taining what are the points upon which the parties are at issue. However, the interlocutor has not been objected to on that ground, and I suppose if we adhere to it there is every probability that so far as these claims can be instructed by the production of vouchers parties will dispense with other evidence.

LORD KINNEAR — I am of the same opinion. It appears to me that the tenant's claim for the sum fixed by valuation under this contract of lease is very much in the same position as the landlord's claim for the fixed rent under a contract of lease, and therefore that the question now in dispute between the parties must be determined by the principle laid down by Lord Fullarton in the case of *Graham* v. *Gordon*, June 16, 1843, 5 D. 1207, which has been followed over and over again since, where his Lordship said that a claim for rent is not liquid in the same sense as a sum in a bond, because it is a payment in consideration of something to be done under a contract, and therefore if the obligations in respect of which the payment is to be made have not been performed, the demand for payment cannot be said to constitute a liquid claim. I think the tenant's position in this case is exactly the same as the position of the landlord in the case figured. He is entitled to have payment of the value of the stock in question, but that is a payment in consideration of the performance of his own obligations under the contract. If either party to a contract of this kind, having against the other a claim for a definite sum of money fixed by the contract, has not performed the obligations incumbent upon him in consideration of which that payment is made, that is a very good answer to an action such as we are now considering.

I agree with your Lordships that there is a case here which must be made the subject of inquiry, and that no decree can be given against the landlord until the pecuniary claims against the defender *hinc inde* have been finally adjusted. I also agree with the hope expressed by Lord M'Laren, that parties may see their way to avoid unnecessary expense in a case of this kind. But that is not a question for us, and as there is no sufficient ground to entitle us to interfere with the discretion of the Lord Ordinary, his judgment must stand.

The LORD PRESIDENT was absent.

The Court adhered.

Counsel for the Pursuer—Dundas—Glegg. Agents—Macpherson & Mackay, S.S.C.

Counsel for the Defenders — Sol.-Gen. Shaw, Q.C. — Salvesen — Lyon Mackenzie. Agents—W. & F. Haldane, W.S.

Friday, December 13.

FIRST DIVISION.

[Sheriff of Aberdeenshire.

SUTHERLAND *v.* URQUHART.

Landlord and Tenant — Lease — Counter Claims—Separable Obligations—Liquid and Illiquid.

An outgoing tenant raised an action against his landlord for the value of crops taken over by the landlord at the expiry of the lease, the amount of which had been ascertained by arbitration under a minute of agreement entered into by the parties at the termination of the lease. The landlord pleaded in defence that he was entitled to set off against the sum sued for, which he admitted was due, counter claims for damages which he alleged were due to him by the tenant for failure to implement the conditions of the lease as to the upkeep of buildings and the cropping of the land.

Held that the defence was irrelevant, on the ground that the claim and alleged counter claim arose upon separate and independent obligations, and that the latter being illiquid, could not be set off against the tenant's liquid claim for the sum fixed by arbitration.

Lovie v. *Baird's Trustees* (*ante*, p. 208) *distinguished.*

Mr John Sutherland, farmer, late tenant of the farm of Upper Tillymauld, on the estate of Byth, Aberdeenshire, raised an action against Mr Beauchamp Urquhart, proprietor of the estate, for payment of the balance of a sum due to him as the price of the grain crop which the landlord took over on the tenant giving up the farm. The value of the crop had been ascertained in a reference to arbitration by the parties under a minute of agreement entered into at the termination of the lease, and in the action this minute of agreement was alone founded on. It appeared, however, that the General Articles, Conditions, and Regulations established by the defender for the tenancy of all farms on his estates of Meldrum and Byth, which were incorporated in the lease, contained provisions for the valuation by arbitration of the crops and other farm produce left by the tenants at the expiry of their leases. The sum fixed by the arbiters appointed to conduct the valuation was £136, but the pursuer admitted that he was due to the defender, for rent and other claims, the sum of £68, and he accordingly restricted his claim to £68.

The defender averred that he had claims against the pursuer to the amount of £205 "for failure to implement the terms of the lease as to the up-keep of buildings and the cropping of the land," together with the liquidate penalty of £72 as stipulated in the lease, and that he had raised an action against him for the former amount. He

contended that he was entitled to set off this claim against that of the pursuers.

The Sheriff-Substitute (ROBERTSON) on 27th June 1895 repelled this plea as irrelevant and granted decree for the sum sued for.

The defender appealed to the Sheriff, who on 16th August affirmed the interlocutor appealed against.

The defender appealed, and argued—The landlord was entitled to retain the price of the crop till his larger claim was satisfied. The two claims practically arose out of the same contract, and both fell to be settled at its termination, the tenant's claim being under the valuation fixed in terms the lease, and the landlord's for breaches of other conditions of the lease. The case of *Lovie* v. *Baird's Trustees*, *ante*, p. 208, was exactly analogous to the present one.

Argued for respondent—This was not a case where mutual claims under the same contract fell to be set off one against another. The claim under the valuation was a special one, separate from claims under the lease. Accordingly the case of *Lovie* v. *Baird's Trustees* did not apply. But even assuming the claims to be on the same footing, there was no authority for saying that the liquid claim by the tenant for value received from him by the landlord could be compensated by the illiquid claim against him for alleged violations of the lease, extending over a number of years, which could not be ascertained without inquiry. The case was ruled by *Macrae* v. *Gordon*, June 1, 1842, 4 D. 1310; and *M'Rae* v. *M'Pherson*, December 19, 1843, 6 D. 302.

At advising—

LORD KINNEAR—This is an appeal from a decision of the Sheriff of Aberdeen in an action at the instance of a tenant against his landlord, but the action is not founded on the contract of lease, but on a separate and distinct contract which, so far as the record goes, has no necessary connection with the lease. The allegation is that when the tenant removed from the farm the defender entered into a submission with him to fix the value of the grain crop upon the farm, that upon the value being ascertained the landlord took the grain crop over at the fixed sum of £136, 7s. 7d., and that at the date of the valuation the pursuer was due to the defender a balance of rent amounting to £62, 6s. 7d. Then the pursuer says that he is willing to admit his liability for the rent, but that the defender refuses to pay him the balance that still remains of the valued price of the grain crop. I agree with the Sheriff that the only defence to this action, which is that the tenant is liable in damages for miscropping and failure to upkeep buildings, is an attempt to set off an illiquid claim of damages against a liquid claim of debt. The case appears to me to afford a very simple instance of the rule that no such right of retention or claim to set off can be allowed. The landlord has bought and received the grain crop at a fixed price, and he then claims to set off, against the right of the seller to obtain payment of the price, an illiquid counter-claim of damages. Such a defence cannot be sustained.

The Sheriff refers to a series of cases in which it was held that a claim for rent might be compensated by a counter-claim on the part of a tenant, though the amount of the rent due was fixed by the lease, and therefore was so far liquid. But these decisions have no application to the present case. They are all illustrations of the rule that one party to a mutual contract cannot enforce the obligations in his favour while at the same time he refuses to implement the counter obligations to the other party. It does not affect that rule that the landlord's claim for rent is *ex facie* of the lease a liquid claim, because the case against him in this class of cases is that the full amount so fixed is not due, the tenant not having received the full consideration, in respect that he has not been put in full possession of the subjects of the lease.

The case of *Lovie* v. *Baird's Trustees*, on which the appellant founded, appears to me simply another illustration of the same rule. But I think that there was in that case another ground very clearly distinguishing it from the present. In that case the tenant was in arrear of rent, and the landlord had claims for rent against him extending over a considerable period. The tenant met these by counter-claims which were illiquid in themselves, but before the controversy was at an end the termination of the lease arrived, and as a consequence the tenant was required to give over to the landlord (or to the incoming tenant) certain houses, grass, fallow land, and dung, upon condition that he should be paid, "according to the valuation of men mutually chosen as aforesaid, for the value of all sown grass, for the dung made upon the farm subsequent to the time of turnip sowing in the previous year, for the value of labour done to the break for green crop or fallow land in that year." Now, upon that supposition the value of these things was fixed, and the tenant then brought an action against the landlord for the amount of the valuation, irrespective altogether of the landlord's claims against him. It was held that the landlord was entitled to a proof of his claims and to retain the amount of the valuation. But then the landlord's claim was just as liquid as the tenant's, for his claim was for arrears of rent, which was a liquid sum; the tenant's was for the amount of the valuation. But both parties were claiming on counter obligations in a mutual contract. In this case the contract on which the tenant founds is separable, if not separate, from the lease. The landlord, according to his own statement, has received the entire consideration for the money which he is now asked to pay. Accordingly, this case does not fall under the rule of the cases to which I have adverted.

It appears to me, therefore, that the judgment of the Sheriff in the action at the instance of the tenant must be affirmed.

The LORD PRESIDENT, LORD ADAM, and LORD M'LAREN concurred.

The Court adhered.

Counsel for the Pursuer—W. Brown. Agents—Henry & Scott, W.S.

Counsel for the Defender—H. Johnston—Cullen. Agents—Auld & Macdonald, W.S.

Friday, December 13.

SECOND DIVISION.

KER'S TRUSTEES *v.* KER.

Trust — Marriage - Contract Provisions — Wife's Power (1) *to Discharge Provisions stante matrimonio,* (2) *to Accept Purchased Annuity in Lieu of Provisions.*

In an antenuptial contract of marriage entered into in 1866 the husband's father bound himself to pay to trustees £40,000, and the husband assigned to them certain estate and effects. These trust funds were to be held, *inter alia*, for payment to the wife in the event of her surviving her husband, and there being children of the marriage, or their issue, of a free yearly annuity of £800 during her lifetime.

The only issue of the marriage were two sons, born in 1867 and 1870. In 1887 the husband became bankrupt, and in 1894, his sons having paid his debts, his bankruptcy was annulled, and his whole estate was vested in his sons.

In 1895 the wife and her sons called on the trustees to denude of the trust-estate in their favour as being the only parties interested in the trust estate.

Held that the annuity being a marriage-contract provision, the wife could neither alienate nor discharge it *stante matrimonio.*

Menzies v. *Murray*, March 5, 1875, 2 R, 507, *followed.*

Held further, that the trustees were not entitled to purchase with the trust-funds an annuity of £800 payable to the wife contingently on her surviving her husband, and thereafter to denude of the rest of the trust-estate, because (1) the security of the trust funds was greater than that afforded by a purchased annuity, and (2) a purchased annuity would not be protected by the trust and could be alienated by the wife.

Lord Charles John Innes Ker, born in 1842, and Miss Blanche Mary Williams, born in 1844, were married on 15th January 1866. Under their marriage-contract, dated 12th and 13th January 1866, the late Duke of Roxburghe bound himself during his life to pay to Lord Charles during the latter's life, and after his death to the trustees appointed under the marriage-contract, an annual sum of £1200. The Duke further bound himself to pay to the marriage trustees a sum of £40,000 out of provision for his Grace's younger children, payable out of the rents of his entailed estates. Lord Charles assigned to the marriage trustees, *inter alia*, (1) the capital of the residue of the estate of the deceased Lieutenant-General Sir James Charles Dalbiac, and (2) his right and interests in and to a sum of £9600 held by the trustees under an indenture dated 24th December 1836.

The purposes of the trust constituted by the marriage-contract so far as relevant to the present case were as follows—(1) the trustees were to pay the free interests and annual proceeds of the trust-estate to Lord Charles during the subsistence of the marriage; (2) to pay to Lady Charles Ker, in the event of her surviving her husband, and there being a child or children of the marriage or the issue of such, an annuity of £800, restricted in the event of her marrying again to £400; "and it is hereby further provided and declared that the said trustees or trustee shall hold and apply the balance of the free income or produce of the property hereby conveyed, after payment of the said annuity or restricted annuity, as herein provided, for behoof of the child or children of the marriage, or for behoof of the issue of any child who may have died, according to the proportions in which they shall be entitled to shares of the funds and property of this trust;" (3) After the death of Lady Charles Ker, if she should have survived Lord Charles Ker, the trustees were directed to hold the whole funds and property for behoof of the children of the marriage, and to pay over the same to them in such proportions, at such times, and under such conditions as Lord Charles might direct and appoint, and failing direction by Lord Charles, the trustees were directed, after the death of the survivor of the spouses, to make over the trust-estate to and among the children equally, the shares of sons being payable when they attained 21 years of age, the shares of daughters being payable when they attained that age or were married, whichever event first happened, it being declared that the shares of the children should become vested in them on Lord Charles' death, unless it should be otherwise declared or directed by him. The marriage-contract contained no provision that the liferents and annuities to Lord and Lady Charles Ker were to be alimentary. Special directions were made as to the disposal of the portion of the trust-estate derived from (1) the estate of Sir James Charles Dalbiac, and (2) the funds subject to the indenture dated 24th December 1836.

The only issue of the marriage were two sons, Charles James Innes Ker, born 19th January 1867, and Bertram Harry Innes Ker, born 5th April 1870.

By two deeds of appointment dated 24th February and 2nd March 1892 respectively, in favour of Charles James Innes Ker and Bertram Harry Innes Ker respectively, Lord Charles irrevocably appointed that one-half of the property subject to the trusts of the marriage-contract should after the death of Lady Charles, if she should survive him, be held in trust for each of his said sons absolutely, and likewise that after his death the moiety of the balance of the free income of the trust property, after payment of the annuity, or restricted an-