terms unless in the case of forehand rents, in which case it shall be held to import an assignation to the rents payable at the conventional terms subsequent to the date of entry."

The possession which is referred to in this section is the possession by the purchaser and has nothing to do with the tenant's possession under the current leases. The rights of the seller and purchaser are determined by taking the rents which are *de facto* paid subsequent to the purchaser's term of entry, and if the legal term for payment of any of these rents was either the term of the purchaser's entry or a preceding term, the rents belong not to him but to the seller.

According to the law of Scotland all farms are treated as either arable or pastoral, and in the case of mixed farms the predominant characteristic determines the class to which any particular farm belongs. This is pointed out by both Lord Kyllachy and Lord Adam in the case of *Mackenzie's Trustees* v. *Somerville*, (1900) 2 F. 1278. The usual term of entry to arable farms is Whitsunday as to the houses, fallow lands, and grass, and the separation of the white crop thereafter, or Martinmas immediately following the said Whitsunday as to the land in crop. The usual term of entry to pastoral farms is Whitsunday. Rents of arable lands are legally due at Whitsunday, a full year after the date of entry to the house and grass, and half yearly thereafter. Rents of pastoral farms are legally due at Whitsunday of entry and half yearly thereafter. Conventionally, the rents may be made payable before or after the legal terms. In the former case such rents are termed forehand, in the latter backhand.

Keeping these recognised rules in view, I think that you find out whether a rent payable after a purchaser's entry was legally due at or prior to his entry by considering whether the farm is arable or pastoral, the date of the tenant's entry, and the terms thereafter at which his rent is payable. In the present case the rent payable at Martinmas was legally due at Whitsunday, the term of the purchaser's entry, and therefore does not go to the purchaser, as it was not rent to become due at a legal term subsequent to that date.

It is not relevant to inquire what possession a tenant gets in return for the rent he pays. Rents are not, I think, legally payable in respect of any particular period of possession or occupancy of land, but in respect of the crop of each year. Lord Dundas, whose opinion I have had an opportunity of perusing, goes in detail into the different authorities which establish this proposition, and I desire to express my entire concurrence in his reasoning and the conclusion which he reaches.

The Court answered both questions of law in favour of the second party.

Counsel for the First Party—Constable, K.C.—Lord Kinross. Agents—Baillie & Gifford, W.S.

Counsel for the Second Party—The Dean of Faculty, K.C.—J. H. Millar. Agents—John C. Brodie & Sons, W.S.

Friday, March 12.

EXTRA DIVISION.

CHRISTIE *v.* WILSON.

Landlord and Tenant — Lease — Water Supply—Obligation on Landlord to Provide Water by Alternative Methods — Choice of Alternatives.

Where by a lease a landlord undertook to give an adequate supply of water by one of two methods, *held* that the option lay with the landlord to select the method.

Landlord and Tenant—Lease—Retention of Rent — Tenant having Obtained Award of Damages Seeking to Retain Balance of Arrears.

In an action by a landlord against a tenant for arrears of rent, the tenant, on the ground that the landlord had not fulfilled his obligation under the lease inasmuch as he had failed to give an adequate supply of water, claimed to retain, and also claimed damages. Damages having been assessed, *held* that the tenant was not entitled to retain the balance of the arrears.

Miss Christie of Cowden, *pursuer*, brought an action against William Strathdee Wilson and his two sons, *defenders*, for the arrears of rent of her farm of Blairingone Mains, Dollar, of which farm the defenders were tenants under a lease between the pursuer and them, dated 4th and 7th October 1911.

The *lease*, article 6, *inter alia*, provided—"The proprietor agrees to supplement the present water supply so as to make it adequate, or otherwise to lay a pipe from the well beside the steading, and if need be to provide a pump therefor so as to bring water up to the dwelling-house."

The defenders averred—"(Stat. 5) The defenders have now been in occupation of the subjects leased since the term of Martinmas 1911. When the defenders entered into possession the water supply was totally insufficient and was polluted and insanitary. Despite frequent applications to the pursuer or her law agents the pursuer has entirely failed to implement the provisions of article sixth of said minute of lease. They have failed to supplement the water supply which existed at entry, or to lay a pipe from the well beside the steading."

The pursuer pleaded, *inter alia*—"(1) The defenders being justly due and indebted to the pursuer in the several sums sued for as rents past due by the defenders under the minute of lease referred to, and in respect of the occupation enjoyed by the defenders of the subjects thereby let, the pursuer is entitled to decree as craved. (4) The counter claims of the defenders being unfounded, vague, illiquid, and such as they are not entitled to set off against a claim for rent, the pursuer is entitled to decree as craved."

The defenders pleaded, *inter alia*—"(3) The pursuer having failed to implement her part of the said contract of lease is not entitled so long as she is in breach to insist on implement by the defenders of their part of said contract. (4) The defenders having,

through the non-implement by the pursuer of her part of the contract, sustained loss and damage to an amount greater than the sum sued for, are entitled to absolvitor."

The *facts* are given in the opinion (*infra*) of the Lord Ordinary (HUNTER), who, after a proof, on 1st May 1914 pronounced the following interlocutor:—"Assoilzies the defenders from the conclusions of the summons to the extent of ten pounds: *Quoad ultra* dismisses the action and decerns: Finds the defenders entitled to two-thirds of their taxed expenses."

Opinion.—"The pursuer, who is proprietrix of the estate of Cowden and Arndean, in the counties of Perth and Kinross, sues the defenders, who are tenants of Blairingone Mains, one of the farms upon her estate, for payment of rent in arrear. For the defenders it is maintained that the pursuer, having failed to implement a material condition of the lease, is not in a position to sue for rent, and alternatively that they ought to be assoilzied in respect that they have suffered loss and damage in consequence of the pursuer's breach of contract in excess of the sum sued for.

"In terms of article 6 of the lease, which runs for a period of ten years from Martinmas 1911, it is, *inter alia*, provided—'. . . . [*quotes, v. sup.*] . . . .'

"For the pursuer it was maintained that on a proper construction of this clause she was entitled to discharge her obligation in either of the specified alternative methods, and that the defenders having refused to be satisfied with a pipe from the well at the steading and a pump therefor, were not entitled to maintain their defence. Had I been able to accept the pursuer's construction I should have given decree in her favour for the amount sued for. It appears to me, however, that I must construe the clause in accordance with the language actually used and without reference to any evidence which was led as to the intention of parties. So construing the clause, I think that the option is with the tenants and not with the landlord. That appears to me to be the natural effect of her agreeing to one or other of two alternatives.

"There is no doubt that the defenders have had trouble in consequence of the scarcity of the water supply. In this respect they are not in an exceptional position, as owing to dryness of the seasons there has been a dearth of water in the district.

"The question of fact in the case is whether or not the pursuer has so supplemented the water supply as to make it adequate. It is proved that the pursuer has done a considerable amount of repair to the pipe which leads the water to the farm-steading from a cistern about 320 yards distant therefrom. It also appears from the evidence of Sir William Haldane and the pursuer's overseers on the Cowden estate that she has endeavoured to meet the defenders' requirements by increasing the supply of water. The defenders say that they have not only not received an adequate supply of water, but that there is a considerable wastage of water from defective pipes. This wastage they maintain would in great measure be avoided if new pipes were laid. Mr Bennett, who is an engineer of extensive professional experience, is of opinion that the water at the steading is inadequate in quantity and defective in quality. He adds, however, 'With regard to the quality of the water from the tank, if the water was taken right down to the steading without being contaminated through these leakages, it would be quite suitable and there would be quite a satisfactory quantity also.' Against this evidence, which is supported by the testimony of other witnesses for the defenders, the pursuer has not led any skilled evidence as to the feasibility of supplementing the water supply or of increasing the quantity and improving the quality of the water by relaying the pipes. She has not examined as witnesses any of the tradesmen who effected the repairs actually carried out. I therefore hold Mr Bennett's view as being in substance established. That means that in my opinion the pursuer has not discharged the obligation undertaken in the 6th clause of the lease. Evidence of doubtful relevance was given by the defender, Mr W. S. Wilson senior, and a Mr Morris as to an interview with Sir William Haldane before the lease was signed, I think that these gentlemen are mistaken as to what occurred, and I had no difficulty in accepting Sir William Haldane's account of his interview with the said defender as being in accordance with fact.

"In the case of *M'Donald* v. *Kydd*, 1901, 3 F. 923, a tenant was held entitled to retain his rent until a landlord fulfilled an obligation undertaken by him to put the farm buildings in habitable condition and repair. Lord Trayner said—'I am disposed to put my judgment simply upon the application of the general rule, that where a person seeks to enforce the terms of a contract against another he is excluded from doing so if it can be shown that he is in default himself in the obligation that the contract puts on him.' This decision was followed in the case of *The Earl of Galloway* v. *M'Connell*, 1911 S.C. 846, and in the recent case of *Brechin*, decided by the First Division but not reported. Applying the law established in these decisions to the circumstances of the present case, I do not think that the pursuer is in a position to maintain an action for rent.

"The evidence led by the defenders as to the extent to which they had suffered damage by the pursuer's failure to provide them with an adequate water supply for their farm appeared to me in certain respects to be both unsatisfactory and exaggerated. At no time did the defenders make any suggestion that they were suffering or had suffered any specific loss in consequence of not having a sufficient water supply. They now maintain that they sold several cows at a loss in the spring of 1912. This I hold not proved. They allege that loss amounting to between £30 and £40 has been sustained by them because the pipe track was left open from the tank or cistern to the steading. Under the lease the landlord has power to resume ground for any purpose, the tenant receiving for the ground

so resumed an abatement of £1, 10s. per acre for arable land and 15s. per acre for hill pasture. I think, therefore, that the defenders might have dispensed with the evidence brought upon this point. It does not appear that there would have been any difficulty in having the pipe track filled in if the defenders had requested it to be done. They made no such request, and I hold no damages proved under this head. The evidence of Mr Dempster, manager of the Perth Creamery Company, satisfies me that the defenders did not lose their contract with that company for the supply of milk in consequence of the deficient water supply to the farm. I think, however, particularly in view of the evidence of the sanitary inspector of the county, that the defenders must have suffered some loss. In the absence of reliable evidence to enable me to accurately estimate that loss, I fix it at the sum of £10. I shall accordingly assoilzie the defenders from the conclusions of the action to the extent of £10, and *quoad ultra* dismiss the action. In my opinion the defenders are entitled to expenses, but modified to two-thirds of the taxed amount."

The pursuer reclaimed, and argued—On a sound construction of the 6th clause of the lease a right of election was given to the landlord. The obligation upon her was an alternative proposition, and in these cases the obligant had the choice, and either method was an implement of the contract—Stair Inst. i, 17, 20, and More's Note, p. cxxi; Bankton Inst. i, 23, 80, and 83; Bell's Comm. (M'Laren's ed.) i, 353; Ersk. Inst. iii, 3, 87; Hunter, Roman Law, pp. 579, 580; Chitty on Contract (16th ed.) p. 756; Fry on Specific Performance (5th ed.) pp. 494, 498; Leake on Contract (6th ed.), p. 486; Addison on Contract (11th ed.), p. 139; *Layton* v. *Pearce*, 1778, 1 Douglas 14; *Reg.* v. *South-Eastern Railway*, 1853, 4 H.L.C. 471; *Reed* v. *Kilburn Co-operative Society*, 1875, L.R. 10 Q.B. 264; Morrison's Dict. vol. 22, *voce* Alternative, Brown's Synopsis, vol. 1, p. 51; Pothier, Law of Obligations, vol. 1, p. 136, sec. 245. Having regard to the conditions that had been ascertained by the proprietrix the gravitation supply could not be made adequate, and so she was entitled to tender the other supply. Even if the pursuer was wrong about this the tenants were not entitled to retain the rent but only to claim damages—*Russel* v. *Sime*, 1912, 2 S.L.T. 344; *Aitchison* v. *Magistrates of Glasgow*, May 4, 1825, 1 W. & S. 153; *Sharp's Factor* v. *Lord Monboddo*, July 3, 1778, M. 10,134; *Humphrey* v. *Mackay*, February 23, 1883, 10 R. 647, 20 S.L.R. 416; *Burns* v. *M'Neil*, January 21, 1898, 5 S.L.T. 289. The cases of *M'Donald* v. *Kydd*, June 14, 1901, 3 F. 923, 38 S.L.R. 697; and *Earl of Galloway* v. *M'Connell*, 1911 S.C. 846, 48 S.L.R. 751, were special cases, and were not applicable, because in neither of them were any damages claimed by the tenant as set-off, and that was the reason the Court took the view it did. The tenants could not possibly both get decree for damages and also retain the whole rent—*Forrest* v. *Scottish County Investment Company*, 1915 S.C. 115, 52 S.L.R. 66.

Argued for the defenders—The choice of alternatives lay with the tenants—*Johnston* v. *Gordon*, Hume's Decisions, 1805, p. 822; *Powell* v. *Smith*, 1872, L.R. 14 Eq. 85; Rankine, Law of Leases (2nd ed.), 475. The choice must be determined *contra proferentem*, and an exception to the ordinary law of contract was shown by the cases quoted to be applicable to cases of landlord and tenant. The legal question in regard to the choice of alternatives did not, however, arise here, because the landlord had elected to do the first alternative, and as it was quite possible she was bound by her choice (Lord Mackenzie referred to Gloag on Contracts, p. 735). In any event the landlord had performed neither of the alternative obligations, and accordingly the only question was what was the tenant's remedy. The tenant was entitled to retain the rent until he was put in full possession of the subject so as to enforce implement of the contract—*Munro* v. *M'Geogh*, November 15, 1888, 16 R. 93, 26 S.L.R. 60 (Lord Mackenzie referred to *Stewart* v. *Campbell*, January 19, 1889, 16 R. 346, 24 S.L.R. 226). The doctrine laid down in *Munro* v. *M'Geogh* (*cit.*) was carried still further in *M'Donald* v. *Kydd* (*cit.*) and *Earl of Galloway* v. *M'Connell* (*cit.*). Further, under the law of contract the pursuer had no right to sue, being herself in breach of the contract—*Turnbull* v. *M'Lean & Company*, March 5, 1874, 1 R. 730, 11 S.L.R. 319. The mere fact that after the action was raised the defenders claimed damages in it did not give the pursuer any better right to sue—*British Motor Body Company* v. *Shaw*, 1914 S.C. 922, 51 S.L.R. 812.

At advising—

LORD DUNDAS—This is an unhappy dispute between landlord and tenant. The proprietrix sues for arrears of rent admittedly due at Whitsunday and Martinmas 1912 and Whitsunday 1913. The defenders' entry to the farm was at Martinmas 1911, and by the lease it was, *inter alia*, provided—"Sixth. . . . [*quotes, v. sup.*] . . ." The defenders plead, *inter alia*—"(3) . . . (4) . . . [*quotes, v. sup.*] . . ." After a discussion in the Procedure Roll the Lord Ordinary ordered consignation of the rents sued for, and allowed the defenders a proof of their averments "as regards the loss and damage they have sustained in connection with the non-implement of the landlord's obligation undertaken in article 6 of the lease." Proof was led at considerable length, and the Lord Ordinary thereafter pronounced a somewhat singularly phrased interlocutor in which he "assoilzies the defenders from the conclusions of the summons to the extent of £10; *quoad ultra* dismisses the action, and decerns," and finds the defenders entitled to two-thirds of their taxed expenses. The pursuer reclaimed, and the defenders, while acquiescing otherwise in the interlocutor, took advantage of the reclaiming note to press for a much larger award of damages. Prior to the raising of the action the pursuer had offered to implement her obligation under article 6 of the lease by laying a pipe from the well

beside the steading, and if need be to provide a pump therefor, so as to bring water up to the dwelling-house.

The pursuer's counsel, as I understood, conceded that at common law, and in the absence of special stipulation, his client would be bound to allow to the defenders the proper use and enjoyment of the water supply existing on the farm at the date of entry. I think article 6 of the lease impliedly recognises this view, but superadds a specific undertaking that the landlord should do one or other of two things—either supplement the existing water supply, *i.e.*, by the introduction of water from additional springs if such could be found; or bring water to the dwelling-house from the well by a pipe, and if need be a pump. The landlord would in my opinion have fulfilled her obligation under article 6 if she provided the tenant with either of the suggested modes of improvement, as well as with the existing machinery of supply, such as it was, in a reasonable state of repair. I do not agree with the Lord Ordinary when he says—"I think that the option is with the tenants and not with the landlord. That appears to me to be the natural effect of her agreeing to one or other of two alternatives." Where a person undertakes to do one or other of two things, I consider that the option as a general rule lies with him as to the method of performing his obligation. I see nothing in the language of article 6 which should take the case out of the general rule, and no authority was cited to us which seemed to me to point in any way to such a result. At the outset of the matter, therefore, I think the option plainly lay with the landlord and not with the tenant.

What actually happened may be briefly summarised. I cannot help thinking that much trouble, expense, and litigation might have been avoided if those acting for the pursuer had proceeded at once to procure skilled advice as to the best course to be pursued in the interest of both parties towards the fulfilment of the agreement embodied in the lease. No skilled advice was however obtained; and the operations actually conducted seem, however well-intentioned, to have been of a piecemeal and in some respects dilatory character. It appears that Sir William Haldane, acting for the pursuer, lost no time in endeavouring, with the assent and concurrence, I think, of the defender, to discover fresh sources of water supply in the region of the existing tank. The endeavour proved unsuccessful, and the evidence leads me to suppose that no such sources are in fact available. Mr Wilson, the defender, seems from the first and throughout to have desired that a metal pipe should be substituted for the existing fireclay pipe leading from the tank to the steading. But I do not think he had any legal right to insist upon this particular measure; and Sir William Haldane was unwilling to incur the cost of it, because he was doubtful whether the yield of water obtainable from the higher ground would be sufficient to warrant the expense, or to afford a really satisfactory solution of the problem. But as it appeared that water was escaping to a considerable extent from the joints of the fireclay pipes and thus failing to reach the steading, Sir William set about the repair of these pipes. The weather was unpropitious, the winter and early spring 1911-1912 were exceedingly rainy, and the proper cementing of the fireclay pipe joints could not be or at least was not effected. In April 1912 there were some weeks of dry weather, but these were not utilised owing, the pursuer says, to the difficulty of securing the services of local tradesmen for the job. The pursuer's witnesses, however, maintain, while those for the defenders deny, that by September 1912 the fireclay pipes had been put into a thoroughly satisfactory and efficient condition, so as to transmit to the steading the whole store of water available in the tank. I am not upon the evidence satisfied that the pursuer's proposition on this point can be safely affirmed. Renewed complaints by the defenders occurred in February 1913. The pursuer's counsel admitted that there was in fact some occasion for these complaints, but attributed them to the unfortunate removal—at the suggestion and desire as he maintained of the defender Mr Wilson—of a small cistern near the steading, and the consequent blocking by sediment of the metal pipe put in its place, and a resultant regurgitation of water in the fireclay pipe, which caused renewed leakage and escape of the water in its downward transit from the tank. We were informed that since the proof the cistern has been replaced, but parties were at variance as to the result, beneficial or otherwise, of this operation. While therefore I believe that Sir William Haldane, who undertook a close personal charge and supervision of the whole proceedings on the pursuer's behalf, endeavoured *in bona fide* to do what seemed best towards implement of the first alternative stipulation in article 6 of the lease—the supplement of the gravitation supply—it seems clear that his efforts were unsuccessful as regards the discovery of fresh springs; and I am disposed upon the evidence to hold that the existing machinery of the water supply from the tank was not in fact in a proper condition of reasonable efficiency during a considerable portion of the period to which the proof relates. If that be so, I do not consider that the defenders were bound to accept the tendered proposal of the pipe, and pump, from the well as in full and sufficient implement of the pursuer's undertaking in the lease. The pursuer therefore cannot in my judgment be held to have in fact fully implemented her contractual undertaking when the action was raised; and I think the defenders are entitled to damages for any loss which they can prove to have resulted to them from the pursuer's failure or delay to implement the terms of the lease.

I now turn to the proof in regard to damages. The defenders' claim on record is for £550. I must say I think this was an unconscionable claim. The Lord Ordinary seems

to me to be well within the mark when he says that the defenders' evidence appeared to him "in certain respects to be both unsatisfactory and exaggerated." It is difficult to believe that if the defenders were really suffering loss and damage to anything like the amount claimed they would have made no suggestion or hint of it prior to the raising of the action. Various specific grounds of claim are set out on the record. I put out of account the averments in stat. 7 (*i.e.*, *inability to plough field owing to track being left open*, £50), which seem to me to be outwith the proper purview of this dispute. Any amount payable on this head cannot be large. None of the remaining heads of claim is, in my judgment, proved. Some of them are disproved, and are clearly such as ought not to have been put forward. I shall not take up time by going into these matters in detail. The defenders' counsel maintained at our bar that damages ought to be assessed to the extent of £300 or thereby. I see no ground whatever upon which such a demand can be supported. The defenders have not, in my judgment, proved any specific damage at all. But I think we may assume that they did suffer some inconvenience and loss for which the pursuer can be held responsible in connection with the occasional carting of water and the like. The Lord Ordinary has estimated the damages at £10. I see no reason to doubt that that is in the circumstances a fair and sufficient award.

The defenders maintain, and the Lord Ordinary has by his interlocutor affirmed, that in respect of the pursuer's failure to implement her contractual obligation as attested and measured by this trifling sum of damages, they are entitled to retain the whole of the rents admittedly due which are sued for in the summons. This view seems to me to be in the circumstances quite unwarrantable. I know of no authority to support it —none was cited which seemed to me to do so—and it appears to me to be contrary to justice and equity. There is so far as I am aware no case where a tenant being sued for his rent, and having claimed and obtained a counter award of damages, has been permitted to retain the balance of the rent due for the period during which the damage was suffered. If the present case can be regarded —I am not sure that it can—as one where the tenants have not been put in full possession and enjoyment of the subjects leased, then the damages seem to me to represent the abatement of rent to which they would on that ground be entitled, and there seems to be no reason why the balance of the rent should not be paid. This case, moreover, is not one where the landlord has refused to implement a material stipulation imposed upon him by the lease. The landlord here has, I consider, been throughout engaged in a *bona fide* attempt to implement her contractual obligation, and at the worst must be taken to have failed, to an extent fairly measured at £10, fully to implement it. The Lord Ordinary was in my opinion wrong in dismissing the action.

If the views I have expressed are well founded I think we ought to recal the interlocutor; to ordain the bank wherein the money is consigned to pay it over to the Accountant of Court, together with such interest as has accrued on it, and to direct the Accountant to pay the consigned money, £170, 1s. 1d. under deduction of £10, to the pursuer in full of her claim for the principal sums sued for; to pay the remaining sum of £10 to the defenders in full of their counterclaim for damages; and to pay the accrued interest to the parties respectively in proportions corresponding to the above division of the principal sum consigned.

As regards expenses in the Outer House, I think the defenders will be liberally dealt with if we find them entitled to one-half of their taxed expenses. The defenders will be found liable in expenses since the date of the interlocutor.

I sincerely trust that there will be no further trouble between the parties, nor any subsequent litigation. As already said, I consider that if the pursuer puts the existing water supply into proper working order, and introduces water to the dwelling-house from the well by a pipe, and if need be a pump, her obligation will be duly implemented. Any loss and damage sustained or to be sustained by the tenants not covered by the £10 now awarded should be capable of a reasonable and commonsense settlement between the parties.

LORD MACKENZIE—The Lord Ordinary has held that the pursuer is not in a position, looking to the circumstances of the case, to maintain this action for rent. The defender, who lodged a counter claim, has been found entitled to £10 in name of damages. By the interlocutor reclaimed against the defender is assoilzied from the conclusions of the summons to the extent of £10, and *quoad ultra* the action is dismissed. No order has been made as regards the money which has been consigned.

On the assumption that the Lord Ordinary was right as regards the amount of damages (a question I shall advert to later), I am unable to see why the defender was entitled to have the action dismissed. The cases cited in support of what has been done are *Macdonald* v. *Kyd* and *Earl of Galloway* v. *M'Connell*. Neither of these warrants the view that where the amount of the abatement or of damage to which the tenant is entitled has been claimed and assessed this is not the measure of what he is entitled to deduct from his rent, leaving the landlord free to get payment of the balance due. The right to retain rent if the landlord fails to give full possession, or is in default as regards the obligation the contract puts upon him, is preliminary to the constitution of the tenant's claim. If the tenant asks abatement of rent this may be stated by way of counter claim, but a separate action may be necessary where the claim is one of damages. Here the pursuer raises no objection to the damages being ascertained under the counter claim, and the Lord Ordinary has fixed the damages at £10. If the Lord Ordinary was right in his view as to amount, the consequences appear to me to follow (1) that it

cannot be successfully maintained that a claim which is represented by an award of only £10 damages can be said to be equivalent to a failure on the part of the landlord to give full possession, and (2) that the full effect of the landlord's breach of contract for the whole period covered by the summons has been ascertained, and therefore the tenant is no longer entitled to withhold the balance of the rent due.

The question whether the Lord Ordinary was right on the question of damages depends in the first place upon the rights of parties under the lease. The view taken is that clause 6 of the lease gives an option to the tenant to call upon the landlord to discharge her obligation in either of the two alternative methods the tenant might prefer. In that view I am unable to agree. Clause 6 is in these terms—". . . [*quotes, v. supra*] . . ." This clause contains a proper alternative, and according to all the authorities cited it is for the debtor and not the creditor to choose the mode of performance.

The next question is as to the meaning of the clause. It must be kept in view that part of the subject let to the tenant was a gravitation water supply, and that this supply, with its necessary apparatus, he was entitled to have continued. The obligation upon the landlord as regards this does not, as Mr MacRobert argued, depend upon clause 6, but upon the common law right of the tenant arising out of the contract of lease. What the landlord by clause 6 undertook was something more. It was recognised by both parties when the lease was entered into that the existing water supply could not in the dry season be considered satisfactory. Though not let as a dairy farm it was in contemplation of both parties that dairy cows were to be kept on the farm for the sale of milk or cheese. Provision was made by clause 6 for the landlord supplementing the existing water supply so as to make it adequate. That is the first alternative, and it was the one which the landlord attempted to carry out. Search was made for additional springs, the water from which might be led into the tank on the hill. One thing is quite certain from the proof that this was found to be impossible. It is therefore difficult to understand how the landlord came to make the statement in answer 5 that "she has taken additional water into the fountainhead from other adjacent springs and has improved the cistern." The fact, however, that it was found to be impossible for the landlord to implement her obligation under clause 6 in this way did not in the least absolve her from the duty incumbent upon her of giving the tenant a water-tight tank and pipe so that he should continue to have the existing supply of water by gravitation. The existence of this obligation was recognised by the landlord's agent throughout. The parties to the case joined issue in the proof upon the question of fact whether this obligation had been implemented, and it is not now possible to deal with the case strictly upon the terms of the interlocutor of 13th December 1913. Accordingly it is necessary to examine the evidence upon this point. Complaints were made by Mr Wilson from shortly after his entry at Martinmas 1911 as to the water not coming from the tank down to the farm. The letter of 28th November 1911 is the first reference to this. On 23rd December 1911 the defender wrote to Messrs W. & F. Haldane that there was plenty of water coming into the tank in the wood but none coming to the farm, all the water being lost on the way. The defender's explanation when this letter is put to him is not satisfactory—he says the pipe might be frozen. But the significance of the letter is that from the first he challenged the condition of the pipes, and the last letter printed, that of 7th October 1913, reiterates the same complaint. Between these dates there are the letters of 30th January, 16th February, 29th May, 22nd July, 30th August, and 11th November 1912. The defender's view as to the pipes not being free from leaks is amply borne out by the other evidence in the case. It is only necessary to refer to the reports made by the estate overseer to Messrs W. & F. Haldane, and to the correspondence and evidence of the sanitary inspector. The result of the evidence, to my mind, is to demonstrate that the landlord was not during all this time giving the tenant what he was entitled to, viz., water-tight pipes. The averment by the landlord in her answer to the defenders' stat. 5 is that she without any delay proceeded to repair the pipe from the fountainhead to the farm. I do not think this is proved. There was, even allowing for excessively wet weather, considerable delay, and the work instructed when done was not enough to prevent the pipes from leaking. It was in my opinion unfortunate that a competent water engineer was not employed by the landlord at an early stage of the difficulty. Instead of this the matter was left in the hands of the local mason and plumber under the supervision of the overseer. The result of this was continual patching, but so far as the proof is concerned we do not even now know whether the pipes for conveying the water from the tank to the house are in a satisfactory state. Evidence was led for the defender that there was leakage at the tank. There is no mention of this on record, and I do not consider it has been proved. A good deal was made by counsel for the landlord of the removal of the small cistern down near the steading, which was said to cause regorging of water in the 3 inch fireclay pipe and consequent bursts and leakage. For this removal it was said the defender is responsible because he suggested it. But there is considerable force in the tenant's answer that his suggestion as to removing the cistern was coupled with the demand for an iron pipe, and if the pursuer chose to do the one thing without the other the defender is not to blame. The construction of the tank is such as to favour the passage of sediment down the pipe instead of retaining it. There is evidence that sediment may get into the pipes through leaks. Both these contribute to choke the pipe with silt lower down. The connection of a 3-inch fireclay pipe with a ¾-inch lead pipe is condemned. As Mr Bennett points out, there must of necessity

be air locking, which subjects the fireclay pipes to greater pressure. The proper way for the fireclay pipes to have been laid was in cement. All these matters may have made the task of the landlord more difficult, but they do not supply an answer to the complaints of the tenant. The suggestions made by the tenant in his letter of 23rd December 1911 was that metal pipes should be put in, and the estate overseer reported to W. & F. Haldane that "it will never be right until it is all in a lead pipe." It is not suggested that under his common law obligation the landlord was bound to substitute a metal for a fireclay pipe, and I am unable to see that there was any obligation upon him to do so under clause 6. The evidence of Sir William Haldane is that he did not consider the expense consequent on putting in a metal pipe should be incurred unless and until he was satisfied as to the supply of water to the tank. The position taken up by the tenant is that if the water that comes into the tank is all conveyed to the farm the supply will be sufficient unless the weather is exceptionally dry. The weight of the evidence, in my opinion, supports the view of the tenant as regards the supply of water. It is, of course, of importance for a tenant to have as much water as possible by gravitation. The offer by the landlord at a late stage of the correspondence was to put in a pipe and pump at the well. There is a controversy as to the quality of the water from this well, and the sanitary inspector took an unfavourable view of it. It is not necessary to go into that, because the offer of water from this well would only be implement of his obligations under the lease if concurrently therewith he was keeping in a proper state of repair the existing apparatus in connection with the gravitation supply. In my opinion the landlord failed in his latter obligation, and is therefore liable in damages for breach of contract.

Upon the amount of damages I agree with the Lord Ordinary that the defender's evidence is unsatisfactory and exaggerated. The largest head of damage was because they were stopped selling milk and had to make cheese. As regards this, I do not think it is proved that the defender suffered loss in consequence of ceasing to sell milk to the Perth Creamery Company and making cheese instead. On 30th April 1912 he wrote to the Creamery Company that he could make a great deal more by making cheese. It is not proved that he could have retailed his milk in Dollar, and even if he could have done so it is not proved what his profit over a sufficient period would have been as contrasted with the making of cheese. As regards alleged loss on the sale of cows, it is not proved that these cows were sold owing to a deficiency in the water supply. The heads of damage claimed in stat. 7 are not referable to defective water supply. On the other hand, there must have been to a certain extent disorganisation of labour and increased labour in carting water, and this is spoken to by the defender. Taking all the circumstances into account I am disposed to leave the amount of damage at the figure fixed by the Lord Ordinary.

The result is that I think the pursuer should have decree for the sum sued for, less £10. I agree with your Lordship as regards expenses.

LORD CULLEN—I concur.

The Court recalled the interlocutor of the Lord Ordinary, decerned against the defenders for payment of the sum of £160, 1s. to the pursuer, and granted warrant to the Accountant of Court to pay the sum of £160, 1s. with interest accrued thereon to the pursuer's agent, and the sum of £10 with interest accrued thereon to the defenders' agent.

Counsel for the Pursuer—Wilson, K.C.—Smith Clark. Agents—W. & F. Haldane, W.S.

Counsel for the Defenders—MacRobert—Dallas. Agents—Glegg & Orrock, W.S.

Thursday, March 11.

FIRST DIVISION.

[Lord Hunter, Ordinary.

CARLBERG *v.* WEMYSS COAL COMPANY, LIMITED.

Shipping Law — Affreightment — Demurrage—Bill of Lading—Discharge of Cargo —Failure to Produce Bill of Lading Timeously—Consequent Detention of Ship.

Bills of lading provided—"The captain to deliver all cargo on ship's railing, and the same to be taken from there by the consignee notwithstanding any custom of the port to the contrary. The goods to be received as fast as the steamer can deliver day and night, or the same will be landed or put into lighters at the risk and expense of the consignee. . . . Steamer . . . to have a lien on goods for freight, dead freight, demurrage, average, and all other charges incurred, not referring to the transport, loading, and discharging of the cargo, and steamer's readiness to count from the time of her arrival in port and clearing at the custom house, any law and/or custom of port to the contrary notwithstanding."

The steamer sailed from Gothenburg on the evening of Saturday, 16th November, reached Methil on Tuesday, 19th, cleared the custom house, and was ready to discharge her cargo at 11 a.m. on that day. The consignees had not then received the bills of lading, but were ready to take delivery of the cargo, and offered the master a bank guarantee indemnifying him from liability through delivering the cargo in the absence of the bills of lading. The ship's agents then refused to discharge until the bills of lading were produced. On Wednesday, 20th November, by arrangement between the agents of the shipowners and the North British Railway Company, the cargo was delivered to the railway company as wharfingers, dis-