

rather, it points to the necessity of resisting further infringements of its execution, and Mr Morison said with much plausibility that the opening words of this section bore on the face of them that such was the meaning of the Act. Section 49 therefore does not apply.

As to section 39 the appellant is in a dilemma. If he says "the deed, instrument, or writing" is the docquet, a decree finding that it is subscribed by the Justice of the Peace would not advance him one inch. He would have it declared—which is not disputed—that the docquet was not holograph, but that would not do his assignation one bit of good. If, however, the appellant says that the assignation is "the deed, instrument, or writing," he is put out of Court by the words "subscribed by the grantor or maker thereof." This deed is not subscribed by the grantor or maker thereof.

This appeal must therefore be dismissed.

LORD ADAM—The question in this case is whether a certain assignation is valid, an objection having been taken to it on the ground that the docquet of the justice of the peace requires to be holograph? The question therefore comes to be, whether or not a notarial docquet requires to be holograph? Previous to the Conveyancing Act of 1874 it was authoritatively settled that the docquet required to be holograph, and we have only to consider what is the effect of the changes in the law in regard to the matter introduced by the clauses of the Act of 1874. The changes introduced by section 41 are that all deeds whether relating to land or not may now be executed notarially, that one notary or a justice of the peace, or in the case of testamentary writings the minister of the parish, may now act in place of two notaries, that the ceremony of touching the pen is no longer necessary, and that the deed must be read over before execution to the grantor in presence of the witnesses. I agree with Mr Morison that the opening words of section 41 show that these changes were only in part introduced, and were introduced without prejudice to the present law and practice. If the alterations specified had the effect of taking away the necessity of the docquet being holograph, such a result would be very much to the prejudice of the existing law. I do not think that the changes introduced had any such effect.

Section 39 appears to me to have no application to the question before us. If the docquet of the notary no longer requires to be holograph, there could be no objection to a deed having a docquet in the form prescribed by the Act whether the docquet was written by the person subscribing or not. If, however, the docquet does require to be holograph, that it is so is essential to the validity of the deed.

The whole case therefore turns on whether or not the docquet requires to be holograph. I have no hesitation in agreeing that the judgment of the Sheriffs is right.

LORD KINNEAR—I also concur. The

reasons supporting the judgment of the Sheriff-Substitute are all fully referred to in his note. I agree with him and also with what your Lordship has said, and therefore think it unnecessary to add anything further.

LORD M'LAREN was absent.

The Court dismissed the appeal and found in terms of the judgment of the Sheriff-Substitute.

Counsel for the Pursuer—Young—Morrisson. Agent—D. Howard Smith, S.S.C.

Counsel for the Defender—Morison. Agent—Alexander Morison, S.S.C.

Friday, February 5.

FIRST DIVISION.

[Lord Kincairney, Ordinary.]

M'DUFF v. BALFOUR.

Lease—Construction—Application of Stipulations to New System of Farming.

The tenant of a farm under a lease for a term of years was bound to leave to the proprietor the dung made after the 15th of June immediately before the expiry, at a price to be fixed by arbitration, the lease requiring that all dung made previously should be applied to the lands. It was also stipulated that the tenant should consume all the straw grown on the farm annually for manure, and apply such manure to the lands yearly. The district in which the farm was situated was not a wheat growing one, and the green crop was the only crop to which manure was applied, the custom which prevailed at the date of the lease being to consume the bulk of the straw crop in the cattle courts during the winter—reserving only what was required for the minor uses of the farm during summer—and to apply the manure so made to the next year's green crop. In the course of the lease the tenant adopted a new system of management. He kept cattle in the courts in summer as well as in winter, and made a considerable part of the straw crop into manure during the summer months, with the result that he left on the farm at the end of the lease an amount of manure, made after the immediately preceding 15th of June, which was quite abnormal for the district.

In an action by the tenant to compel the proprietor to pay for this manure, held (1) that the obligations laid on the tenant by the lease were (a) to consume one year's straw crop before the next was ingathered, and (b) to apply all the manure made after June 15th to the green crop of the following year; and therefore (2) that the proprietor was bound to pay for the manure left on the

farm, in respect that the system under which it had been made involved no breach of the stipulations in the lease—*diss.* Lord Adam, who held that the tenant was bound by the lease to consume the straw crop of a year during the succeeding winter, and apply it to the green crop of the next year.

From 1866 to 1885 James M'Duff was tenant of the farm of Kingsdale on the estate of Balbirnie in Fife under a nineteen years' lease. At the expiry of this period M'Duff obtained a new lease of the farm from the proprietor, John Balfour, for other nineteen years from Martinmas 1885, with an option to either party to terminate the lease at the expiry of five years.

The subjects so let extended to 349 acres, and the rent fixed was £160. The lease laid the following obligations, *inter alia*, upon the tenant—"And further, to manage, cultivate, and improve the lands hereby let, according to the rules of good husbandry, adopting a rotation of not less than five years, whereof two years at least shall be pasture, and shall not hurt or run out the same by taking scourging crops or otherways, and particularly without prejudice to the foresaid generality, the following stipulations are specially agreed to, namely: . . . That the tenant shall leave to the proprietor or incoming tenant, at the expiry of this lease, the dung that may be made after the 15th day of June immediately before the expiry; all dung made previously must be applied to the lands hereby let for the benefit thereof; said dung so to be left to be paid for by the proprietor or incoming tenant at a price to be fixed by two arbiters, to be mutually chosen: . . . That the tenant shall be entitled to sell turnips and hay, provided he shall produce evidence to the satisfaction of the proprietor that he has brought and applied to the lands hereby let vegetable matter, bones, or dung to at least the same manurial value during previous years: That, with the exceptions above-mentioned, the tenant shall not sell or remove from said farm any turnips or green crop (except potatoes), hay, grass, straw, fodder, chaff, or dung of any kind that may be grown or made on the lands hereby let, but shall annually consume the same on said farm for manure and shall apply such manure to the lands yearly."

M'Duff took advantage of the break at the end of the first five years, and the lease accordingly came to an end at Martinmas 1890. At that date there was upon the farm 1372 cubic yards of dung, and M'Duff claimed payment of this amount from the landlord, at a price to be fixed by arbiters chosen in accordance with the lease.

The landlord having denied that he was bound to take over so large a quantity of dung, M'Duff raised an action to enforce payment. He averred that the whole of the dung which was left on the farm had been made after 15th June 1890.

In statement of facts for the defender it was set forth, *inter alia*—"During the last three years of the lease the pursuer, instead of annually consuming the straw upon the

farm, has kept it up, and used instead purchased material, such as mill-dust. Accordingly at 15th June last the pursuer had on the farm a quantity of straw amounting to about a whole year's crop, and out of all proportion in excess of the quantity which would have been on the farm at that date in the ordinary course of prudent management, or if he had complied with the provisions of the lease. About that time he brought upon the farm a large stock of cattle, which consumed the straw, and converted it into manure between 15th June and Martinmas. Under the lease as aforesaid, the tenant's claim for payment for manure is limited to the manure made subsequent to 15th June in the last year of the lease. The object of the pursuer in adopting the course of management detailed was to make an abnormal quantity of manure within the foresaid period and claim payment for it."

The defender pleaded—" (3) The defender is not bound to pay for more manure than would have been made in the ordinary course of prudent management and in accordance with the system of cultivation prescribed by the lease within the period specified in the lease, and the pursuer is bound to leave the remainder free of charge to the defender or the incoming tenant."

The value of the dung was ascertained by remit, made of consent of parties, to be 4s. 3d. per cubic yard, or £291, 11s. in all.

Proof was allowed, the material results of which were as follows—It appeared that the amount of manure left on the farm at the close of the lease was beyond any previous experience in the neighbourhood for a farm of the size of Kingsdale, and proved an objection to the letting of the farm, so that the landlord had ultimately to accept from the incoming tenant a sum much less than its value. It was, however, proved that it had all been made since the 15th of June 1890, and its amount was accounted for by the fact that under his second lease the pursuer had introduced a different system of management from that practised in the district, with the result of making a greater quantity of manure in the summer months. The district in which the farm of Kingsdale was situated was not a wheat-growing district, and the green crop was the only crop to which manure was applied. The ordinary system of farm management which had been followed by the pursuer during the whole of his previous lease was to make the bulk of the year's straw crop into manure in the course of the following winter, and to apply it to the next season's green crop, only a small proportion of the straw, a fourth to a sixth, being kept after the month of June for use as litter during the summer, for happing the potatoes and thatching the stacks of the next crop. Under this system a good stock of cattle was kept and fed in the courts during the winter. In summer only a few cattle were kept, and these were pastured in the fields.

Under his new system the pursuer kept as many cattle in summer as in winter.

He fattened them in the courts, and bought a large quantity of feeding stuffs for this purpose. To provide litter he kept a considerable part of the straw crop for consumption during the summer. He also increased the yield of straw which the farm gave by breaking up and cropping some ground which previously he had allowed to lie fallow, and besides straw he used pob or dust from flax mills, when that was necessary. The evidence showed that the straw crops of 1888 and 1889 were exceptionally bulky, and that no pob was used by the tenant during 1890. Under the pursuer's new system the straw crop of one season was consumed by the time the next season's crop was ingathered, and all the manure made after June in one year was applied to the green crop of the next year. It was proved that the green crop of 1890 had been well manured.

The date at which the pursuer adopted his new system was uncertain. The defender failed to establish that the change was made in the last year of the lease.

On 18th August 1891 the Lord Ordinary (KINCAIRNEY) pronounced this interlocutor:—"Finds (1) that the pursuer has, from Martinmas 1886 to Martinmas 1890, been tenant of the farm of Kingsdale belonging to the defender, and situated in the county of Fife; (2) That the lease current at Martinmas 1890 provides that the tenant shall annually consume the straw made on the farm for manure, and shall apply such manure to the lands yearly, and that all dung made prior to the 15th June immediately preceding the termination of the lease shall be applied to the lands for the benefit thereof; and that all dung made after the said 15th June shall be left to the proprietor or incoming tenant, at a price to be fixed by arbiters; (3) That at the expiry of the lease at Martinmas 1890 there was on the farm dung to the extent of 1372 cubic yards, which had all been made after the 15th June 1890; (4) That it has not been proved that the pursuer's course of management, by which the said manure was produced, was unfair or in contravention of his lease, or of the rules of good husbandry; (5) That the value of the said manure at Martinmas 1890 was £291, 11s.: Therefore finds the pursuer entitled to be paid the value of the said manure, and decerns against the defender for payment to the pursuer of the said sum of £291, 11s. with interest as concluded for: Finds the pursuer entitled to expenses, &c.

"*Opinion.*—This is an action by an outgoing tenant against his landlord for the value of the farmyard manure left on the land and taken by the landlord at Martinmas 1890, when the lease expired.

"The parties have by agreement fixed the amount of the manure left at 1372 cubic yards, and its value at Martinmas 1890 has been ascertained under a remit, made of consent in this process, to have been 4s. 3d. per cubic yard, or £291, 11s. in all.

"The pursuer has been tenant of the farm of Kingsdale in Fife since Martinmas 1866. His first lease expired at 1885. He then obtained another 19 years' lease, but with

a break at the option of either landlord or tenant at the end of five years. Of this option the tenant availed himself, and so brought the lease to an end at Martinmas 1890.

"The pursuer's claim is founded on a clause in his lease, to the effect that he should leave to the proprietor or incoming tenant the dung made on the farm after the 15th day of June immediately before the expiry of the lease, at a price to be fixed by arbiters; but should apply to the land all the dung made before that date. Provision is thus made for disposal of all the dung on the farm at the end of the lease—that made before 15th June is allotted to the land, that made after is to be sold to the landlord.

"It is clear that 15th June was fixed on as a date at or before which the sowing of the green crop might be assumed to be completed; and what the clause really provides is, that all the manure on the farm when the green crop was sown in the last year of the lease should be applied to that crop.

"It has been amply proved that all the dung left was made after 15th June 1890. At that date all the courts were clear, and no manure remained on the farm unapplied. I regard this as a point proved beyond dispute, and I do not think it was seriously disputed.

"The pursuer is therefore *prima facie* within the clause on which he founds, and *prima facie* is, in virtue of that clause, entitled to be paid for the manure he has left.

"The amount of manure left, however, is very exceptionally large, so much so that it is in evidence that intending offerers for the farm were deterred by it, and that the landlord found himself obliged in the end to accept from his new tenant a sum much less than its value, and the landlord now maintains that it could not have been made, and in fact was not made, by a course of management in compliance with the lease, with the custom of the district, or with the rules of good husbandry. His plea is that 'The defender is not bound to pay for more manure than would have been made in the ordinary course of prudent management, and in accordance with the system of cultivation prescribed by the lease within the period specified in the lease, and the pursuer is bound to leave the remainder, free of charge, to the defender or incoming tenant.'

"I think that plea sound in law, and consider that when the lease provides that the tenant must apply all the manure made on the farm before June, what is meant is, all the manure that ought to have been made in a fair course of management, and when it provides that the landlord shall pay for all the manure made after 15th June, what is meant is, that he shall pay for all the manure which should have been made in a fair course of management after the sowing of the green crop.

"The defender founds on a provision in the lease to the effect, so far as it bears on this question, that the tenant shall not sell

the straw but shall annually consume it on the farm for manure, and shall annually apply such manure to the lands.

"These are the only provisions of the lease to which it is necessary to refer.

"There is no wheat grown on Kingsdale Farm, and it has been the pursuer's practice to apply his farmyard manure to the turnip break at seed time, that is in April, May, or June, and to no other crop and at no other time. That has also been the custom on most of the farms in the district on which wheat is not grown.

"This may or may not be enlightened farming, but there is no doubt that the clauses of the lease have reference to that custom.

"It has apparently been the general custom in the neighbourhood to apply much the larger part of the straw of one year to the green crop of the following year, and to reserve only a fraction, from a fourth to a sixth, of the straw of the year for use during summer and autumn. It has also apparently been the custom to keep comparatively few cattle in summer and to keep them on pasture, and thus to make very little manure after June.

"In June 1890 the pursuer did not follow this ordinary course pursued by his neighbours, but he had a large quantity of the straw of the crop of 1889 not converted into manure after the green crop was sown and manured. I do not think the exact amount is stated in the proof, but as it was the straw out of which the 1372 cubic yards of manure were made, it must have been more than 100 tons.

"Now, the lease contains no restriction whatever as to the amount of the manure which the tenant might make after 15th June, and therefore the tenant committed no breach of the express provisions of the lease in converting all that straw into manure; and it is hard to see how the conversion of it into manure could possibly be against the rules of good husbandry, and no witness says that it was. Therefore it would seem to follow that no exception can be taken to the conversion of the straw which was on the farm on 15th June 1890 wholly into manure, and that the pursuer's management after 15th June 1890 cannot be successfully challenged.

"The true question must therefore regard the straw which was left after turnip sowing, rather than the manure made from it, and the question is, has it been shewn that that straw was accumulated by a course of management at variance with the provisions of the lease and of good husbandry. And that is the only question, because there is no question raised in this action about miscropping nor about mismanagement of any kind, except so far as it bears on this one question as to the amount of the straw in June. Proceedings have been taken under the Agricultural Holdings Act, but none of these proceedings have been put into the proof except the claims of parties. They have been carefully withheld, and I know nothing at all about them.

"The question whether the straw has

been fairly accumulated is the question to which the proof has been directed, and I have found it very difficult, all the more difficult I must take leave to say, on account of the very unsatisfactory character of the proof, which is desultory, loose, and speculative, and much of it little to the point. Long as it is, it is remarkable how little of definite and tangible fact can be extracted from it.

"The first question is, whether it has been proved that the straw remaining at June 1890 was accumulated by a violation of the provisions of the lease? It falls on the defender to establish that it was, and I have come, though not without hesitation, to think that he has not done so.

"The precise meaning of the provision that the straw shall be consumed annually for manure and that the manure shall be applied to the land annually is not obvious. The time of the year when it is to be applied is not mentioned. But there is no time when it could be applied according to the custom of the district and the pursuer's system of cultivation except the potato and turnip seed time. But it cannot be meant that all the straw of one harvest shall be applied to the next green crop. That would be impossible, because it is admitted that it is necessary to hold some part of it over for use during summer and autumn. It is said, indeed, to be the custom to apply a very large proportion of the crop of one year to the green crop of the next but there is no provision in the lease to that effect. The mode in which according to the defender the requirement of the lease ought to be complied with is by the application of five-sixths of the crop to the next green crop and one-sixth to the green crop following. But the words of the lease would be equally complied with by the application of the manure to the two green crops in any other proportion, as, for example, if half of the crop were to be applied at the first turnip sowing and the other half at the next turnip sowing. In either case the manure would be applied annually, that is, between June and June.

"Now, is it proved that the pursuer failed to comply with this requirement? It may be the fact that he did fail to do so at some time in the course of one or other of his leases, but I am unable to hold that it is proved that he did.

"Few of the witnesses for the defender knew anything about the pursuer's course of management. Most of them only saw the farm on one or two occasions in 1890 or 1891 and had no knowledge about his management previously. The witness John Hill, it is true, was a neighbour, but he says little on the point. He appears to be not unfriendly to the pursuer, and his evidence adds little to the case of the defender. John Ballingall, who is probably the defender's principal witness, depones to having seen about 70 tons of straw of the year 1888 in August 1889, but his evidence goes no further back. He is corroborated by Mr Neil Ballingall, the defender's factor, who no doubt speaks about the pursuer's management generally, but whose evidence

appears to me to be so indefinite as to be of very little value in this question.

"The defender maintains that the pursuer must needs have withheld some part of his straw, in violation of the lease, otherwise his manure heap could not have so much exceeded the manure which he purchased when he came to the farm. I am not satisfied on this point, having in view the pursuer's evidence that he was in the habit of purchasing manure, and also mill dust and dreg and draff from the Methil Distillery, which is in the neighbourhood of his farm, but, at all events, I have no means of knowing at what period of the pursuer's occupation it occurred, if it happened at all.

"I therefore do not think it proved that the pursuer has violated the express conditions of his lease in relation to the annual consumption of the straw and application of the manure.

"But the defender further maintains that the pursuer's accumulation of straw was the result of a violation of the rules of good husbandry.

"If it was proved that the straw remaining in June 1890 was unduly withheld from the turnip break of June, I should have held the defence established, and should not have allowed the pursuer the value of manure made from straw, which should in fair management have been converted and applied to the green crop. But I do not think this proved. The defender's evidence is not, in my mind, satisfactory or convincing on the point, and I cannot prefer it to the direct evidence of the pursuer, and of his various farm servants, that the green crop was liberally manured, except what is described as a small portion, which was not manured because of a miscalculation of the available amount of manure. The evidence led by the pursuer is certainly to the effect that the green crop was fairly manured, and the green crops which followed appear to have been above average, and such as could not have been looked for had the land been starved, unless it were forced by artificial manures, which does not seem proved. No doubt on this point there is evidence both ways. I only say that I think the evidence for the pursuer is the stronger.

(After examining the evidence on this point his Lordship continued)—"The landlord complains that he suffered great disadvantage and loss by the accumulation of unapplied manure. He did so suffer, if he can show that the tenant was under obligation to apply it to the green crop of 1890, but not, I think, otherwise. If the green crop was fairly treated I do not see any disadvantage to which the landlord has been illegally subjected. He or the incoming tenant required at least part of the manure if not the whole of it, and if they had not found it on the farm, would have required to purchase it elsewhere; but it is sufficient to say that it was manure actually made, and not unfairly made, after 15th June 1890, and after the green crop was adequately manured.

"On the whole, I have, after repeated persual of the proof, come to the conclusion that the defender's defence, although good in law, has not been made out in point of fact, and that the pursuer is entitled to be paid for the manure left on the farm.

"The view which I have taken of the case depends on the provisions of the lease and the evidence, and not on any question of common law. I may, however, quote the following cases which bear on the point, most of which were referred to:—*Berry v. Allan*, 1827, S. 212 *aff.* June 10, 1829, 3 W. and S. 429; *Greig v. Mackay*, July 20, 1869, 7 Macph. 1109; *Murray's Trustees v. Murray*, July 19, 1889, 26 S.L.R. 762; *Reid's Executor v. Reid*, February 28, 1890, 17 R. 519; *Penman's Executor v. Jamieson*, January 20, 1886, *per* Lord Fraser; and *Esson v. Morrison*, January 21, 1891, 2nd Div. Neither of the last two cases are reported."

The defender reclaimed, and argued—The pursuer had violated his lease, and the large quantity of manure for which he claimed payment was the result of this violation. He was bound by the lease to apply all the straw of one crop, in the form of manure, to the green crop of the next year, except such small portion as it might be necessary to retain for litter, thatching the next year's stacks, and happing the potatoes. It was only in this way that he could consume the straw crop of one year, and apply it to the land before the time for using the crop of the succeeding year arrived. That was what he was required to do by the stipulation in the lease, and what he had failed to do. Assuming that he had not contravened the stipulations of the lease, and that he was entitled to alter the system of management which the parties had in contemplation at the date of the lease, he was not entitled after making this change to take advantage of a clause in the lease framed with special regard to that previous system—*Greig v. Mackay*, July 20, 1869, 7 Macph. 1109, *esp. per* Lord Justice-Clerk, 1113. The pursuer had adopted this system at the end of his lease in order to be able to make a large claim against the landlord.

The pursuer argued—He had broken no stipulation in the lease. He was obliged by it to consume the straw annually and apply it yearly to the lands. It was not reasonable to hold that the period of consumption and period of application were concurrent. The more reasonable view was that the first period preceded the second, the period of consumption extending from Martinmas to Martinmas, and the period of application from June to June. If the pursuer had found it convenient to change his system of management, that was not the affair of the landlord, provided he did not contravene the conditions of his lease, and it was not proved he had done so. The suggestion that the pursuer's change of system had been prompted by the desire to make a large claim against the defender was unwarranted by the evidence.

At advising—

LORD PRESIDENT—The claim of the pursuer of this action is that the defender, whose tenant he was in the farm of Kingsdale, in Fife, shall pay him the value of 1321 cubic yards of dung left on the farm at his removal at Martinmas 1890. This claim is rested on the following stipulation—"The tenant shall leave to the proprietor or incoming tenant, at the expiry of this lease, all dung that may be made after the 15th of June immediately before the expiry; all dung made previously must be applied to the lands hereby let for the benefit thereof; said dung so to be left to be paid for by the proprietor or incoming tenant, at a price to be fixed by two arbiters." . . .

This stipulation, however, is only one part of a clause dealing with the mode of cultivation, and including the subject of manure, and its scope and application must be ascertained with reference to certain other stipulations which form parts of the same clause. These are, that (with certain exceptions which do not directly bear on the question) "the tenant shall not sell or remove any . . . straw . . . or dung of any kind that may be grown or made on the lands hereby let, but shall annually consume the same on said farm for manure, and shall apply such manure to the farm yearly." Now, the defender says that the amount of dung which he is asked to pay for is enormously in excess of what the pursuer would have had extant at Martinmas if he had fulfilled the obligations which I have last mentioned, and he says that the excess has been produced with straw which ought to have been already applied to the land in manure prior to 15th June 1890. The defender maintains that he is not bound to pay for more manure than would have been left if the mode of dealing with the straw prescribed by the lease had been followed. The pursuer does not dispute that if this last proposition be applicable to the facts of the case it affords a good legal defence to the action, but he denies that he has contravened the lease.

The question therefore between the parties is, whether the pursuer has contravened the lease in the matter of straw and dung? Other controversies as to the general effect of the pursuer's management have added complexity to the case, but it really turns on the more limited question which I have stated. If the pursuer has not contravened the lease, then it is nothing to the purpose that his methods are unusual, or that they land the defender with an exceptional and inconvenient amount of manure. If, on the other hand, the pursuer, instead of giving the land the benefit of the straw which he had undertaken to put into it, has held it back, with the effect, if not the intention, of making the landlord pay for what he was entitled to get as part of the return for the use of the land, then the defender is perfectly justified in resisting a claim that the same thing should be counted twice.

For greater clearness it may be well here to say that I take the controversy to relate

to the straw of the crop 1889. It is true that there is some evidence that the pursuer had on the farm in May 1890 some straw of crop 1888, but the pursuer denies this, and I do not think it is proved.

Now, the defender's theory of the lease is that the clause requiring the tenant to annually consume the straw for manure, and to apply such manure to the lands yearly, means in terms that the straw of crop 1889 must all be put into the ground in manure before the reaping of crop 1890. In other words, it means that the two processes of turning the straw into manure, and applying the manure so made to the land are both to be completed within the same year, viz., between Martinmas 1889 and Martinmas 1890.

This theory is exposed to one grave difficulty. To whatever period or periods the clause immediately in question relates, it is expressed absolutely, and does not purport to recognise any exception (for the words "with the exceptions above mentioned" relate to turnips and hay only). But the clause founded on by the tenant, and providing for the landlord taking over at Martinmas of the last year dung made after 15th June, proceeds on the assumption that there will be dung extant unapplied to the land at the end of the period, which on the theory I am now discussing ought to see it all applied to the land.

It has been suggested, indeed, that this clause may be accounted for by supposing it to apply to straw or dung bought outside, and brought on the land, but I cannot think this a fair explanation, for (1) the clause speaks of the dung in question as if it were distinguished only by date and not by origin from that which by express provision must be put into the land, and this can only be home-made manure; and (2) the purchase and importation of manure or straw on to a farm in the last year of the lease is not so customary an event as to form a natural subject of stipulation.

It has also been suggested that the clause may be accounted for by holding it to apply to dung made with straw of crop 1890, thrashed and made into dung between harvest and Martinmas. I cannot think this a natural construction, and it had not occurred to the defender. No one reading the clause would be apt to suppose that when the lease speaks of "the dung that may be made after the 15th day of June immediately before the expiry," and promises the tenant payment for "said dung," it really meant dung made after harvest, and that the tenant was not to get paid for any more.

The defender did not submit any such contention. He admits that the clause providing payment of dung made after 15th June applies to dung made with straw of crop 1889, and his argument is that the two clauses are to be reconciled by treating the one as applying to an unexpressed but implied exception from the other; or, in other words, that while the tenant is in words told that he must have all his straw underground in manure by Martinmas, this really means all except what he requires for what

are described in argument as litter and the minor uses of the farm. This, however, gives rise to a very awkward difficulty. Not only does it assume an unexpressed exception to what purports to be an absolute rule, but it turns out that there are no *media* for determining the extent of the exception. Take the present case—this pursuer, for better or worse, took to keeping a large head of cattle in summer and stall-feeding them. For this he required a much larger amount of litter than his neighbours or predecessors. Now, there is admittedly nothing in the lease to prevent his doing all this, and yet in the case before us he avows that he kept and required to keep the half of his straw of 1889 to litter these cattle, and it is of the result of this that the defender complains. It turns out, therefore, that the defender's theory of the case requires us to read into the absolute obligation about the straw an exception of straw required for litter and the minor uses of the farm during summer, but that this exception is again to be limited to one only of the modes of stock farming permissible under the other clauses of the lease.

I confess my inability to keep up with such elaborate interpolation in a contract if any other construction is available which can live with the words of the contract without addition or subtraction.

Now, I think there is such a construction. The whole difficulty of the theory from which I have turned arises from its assuming that one and the same year is running for the making the straw into manure, and also for the putting that manure in the ground.

Is this necessary, either from the structure of the clause or from the relation of the two operations? I think it is not. As regards the phraseology of the clause, my own experience is that the attention of the reader is arrested by the fact that the description of the one process and the description of the other, each has a separate word to express the time prescribed, "annually" and "yearly," and the fact that the words may be or are synonymous makes it not the less noteworthy. Without making too much of this, I think it rather favours, and it certainly permits, the idea of a separate period being assigned to each. When we turn to the reason of the thing, the matter stands thus—The process of turning the straw into dung necessarily goes on all the year round, to a greater or less extent, and it necessarily has its beginning from the harvest when the crop of straw is ingathered. Towards the middle this period comes what *de facto* is the time for applying the manure to the land at or before seed time. No one, suppose he were ever so anxious to comply with a lease, can either have put into the land, by seed time 1890, manure made the summer and autumn after it is over, or can, except unwisely, put it into the ground in harvest or by Martinmas. The meaning of applying manure to the lands annually is, according to plain good sense, applying each season the manure then available. Thus, if we take each of the two clauses describing the

two operations separately, it is complete in itself; we effect a separation which the good sense of the subject-matter justifies, and the two work harmoniously.

That the lease contemplates a yearly season for the putting manure into the land is, I think, shown by the date named in the clause founded on by the tenant. All dung made to 15th June in the last year of the lease must be put into the land, this date representing the close of the time for sowing turnips, and therefore for manuring; what is made after 15th June is held to be legitimately waiting for next season, and therefore is to be taken over and paid for.

Accordingly, I think that the "yearly" application of manure contemplated in the lease is an application at and before seed time, that being necessarily the period when the manure is applied to the land, and that period of the year being recognised by the lease. I may add that I am not at all surprised that this last point is not made more definite in expression, because the landlord's interests are completely protected whatever latitude this particular clause may permit to the tenant, for the second of the two stages of the process, even if the word "yearly" were held to imply a period of a whole year.

The joint operation of the clauses which (1) compel the tenant annually to turn his straw into dung, (2) forbid him to sell or remove any dung, and (3) only pay him for dung made after 15th June in the year he leaves, make it a matter of indifference to the landlord whether the tenant does or does not act like a man of sense as to the time of year when he manures the land, and makes it correspondingly indifferent to him whether the tenant have or have not a whole year from any given time to put the dung on the land. In other words, the key of the situation is the clause about the straw—so soon as the tenant is forced each year to turn the straw crop into dung, and knows he can make nothing of that dung except by putting it into the farm, he is sure to do so, and sooner rather than later, in order to reap the results.

In my opinion, therefore, this theory, that there is one period allowed for making the dung and another for using it, holds water; while the competing theory, that the periods are concurrent, does not. The result is, that in my judgment the pursuer has not contravened the lease, and is entitled to the decree which he has obtained. It may quite well be that the number of cattle kept in summer during the latter years of the lease was greater than either he himself or the defender thought of when the lease was executed. But if the pursuer has not contravened the rules prescribed by the lease, the legal condition indicated in the defender's third plea has not arisen.

My judgment rests upon the terms of the lease, while the Lord Ordinary seems to have proceeded upon a more elaborate and comprehensive view of all the material submitted to his Lordship; but I have only one alteration to suggest in the interlocutor

before us—I think we ought to affirm the interlocutor, with this variance, that there be omitted from the fourth finding the following words in line 15 “unfair or,” and in line 16 “or of the rules of good husbandry.”

LORD ADAM—The Lord Ordinary has given the pursuer, who is the waygoing tenant of the farm of Kingsdale, decree for the sum of £291, 11s., being the value of the dung left by him on that farm at the expiry of his lease at Martinmas 1890.

The lease, which is dated in February 1885, contains a clause to the effect that the tenant shall leave to the proprietor or incoming tenant at the expiry of the lease the dung that may be made after the 15th of June immediately before the expiry, said dung so to be left to be paid for at a price to be fixed as there specified. It is upon this clause that the pursuer founds his claim.

It is not disputed that the dung in question was made after the 15th June immediately before the expiry of the lease—that is, after 15th June 1890—and it is not disputed that the sum decerned for is its value.

The answer of the defender, the proprietor, is that the tenant was bound in terms of a clause in his lease to have converted the straw from which this dung was made into dung, and to have applied it to the lands yearly—that is, practically in this case before the 15th June 1890,—that the tenant is prohibited from selling dung made from the straw in question, and that consequently he is not entitled to payment for this dung.

The facts which raise this plea are not in dispute. It is not disputed that the dung was made from the straw of the second last crop, which was reaped in September 1889, and it is not disputed that the clause in question, whatever its proper construction may be, applies to the straw of that crop.

The clause in the lease founded on by the landlord provides that the tenant shall not sell or remove any turnips, . . . straw, . . . or dung grown or made on the lands, but shall annually consume the same on the farm for manure, and shall apply such manure to the lands yearly.

It is to be observed that this clause does not apply to the waygoing crop—that of 1890—which the tenant is entitled to sell or remove, but that it does apply to all previous crops.

It appears to me that the clause clearly provides for three things—one, which the tenant is prohibited from doing, viz., selling or removing any straw grown or dung made on the lands; and two things which he comes under an obligation to do, (1) annually to consume the straw on the ground for manure, and (2) to apply such manure to the lands yearly.

I agree that the time which the tenant practically has to do this is between the reaping of the crop, presumably in September, and the June following, because between the latter date and Martinmas no

manure is ever applied to the lands.

I think that the object and effect of the provision in question is to secure that the straw and dung of one year's crop shall be applied to the lands as the manure of the succeeding year's crop. The lease says that the tenant is annually to consume the straw for manure, and to apply such manure to the lands yearly.

The tenant in this case entered to the lands at Martinmas 1885. His first crop would therefore be reaped in September 1886, and according to my construction of the lease the straw ought to have been made into dung and applied to the lands between that date and June 1887, and so on as regards each succeeding year's crop. The fourth crop, with reference to the straw of which the present question has arisen, would be reaped in September 1889, and in my view ought to have been made into dung and applied to the lands on or before June 1890. In this way the straw is annually consumed, and the dung applied yearly to the lands, as provided for by the lease.

It is suggested, however, that part of the straw or dung of one year's crop may be applied as the manure of the succeeding year's crop, and part carried forward so as to manure the next succeeding crop—that is (to take, for example, the first year's crop under the lease), that the dung made from the straw of the crop reaped in September 1886 might have been in part applied on or before June 1887 as manure for that year's crop, and in part applied on or before June 1888 as manure for that year's crop. The answer is that that would not be applying such manure to the lands yearly in terms of the lease, but in two separate years. And so, to come to the crop in question—that reaped in September 1889—it is contended that part of the dung made from it might be applied to the lands on or before June 1890 as manure for the crop of that year, and part left to be carried forward and applied on or before June 1891 as manure for the crop of that year. But I say as before that that would not be applying the dung to the lands yearly, but partly in one year and partly in another. Moreover, I fail to see how the tenant, on whom the obligation lies to apply the dung to the lands, could be in a position so to apply it on or before June 1891, because he has ceased to be tenant of the farm at the preceding Martinmas, and has nothing to do with the lands thereafter. The tenant accordingly does not propose to apply the dung to the farm. He claims and has got decree for the price of the dung so carried forward in direct contravention, as it appears to me, of the provision in the lease that he shall not remove or sell any straw or dung grown or made on the lands let.

It is said, however, that this construction of the lease is inconsistent with the clause founded on by the tenant, which provides that the tenant shall leave to the proprietor or incoming tenant at the expiry of the lease the dung that may be made after the 15th day of June immediately before the expiry, the dung so to be left to be paid for

by the proprietor or incoming tenant at a price to be fixed by arbiters.

In my view there is no inconsistency between the two clauses, because this clause assumes—and I think rightly assumes—that the straw of the previous crop shall have been made into dung and applied to the lands previous to the 15th June. But the inconsistency is said to lie in this, that if all the straw of the crop of 1889 had been made into dung before the 15th June 1890 there would be no straw left to make into dung to which this clause could apply. But I think that is a fallacy. The clause is adapted to a system of farming by which the stock is pastured in the fields in summer, but brought into the courts after harvest and fed there—a system which prevailed on the farm till the tenant changed it in the last year of the lease.

Obviously under this system very little straw would be required in summer when the stock was in the fields, but a good deal would be required for litter and food after the stock was brought into the courts until the succeeding Martinmas. For this the tenant had recourse to the straw of the new crop, and it is to the dung made from this straw that the clause in the lease founded on by the tenant applies, and the clause founded on by the landlord does not apply. And rightly so, because as the tenant on entry had paid for the straw and dung which produced the first crop, so it was right and proper that no part of the straw or dung of the last crop should be applied at his cost to produce a crop from which he was to derive no benefit. The clause in truth is not a clause introduced for the benefit of the tenant, but for the benefit of the landlord. It is a restriction of the tenant's right to remove the whole of the waygoing crop.

I demur therefore to the conclusion that in order to reconcile the two clauses in question it is necessary to imply any exception to the universality of the landlord's right to have the whole of the straw consumed on or before June in each year.

It is said, however, and quite truly, that straw is needed in summer for certain minor purposes about the farm, such as thatching, &c., and that if the tenant were bound to consume the whole straw of his crop before the 15th June, he would have none left for such purposes, but would have to buy. No doubt that would be so, and it is said that no tenant would become a party to a lease containing such a stipulation, and that a construction of the lease which leads to such a result would not be a reasonable construction. Probably, however, the tenant would be well aware that the landlord, except during the last year of the lease, had no interest to insist on the strict fulfilment of the stipulation, seeing that all dung made from straw reserved for such purposes would ultimately be applied to the lands, and if the landlord chose to insist on it during the last year of the lease, and the tenant had to buy straw, he would suffer little prejudice, because he would get the value back in the shape of the dung into which it had been converted.

But however that may be, I am of opinion that the tenant has bound himself to apply the straw grown and dung made of each year's crop as the manure of the succeeding year's crop, and that the dung for which he seeks payment has been made in contravention of his lease.

If the tenant in this case had been content to carry on the farm on the system on which it had been previously carried on, and reserved as usual only a small portion of the straw for the minor purposes about the farm, probably nothing would have been heard about the landlord's right to have had the dung made from that straw applied to the lands, and he would no doubt have paid for all the dung left by the tenant without objection, although a small part of it might have been the produce of that straw.

But when the tenant for his own benefit introduced during the last year of the lease a new system of management, and reserving, in order to carry out his system, at least one-half of the straw of the previous year's crop, with the result of producing from that straw a most unusual quantity of dung, which, as the evidence shows, no incoming tenant would buy, then I am not surprised that the landlord should insist on what he considers his rights under the lease, and should decline to pay for such dung.

In my view, the landlord is right in his contention, and I cannot find the tenant entitled to payment of dung which by the lease he is, in my opinion, prohibited from selling, and was bound to have applied to the lands as manure for the previous year's crop.

LORD M'LAREN—I have had an opportunity of considering your Lordship's opinion and also that of Lord Adam, and I concur in the opinion of your Lordship, and have very little to add. In construing the obligation in this lease it must be kept in view that all leases deal with a variety of annual operations, and as the operations of agriculture are dependent on the seasons, it would be difficult—indeed impossible—to conceive that all such obligations have in fact the same periods of commencement and termination. The periods from and to which annual operations run must be affected by the nature of the annual operations. Especially is this the case where one operation is dependent on the other. In the present case the lease deals in the same clause with two distinct operations, namely, the consumption of the straw grown on the farm and the application of the manure to the ground. The consumption of the straw, as I understand, includes what is consumed as food and also what is consumed as bedding, each contributing to the manurial product, and the two operations, according to the lease, are to be performed annually. There is a slight variation of phrase in the case of the two obligations, but nothing is said as to the commencement of the annual period in either case. I think, consequently, that the sound construction in the case of the

obligation to consume the straw is, that the term of the commencement is the earliest period in each year at which it is possible for the straw to be consumed. That being assigned as the term of commencement, I think the period for the consumption of the straw continues during the whole of the ensuing year, and the tenant has a period of twelve months—say from October to October—within which to complete the operation. The feeding of cattle is not like the operations of ploughing or manuring which can only be done at one time of the year, but as the animals must be fed every day, and there is no obligation in the lease to turn them to grass at any particular time of the year, the consumption of the straw may be spread over the whole year.

There is also an annual period for the fulfilment of the obligation to apply the manure made on the farm to the ground, but it cannot well begin at the same time as the obligation to consume the straw, because in the proper course of husbandry the preparation of the ground for the green crop commences in March and is completed in June. According to my reading of the obligation in the lease relating to the consumption of the straw, it is a physical impossibility that the whole manure derived from the straw of the crop of one year should be put into the ground between March and June of the next, and I will not suppose that two sensible persons entered into a contract binding one of them to perform an impossibility. Accordingly, it seems to me that if the tenant has a year to perform each of the stipulated obligations, the annual periods must be different in each case, and the tenant has from spring to spring to fulfil the obligation to apply the manure to the land. This view is confirmed by the fact that there is a provision in the lease for the taking over by the landlord of the manure remaining unapplied at the term of Martinmas in the last year of the lease. If the true construction of this lease were that the whole manure must be put into the ground before Martinmas, there would be nothing left to be taken over, and it would be quite unnecessary to provide for any manure being taken at a valuation. Once the above construction of the obligation in the lease is reached it becomes very difficult for the landlord to maintain that the tenant is in breach of it, on the ground that a larger quantity of manure has been left than was anticipated. I quite admit that it was possible for the tenant by violating some of the other provisions of the lease to have had an excessive quantity of manure remaining over at the end of the lease, but no such violation is established. The whole quantity of land which the tenant was bound to put into green crop was so used, and it is clearly proved that the land was adequately manured. Accordingly, I must hold the quantity left over to be no more than the result of the application of the conditions of the lease to a somewhat different course of management from what was contemplated by the parties at the time the contract was entered into, but still a course of management which

it was within the tenant's power to adopt.

LORD KINNEAR—The question is one of considerable difficulty, and I agree with the Lord Ordinary that the difficulty is not diminished but rather increased by the proof, which seems to have thrown some of the real facts of the case into confusion. The real difficulty arises upon the construction of the contract, from the application of its conditions to a state of circumstances not contemplated, it seems to me, at the date of the bargain, but whether they were contemplated or not we must inquire whether they fall within the scope of the contract, and if they do we must give effect to it.

There can be no question that the amount of manure which the pursuer requires his landlord to pay for is not only exceptionally large, but that it exceeds the normal amount to so great an extent that the landlord could not hope to obtain any benefit from the purchase at all corresponding to the price that he has to pay; but that is not a consideration which we can take into account if the contract obliges him to purchase and pay for it. Now, in order to determine whether it does so or not, I agree, as I understand with all your Lordships, in thinking that we are not called upon to consider any question of good or bad husbandry, or of the comparing of the tenant's management with any system of cultivation generally adopted in the county. The only question is, whether the manure which the pursuer requires the landlord to take over at a price ought, under the conditions prescribed by the lease, to have been put into the land before the 15th of June 1890, because I think the one ground of defence which requires consideration is that the tenant is proved to have had on his hands on the 15th of June 1890 a large quantity of unconsumed straw which the lease required him to convert into manure and apply to the land before the 15th of June, and therefore that when he proceeded to convert it into manure after the 15th of June he was already in breach of contract, so that he came to demand payment as at the end of the year, when he was leaving the farm, for what must have been put into the land in spring if the conditions of the lease had been performed.

Now, it is clear enough that the clause on which the pursuer relies does not in itself impose expressly or by imputation any restriction whatever upon the quantity of straw which the tenant may convert into manure after the 15th of June, because the clause is to the effect that "the tenant shall leave to the proprietor or incoming tenant, at the expiry of his lease the dung that may be made after the 15th day of June immediately before the expiry; all dung made previously must be applied to the lands hereby let for the benefit thereof; said dung so to be left to be paid for by the proprietor or incoming tenant at a price to be fixed by two arbiters." . . . So far as that goes the tenant might begin making dung on the 16th of June, and go on making it till the expiry of the lease, and the pro-

prietor or incoming tenant would be bound to take it all. But then it is said that there are other conditions which impose a restriction not found in the clause itself, and that when all the clauses applicable to this matter are read together they not only require the tenant to put into the land all the dung which he has actually made before the 15th of June, but further require him to convert into manure for that purpose all the straw, or at least the great bulk of the straw of the last year's crop, so that it may be ready to be applied before the 15th of June. I am unable to find any such condition in the lease.

I agree that if the tenant had unduly withheld the straw which remained unconverted in June 1890 from the turnip-break of that year, so as to leave the green crop unmanured, there might have been very good ground for maintaining that he was acting in fraud of the contract, and endeavouring to get money for manure which he was bound to put into the land without payment. There is some evidence for the defender to show that this is what he did, but I agree with the Lord Ordinary that the defender's case on this point is not proved. Taking it, therefore, that the manure made before June was all put into the land, and that the land was thereby well manured, the question is, whether the lease still prohibited the tenant from having any considerable quantity of unconverted straw after the 15th of June. Now, the clause founded on by the defender seems to me to contain two distinct and separate stipulations, and I agree that if the tenant has failed to perform either of them he is in breach of the contract, and cannot recover. The first is that the tenant, who is prohibited, except under certain specified circumstances, from selling any "turnips or green crop (except potatoes), hay, peas, straw, fodder, chaff, or dung of any kind that may be grown or made on the lands, shall annually consume the same on said farm for manure;" and the second is, that the tenant "shall apply such manure to the lands yearly." There are thus two entirely distinct operations enjoined on the tenant—first, the consumption on the farm of the straw, &c., grown there, and second, the application of the resulting manure to the lands. Now, I cannot see any ground for alleging that the tenant has failed to perform the first of these operations. Straw may be consumed in various ways, but it is not questioned that straw which has been used for litter during the year, and so converted into manure, has been consumed in terms of the lease. If the tenant had failed to consume the whole straw produced on the farm between the reaping of one crop and the reaping of the next, and so had left unconsumed straw on the farm, he would have been in breach of the lease, but there is no evidence that he has not fully performed the obligation to consume the straw. It is for straw converted into manure in terms of the lease that he now demands payment. I agree with your Lordships and the Lord Ordinary that there is no evidence that any material

was used to make that manure except the straw of crop 1889.

But then it is said that the dung is also to be applied yearly, and that if the tenant has unconverted straw in June he cannot comply with that condition, because manure made from that part of the straw cannot be put into the land in the same year as that made from the other portion of the straw crop which has been already consumed. To this there are two answers. In the first place, if the lease required that all the manure should be put into the land by June, which I think it does not, the condition might still be performed. If the condition that the manure shall be applied yearly means that the tenant is to have twelve months within which he is to complete his application of the manure made from any particular crop, it is obvious that that period cannot begin to run from exactly the same date as the twelve months during which the crop is to be consumed. The two operations cannot be simultaneous, because the one must be completed before the other begins. The manure must be made first and then applied after it is made. The defender's own case is that at least $\frac{2}{3}$ ths of the whole is properly applied at the potato and turnip seed time, and if that be so, it seems to follow that the other process must have begun at a considerably earlier period. But if the tenant begins to apply in June, puts in all he has already made, and then goes on to make more and puts that into the land at the next turnip and potato seed time, he will have satisfied the condition that the manure shall be applied yearly by putting it in between June and June.

But then, in the second place, the lease does not prescribe the time of year at which the manure is to be applied. It is true that according to the evidence the usual time for tenants on this estate to manure their land seems to have been immediately before the sowing of the green crop, but that is not required by the lease. All that is required is the annual consumption of the straw crop on the farm. The lease prohibits the tenant from selling that crop, and requires him to convert it into dung and apply it to the land yearly, but that may be satisfied by his putting it into the land at the most convenient time for himself. I think, therefore, that the second answer to the defender's contention is, that the lease does not prescribe any particular time for the application of the manure to the land, but only requires that it shall be applied yearly. It seems from the evidence—and this is the only source from which we learn it—that having regard to the system of agriculture in vogue in the district, the most advantageous time for applying the manure to the land was at or about the sowing of the green crop, and that no doubt was the time at which the parties, when they entered into the lease, contemplated that it would be applied, not because the lease prescribed it, but because they assumed that the tenant in the exercise of his judgment would put the manure into the ground at this useful and convenient time.

That result was not provided for by any regulations in the lease, but was left to be attained by the operation of the ordinary motives which guide a man in carrying on his business. If, however, the tenant changes the system of management and adopts a new one, which disturbs the ordinary recurrence of the terms convenient for making manure, the motives which were previously supposed to operate so as to lead the tenant to apply the manure to his land in June cease to operate, and the question arises whether there is in the lease anything to prevent the tenant making such a change and applying the manure to the land at a different time. If during the course of the lease he had changed his system of management, and begun feeding cattle in stalls in summer to a great extent, and if, as some of the witnesses say, the only useful time for manuring the land were in June, the practical question would then have arisen, whether the disadvantage of making a great quantity of manure after the 15th of June was a sufficient reason for abiding by the old system. The question would have been one of the balance of advantage. It seems to me that if such a question had occurred during the course of the lease it would have been quite out of the power of the landlord to interfere and say that the tenant was not to apply the manure except as was contemplated when the lease was entered into. If the tenant had a great quantity of manure in hand after the middle of June, the landlord might prohibit him from selling it, and it would be a question for the tenant whether he would make manure which he could not sell, nor with any advantage put into the ground in winter.

In the case which has happened the tenant made a great quantity of manure after the month of June in the last year of his lease, and so threw on his landlord the result of his change of system. The question is, whether there is anything in the contract to prevent him doing so? and I think there is nothing. We are all agreed that there is nothing in the lease to prevent the tenant changing his system of management; is there anything to enable the landlord to deal with the manure which the tenant has in hand in consequence of his change of system without paying for it? I think there is not, because the clause in the lease treats of manure made after June in the last year of the tenant's occupancy, and provides that the tenant shall leave it on the farm, and that he shall be entitled to payment for it from the proprietor or incoming tenant. There is nothing to limit the proportion of manure to be left in this position. It is said that the lease contemplates that only a small proportion of the straw crop should be left over after the land has been manured, and it is accordingly suggested that the tenant's possession of such straw is really accounted for by a relaxation of the conditions of the lease which it was understood between the parties would be made. I can find no ground for such a conclusion, but the tenant is—it seems to

me in accordance with his contract—in possession of manure at the end of his occupancy, and is entitled to payment for it. No doubt the extent of his claim presses somewhat hardly upon the landlord, because undoubtedly the operation of the clauses of the lease is to throw on the landlord a burden which neither party contemplated at the time when the contract was entered into, and to confer on the tenant a corresponding advantage—a result not altogether equitable,—but when people make a contract of this kind, containing very specific and stringent stipulations for the regulation of their future rights and interests in circumstances which they do not very clearly foresee, the consequences are very apt to be prejudicial to one or other of the parties. Where this happens, as it frequently does, it is impossible for the Court to make a new contract for them different to that which they have made for themselves, or to readjust their interests as they might have done if they had not been already bound. We must construe the contract they have made according to its terms.

The Court varied the interlocutor of the Lord Ordinary by omitting the words "unfair or" and "or of the rules of good husbandry" from the fourth finding: *Quoad ultra* adhered to said interlocutor and decerned, &c.

Counsel for Pursuer—Shaw—A. S. D. Thomson. Agent—T. T. Muir, S.S.C.

Counsel for Defender—Comrie Thomson—C. N. Johnston. Agents—Strathern & Blair, W.S.

Wednesday, February 3.

FIRST DIVISION.

COWAN AND OTHERS, PETITIONERS.

Company—Winding-up—Creditor's Petition—Disputed Debt—Voluntary Liquidation—Majority Requisite for Special Resolution—Companies Act 1862 (25 and 26 Vict. cap. 89)—Expenses.

Creditors of a public company holding an extract decree-arbitral for £58, 12s. 2d., presented a petition for the winding-up of the company. The company in their answers alleged that a process of voluntary liquidation was going on, and produced a minute of an extraordinary general meeting containing a declaration by the chairman to the effect that a resolution to wind-up the company voluntarily was carried. The minute further contained the statement that there voted for the resolution eight, and for an amendment four. The company admitted their liability for the debt to the amount of £43, but disputed it to the extent of £15, 12s. 2d., and stated that they wished to test the regularity of the arbiter's decree.

Held (1) that there was no voluntary