Friday, December 16.

FIRST DIVISION.

[Lord Low, Ordinary.

HANNAY AND OTHERS *v.* MUIR AND OTHERS.

Process—Amendment of Record.

In an action at the instance of shareholders in a company against the secretaries of the company and its agents abroad, it was originally averred that the agents, who were allowed a fixed percentage to cover all charges, including brokerage, had charged against the company sums in excess of the commission and brokerage. The pursuers proposed to amend their record by substituting for this averment a statement that the agents had received from sellers of goods to the company commission which they had wrongfully appropriated. It was further proposed to substitute for an averment that the defenders had retained in bank a large amount of money belonging to the company, and appropriated the interest accruing therefrom, an averment that this fund had been created by the defenders obtaining unnecessary advances on behalf of the company, and that the interest paid on these unnecessary advances constituted a loss to the company. *Held* that the amendments were competent, the action being in substance an action of accounting, although each item was made the subject of a separate petitory conclusion, and the difference between the original and amended averments not being essential.

Process—Summons—Conclusion against Two Defenders Jointly for Separate Wrongs.

Held that to justify a conclusion against two firms jointly and severally for a lump sum of damages in respect of separate wrongs, it was not enough to aver that the senior partner of both firms was the same person, and that he exercised a predominating influence over them, and controlled their whole business for his own purposes.

Title to Sue—Minority of Shareholders of Company.

Held (by Lord Low, Ordinary) that a minority of the shareholders of a company had a title to sue its officials where they averred that the defenders had defrauded the company, and had control of the votes of the shareholders so as to make inquiry by the company or by a majority of the shareholders impossible.

An action was raised by certain shareholders in the Champdany Jute Company, Limited, against the directors of the company, and against James Finlay & Company, East India merchants, Glasgow, and Finlay, Muir, & Company, merchants, Calcutta, who were respectively the secretaries of the company and the agents in India.

The summons contained the following conclusions:— "Therefore the defenders James Finlay & Company and Finlay, Muir, & Company ought and should be decerned and ordained by decree of the Lords of our Council and Session, conjunctly and severally or severally, to pay or refund and restore to the said Champdany Jute Company, Limited—*First*, a sum of £16,250 sterling; *second*, a sum of £8160 sterling; and *third*, a sum of £8000 sterling, with interest upon each of said sums at the rate of 5 per cent. from the date of citation to follow hereon until payment of the same."

The defenders against whom the fourth conclusion was directed were the directors of the company, Sir John Muir being chairman. James Finlay & Company had been appointed secretaries of the company at a fixed annual salary of £600, while the remuneration of Finlay, Muir, & Company was to be by percentage, and the 58th article of the articles of association provided that they should "transact all the business of the company in India," and that "they shall guarantee payment of the price of all goods sold, in so far as these have been delivered by them on behalf of the company. For their services they shall be allowed as remuneration 3½ per cent. on the amount of all goods sold and delivered as aforesaid, which remuneration shall include and be in full of all allowances for rents, salaries, office expenses, and *del credere* or guarantee commission, and all other claims, but shall not include or cover brokerage, which brokerage shall not exceed 1 per cent."

The pursuers averred that Sir John Muir was the principal if not the sole partner in the two firms of James Finlay & Company and Finlay, Muir, & Company, "that the whole affairs of the company have from the commencement of its business been controlled by Sir John Muir in this country through his said firm of James Finlay & Company, and in India through his said firm of Finlay, Muir, & Company," and that he had a control of a majority of the shares of the company, and used his power for the purpose of preventing inquiry.

In support of the first conclusion they averred (cond. 8) that Sir John Muir and his firm Finlay, Muir, & Company, in pursuance of a scheme to work the business of the company to their own profit, "knowingly charged sums in excess of said commission and brokerage, and upon purchases as well as sales, and have appropriated the same to themselves, to the loss, of the said company." It was stated that the exact amount could not be estimated, as the item did not appear in the balance-sheet, and other information had been withheld, but that it was not less than the sum first concluded for. The second conclusion was supported by averments that James Finlay & Company and Finlay, Muir, & Company had "been in use to charge commission on every advance obtained upon the com-

pany's account in Glasgow or Calcutta against said company, and have thereby illegally made large profits for themselves at the expense of the shareholders." The pursuers further averred that, with the object of earning these commissions, Sir John Muir designedly adopted an expensive mode of financing the company at a time when there were large sums lying in the bank at the credit of the company. As regards the third conclusion, the pursuers averred that Sir John Muir and his firms had retained in bank a large amount of money belonging to the company unemployed and unproductive, and that the amounts so "lodged have borne interest, and that said interest, instead of being credited to the company, has been appropriated by" the defenders, and that they were in the habit of "drawing upon the funds of the company lying in the bank for their own business purposes without paying interest for the accommodation."

The pursuers pleaded—"(1) The defenders Sir John Muir and his firms of James Finlay & Company and Finlay, Muir, & Company, having illegally and fraudulently appropriated to themselves the sums in the first, second, and third places sued for, are liable jointly and severally in repetition thereof to the company as concluded for."

Answers were lodged by all the various defenders, who denied the pursuers' averments and pleaded, *inter alia*, that the pursuers had no title to sue, and that the action was irrelevant.

The Lord Ordinary (Low) on 3rd March 1896 allowed the pursuers a proof of their averments before answer. . . .

"*Opinion.*—The pursuers are a small minority of the shareholders of the Champdany Jute Company, Limited, which carries on business as manufacturers of jute at two mills near Calcutta.

"The defender Sir John Muir is chairman of the company, his Glasgow firm of James Finlay & Company are secretaries of the company, and his Calcutta firm of Finlay, Muir, & Company are the company's agents in India. The pursuers aver that Sir John Muir is practically the sole partner of both those firms.

"By the 58th article of the articles of association of the company it is provided that Finlay, Muir, & Company shall be agents of the company in India until they resign or are removed by a resolution of the shareholders passed at a general meeting. They are to transact all the business of the company in India, and to receive as remuneration a commission of 3½ per cent. on the amount of all goods sold and delivered, and of 1 per cent. for brokerage.

"It was provided in the 64th article that no shareholder, not being a director or auditor of the company, should be entitled to inspect the books, accounts, documents, or writings of the company, except such as might be produced for inspection at any meeting of the company.

"The summons concludes in the first place for decree against James Finlay & Company, and Finlay, Muir, & Company, to pay and restore to the Champdany Company three separate sums of money.

"The first sum is £16,250, being the amount which the pursuers allege that Sir John Muir and his firms have fraudulently charged the company in excess of the commissions to which they were entitled under the articles of association.

"The second sum is £8160, which the pursuers aver that Sir John Muir and his firms have improperly charged the company as commission upon advances obtained for the company. The pursuers aver not only that the services for which these commissions were charged were covered by the commission allowed by the articles of association, but that, with the object of earning the commissions, Sir John Muir designedly adopted an expensive mode of financing the company, and did so at a time when there were large sums belonging to the company lying idle in bank.

"The third sum is one of £8000. The pursuers aver that Sir John Muir and his firms, instead of crediting the company with the interest upon the moneys lying in bank, appropriated the interest to their own purposes, and that they were in the habit of drawing upon the funds of the company lying in bank for their own business purposes without paying interest for the accommodation.

"The pursuers aver that the accounts of the company have been falsified and manipulated so as to conceal the fraudulent charges complained of, and that the auditors of the company, who are in Glasgow, have never had access to the books of the company in India, where the business is carried on.

"The pursuers further aver that Sir John Muir has control of a majority of the shares of the company, and has used his power for the purpose of preventing inquiry. The pursuers allege that their efforts within the company to have an inquiry into the matter of which they complain have thus been frustrated, and they have been compelled to bring the present action.

"The defenders state a variety of preliminary pleas, but ultimately the argument was practically confined to the plea of no title to sue.

"It was argued that as this was a complaint of the conduct of those who were managing the affairs of the company, it could only be insisted in by the company and not by individual shareholders. If the pursuers had been a majority of the shareholders they might have sued in the company's name, because a majority was competent to decide upon all matters relating to the internal management of the company, but being a minority they could not do so.

"There is no doubt that the general rule is that for which the defenders contend. Directors and managers are servants of the company, and it is the company who has the title to call them to account—*Orr* v. *Glasgow, &c., Railway Company*, 3 Macq. 799. Further, if the complaint relates to a matter of internal management which it is competent for a majority to sanction, an

action by individual shareholders will not be sustained — *Macdougall* v. *Gardiner*, 1 Ch. D. 13; *Foss* v. *Harbottle*, 2 Ha. 461.

"But to these general rules there are exceptions. Thus if a company is defrauded by a person who can command a majority of votes, and who thereby stifles inquiry, a minority of the shareholders, or even a single shareholder, can sue — *Mason* v. *Harris*, 11 Ch. D. 97; *Atwool* v. *Merryweather*, 5 E. 464.

"That is the case which is alleged here. The pursuers aver that Sir John Muir has defrauded the company, and has used the voting power under his control to prevent the pursuers obtaining redress through the company. I am therefore of opinion that, assuming these averments to be true, the pursuers have a good title to sue.

"It was also contended that the pursuers' averments are not sufficiently specific. It is plain that the pursuers are necessarily under some disadvantage in stating their case, because under the articles of association they are unable to obtain access to the books. The defenders on the other hand have the books at their command, and as the nature of the charges which the pursuers make are stated distinctly enough, I do not think that the defenders can be prejudiced by want of specification of details. If the charges are not well founded the defenders can have no difficulty in meeting them." . . .

The pursuers reclaimed.

In respect of a minute lodged by the defenders, in which they offered to give the pursuers access to the books of the company, process was sisted by the Court on March 11th 1896.

Thereafter the pursuers proposed to amend their record as follows:— They restricted the conclusions of the summons, the first to the sum of £1306, 17s. 6d., the second to the sum of £5300, and the third to the sum of £3544, 11s. 4d. For the averment in cond. 8, quoted *supra*, relative to the first conclusion, they substituted the averment that Finlay, Muir, & Company "frequently received from jute merchants and others, on purchases which they had made as agents for and on behalf of the company, commissions, rebates, discounts, or other allowances, which they wrongfully and in breach of their agreement with the company, and their duty as the company's agents, appropriated to themselves in place of crediting to the company as they were bound to do." The amount thus appropriated was averred to be that claimed in the restricted conclusion. The averments relating to the second conclusion were not materially altered except as regards the amount concluded for. As regards the third conclusion, the pursuers for their previous averments substituted statements that a large and unproductive balance lying in bank at the company's credit had been created by the defenders' practice of obtaining advances on behalf of the company in excess of its requirements, and that the loss to the firm was not only the commissions illegally charged by the defenders, "but the interest and discount paid to banks or others on said advances in excess of the company's requirements." The pursuers further averred that the interest upon the surplus funds used by the defenders for their own purposes without paying interest amounted to £211, which was included in the restricted sum concluded for.

The defenders lodged answers to the amendments, and also maintained that they were incompetent.

Argued for reclaimers — Even if the amendments were not allowed, they would be entitled to a proof of their original averments, but they were competent, and as amended the record was clearly relevant. *Competency*—The amendments on the averments supporting the first conclusion were of the very nature contemplated by the Act as being calculated to enable the true issues in the action to be tried. The pursuers' charge was that the defenders had overpaid themselves. The charge still remained, and it was quite legitimate for them to amend their statements as to the modes of overpayment. The only question was the amount of the defender's remuneration, and no new fund was introduced into the case. The amendments certainly fell within the principle as to admissible amendments—*Rottenburg* v. *Duncan*, Oct. 23, 1896, 24 R. 35. With regard to the third conclusion, it was true that the basis of the claim was altered, but it was still a claim for interest, only instead of being interest on money lying in bank, it was interest for money unnecessarily borrowed. This was in reality an action of count, reckoning, and payment, and the proposed amendments were entirely consistent with the alterations allowed in such actions. It was maintained by the respondents that these three conclusions were bad, as they were directed against the two firms conjunctly and severally for one and the same sum in each conclusion. That might be the case where there were several distinct defenders involved in a case without any connection, but the averments here were to the effect that there was really only one *persona* under the various names of the defenders, viz., Sir John Muir, and that these conclusions were directed entirely against him. That being so, the cases of *Barr* and *Taylor* did not apply. 4. This turned upon a question of fact, and there must accordingly be a proof. The detailed statement of the reclaimers showed that there had been no balance of profit out of which dividends could be paid. The cases cited by the respondents were decided after the facts had been brought out.

Argued for respondents — The amendments were incompetent, and even as the action now stood it was wholly irrelevant as regards all the conclusions. The three conclusions were all founded on fraudulent acts said to have been committed by the two firms of James Finlay & Company and Finlay, Muir, & Company, agents of the company. All the conclusions were for payment "conjunctly and severally or severally," and for restoration to the company at the instance of a small section of share-

holders. To deal with the conclusions separately:—1. *Competency*—The effect of the amendments was to restrict the pursuers' claim to a very small sum, and the case as now laid was wholly different from the old case. It was no longer a question of breach of the terms as to remuneration, but whether they were bound to communicate to the company all brokerage received by them. The first was a breach of contract, the second a breach of trust—the first a charge of receiving too much from the company, the second of receiving something from somebody else and not handing it over. That was clearly a case of substituting a new dispute and a new set of legal relations, and was accordingly not a competent amendment — *Rottenburg* v. *Duncan; Leny* v. *Magistrates of Dunfermline*, March 20, 1894, 21 R. 749; *Russell, Hope, & Company* v. *Pillans*, 1895, 23 R. 256; *Gibson's Trustees* v. *Fraser*, July 10, 1877, 4 R. 1001; *Forbes* v. *Watt's Trustees*, November 9, 1870, 9 Macph. 96. It had been said that the liberty of amending was extended by *Guiness, Mahon, & Company* v. *Coats Iron and Steel Company*, January 21, 1891, 18 R. 441, but that was a case of a defender stating a new defence, and had no bearing on the present question. *Relevancy*—It was to be noted that there was no averment whatever made against John Finlay & Company. 2. This conclusion was not quite in the same position as the first, and it could not be maintained that the amendments were incompetent since the averments remained practically the same. They were, however, clearly irrelevant. It was a complaint against two firms for transactions by one in Glasgow and one in Calcutta without any attempt to particularise them. But they could not make each liable for the acts of the other, and could not get a joint and several conclusion. This was just the sort of summons which was held incompetent in *Barr* v. *Neilson*, March 20, 1868, 6 Macph. 651; *Taylor* v. *M'Dougall & Sons*, July 15, 1885, 12 R. 1304. The pursuers should have made up their minds as to which firm was liable for such advances, or else have made a relevant averment of joint-action as regards the whole. 3. As regards competency, this conclusion was almost in the same position as the first. The pursuers had withdrawn the charge of taking the interest, and substituted for it a claim that the defenders must pay interest on the advances made by the banks. That was a complete substitution of one claim for another and was therefore incompetent. Even as amended the averments were irrelevant, on the same grounds as were those supporting the second conclusion.

At advising—

LORD PRESIDENT—The question primarily before us is, whether the record shall be amended as proposed by the pursuers. If those amendments are necessary for the purpose of determining in this action the real questions in controversy between the parties, then we have no option in the matter—they must be made. What, then, is the real question in controversy between these parties, and how do these amendments bear on that question?

The three first conclusions call for payment of money into the coffers of the Champdany Jute Company, Limited, by two firms who acted, the one as the agent in Calcutta, and the other as the secretaries of this limited company. In substance, the action is brought, so far as these conclusions go, to rectify the accounts between the company and those agents, and the true question between the parties is whether the agents have taken too much and given the company too little. If this action had formally been an action of count, reckoning, and payment, this question of amendment would hardly have been debateable. The mere circumstance that the pursuers have made each item in the accounting the subject of a separate petitory conclusion really makes no difference on the substance of the action. But, further, the difference between the original statements in support of these claims and the new statements are not essential. I take, as illustration, the first conclusion, as on it the defenders fought the question of amendment most keenly. The change proposed is, that whereas originally the complaint was that the agents allowed themselves too much commission, taking it out of funds in their hands, the charge now is that they kept to themselves commissions allowed them by third parties, which they ought to have communicated to their principals. Now, whether they took the money from the company, or intercepted it on its way to the company, the gist of the complaint is that they have not credited the company with enough. The amendment in this case is necessary in order to give fair notice; and although the change is really to substitute the one complaint for the other, I think the one as much as the other is within the scope of the controversy.

I do not examine the other branches of the amendment, because the same general considerations cover them also. My opinion is that the amendments must be allowed, and I proceed to discuss the remaining questions of the case on the assumption that they are made. It is our practice, in accordance with the statute and its orderly working, not to reserve the question of expenses on these occasions, but to deal with it on the spot. For reasons, soon to be disclosed, the present case stands in a somewhat curious position on this point; but I think the condition on which we allow these amendments must be payment of expenses from 28th June 1898, when the note setting forth the proposed amendments was lodged.

I now proceed to consider pleas of the defenders which are vital to the pursuers' case, and I shall take the first three conclusions in their order, prefacing what I have to say on each with some general remarks which apply to all.

The defenders who are sued under these conclusions are James Finlay & Company, East India merchants, in Glasgow, and Finlay, Muir, & Company, merchants, in

Calcutta. These two firms, trading the one in Scotland and the other in India, held different positions in relation to the Champdany Company. James Finlay & Company were appointed secretaries to the Champdany Company at a fixed salary. Finlay, Muir, & Company's position was settled by the articles of association of the Champdany Company, for by article 58 they were constituted agents of the company in Calcutta to be paid by a specified percentage. Now, the peculiarity of this summons is that it concludes against those two firms conjunctly and severally, or severally, for one and the same sum in each of the three first conclusions, and the two firms are the sole defenders in those conclusions. The theory which is supposed to justify this is that Sir John Muir is dominant in both firms, and that both are completely under his control. Assuming this to be the case—as we are bound to do on the question of relevancy—it does not take away the fact that, on the pursuers' own showing, Sir John Muir is not the sole partner of either firm. The mere statement that Sir John is as good as sole partner, as the other partners are completely under his control and domination, and are truly only other names for himself, does not take away the fact that each of these firms is a separate *persona*. Nor should we omit to observe that the articles of association expressly provides for the agency being in Finlay, Muir, & Company "as that company is and may for the time being be constituted." As the pursuers, at the best for them, are suing for behoof of the company, they are committed to a recognition of those two firms, as respectively the company's secretaries and the company's Calcutta agents. And in fact they have not, in the three conclusions which I am considering, acted up to their theory of Sir John Muir being the real agent and the real secretary, for he is not made defender in any one of the three.

Turning to the restricted conclusions in their order, the first is a claim for £1306, 17s. 6d. Now, when we look at the averments about this claim, we find that they relate solely to Sir John Muir and his firm of Finlay, Muir, & Company, and that James Finlay & Company are not so much as mentioned. That being so, it is obvious that the averments are irrelevant to support the conclusions against James Finlay & Company, and that this conclusion must be dismissed so far as directed against them. All that will be left standing of this conclusion will be the several conclusions against Finlay, Muir, & Company. I do not think that we are in a position to deal with the defenders' plea founded on their construction of the clause about brokerage; or at least I do not think that we can do so now so well as after evidence.

The objection to the second conclusion is different. From the amended condescendence it appears that the pursuers' complaint is that on advances, some of which were obtained in Glasgow and some in Calcutta, commissions have been charged which were not due. Now, the pursuers do not distinguish between the Glasgow advances and the Calcutta advances, and they conclude for one sum against the two firms conjunctly and severally, or severally. There is nothing whatever averred to show liability for the Glasgow advances by the Calcutta firm, or for the Calcutta advances by the Glasgow firm. The pursuers seem to have thought that once they asserted the all pervading dominance of Sir John Muir it did not matter whether, as in the first claim, they only mentioned one of the two firms, or whether, as here, they make an averment showing the sum claimed to be the aggregate of separate claims against each firm. But, in my opinion, this will not do, and if a claim of this kind exists, the pursuers ought to have informed themselves, or at least to have made up their minds as to which firm was responsible for which moneys. At present this is not done, and no relevant averment is made of joint action regarding the whole. I am therefore of opinion that this conclusion must be dismissed as against both defenders.

The third conclusion is a very clear case of the same thing, and this conclusion must share the same fate. Nothing can be more crude than the amended condescendence 12. No hint is given as to how, when, where, and by which of the firms the surplus funds were used, or to what extent, by Sir John Muir individually.

If the case be dealt with as I propose, the proper procedure will be to have the record amended on the conditions stated, and this having been done, to recal the Lord Ordinary's interlocutor of 3rd March 1896, to dismiss the first conclusion, except as far as it concludes against Finlay, Muir, & Company severally, to dismiss the second and third conclusions; before answer, to allow to the parties a proof of their respective averments in so far as these relate to the first conclusion as against Finlay, Muir, & Company, and to the pursuers a conjunct probation, and to remit to the Lord Ordinary to proceed.

LORD ADAM and LORD M'LAREN concurred.

LORD KINNEAR was absent.

The Court pronounced the following interlocutor:—

"Open up the record: Allow the amendments for the pursuers and reclaimers Maxwell, Hannay, and others contained in No. 50 of process upon payment by them to the defenders of expenses from 25th June 1898, the date of lodging said note, to the present date: And allow the amendments by the defenders Douglas Mann Hannay and others in answer thereto contained in their minute, and by the defenders Sir John Muir and others also in answer thereto contained in their minute: And said amendments having been made and said expenses paid, of new close the record: Recal the said interlocutor of 3rd March 1896 reclaimed against: Dismiss the first conclusion of the summons, except in

so far as it concludes against Finlay, Muir, & Company: Dismiss also the second and third conclusions of the summons, and decern," &c.

Counsel for Pursuers—H. Johnston, Q.C. —M'Leod. Agent—A. G. G. Asher, W.S.

Counsel for Defenders—Ure, Q.C.—Clyde. Agents—Forrester & Davidson, W.S.

Friday, December 16.

SECOND DIVISION.

[Lord Stormonth Darling, Ordinary.

MACLAINE *v.* STEWART, *et e contra.*

Lease—Missives of Lease—Whether Estate Regulations Incorporated by Implication in Missives.

Where parties had entered into missives of lease which contained the essential terms of a lease, but no reference to the estate regulations usually incorporated in leases granted by the proprietor, *held* that the tenant was not entitled to the benefit of provisions in the regulations as to the taking over of sheep stock by the landlord at the termination of the lease, where the tenant had in the negotiations subsequent to the missives repudiated the intention to be bound by them.

Custom—Proof of Custom—Whether Terms Added to Lease by Custom of District—Lease.

A tenant led evidence which proved that it was the invariable custom in a certain district to insert in leases of sheep farms one or other of several widely varying provisions for taking over sheep stock at valuation from an outgoing tenant. *Opinions* (*per* Lord Moncreiff and Lord Stormonth Darling, Ordinary) that this evidence was not relevant to establish any custom binding upon landlord who had let a sheep-farm to a tenant upon missives which made no reference to any such obligation.

Lease—Outgoing—Taking over Stock at Valuation—Regular Stock of Sheep—Excessive Stock.

Evidence upon which *held* (*diff.* from the Lord Ordinary) that a landlord had sufficiently established that the stock proposed to be handed over by an outgoing tenant was excessive.

In the first of these two conjoined actions Murdoch Gillian Maclaine of Lochbuie sued Peter Stewart, lately tenant of the farms of Rossal and Dernaculen on the estate of Lochbuie, in the island of Mull and county of Argyll, for £70, being the defender's half-year's rent from Martinmas 1896 to Whitsunday 1897, when his lease came to an end.

In the cross action Stewart called Lochbuie and the incoming tenants of Rossal and Dernaculen, and concluded, *inter alia*, (1) for declarator that the sheep-stock on Rossal and Dernaculen at Whitsunday 1897 was the regular stock of these farms in acordance with article 12 of the estate regulations on the estate of Lochbuie, which he maintained was incorporated in his lease, and did not exceed the average number kept during the five years of his lease; (2) for decree ordaining Lochbuie, in terms of the 12th article of the estate regulations, to take over the stock on these farms at valuation, under deduction of 800 and 400 sheep taken over or to be taken over at valuation by the incoming tenants, or otherwise under the same reduction to take over the stock at the prices fixed by valuation in the submissions between Stewart and the incoming tenants of Rossal and Dernaculen; and (3) for payment of the value of the sheep so fixed.

The conclusions of the summons were subsequently restricted to those against the defender Maclaine, the action as against the other defenders being withdrawn.

It was admitted that the half-year's rent sued for was due and unpaid.

The sheep upon the farms, over and above the 800 and 400 taken over by the incoming tenants, were sold by auction in terms of an agreement between the parties, and the question ultimately came to be, whether Stewart was entitled to payment of the difference between the price realised at the auction and the price which would have been obtained if these sheep had been taken over at valuation, less the amount of the half-year's rent. Lochbuie had bound the incoming tenants to take over only 800 and 400 sheep respectively.

Stewart averred—"(Cond. 4) . . . It is the universal custom on sheep farms in the district and an implied condition upon which all sheep farms are let, that the landlord or incoming tenant shall take over the usual and regular stock of sheep at the termination of an outgoing tenant's possession. This is a necessary custom in the interests of all parties alike."

Stewart pleaded—"(1) The defender Murdoch Gillian Maclaine being, as proprietor of the said farms, bound to take over the usual and regular sheep stock on the said farms from the pursuer at the termination of his lease, the pursuer is entitled to decree against him as concluded for with expenses. (2) In respect of his agreement with the incoming tenants limiting the number of the sheep stock that they were to be bound to take over, the said defender is bound to take over the balance between those numbers and the usual and regular stock on the farms."

Lochbuie denied that he was bound under the lease between him and Stewart to take over any sheep at all at valuation, or to take the incoming tenants bound to do so; and he also pleaded—"(4) The proper stock of the said farms having been duly taken over bythe incoming tenants, the said defender ought to be assoilzied from the whole conclusions of the summons so far as directed against him."

A proof before answer was allowed in