apparatus, and if *ex abundante cautela* the parties wished to make it quite clear that the defendant was to keep everything let in good and tenantable repair, the fact that the words "after the same shall have been put in thorough order and repair by the landlady" were not repeated later on in sub-section C cannot affect the construction of the sub-section. After all, it is the third section, and not the words within brackets in the second section, which was intended to incorporate the covenants entered into by the landlady. I cannot quite agree with the learned Judge in the Court below that if the meaning of the third section be doubtful it should be construed most unfavourably for the landlady. He says that the lease was prepared by the landlady, and that as the words

were her own words the construction ought to be against her, because she ought to have expressed herself more clearly. But the lease was prepared, on behalf of both parties to it, and, so far as the plaintiff was the *promissor* and the defendant was the *stipulator*, the rule of construction, whatever may be the value of it, is that the construction should be in favour of the former, and against the latter. The rule of the Roman Law was *fere secundum promissorem interpretamur*, the reason being *quia stipulatori liberum fuit verba late concipere* (*Digest*, 45, 1, 99). The *stipulatio* consisted of question and answer, and as it was the *stipulator* who framed the question, it was deemed to be his duty to frame the question in such a way as to leave no doubt as to its meaning. The passage from *Voet* (18, 1, 27), quoted by the learned Judge, merely adopts the rule of the Roman Law, and applies it to cases in which a party to a contract of sale stipulates for some special pact in his own favour. So far as the plaintiff in the present case covenants to perform certain acts, she is the *promissor*, and the defendant is in the position of the *stipulator*, and the benefit of the doubt as to the meaning of the covenant should be given to the plaintiff, and not, as the learned Judge held, to the defendant. In England the rule of construction is that the words of the covenant are to be taken most strongly against the covenantor, but, as was said by Lord ELDON in *Browning* vs. *Wright* (2 B. and P., 13), the rule must be qualified by the observation that due regard should be paid to the intention of the parties, as collected from the whole context of the instrument. *Bacon*, commenting upon the maxim, "*Verba fortius accipiuntur contra proferentem*," says: "This rule, that a man's deeds and his words should be taken strongliest against himself, though it be one of the most common grounds of the law, it is, notwithstanding, a rule drawn out of the depths of wisdom." Further on, however, he says: "But this rule, as are all others which are very general, is but a sound in the air, and cometh in sometimes to help and make up other reasons without any great instruction or direction." Certainly, in the present case more advantage is to be gained from a careful perusal

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of all the provisions of the lease than from the application of a technical rule of interpretation to any particular provision. The technical rule referred to by the learned Judge would aid the plaintiff rather than the defendant, but it should not be invoked unless, without its aid, it would be impossible to arrive at the real intention of the parties. In the present case the intention of the parties seems to me to be reasonably clear, having regard to the whole context of the contract of lease, and to the purpose for which the apparatus in question was required. The hotel is admitted to be a first-class hotel, the rent is not inconsiderable, and the bath-rooms at the time of the lease were connected by means of pipes to an apparatus which was supposed to supply hot water for heating the baths required by visitors. That apparatus forms part of the property leased, and ought, in my opinion, to have been placed in thorough order and repair in terms of the third clause of the contract of lease.

Assuming, however, that the plaintiff's obligation under the lease to put in thorough order and repair applies only to the buildings, his Common Law obligation to put the fittings and fixtures let with the buildings in a condition to make it reasonably fit for use would still remain. The authorities, among which I need only mention *Grotius* (Introd., 3, 19, 12) and *Voet* (19, 2, 14), are clear that if the agreement of lease had been silent as to repairs, this obligation would have rested on the plaintiff as lessor, and it lies upon him to satisfy the Court that he has been relieved from this obligation by the terms of the agreement. In the case of *De Beers Consolidated Mines* vs. *London and South African Exploration Company* (10 S.C.C., 359) one of the covenants of the lease there in question was that the lessee should, on the expiration of the lease, deliver the land with all buildings in good repair, with a proviso that the lessees might during their tenancy remove all such improvements as should be capable of removal without injury to the lease itself. It was contended on behalf of the lessor that buildings affixed to the soil did not constitute improvements, and that the effect of the covenant was to prevent the lessee from re-

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moving before the expiration of the lease such buildings erected by him, but the Cape Supreme Court held that, as this was a right which the lessee would have enjoyed at Common Law, he could not, in the absence of clear and explicit language to that effect, be held to have deprived himself of such Common Law right. That decision was subsequently affirmed by the Judicial Committee (12 S.C., 107). There is certainly no clear and explicit language in the agreement of lease now under consideration to indicate that the defendant intended to deprive himself of his Common Law right to have the apparatus in such condition as to make it fit for use. The plaintiff has failed in putting the apparatus in thorough repair, or even in such a condition as to make it reasonably fit for use. The defendant, by his expenditure, has succeeded in making the apparatus at all events fit for use, and the question remains whether he can recover the amount expended by him.

There is a singular dearth of authority as to the specific remedy of a lessee on failure on the part of the lessor to put the premises in a proper state of repair. According to *Grotius* (Introd., 3, 19, 12), "the lessee may advance the money for the repairs and place it to the account of the rent," but the authorities cited by him do not seem to be quite in point. They refer rather to the claim to compensation which under the Roman Law the tenant had for permanent improvements, and *Grotius* may have considered that if such compensation was payable for the lessor for improvements which he was himself not bound to effect he would *a fortiori* be liable to pay compensation for repairs which he was bound to effect. *Grotius'* statement of the law is adopted by Chief Justice MAASDORP in his *Institutes of Cape Law* (2,208), and by *Dr. Nathan* in his Common Law of South *Africa* (S. 908). In the case of *Vowe* vs. *Pedder* (1 Menzies, 33), it was held by the Cape Supreme Court that the allegation of unliquidated damages for want of repairs is no defence to a provisional claim for rent on a lease. The defendant in that case had not effected any repairs himself, and the Court held that he had failed to make out a *prima facie* case to satisfy the Court that in the principal case he

would succeed in proving that he had sustained damage to any extent which would, in law, have had the effect of discharging him wholly or in part from liability for the rent claimed. This case was cited in the subsequent case of *Fish* vs. *Hausman* (8 C.S.C., 44), where it was decided by the same Court that a tenant who had not actually expended money on repairs was not entitled to set off the estimated cost of such repairs against a claim for rent. The judgment, which was that of a full Court, seems to have taken for granted that if repairs such as had been contemplated by the parties had been effected by the tenant, he would have been entitled in the principal case to counter-claim for the amount reasonably expended by him. "If the building," it was said, "had been put in repair, the cost could have been claimed, but this has not been done. . . . If the defendant repairs, he will probably claim for the amount expended, but he can claim only for putting in such a state of repair as the parties contemplated." In the case of *Bensley* vs. *Clear* (Buch., 1878, p. 89), it was taken for granted by counsel and by the Court that where the lessor fails in his obligation to place a house in a proper and tenantable state of repair, the tenant can require an abatement of the rent to the extent to which he has gone to expense in placing the house in a proper state of repair, but there was no actual decision on the point. In the case of *Assignees, Kaiser Brothers* vs. *Continental Caoutchouc Company* (23 C.S.C., 736), it was held that the premises were not so defective as to justify the tenant in quitting possession, but it was added that, if the plaintiffs should refuse to repair the premises, as repairs were required, the defendants might be entitled to effect repairs and deduct the expenses from the rent. In the present case, the question is complicated by the fact that the payment of rent is stipulated for "without any deduction whatsoever," but I do not consider that this stipulation was intended to deprive the lessee of any right which he might have to claim any sum of money from the lessor by way of damages or otherwise. The defendant informed the plaintiff of the defective condition of the apparatus; the plaintiff did not effect the repairs, but repudiated all

liability to effect them, and the defendant found that his hotel business could not be properly carried on without his effecting the repairs himself. The amount reasonably expended was less than the amount of the rent now claimed. Under these circumstances, I am of opinion that the defendant ought to have paid the full rent, and sued for the sums expended by him; but this is a technicality which should not be allowed to affect the final result. If the defendant was at fault in deducting his expenses from the rent, the plaintiff was equally at fault in refusing to pay those expenses. The amount tendered by the defendant was the amount which in the result he is called upon to pay, and he was properly allowed his costs after the date of the tender. The appeal must be dismissed, with costs.

INNES, J.: The outstanding facts connected with this litigation are hardly in doubt. Rent for the months mentioned in the summons had not been paid before action; the hot-water installation of the Ocean View Hotel was not in working order at the commencement of the lease; and the tenant expended £52 18s. 9d. in repairing and improving it. The point in controversy is whether the tenant is entitled to claim a reduction of the rent by reason of the expenditure thus incurred, or, alternatively, to recover in reconvention the whole or any part of his outlay. And that depends upon the correct replies to three questions. Was there any obligation on the part of the landlord to place the installation in working order? If there was, then, seeing that he did not do so, did the law allow the tenant to execute the necessary repairs, and to charge them against the rent: and (supposing the foregoing questions to be answered in the affirmative) were there any special circumstances present in this case which would operate to deprive the tenant of that legal remedy? It will be convenient to deal with these questions in their order.

In regard to the first one, much depends upon the meaning to be given to the word "premises" in section 3 (3) of the contract. If it includes the hot-water installation, then the case for the respondent is very strong; if, on the other hand, it refers to the land and buildings only, then

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the inquiry becomes more complicated. And, in investigating the meaning of the expression, the installation should, I think, be regarded not as a fixture, but merely as a fitting of the house. The evidence upon the point is not so full as it might have been; but, seeing that neither the boiler nor the cylinder was fastened to the floor, and that the pipes were not built into the walls, I am not prepared to differ from the conclusion at which apparently the Magistrate arrived. I shall, therefore, regard the installation as an important fitting used in connection with the building, but not forming, in any legal sense, part of it. The point is, whether, taken in that way, the installation is included in the "premises" which the appellant undertook to put in thorough order and repair. Now the word "premises" has two meanings. Its original meaning in law was the thing previously expressed. It was the English custom, in leases and other dispositions of real estate, to set out initially the names of the parties, and also a detailed description of the property deal with. This was referred to in subsequent portions of the document as the "premises"—the things already premised. Gradually the expression was also used to indicate not the description of the property leased, but the property itself. Hence its popular meaning came to be a building with the ground and other immovable adjuncts belonging to it. And so we find, in a judgment of the Privy Council—*Beacon Assurance Company* vs. *Gibbs* (1 Moore, P.C.N.S., p. 97)—the following passage: "The word 'premises,' though in popular language it is applied to buildings, in legal language means the subject or thing previously expressed." Nor can there be any doubt that in the lease before us "premises" is used in both senses, as having sometimes its legal, and at other times its popular, meaning. Instances have been given to illustrate this by the learned Judge, and no good purpose would be served by endeavouring to add to them; what we have to ascertain is the sense in which it was employed in section 3 (3). Now, a detailed description of all the property, movable and immovable, which formed the subject of the lease, was set out in the first clause of the contract. And if this had been followed by

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a section merely imposing upon the landlord the duty of repairing the "premises," then undoubtedly the word "premises" would have included all the property—the fittings and fixtures as well as the house and grounds—which formed the subject of the lease. But the contract has not been so drawn. After dealing in section 2 with the obligation of the tenant as regards repair and replacement, section 3 (3) provides that the landlord shall "put the premises, both inside and out, in thorough order and repair." There seem to me to be two considerations in favour of the view that "premises" in that clause does not include the movable fittings in the house. There is first the use of the expression, "inside and out." These words would be employed with perfect fitness if "premises" referred to the buildings leased; but they would be wholly inappropriate if "premises" meant not only the house, but the scheduled fittings and fixtures which it contained. "Inside" cannot be taken to denote that some of the premises were contained within the remainder; it must mean the inside as well as the outside of the "premises" themselves. And I cannot think that the contracting parties intended to provide that the landlord should place in thorough order the insides of the lamps, the pipes, the electroliers, and other articles mentioned in the schedule. The second consideration, which is stronger still, arises from the important bearing which the language of section 2 (c) has upon the interpretation of section 3. The first-named clause provides that the tenant shall "keep the exterior and interior of the demised premises (after the same shall have been put in thorough order and repair by the landlady as hereinafter provided), and all additions thereto . . . . and the drains, soil, and other pipes, and sanitary and water apparatus, as also the electric wires and apparatus, as also any other adjuncts that may be added to or connected with the premises in good and tenantable repair." Now, it seems clear that "premises" in that section means the buildings only, and was not intended to include the fittings and other leased articles mentioned in the first clause of the contract. Not only does the expression "exterior and interior" point strongly in that direction, but the

separate enumeration of the other articles shows that they were not meant to be included in the general term. If they were, then there was no object in mentioning each of them with the utmost particularity. I cannot regard the words of enumeration as being mere surplusage; on the contrary, taken in conjunction with the use of the expression "exterior and interior," they satisfy me that "premises" in section 2 (c) was not intended to cover the articles separately specified, but was used to denote the buildings alone. The grounds were specifically dealt with in the sentence immediately following the passage which has been quoted. And that conclusion is decisive as to the interpretation of "premises" in the third section, because the words "after the same shall have been put in thorough order and repair by the landlady as hereinafter provided," are a clear reference to the obligation of the lessor as set out in that section. They show that the word "premises" must bear the same meaning in section 3 (3) that it bears in section 2 (c). And the position in which they are placed in the clause where they occur indicates clearly to my mind that it was the "buildings" only, both inside and out, and not the fixtures and fittings, which the landlady undertook to put in thorough order and repair.

But that by no means concludes the inquiry on this part of the case. Because the fittings were also a distinct and specific portion of the subject matter of the lease. The tenant undertook to keep them "in good and tenantable repair and condition," to replace such as became worn out, lost, or unfit during the tenancy, and to deliver them up in like good repair and condition at the termination of the contract. That, of course, implied that if they were not, at the commencement of the term, in repair and condition contemplated (as certainly the hot-water apparatus was not); then one or other of the parties would effect the necessary repairs. And we have to decide whether the terms of the contract relieved the landlady from that obligation. I state the point in that way advisedly; because it seems to me that the obligation which, in the absence of any modification by agreement, the common law would impose upon a landlord ought not to be lost sight of in ascertaining the position of these contracting parties. Now, the Roman-Dutch law (differing in this respect from the law of England) imposes upon every lessor the duty of placing and maintaining the leased premises in a condition reasonably fit for the purpose for which they are let (*Van der Linden*, 1, 15, 12; *Grotius*, 3, 19, 12; *Pothier, Contrat de Louage*, s. 106, etc.). The principle is that the tenant is entitled to the due use of the thing which he has leased, and he cannot enjoy that use unless the property is delivered and maintained in a state of repair which is reasonable under the circumstances. This rule should, on principle, apply to leases of movables as well as to houses and buildings And *Pothier* in the section referred to specifically states that it does. He instances the case of the hire of a loom for making stockings. It is the duty of the lessor, he says, to maintain the machine in such a condition that the lessee is duly able to use it for the purpose for which it is let; and the lessor is bound to execute all repairs necessary to that end, and not called for by the fault of the lessee. So that, in the absence of any special stipulation on the subject, it would have been the duty of the lessor in this case to hand over the hot-water apparatus, which was one of the things specifically let, in a condition of repair reasonably fit for use as such. But of course that obligation might be varied by contractual stipulation express or implied. Which leads me to inquire whether the provisions of the lease relieve the landlady of her obligations in that regard, either expressly or by clear implication. If they do not, then the obligation remains. Express stipulation upon the point there is none. The document, as I read it, is silent on the question whether the lessor or the lessee should initially place the fittings and fixtures in that tenantable state of repair which it clearly contemplated. The only relevant provisions are that the landlady should forthwith place the buildings in thorough order and repair; and that the tenant should maintain them and also the fittings and fixtures in good and tenantable repair, replace such of the latter as might become unfit during the tenancy, and hand them over in similar repair at the expiration of the term. It is important to

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note that the obligation undertaken by the landlady, with regard to the buildings, is more extensive than that which the common law would impose. The expression "thorough order and repair" denotes a higher standard of excellence than the reasonably fit condition which the common law would exact. And the provisions as to maintenance and redelivery placed upon the tenant an obligation during the continuance of the lease from which he would otherwise have been free. "Good and tenantable repair and condition" may, I think, be regarded as fairly equivalent to the condition in which under the common law the lessor would have been bound to maintain the leased property. This obligation has been expressly assumed by the lessee. Are we justified in inferring from these provisions that the parties intended to go further and to transfer, from the shoulders of the landlady to those of the tenant, a burden which, at the outset of the contract, the ordinary law would have placed upon her? I don't think we are. The maxim "*expressio unius est exclusio alterius*" is frequently of service in the interpretation of written instruments. It is not, however, a rule of construction, but a principle of common sense, by which we may be guided, in arriving at the intention of the parties to an imperfectly expressed document. And much depends in each instance upon the terms of the document, and more especially upon the relation in which the thing expressed stands to the thing which is not expressed. It by no means always follows that the mention of one matter implies the exclusion of what may at first sight appear the converse. In *Uitenhage Municipality* vs. *Colonial Government* (9 S.C., p. 375) the contract provided for a supply of water by the Municipality to the Government for a certain period, and gave the Government the right to terminate the agreement at twelve months' notice. No right was expressly given to the Municipality to put an end to the arrangement; and it was argued, upon the principle that the mention of one excluded the other, that no such right was intended to be conferred upon that body. But the Court held that the maxim in question did not apply, and that the true intent of the parties was that the right of giving a reasonable

notice to terminate the arrangement was not intended to be taken away from the Municipality. If, in the present case, the lease had provided that the lessor should carry out only the Common Law obligations in respect of the buildings, there would have been considerable force in the argument that the omission of a similar provision with regard to the fittings and fixtures showed an intention to release him from the same obligation with regard to them. But, as already pointed out, the terms of sect. 3 (3) go beyond the Common Law; and the object of inserting it may have been, not to remove the landlord's ordinary obligation in respect of the fittings, but to extend it in respect to the buildings. Indeed, the application of the maxim which I am considering operates, in this case, in favour of the tenant, just as much as it does in favour of the landlord. Because it might be argued that the express mention of an obligation on the part of the tenant to keep the fittings in repair implied the exclusion of any similar obligation to place them in repair. To my mind, however, this is not a case in which the maxim affords a satisfactory guide to the intention of the parties. Looking at the various provisions of the deed, I cannot find any clearly implied variation of the obligation which the Common Law would impose upon the landlord in respect of his duty to place the leased property (other than the buildings) in proper repair. It may be said that when parties enter into an elaborate agreement of this kind, we must infer that their intention was that the document should govern all their relations, and that the Common Law should be excluded. But one can only judge of the intention of contracting parties by the language which they use; and if that language does not exclude a liability, which *prima facie* rests upon one or other of them, then the liability remains. Not only so, but I think that these parties must actually have intended that it should remain. The landlady had no objection in interfering with the operation of the Common Law, because she was in possession of a guarantee from the previous owner of the installation that it was in order; and the tenant has consistently repudiated any obligation to place it in order. Nor do I think that the tenant would

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have agreed to replace any portion of the fittings which became worn or unfit during use if the intention was that the lessor was not to be bound to place them in proper repair at the outset. This is probably not the conclusion at which an English Court would arrive. It was held in *Payne* vs. *Haine* (16 M. and W., p. 541) that under a contract to keep premises in good repair, a tenant was bound to place them in that condition; because he could not keep them in good repair without putting them into it; but that the extent of the repair must be measured by and Lord ESHER, M.R., said that "where the premises was followed in *Proudfoot* vs. *Hart* (25 Q.B.D., p. 42), and Lord ESHER, M.R., said that "where the premises are not in repair when the tenant takes them, he must put them into repair, in order to discharge his obligation under a contract to keep and deliver them up in repair." These decisions are not binding upon us; and I think they must be read in the legal atmosphere in which they were delivered. Under a system of law which (apart from agreement) casts no obligation upon the landlord to make his premises tenantable, or even habitable, it may be that the eminent judges who decided these cases were forced to the harsh conclusion at which they arrived. But the matter is different under the more equitable doctrines which, with us, regulate the rights of landlord and tenant. And starting, as we must do, from the obligations which our Common Law imposes upon a lessor, it seems impossible to hold that, because a tenant expressly undertakes to relieve the landlord of portion of his obligations, therefore he must be considered as bound to release him from the remainder also. The English decisions were followed in a South African case (*De Waal* vs. *Pollock* (16 N.L.R., 1896, p. 154), which was referred to during the argument. But no Roman-Dutch authority seems to have been there quoted or considered; and with great respect to the judges who decided that case, I am not prepared to follow its authority. In my judgment, the fact that a lessee undertakes to keep and re-deliver premises in tenantable repair does not relieve the lessor from the obligation of placing them in due repair at the commencement of the lease. The conclusion at which

I arrive in this part of the case, therefore, is that the obligation rested upon the appellant to deliver to the respondent this not-water installation in a condition of repair reasonably fit for the purposes for which it had been leased. That being so, I am satisfied that she did not discharge her obligation. The apparatus was practically worn out when the respondent took over the premises. Upon the evidence there is no room for doubt on this point. But the appellant relied upon a certificate given by Mr. Street Wilson, the architect, to the effect that on June 21, 1909, the premises were in thorough repair, both inside and out. He contended that this was a certificate which, in terms of sect. 3, was conclusive upon the point. But in my opinion it was not such a certificate as that section contemplated. It was given merely in respect of the repairs to the building, which at that time had just been completed. It was obtained by the attorney of the landlady, who requested the architect to issue it in respect of the house only; and who now seriously asks the Court to accept it as covering the hot-water installation as well. It was not granted by the architect as an arbitrator after hearing both parties; but it was issued for a limited purpose at the request of the lessor alone. And the contention appears to me untenable that the lessor should now be allowed to rely upon it as if it had been issued in respect of the entire subject matter of the lease.

I come now to deal with the tenant's right to execute the necessary repairs himself, and to charge them against the rent. The existence of such a right has been taken for granted in more than one South African case (*Fish* vs. *Hausman* (8 S.C., p. 44), *Bensley* vs. *Clear* (1878, Buch., p. 89), *Assignees of Kaiser Bros.* vs. *Continental Caoutchouc Co.* (23 S.C., p. 736), but in none of them was the decision of the point necessary for the settlement of the dispute. The remedy is a special one, because the amount claimed is not ascertained by reference to the ordinary tests applicable in respect of general damages. The tenant reclaims what he has necessarily expended in executing the repairs which the landlord should have effected. One would think that if the right does exist

it must have originated as a special form of the *actio ex conducto;* and that appears to be the case. There is certainly direct authority in favour of it. *Grotius* (3, 19, 12) states distinctly that if the lessor fails to keep the property in a suitable state of repair, the lessee may advance the money for the repairs, "and place it to the account of the rent." The passages of the *Digest* to which he refers, in support of his statement, do not seem directly in point. They are to the effect that a lessee who has carried out useful improvements in the property let, which he was not in terms of his lease bound to make, may recover the expenses from the landlord, or set them off against the rent. It may be that *Grotius* considered that the right of the tenant to recover the cost of expenses for repairs which the landlord ought himself to have made, was an *a fortiori* right. But the references cannot be considered satisfactory, especially as they seem to go considerably further than the law of Holland did in allowing a lessee compensation for improvements. There is, however, another *lex* (*Digest*, 19, 2, 25, 2), subsequently quoted by *Grotius*, which does appear to justify his view in regard to the tenant's right to recover the cost of necessary repairs. It is there stated that if a room is let and the light is blocked by buildings erected outside, the tenant may terminate the contract, or may set off his damages against the rent. And, adds the jurist, "the same rule applies if the doors and windows are in thoroughly bad repair, and the landlord refuses to put them right." I gather from that passage that, under such circumstances, the Civil Law allowed the tenant to set off against the rent the cost of duly repairing the doors and windows of the leased property. For it is difficult to see what other form the damages due to such defects could take. This view is confirmed by the high authority of *Pothier* (*Contrat de Louage*, sect. 108). According to him the right of a lessee to compel the lessor to effect repairs is a branch of the *actio ex conducto*. And he adds that the proper course is for the Court, in the course of such a suit, to order an inspection by some person qualified to ascertain the cost of the repairs; to allow the landlord a certain time within which to make them,

and in his default to authorise the tenant to effect them, for the ascertained price, and charge that sum against any rent due, or if no rent is due to recover the amount from the landlord. *Pothier* also states that, if the landlord's delay in effecting repairs has caused damage to the tenant, the latter may recover that damage by the *actio ex conducto*. I think we are justified on the strength of these authorities in holding that where a landlord refuses to execute those reasonable repairs which the Common Law requires him to do, the tenant may effect such repairs himself, and may deduct the necessary cost of them from the rent due. But I should like to say that, in my judgment, this right is confined to repairs properly so called; that is to say, to the remedying of such dilapidations and flaws as unreasonably interfere with the use of the property for the contemplated purpose. It cannot be extended so as to allow a tenant to effect structural alterations or improvements against the will and at the expense of his landlord. And in any case the right is one which should not be exercised without prior demand and notice to the owner of the property. Moreover, I fully agree with the remarks contained in *Wille's Landlord and Tenant* (pp. 274-5), in which tenants are warned against the practical risk they take in making repairs themselves, and are advised that the more prudent course, in general, is to seek the intervention of the Court. But the right so to make repairs does, to the extent mentioned, exist. And there are cases (of which this seems to be one) in which it is an appropriate and equitable form of relief. The tenant could hardly be expected to throw up the lease of the entire property, because of defects in the hot-water installation. Yet, if those defects were not remedied, the business of the hotel would suffer; the landlord denied that he was under any obligation to remedy them; and the practical course was for the tenant to do the repairs himself and set off the cost against the rent due.

It remains to consider whether the evidence discloses any circumstance which would deprive the tenant of the legal right which he exercised. I do not think that the clause in the lease providing for the payment of rent on a

certain day "without any deduction whatever" has that result. That provision cannot relieve the landlady of her obligation to place the leased property in repair, or deprive the tenant of the remedy which the law gives him in respect of her initial default. That default afforded *pro tanto* a defence to the claim for rent. And I entirely agree with the learned Judge when he says that "it is only the rent due which can be stipulated to be paid without deduction." Then it was argued that the tenant knew of the defect in the installation when he took possession, and that that fact prevented him from recovering the cost of repairing it. Mrs. Hay clearly must be taken to have known that the hot-water apparatus was out of repair, in spite of the guarantee of good condition given by her husband. But the evidence of her authority to bind her principal (Cran) by taking possession with that knowledge is not very satisfactory. Assuming, however, that her knowledge is attributable to him, I am not satisfied that her entry upon the premises, as his manager, should operate to deprive him of the right which he claims. The legal effect of the acceptance by a tenant of leased property, with knowledge of existing defects, was discussed by CONNOR, C.J., in *Moreland* vs. *Dent;* and the authorities were considered by him in a very learned judgment. The principle underlying them is in effect that of waiver; knowledge, it is said, is equivalent to renunciation. And when a tenant is content to enter upon the occupation of leased premises, under circumstances which show that he accepts them as a fulfilment of the landlord's obligation, then he cannot take advantage afterwards of defects of whose existence he was aware when he took over the property. But the present is not a case of that kind. Mrs. Hay's evidence was to the effect that "almost directly after entry" she complained about the apparatus, and that the appellant's attorney undertook to have it repaired. Mr. Poynton denied that he had given any such undertaking; but he did not deny that Mrs. Hay had complained. And the statement in her letter to him, of July 27, reminding him of her complaint, was not challenged in his replying communication. So that the respondent's agent did not acquiesce in the defective condi-

tion of the installation. She was compelled by circumstances to take possession, but she made it clear that she was not satisfied. Moreover, it is common cause that the general repairs to the buildings, which the landlady caused to be made in terms of the lease, were effected after Mrs. Hay took possession. And that shows that her entry upon the leased property was not intended, nor understood, to imply that she waived any right which her principal had to insist upon its repair. A point was also made of the fact that no due notice was given to the landlady before the first repairs were executed by Sperryn. That is no doubt true; but the attitude taken up by the landlady clearly shows that such notice would not have affected her in any way. If it had been given, she would have repudiated all liability, as she afterwards did. And though, as already pointed out, notice should be given to the lessor, before the repairs are executed by the tenant, I do not think this is a case in which the neglect to give such notice should affect the result. The repairs first executed were small; there can be no question as to their actual cost, and the landlady has consistently repudiated all liability to effect them herself. As to the second set of repairs, due notice of the tenant's intention to make them was given to the landlady, after the latter had repudiated any obligation to carry them out herself. I can see no sufficient reason, therefore, for depriving the tenant in this case of the remedy which the law would give him.

There is only one other point upon which it is necessary to remark. I have already pointed out that only repairs properly so called can be effected by the tenant against the will of the landlord. And I confess to having entertained considerable doubt whether the work carried out by West properly falls under that denomination. What he did was to renew the boiler, the cylinder, and the pipes connecting them. That is remarkably like a new installation, and in fact the respondent's attorneys so described it in the correspondence. Improvements corresponding in degree, if effected to a building, would hardly be considered mere repairs. But after all, an installation of this kind is a very special apparatus. It must be con-

sidered as a whole; the heating arrangement, the boiler, the cylinders, and the distribution pipes. All these parts are liable to wear out, and the only practicable way of repairing any one part seems to be by replacing it with a new one. A corroded boiler, a cracked cylinder, or a broken pipe can hardly be mended in the ordinary sense. And the evidence satisfies me that large portions of the installation were so worn that the whole could only be satisfactorily used by replacing the defective sections altogether. And Sperryn s evidence, rightly understood, is not in conflict with this view. No doubt he did say: "It was not in working order when I took on the job. It was in working order when I left." But a reference to the remainder of his evidence, and to the account which he rendered, shows that he was only referring to the circulation system; that is, the pipes leading from the kitchen to the bathrooms. These pipes he put right, but he did no work to the remainder of the installation beyond packing the radiator, and appears to have paid little attention to it. What he considered to be in order as the result of his work was not the installation as a whole, but the circulation system, by which the water was conveyed from the kitchen to the bathrooms. That being so, I am not prepared to differ from the view of the learned Judge that the work done amounted to reasonable repairs under the circumstances. In my judgment, therefore, the appeal fails, and must be dismissed, with costs.

SOLOMON, J.: I have the misfortune in this case to differ from the rest of the Court. The first and one of the most important questions to be determined in this appeal is the meaning of the word "premises" in section 3, sub-section 3, of the contract of lease. "Premises" is a word of equivocal meaning, and may be employed either in its etymological sense of what has gone before, in which case it would mean in this sub-section the whole of the property let, or in its popular sense, of the house or buildings. And not only is the word capable of bearing both these meanings, but it is clear that in this very lease it is used sometimes in the one sense and sometimes in the other. It would be superfluous to examine all of

the many sections in which the expression occurs for the purpose of determining in what sense it is employed in each instance. But I may refer by way of illustration to sub-sections (f) and (g) of section 2, in the first of which the tenant covenants "to paint the outside wood, metal, stucco, and cement work of the demised premises," and in the second of which he covenants to "paint all the inside wood and iron work of the demised premises, and to repaper the parts usually papered, or so much of the premises as shall be used for the business." In these sub-sections, the word clearly is used in the sense of buildings. On the other hand, in section 3, sub-section 1, which provides that "the tenant paying the rent shall peaceably hold and enjoy the demised premises during the said term," it is equally clear that it included the whole of the property let. The word then being ambiguous, and being used in more than one sense in this lease, the question to be determined is, in which sense is it to be construed in section 3, sub-section 3? To answer that question, we must first have regard to the preceding sections of the lease. Section 1 sets out in detail all the property leased, and the rent to be paid in respect thereof. The property is described as follows: "All that hotel known as the Ocean View Hotel, with the ground in extent about two acres, together with the outbuildings belonging thereto, together with the trade and other fixtures and fittings now thereon." Attached to the lease is a schedule of the fixtures and fittings, included in which is "one water heater, with connections to bathrooms"; and it is common cause that this is the hot water apparatus which is the subject of this action. It is clear, therefore, that this apparatus is part of the property let by the defendant to the plaintiff. If, then, section 3 had followed immediately upon section 1, and if it had simply read, "the landlady covenants to put the premises in thorough order and repair," I should have felt no difficulty in agreeing that the word "premises" was used in its widest sense, and that it included the hot water apparatus in question in this case. But there appears to me to be two serious difficulties in the way of disposing of the case on these simple lines. The first is: that the words "both

inside and out" are added after "premises" in sub-section 3, so that it reads, ". . . to put the premises, both inside and out, in thorough order and repair"; and the second is that section 3 does not follow immediately upon section 1, but that section 2 is interpolated, and, in my opinion, sub-section (c) of that section has an important bearing upon the construction to be placed upon sub-section 3. And, in the first place, the addition of the words, "both inside and out," is, to my mind, very significant. These are words which are commonly employed in leases of houses, where there is a covenant to repair by either the landlord or the tenant; but it is difficult to conceive of their being applied to the lease of anything other than a building, as, for example, to fittings and furniture. If we were to accede to the argument that the word "premises" is to be construed as meaning the whole of the property let, and if we were to substitute for the word its equivalent, as set out in sect. 1, the clause would read somewhat as follows: "The landlady covenants to put the buildings and the fixtures and fittings, both inside and out, in thorough order and repair." I can scarcely imagine, however, a lease being drawn in that form, and the use of the words, "both inside and out," is, to my mind, a strong indication that the word "premises" was employed in that sub-section, not in its etymological sense, but in its popular sense of house or buildings. That inference is much strengthened by a reference to sub-section (c) of section 2, which contains the tenant's covenants to keep the property let in repair. The tenant covenants to keep in repair, first, "the exterior and interior of the demised premises"; if the section had stopped there, the language would correspond with that used in sub-section 3, already referred to, viz., "the premises, both inside and out," and would indicate, though somewhat more strongly, that the buildings only were referred to. But this is made clearer by what follows, for the section goes on to give a detailed list of the rest of the property let in addition to the buildings, viz., "all additions thereto, and the boundary walls and fences thereof, and the drains, soil, and other pipes, and sanitary and water apparatus

thereof, as also any other adjuncts that may be added to, or connection with, the premises." If by "the exterior and interior of the demised premises" is meant the whole of the property let, then all the subsequent words are superfluous and meaningless, as all these things had already been included; but if these words only mean the buildings, then it is evident that the following words were necessary in order to effect the intention of the parties that the obligation to keep the whole of the property in repair should fall upon the tenant. But the matter does not end there, for sub-section (c) draws a distinction between "the premises" and the rest of the subjects of the lease. In the first place the former are preceded by the words, "the exterior and interior of," which are appropriate when used with reference to buildings, but which are singularly inappropriate when applied to such things as fixtures and fittings. And, secondly, in the case of the former, the obligation to keep in repair is qualified by the words in brackets, "after the same shall have been put in thorough order and repair by the landlady," whereas no such words are used with reference to the fixtures and fittings. In my opinion, therefore, the inference is very strong that in sub-section (c) by "the exterior and interior of the premises" is meant only the buildings as distinguished from the fittings and fixtures. And if that is a correct conclusion, then it seems to follow almost of necessity that the corresponding words in sub-section 3 of section 3, "the premises, both inside and out," are used in the same sense. For the words in brackets in sub-section (c) refer directly to those used in sub-section 3. The words are: "After the same shall have been put in thorough order and repair by the landlady as hereinafter provided." And it is in sub-section 3 of section 3 that it is provided "that the landlady should put the premises, both inside and out, in thorough order and repair." It follows, therefore, that, whatever meaning is assigned to "the exterior and interior of the premises," in sub-section (c) of section 2, we must assign the same meaning to the words "the premises, both inside and out," in sub-section 3 of section 3. I come to the conclusion, therefore, that

the express covenant by the landlady to put "the premises, both inside and out," in thorough order and repair has reference only to the buildings, and does not include the hot water apparatus and the other fittings, though these also formed the subject of the lease. Then, if that be so, the next question is this: Was the obligation of the landlord to put the premises in repair limited to the buildings? In my opinion it was. For this seems to me to be essentially a case in which the maxim *expressio unius est exclusio alterius* should be applied. The express mention of the buildings alone in the covenant to put in repair suggests the inference that the rest of the property let was excluded from the operation of that covenant. The lease is an exceedingly full and elaborate one, and amongst other matters it is clear that the question of repairs was carefully considered by the parties If, then, the intention had been that the landlord should put in repair everything that was the subject of the lease, that, I think, would have been stated, and the fact that his covenant is limited to the buildings only is a very strong indication that he undertook no obligation to put the rest of the property in repair. And that inference is to my mind very much strengthened by a reference to sub-section (c) of section 2, for there, as I have already pointed out, a clear distinction is drawn between the buildings and the rest of the property let. As regards the buildings, the tenant covenants to keep them in good and tenantable repair "after the same shall have been put in thorough order and repair by the landlady." He also undertakes to keep in good repair the rest of the property, including the pipes and sanitary and water apparatus, but there is no word here about these having been first put in order and repair by the landlady. This omission is, to my mind, very significant. The words in brackets are deliberately placed, not at the end of the list of the things let, but in the middle, showing that they were intended to refer only to that part of the property which preceded, and not to that part which followed the brackets. It is, to my mind, just as if the landlady had said: "I undertake to put the buildings in thorough repair, but, as regards the other things, I accept no

responsibility; you know their conditions, and you must take them as they are." But it was argued that by Common Law there is an implied obligation on the lessor to hand over the property let in good order, and that, consequently, there was no necessity to provide in the lease that the fittings should be put in that condition. That, no doubt, would be a very strong argument, if there were no express provisions in the lease with regard to the lessor's obligation to repair; but when we find that this very subject is dealt with in the lease, the contention seems to me to lose much of its force. In my opinion, the parties, when they made the elaborate provisions which are contained in the lease, intended that their rights and duties should be regulated by the contract itself, and not by the Common Law. And if in the document itself we find provisions, either express or implied, determining the extent of the landlord's obligation to put the property in repair, then, in my opinion, we are not justified in going outside of the agreement itself, and imposing upon him obligations which are implied by the Common Law in contracts of *locatio conductio*. I need scarcely say that if it were found impossible from the written agreement to come to any conclusion as to whether or not the landlady was required to put the fittings in order, I should unhesitatingly agree that it would be necessary to have recourse to the Common Law for the purpose of determining that question. But the view which I take of the lease is that by its terms the landlady is impliedly relieved of that obligation. Suppose, for example, that the lease had provided that the lessor should put the buildings only in good order and repair, would it have been allowed to the lessee to invoke the Common Law, and to insist upon the lessor putting the rest of the property in the same condition? In my opinion, it would not: *Expressio unius est exclusio alterius.* But it is said that the present is a different case, for that here the obligation on the lessor to put the buildings in "thorough" order is in excess of the Common Law duty, which is merely to put them in "good" order; and that the true meaning of this lease is that the landlady shall put the buildings in "thorough order and the fittings in "good" order.

I find it difficult, however, to accept that view. The important point, to my mind, is that the parties were dealing with the subject of the repairs to be effected by the landlord, and that they must have had in mind everything that was the subject of the lease; yet in the covenant the buildings only are referred to, and the fittings are not mentioned. The question seems to narrow itself down to this: were the fittings omitted because the intention was to exclude them from the operation of the covenant, or because the parties were satisfied that the landlord's Common Law obligation should apply to them? My own view is in favour of accepting the former of these alternatives. But, further, to what extent, if any, the words, "thorough order and repair," are stronger than "good order and repair," is very difficult to say. I cannot find that the former words have ever formed the subject of judicial decision, though the latter have. In the lease in the case of *Alexander* vs. *Armstrong* they seem to be used as practically synonymous. There it was provided that the lessee should keep the inside and outside of the premises in a good" state of repair, and hand the same over at the termination of the lease in "thorough good" order and condition. But I can scarcely imagine that it was contemplated that his obligation at the termination of the lease in regard to the state of the premises should be greater than during its currency. Again, in *Woodfall on Landlord and Tenant*, I find in the forms in the Appendix in one case the tenant covenants "to keep, and at the termination of the lease to leave, in 'thorough' order and repair, the dwelling-house, etc." In another case the tenant covenants to keep and leave the premises in "good and substantial repair and condition." And in the third case, the form of the covenant is that the tenant shall keep and yield up the premises in "good" repair, and that the landlord shall forthwith put them into "complete tenantable repair." The language, it will be seen, varies from time to time, but I very much doubt whether there is any substantial difference in the tenant's obligations in these cases. But even if there is, in my opinion, the maxim *expressio unius* applies equally, whether the landlord covenants to put the buildings in "thorough"

order or in "good" order. But it was further contended that the lessee's covenant to "keep" the fittings in good order implies that they shall first be "put" into good order by the lessor. That, no doubt, would be a very strong argument, if these words had to be construed without reference to the context, though in the English Courts, they have been interpreted to mean, not that the landlord, but that the tenant himself, shall put them into good order. This point was first definitely decided in the case of *Payne* vs. *Haine* (16 M. and W., 541), by a strong Bench, including such distinguished judges as Barons PARKE and ALDERSON. And the decision was approved of and followed by Lord ESHER and LOPES, L.J., in the much later case of *Proudfoot* vs. *Hart* (L.R. 25, Q.B.D. 42). That is a decision which depended entirely upon the construction of the words of the lease without reference to the Common Law, and that decision has been followed in the Courts of Natal in the case of *De Waal* vs. *Pollock* (16 N.L.R., 154). And there is much to be said in this case in favour of adopting these decisions. The lease is drawn according to English forms and precedents; the legal terms employed are those of the English law; the meaning of the covenant in question has been definitely settled by distinguished judges in England, and has been followed in the Courts of Natal, the Province from which this appeal comes. At the same time, my own feeling is that these decisions have gone too far, and there are English cases earlier than that of *Payne* vs. *Haine* in which a somewhat different construction has been placed upon such a covenant. Thus in *Gutteridge* vs. *Mungard* (1 Moo. and Rob., 334), TINDAL, C.J., commenting upon a covenant by a tenant to keep in repair, says: "The tenant is to take care that the premises do not suffer more than the operation of time and nature would effect; he is bound by seasonable applications of labour to keep the house as nearly as possible in the same condition as when it was demised." And, again, in the case of *Burdett* vs. *Nethers* (7 A. and E., 136), which was an action for damages against a tenant for yielding up premises in bad repair, where the judge at the trial had rejected as inadmissible evidence to show

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that the premises were in bad repair at the beginning of the lease, the full Court disapproved of his ruling, and ordered a new trial. Lord DENMAN there said: "It is very material, with a view both to the event of the suit and to the amount of damages, to show what the previous state of the premises was." And in the case of *De Beers Consolidated Mines* vs. *The London and S.A. Exploration Co.* (10 S.C., 373), the Chief Justice, in his judgment, says: "The ordinary rule in this colony for the construction of a covenant to repair is that the buildings must be left in the state of repair in which they were delivered to the lessee." In the present case it is unnecessary for me to express a definite opinion upon the question whether under sub-section (c) of section 2 the tenant was bound to put in good repair any of the fixtures and fittings which were not in good repair at the beginning of the lease, or whether his obligation was limited to keeping them in as good a state of repair as they were when he took them over. For, in the view which I take of the case, it is sufficient that the other provisions of the lease lead me to the conclusion already stated that the landlord's obligation to put the premises in repair is confined to the buildings, and does not extend to the fixtures and fittings, which, I think, the tenant must be taken to have accepted in the condition in which they were to his knowledge at the beginning of the lease. If this view be correct, then it follows that the defendant had no right to deduct from the rent due by him the amount expended in putting the hot-water apparatus in order. In my opinion, therefore, the appeal should be allowed, and the judgment of the Chief Magistrate should be restored.

Lord DE VILLIERS, C.J., intimated that MAASDORP, J., who heard the argument, had had an opportunity of reading his judgment, and desired him to say he agreed with it.

Appeal dismissed accordingly.

[Appellant's Attorney, POYNTON.
Respondent's Attorneys, CALDER & CALDER.]

CAPE TOWN.]

DE WIT AND VIVIER *vs.* SWART.

Perennial stream.—Intermittent stream.—Diversion of Water.

The plaintiffs and defendant, being riparian owners in divided shares of a farm through which a perennial and an intermittent river flowed, had, before subdivision of the farm, apportioned the water of both rivers by private arrangement between themselves. This was continued for three years after such subdivision until the defendant opened up a fountain above the intermittent river, and claimed the right to divert for his own exclusive use not only the additional supply thus obtained, but also the natural flow of the stream. Thereupon a written agreement was entered into between the plaintiffs and defendant to the effect that the owners should use the water of the perennial stream as formerly, and should have the right to the water out of a certain dam in the intermittent stream:—Held, *that under the agreement plaintiffs were entitled to their share of the water naturally flowing in such intermittent stream above the dam without prejudice to the defendant's right to divert all the water obtained by him before it reached the channel of the river.*

The principle that water allowed by a riparian proprietor to flow into a perennial river becomes part of the natural flow thereof is equally applicable to a case in which riparian proprietors agree to give each in turn the exclusive right to the use of the water of an intermittent stream.

This was an appeal from a judgment of HOPLEY, J., in the Cape Provincial Division.

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De Wit and Vivier *vs.* Swart.

The present appellants brought an action in the Court below for a declaration of rights with respect to the water in a kloof or stream called Brak Rivier, in the district of Riversdale, for an interdict and for £500 damages. In their declaration they alleged that the parties were the