is referred are questions arising in the course of the execution of the work or in course of the work where the contractors are failing to execute it, and where it is necessary to call in the arbiter to call on them to complete the work—questions as to whether the work being done is of the quality and character stipulated for, as to whether the contractor at the close of the work is entitled to leave it as duly completed or not, and the like questions. I think this clause goes no further, and that it certainly does not embrace the reference of such a matter as we are dealing with.

On these grounds I agree with your Lordship in thinking that we should find that the pursuer's claims of damage as stated do not fall within the clause of arbitration, and should remit to the Lord Ordinary to allow a proof. I may say I should have decided this point entirely as the Lord Ordinary has done, but for the specification that has been given with reference to the delays that occurred in furnishing the plans. These delays are, on the face of them, and on the statement of the pursuer as amended, quite excessive and unreasonable, and if the pursuer makes out a case of that kind it appears to me he would be entitled in law to recover such damages as he could show were the direct result of what must be regarded as the defenders' failure to perform their contract or breach of contract arising from the fault of their engineer.

LORD ADAM—I concur. I agree with your Lordships that all the matters, except those referred to in article 13 of the condescendence as now amended, fall within the clause of arbitration in this contract, and I do not think there is any doubt about it.

With regard to the matters alleged in the 13th article of the condescendence, my view is that they disclose a state of matters not within the contemplation of parties at the time when the contract was entered into, and not provided for by the parties in the contract. We have in the contract a somewhat similar matter with which the contract does deal, namely, delay arising from failure on the part of the railway company to give the contractor possession of the ground in good time. That is provided for; that has been made matter of contract between the parties, and is duly provided for. But this other, which is alleged here, does not appear to have been provided for at all, or to have been in the contemplation of the parties. Now, if that be so, I cannot doubt that these parties had an implied condition or an express condition in the subject in the contract—an implied condition that the plans necessary to enable the contractor to carry on his work and complete his work within two years—should be furnished within reasonable time. I cannot doubt that. I cannot think there is any force in the argument of Mr Dickson, that the railway company might have kept up their plans till the eleventh hour, and then have produced them, and all the same have proceeded against the contractor for damages. I do not think that that is a possible condition of this contract. I think it is implied that the plans should be furnished within reasonable time. According to the pursuer's allegation—it may be true or false—they were not so furnished, and in consequence a deal of extra work, not extra work in the sense provided for by the contract, but work that otherwise it would not have been necessary for the contractor to do in the course of the execution of this contract, and a deal of expense, were involved. "Such extra work was rendered necessary," he says, "as the direct result of the contract by your not duly and properly furnishing me with plans," and he is prepared to show a jury or the Court that he has suffered a certain amount of damages in consequence, and if he succeeds in making out a case I do not see why he should not recover damages.

LORD M'LAREN concurred.

The Court recalled that portion of the interlocutor reclaimed against which sustained the plea of relevancy as regarded article 13 of the condescendence, and remitted to the Lord Ordinary to allow the parties a proof upon that portion of the pursuer's claim.

Counsel for the Pursuer—R. Johnstone—Ure. Agents—Macpherson & Mackay, W.S.

Counsel for the Defenders—D.-F. Balfour, Q.C.—Dickson. Agents—Hope, Mann, & Kirk, W.S.

Thursday, November 28.

FIRST DIVISION.

[Lord Kyllachy, Ordinary.

THE DUKE OF ARGYLL *v.* M'ARTHUR AND OTHERS.

Landlord and Tenant—Grazing Lease—Construction—Outgoing Tenant—Mode of Estimating usual Average Stock of Farm.

The lease of a sheep farm, which included no right of common pasturage, referred to certain estate regulations which contained the following article—"The tenants shall be bound to keep the lands respectively let to them under a full and sufficient stock during the currency of their respective leases; and the proprietor shall have the power of fixing the souming of sheep, black cattle, and horses to be kept by each tenant; and the outgoing tenants shall at removal, whether the lease shall have come to its natural termination or not, deliver over at valuation the sheep-stock on the respective farms to the proprietor or incoming tenant, who shall be bound to receive the same; and in no case shall the number of the sheep so delivered over either exceed or be under the usual average stock or souming of the farm.

In a question between the landlord and the outgoing tenant—*held* (1) that

although the second clause of this article referred alone to farms with a right of common pasturage, yet as the third clause referred to all classes of farms, and was referred to by the terms of the fourth clause, the latter was also applicable to all classes of farms, and meant that in the case of farms with common pasture the stock delivered was not to exceed the souming fixed by the landlord, and in other cases was not to exceed the usual average stock of the farm; and (2) that the "usual average stock of the farm" meant the stock which the farm would usually carry, which fell to be estimated by taking an average of the years of the lease, omitting exceptional years.

In this action the Duke of Argyll sought to have it declared that the amount of sheep stock which as landlord he was bound to take over at the termination of the lease from the trustees of the deceased John M'Arthur, late tenant of the lands of Boccaird and others in the county of Argyll, ought not to exceed the "usual average stock or souming of the said farm."

The action was raised in the following circumstances—In April 1870 the Duke of Argyll let to the late James M'Arthur the lands of Boccaird and others in Argyllshire on a nineteen years' lease at a rent of £500. The lease was made subject to the general regulations applicable to the Argyll estates.

The 14th article of these regulations provided as follows—"The tenants shall be bound to keep the lands respectively let to them under a full and sufficient stock during the currency of their respective leases, and the proprietor shall have the power of fixing the souming of sheep, black cattle, and horses to be kept by each tenant, and the outgoing tenants shall at removal, whether the lease shall have come to its natural termination or not, deliver over at valuation the sheep stock on the respective farms to the proprietor or incoming tenant, who shall be bound to receive the same; and in no case shall the number of the sheep so delivered over either exceed or be under the usual average stock or souming of the farm."

On his entry to the farm M'Arthur took over the sheep stock at valuation from the previous tenant, and his own lease terminated at Whitsunday 1889. The farm was not re-let, and under article 14 it became incumbent on the Duke to take over the sheep stock at a valuation.

The pursuer averred that the number of sheep which he was called upon to take over was 4500 or thereby, which he alleged to be grossly in excess of the usual average stock of the farm.

The defenders pleaded that the present did not exceed an average stock.

Proof was led before the Lord Ordinary (KYLLACHY), and the facts established appear from his Lordship's opinion.

On 11th July 1889 the Lord Ordinary found "(1) that the sheep stock on the farm of Accurrach, which the defenders are, under and in terms of the lease thereof and relative articles, conditions, and estate regulations, bound as at Whitsunday 1889 to deliver over, and the pursuer to receive at valuation, ought neither to exceed nor be under the usual average stock or souming of the said farm; (2) that the usual average stock of the said farm did not exceed 3200 sheep; (3) that the sheep stock presently on the said farm, which the defenders propose to deliver over as at Whitsunday 1889 to the pursuer at valuation as aforesaid, is in excess of the usual average sheep stock of the said farm; and (4) that the pursuer is not bound to take over at valuation the excess of said sheep stock over the said 3200 head, &c.

"*Opinion.*—I have given my best consideration to the proof in this case, and I have come to the conclusion that the sheep stock on the farm of Accurrach at Whitsunday 1889 was in excess of the usual average stock of the farm, and that the pursuer is justified in his demand that the stock, which he falls under the lease to take over, shall be reduced to at least 3200 head.

"The question appears to me to turn mainly upon the terms of the clause in the defenders' lease (or rather in the general regulations therein incorporated), by which it is provided that 'outgoing tenants shall, at removal, . . . deliver over at valuation the sheep stock on their respective farms to the proprietor or incoming tenant, who shall be bound to receive the same; and in no case shall the number of sheep so delivered over either exceed or be under the usual average stock or souming of the farm.' There does not appear in this case to be any common pasture, so that there is no question of 'souming' as distinguished from the proper sheep stock of the farm.

"The defenders contend that the 'usual average stock of the farm' means not the actual stock which has been kept upon the farm during the lease, but its proper stocking according to a proper system of management, and their contention is that it was only during the last three years of the lease that such proper system of management was followed, and that therefore the only question is, whether the sheep stock tendered to the proprietor at last Whitsunday is in excess of what the farm as managed during the last three years is capable of supporting.

"The pursuer disputes this construction of the lease. He maintains that the actual stock kept on the farm during the lease is the standard to be appealed to; that that actual stock (which up to the last two years of the lease did not vary materially) *prima facie* represents the true carrying capacity of the farm, and that at all events the parties to the lease made their contract upon that footing. He denies the right of the tenant to alter the system of management during the last years of the lease to the effect of throwing a larger stock on the landlord's hands. And he maintains separately (1) that the new methods introduced by the tenant have not been shown to be necessary or advantageous; (2) that even assuming them to be so, they do not justify the great increase of stock complained of; and (3) that that increase of stock was espe-

cially objectionable, because even the average stock during the lease considerably exceeded the former stock, and was always somewhat in excess of the proper carrying capacity of the farm.

"I am unable to adopt the defenders' construction of the clause in the lease. The question is not, in my opinion, what the farm is capable of carrying, or may be made to carry, by some particular system of management. The question, I think, is what—as worked during the lease—the farm has in fact carried. That is, I think, the canon prescribed by the lease. No doubt questions more or less difficult may be figured in applying that canon in conceivable circumstances. Had, for example, the stock been increased in the middle of the lease, and been so legitimately, and had the increase been maintained and become established, it may be that the stock so increased would fall to be treated as the usual average stock, although taking the lease as a whole it was over the average. So also, if during the last years of the lease the farm was for the first time wrought in conformity with the usual and established modes of working similar farms it might be at least open to argument whether the landlord could object to take over a stock which was appropriate to such usual and established mode of working. But in my opinion it is unnecessary to consider such questions here. Taking the facts as they appear on the proof, it does not appear to me that there is in the present case any difficulty in ascertaining what was the usual average stock of this farm of Accurrach.

"The facts of the case are, as I understand them, shortly these—The farm of Accurrach is situated (speaking roughly) along the road leading from Inveraray to Loch Awe, and it occupies both high ground and low ground, and carries a stock of blackfaced sheep—ewes as well as wedders. It is also suitable for the grazing of cattle. It was let to the late Mr Macarthur in 1863, when he and a partner Mr Hardie took it over from a former tenant Miss Smith. At that time the sheep stock numbered 2486 of all classes, and there were besides some 50 or 60 head of cattle, young and old. In 1870 Mr Macarthur took a new lease for nineteen years (the lease which has just expired) in his own name, and in that year his clipping list (which represents practically the stock at Whitsunday) amounted to 3196, and in the following year to 3021. This increase (as compared with 1863) was partly, it is said, due to drainage, and partly to the introduction of the system, now so common, of wintering the wedder hoggs in each year off the farm. The stock continued at much the same figure till 1887, two years before the close of the lease, the average clipping-list from 1870 to 1886 being about 3150. In 1887, however, the stock at clipping rose to 3299, in 1888 to 3535, and at Whitsunday 1889, when the lease expired and the present question arose, it had risen, including stragglers, to about 4000 or 4071.

"This increase was, the defenders say, due to and justified by the facts (1) that about 1886 Mr Macarthur gave up keeping cattle; (2) that he further in 1886 introduced the system of wintering away not only his wedder hoggs but also his ewe hoggs; (3) that at the same time he further introduced the system of 'harvesting'—that is to say, of sending away both classes of hoggs, not as usual in October but early in September. It is said, and appears to be proved, that for every 100 hoggs wintered away which were formerly wintered at home the tenant may add 50 sheep of one class or another to his general stock. It is also said, although this appears more doubtful, that for every 100 hoggs harvested, which were formerly only wintered, 25 sheep of one class or another may be added to the general stock. In this way, assuming that the total number of hoggs sent away in each year was about 1000 (which seems about the figure with a total stock of 3000), and assuming also that the ewes and wedders are in equal proportions, the total gain to the carrying capacity of the farm by the wintering away of ewes, and by the harvesting of both ewes and wedders, would, according to the calculation, stand thus, $\frac{500}{2}+\frac{1000}{4}=500$. That is to say, an increase of 500 sheep at clipping was no more than was appropriate to the change of system introduced with respect to the hoggs. Similarly, the defenders say that each "cattle beast" is equal to 5 sheep, and taking 50 cattle as the former stock, they hold that the abolition of the cattle added not less than 250 to the normal sheep stock, so that in all the normal sheep stock is thus brought up from say 3150 to 3900, being within 300 or thereby of the stock proposed to be delivered to the pursuer. I should perhaps add that in the last year of the lease the tenant made a further change on his former system, viz., by wintering away not only his whole hoggs, but also about 440 gimmers and dinmonts, *i.e.*, six-quarter old ewes and wedders. This, however, the defenders did not stand upon as a change justifying an increase of stock. The fact is only important in this way, that in the last year of the lease no less than 1817 sheep of one kind or another were wintered off the farm, and only returned to it in April 1889, a month or so before the valuation.

"It appears to me upon the proof to be at least donbtful whether the system of wintering away the ewes and of harvesting the whole hoggs is a system either necessary or suitable to the farm of Accurrach. Mr Macarthur knew his business, and it is significant that he did not attempt anything of the kind till the close of the lease. I think it is also open to serious doubt whether the substitution of sheep for black cattle was a good thing for the farm, or a thing which augmented its carrying capacity for sheep to the extent suggested. I further think the defenders' figures, which I have taken above, are outside figures, and that in particular the addition of 25 per cent. for 'harvesting' is on the evidence quite an outside figure.

"But assuming all these points in the defenders' favour, it seems to me that the above narrative of the facts, and in parti

cular the above statement of the clipping figures, is conclusive against the suggestion that the stock which is now tendered to the pursuer (4200 or thereby) is on any reasonable construction of the words 'the usual average stock' of this farm. Difficult questions may, as I have said, be figured. In my opinion this is not one of them. A stock rising from about 3200 to 4200 at the very close of the lease, and which can only be kept on the farm by adopting a system of management different from that pursued until nearly the close of the lease, exceeds in my opinion the usual average stock of the farm, giving that expression the utmost possible latitude.

"I therefore decide substantially in favour of the pursuer, fixing the stock at 3200, and finding that the pursuer is not bound to take over a larger stock.

"With respect to the proportions in which the excess is to be apportioned among the different classes of sheep, it may be necessary, unless the parties agree, to make a remit to a man of skill to fix those proportions. In the meantime I only notice that there is no question of any excess in the ewe stock. The excess, if there be an excess, is admitted to lie in the class of two and three year old wedders and ewe and wedder hoggs."

The defenders reclaimed, and argued—(1) The 14th article of the estate regulations did not apply to a lease like the present, because throughout there was a reference to "souming" which was only intelligible where there was common pasture, which was not the case in the present lease. But (2) if it should be held that the 14th article was generally applicable, then the last clause did not apply, for it related entirely to "club" farms with a common right of pastureage. The word "average" in the last clause related not to quantity of stock, but to quality, and the expression "usual average stock of the farm" meant not the actual stock which was kept upon the farm during the lease, but its stocking according to a proper system of management. In estimating the stock which the pursuer was bound to take over an average should be struck from the results of the last three years only, because it was during that period alone that the improved system introduced by the defender began to show. The mode adopted by the Lord Ordinary for ascertaining an average, by taking the totals of the clippings of the various years and dividing the result by 19, was not a fair mode of estimating the average stock of the farm, because by it the tenant derived little or no benefit from any improvements which he might have executed which improved the carrying capabilities of the farm.

Argued for the pursuer — The 14th article of the regulations applied equally to farms like the present, and to those where there was a right of common pasture, and this article was incorporated into the defenders' lease. But for it he had no claim upon the pursuer to take over any stock at the termination of the lease. The meaning of the words "usual average stock of the farm" was just the stock which during the lease the farm carried, and the mode adopted by the Lord Ordinary of ascertaining this was the only fair and reasonable method that could be suggested. To adopt the defender's contention, and reach an average from the totals of the last three years, was practically to strike the word "average" out of the contract.

At advising—

LORD PRESIDENT—This is a question between landlord and tenant which depends upon the terms of a lease of a sheep farm in Argyllshire, and relates to the amount of stock which the landlord was bound to take over at the termination of the lease. The lease is of a very short description and contains very few special stipulations, but refers to certain articles, conditions, and regulations which are embodied in all leases of farms belonging to the Duke of Argyll in the county. The clause which we have to construe is the 14th of the articles, but it is of importance to observe in regard to the other regulations, and also in regard to the lease itself, that except in the 14th article there is nothing whatever by way of contract between the parties regarding the taking over of the stock at the termination of the lease. There is nothing in the lease about it, and nothing in any other of the articles contained in the separate paper. Accordingly it follows as a necessity that the argument first maintained on behalf of the reclaimer that the 14th head does not apply to this case cannot be listened to for a moment, because if so, there would be no obligation upon which the tenant could found in asking that the stock should be valued and taken over.

But it has been maintained, in the second place, on the construction of this clause that while some portion of it undoubtedly does apply to the valuation and delivery of the stock of a farm of this description, there are other portions of the clause, and particularly the last provision, which do not apply to the case of a farm like the one in question, which is exclusively let to one tenant, but only to club farms where the subject let is a right of pasturage along with another tenant. The clause begins thus—"The tenants shall be bound to keep the lands respectively let to them under a full and sufficient stock during the currency of their respective leases." Now, as far as that condition is concerned, I do not understand it to be now disputed that that applies to all the leases of the farms on this estate, whether they be hill farms, or agricultural farms, or farms with a right of common pasturage only. The next provision is that "the proprietor shall have the power of fixing the souming of sheep, black cattle, and horses to be kept by each tenant." Now, that can in its terms only apply to cases of possession of the nature of souming or of souming and rouming; and accordingly while the first portion of the clause is universal in its application, the second is appropriate only to a case of common pasturage.

The next clause is this—"The outgoing tenants shall at removal, whether

the lease shall have come to its natural termination or not, deliver over at valuation the sheep stock on the respective farms to the proprietor or incoming tenant, who shall be bound to receive the same." Now, here again the reclaimer, in contradiction of his first argument for the construction of this 14th head, now admits that that must apply to a farm like the present, and he is driven to do so, because otherwise he would have no right to demand the valuation of stock at all; and so that applies to the lease of a farm like the present, and also to a right of common pasturage.

And then follow these words, which constitute the conclusion of this 14th head—"And in no case shall the number of sheep so delivered over either exceed or be under usual average stock or souming of the farm." This, it is contended by the defenders, applies only to a lease of common pasturage, and not to such a lease as we have here. Now, I cannot concur in that suggestion. I think it is quite impossible to read these words in that limited sense. The clause immediately preceding admittedly applies both to a farm like the present, in which there is one tenant, and to a right of common pasturage; and the words with which this clause is introduced seem to me to refer back to the clause immediately preceding, because the words are "in no case." That surely means "in none of the cases preceding." I cannot conceive of the words bearing any other meaning. And still further, the provision itself is "in no case shall the number of sheep so delivered." That is a reference back, and it can only be a reference back to the portion of the clause of the 14th head, which relates to the delivery of sheep and the one which relates to the delivery of sheep is one which admittedly applies to both classes of farms. So that I think it is demonstrable that this clause is intended to apply, just as the immediately preceding clause does, to a farm tenanted like the present or to a possession consisting of a right to common pasturage with others.

Now, if that be so, what is the meaning of the clause itself as applied to both cases? I do not think that admits of any very great difficulty. "In no case shall the number of sheep so delivered over either exceed or be under the usual average stock or souming of the farm." If it be a case of souming, the sheep so delivered are not to exceed the souming as fixed by the landlord; if it be a case like the present, then the sheep so delivered and received are not to exceed the usual average stock of the farm.

Now, what is meant by the "usual average stock of the farm"? That is really the only remaining question, and though perhaps the phrase is not very well suited, because it admits of some little ambiguity, I think one may fairly say that the "usual average stock" of a sheep farm like the present is just the number of sheep it can carry. A pastoral farm like this is always spoken of in different language from an agricultural farm, for the best of all reasons—it is never measured. It is not the custom to measure such farms, and therefore one speaks of it with reference to some other element of value than the acreage. If an agricultural farm consists of so many acres one may easily form an opinion of what it is worth by looking at the land in the neighbourhood, and seeing the usual letting value, and so forming an opinion as to what amount of rent should be given for it. But in the case of a sheep farm you cannot value it in that way at all. The only way you can calculate that is by the test of how many score of sheep it will carry. Of course a hill consists of pasturage—partly rough pasturage, partly heather, and partly rock—and therefore it cannot be spoken of or dealt with in the same way as an agricultural farm. It can only be looked at as a subject of value according to the number of sheep it will carry.

Now, I think that that is what was meant in this clause by the "usual average of sheep stock." I cannot find any other meaning, and I think that that is a very natural meaning. If the number of sheep to be delivered over and accepted by the landlord is to be the usual average stock—that is, the number the land will carry—how is that to be ascertained? The phrase at once suggests that there must be an average of something. Is that an average of years? I do not know any other way an average can be struck as to the number of sheep on the farm. What number of years are we to take as fixing this usual average? Naturally enough—and that was the view of the Lord Ordinary—the years of the endurance of the lease which has just come to an end suggest themselves as a fair representation of what the farm has carried for that period, there being no disturbing element in the case. I cannot conceive of a fairer mode of striking an average than to take the years of the tenant's occupation, during which it is not alleged that the stock upon the farm has been too small, nor, on the other hand, that there has been an excessive stock. If these disturbing elements occur—say that for a certain portion of the nineteen years the stock has been insufficient, or if it can be shown that in some years there has been an excessive stock—then the years in which such disturbing elements occur must be struck out of the calculation, and that will probably leave still a sufficient number of years during the lease that the farm was sufficiently stocked to form a foundation for the calculation.

In the present case I do not think there is very much difficulty. The occupation by Mr M'Arthur has been continuous throughout the whole nineteen years, and of course it has been subject to several vicissitudes and calamities, like other sheep farms, by deaths and otherwise, and the result apparently is to him a very favourable one, taking the years of occupation altogether. But there is one disturbing element during the last two or three years of the lease, which might create very great difficulty if these years were to be taken into the number of years during which the average is to

be struck—I mean the years during which the tenant increased to a very large extent the amount of the stock—that is, of the wedders, and latterly, I think, of the ewes also, by wintering the wedders upon a farm either belonging to someone else, or occupied by someone else, or even occupied by this gentleman himself, but at a distance from the farm in question. It rather appears to me there is a little fallacy in holding that the effect of that extra wintering must necessarily be taken into account as showing that the stock on the farm is in consequence of that a larger stock than it would otherwise be, because it arises from this, that the tenant is thereby enabled to maintain a larger stock on the farm by reason of these sheep occupying for one-half of the year not his farm but another farm. Now, that is not merely the occupation of this farm; it is the occupation of this farm and the partial occupation of another farm, and that a speculation which is additional to the speculation on which he entered in taking this lease. He has a separate contract with the owner or occupier of the separate land to winter his sheep, and that is not arising out of this lease, but out of another contract, and therefore if it were necessary to determine that question I should have the greatest doubt whether the increase of stock produced by that mode of wintering could be taken into account in fixing what is the stock to be handed over by the tenant to the landlord under the clause that it shall neither exceed or be under "the usual average stock."

But it is really not necessary to pursue that question further, because I am quite satisfied that taking the average of the years of this lease, excluding only the last year, they afford a perfectly good foundation for the result at which we must arrive. Indeed, the landlord offered either to take the whole of the lease, or to take the last ten years of the lease, or to take the last seven years (excluding always the last year), and they all come almost to the very same result. That affords, I think, a pretty strong indication that the mode maintained by the landlord is founded on the justice of the case.

I could quite understand a case in which, taking the average either of the whole years, or of ten years, or seven years, a just result would not be furnished because of disturbing elements. But then I think this does not occur in the present case, and I am quite satisfied that the Lord Ordinary has arrived not only at the fair result, but at a result precisely in accordance with the stipulations of the 14th head of the regulations. I think he has applied the last clause of that head to the case before him in the way which the justice of the case demanded, and therefore I am for adhering to the judgment under review.

LORD SHAND—The reclaimer has argued that the closing words of this 14th section of the estate regulations have no application to this case, and he says that they relate only to the farms in which the occupants have a right of common pasturage. This argument appears to me to be quite unsound, and I have no hesitation in holding that the words of this clause cover the lease in question. All that remains then is to determine what meaning is to be put upon the words "usual average stock." I think that they refer to the sheep in actual occupation of the farm, which the tenant is bound to give over, and which the landlord is bound to take.

It appears to me that the word "average" refers not to the quality of the stock, but to the quantity as judged by the number of sheep which the farm has carried during the various years of the lease. But it must be the usual average, and if it can be shown that there have been one or two exceptionally good or bad years—when there has been an exceptionally large or small stock, these years, in striking an average—should be omitted.

Now, during the last three years of this lease the tenant has had an unusually large stock, and he proposes to reach his average by taking into account these three years only. But to give effect to this contention would simply be to strike the word "average" out of the clause. As your Lordship observed, it is not altogether fair for the landlord perhaps to take these three years into account in fixing an average, because owing to exceptional circumstances the stock carried during that period was unusually large, but if they are thrown in the tenant will not by means of them obtain a higher average than the Lord Ordinary has allowed him. Suppose there had been a great expenditure of capital on this farm during the currency of the lease in draining and fencing, and that in consequence thereof it had, say for the last eight or ten years of the lease, carried a largely increased stock, then no doubt the average would be reached by computing these later years, but we have no such special circumstances to take into account in dealing with the present case, and I have come to the conclusion that the result arrived at by the Lord Ordinary is the right one, and that his judgment ought to be adhered to.

LORD ADAM—I concur. From the outset I had no doubt that section 14 of the estate regulations applied to this farm, and that it was incorporated in and formed part of the lease. If it did not, then clearly there was no obligation on the Duke to take over a single sheep at the expiry of the lease. To my mind this clause is applicable both to farms like the present and also to what Mr Asher called "club" farms, *i.e.*, farms having a right of common pasture. With reference to the meaning of the word "average," I think it relates to the average amount of stock which the farm is known to carry, and that the best evidence of what it is capable of carrying is just what during the currency of the lease it has annually carried. Upon these grounds I am of opinion that the conclusion arrived at by the Lord Ordinary is right.

LORD M'LAREN concurred.

The Court adhered, and remitted to the

Lord Ordinary to proceed further in the cause.

Counsel for the Pursuer—H. Johnston—Guthrie. Agents—Lindsay, Howe, & Company, W.S.

Counsel for the Defenders—Asher, Q.C. —Salvesen. Agents—Gill & Pringle, W.S.

Friday, November 29.

FIRST DIVISION.

[Lord Lee, Ordinary on the Bills.

BIDOULAC AND OTHERS (GUTHRIE'S TRUSTEES) *v.* M'KIDD (SINCLAIR'S TRUSTEE).

Landlord and Tenant—Lease—Irritancy—Clause declaring Lease ipso facto Null on Tenant's Bankruptcy.

A clause in the lease of a farm for nineteen years declared that in the event of the tenant's bankruptcy the lease should, "*ipso facto*, become void and null, as if the same had never been entered into, and all right, title, or management of or in the said lands competent to the tenant or his foresaids (heirs), or to any trustee or manager for their creditors, shall cease and determine, and the same is hereby . . . declared to be forfeited to the landlords accordingly." *Held* that the said clause only gave an option to the landlord to put an end to the lease.

Reparation — Lease — Construction—Bankruptcy of Tenant—Renunciation—Damages for Breach of Contract—Acquiescence of Landlord.

A clause in the lease of a farm for nineteen years declared that in the event of the tenant's bankruptcy the lease should, "*ipso facto*, become void and null, as if the same had never been entered into, and all right, title, or management of or in the said lands competent to the said tenant or his foresaids, or to any trustee or manager for their creditors, shall cease and determine, and the same is hereby . . . declared to be forfeited to the landlords accordingly."

The tenant having been sequestrated in the seventh year of the lease, the trustee on his estate wrote to the landlord a letter, in which, after referring to the above clause, and intimating that the lease had come to an end in terms thereof, added that the tenant and he, as his trustee, would remove from the farm at the separation of that year's crop from the ground. It was subsequently arranged that the trustee should continue in possession of the farm till the following Whitsunday, on condition that he became personally bound to pay the rent at that term. The landlord then let the farm from that term to another tenant at a reduced rent. He subsequently lodged a claim in the sequestration, of which he had given no prior intimation, for the loss occasioned to him by the tenant failing to fulfil his obligations under the lease.

Held that the landlord was entitled to be ranked for the said claim, in respect that the clause in the lease only gave an option to the landlord to put an end to the lease, and that he had not acquiesced in the renunciation of the lease by the tenant so as to be barred from insisting in his rights under the lease.

By lease dated the 13th and 15th July 1880 the trustees of the late Colonel Guthrie of Scotscalder let to Donald Sinclair, farmer, Leosag, and his heirs, but expressly excluding assignees and sub-tenants, legal and conventional, of every description, all and whole the farm of Braehour, in Caithness. The lease was to endure for nineteen years from Whitsunday 1880. The rent stipulated was £205, payable at Candlemas and Lammas by equal portions.

By the 15th clause of the lease it was, *inter alia*, provided that "in case the said tenant or his foresaids shall, during the currency hereof, become bankrupt, in terms of the subsisting Bankrupt Statutes for the time, or if a sequestration shall be awarded against him or them, or if they shall voluntarily divest themselves of their effects, then, and in any of these events, this tack shall, *ipso facto*, become void and null as if the same had never been entered into, and all right, title, or management of or in the said tenant or his foresaids, or to any trustee or manager for their creditors, shall cease and determine, and the same is hereby in any of these events declared to be forfeited to the landlords accordingly."

Donald Sinclair became bankrupt, and his estates were sequestrated under the Bankruptcy Statutes on 17th August 1886. James M'Kidd, ironfounder, Thurso, was duly elected trustee on the estate, and on 28th September 1886 he wrote to the agents of the marriage-contract trustees of Mr and Mrs Guthrie of Scotscalder, who had succeeded to the rights of Colonel Guthrie's trustees under the lease, in the following terms:—"Referring to the lease of the farm of Braehour, . . . I beg to intimate to you that the said Donald Sinclair has become bankrupt, and that sequestration was awarded against him on 17th ulto., in consequence of which the said lease or tack 'has *ipso facto* become void and null, as if the same had never been entered into, and all right, title, or management of or in the said lands competent to the said tenant or his foresaids, or to any trustee or manager for their creditors, shall cease and determine.' I further hereby intimate that I have been elected and duly confirmed trustee on the said sequestrated estate, and that the said Donald Sinclair and I, as trustee foresaid, shall remove from and vacate the said farm of Braehour at the separation of the crop from the ground. If, however, the proprietors desire that instead of vacating the said farm at the separation of the crop from the ground the removal should be at the term