one rule of valuation where the teind was not severally drawn—viz., that all lands, whether grass-lands or corn-lands, should have their teinds, parsonage and vicarage, commuted to one-fifth of the constant rent.

Three valuable judgments, pronounced by the Commission of 1707, have been collected by Mr Buchanan in his recent work on Teinds, from the Registers of Decrees, which clearly establish this proposition. They occurred in the years 1710, 1723, and 1725 respectively. But it is sufficient to cite one for example, the case of *Tannadice*, in which it was expressly found "that when the teind, parsonage and vicarage, belonged to one titular, they were to be jointly valued, and that the fifth of the cumulo rent, both of laboured land and grass, was teind, parsonage and vicarage." But even where the parsonage and vicarage belong to different titulars, the position and liability of the heritor are not altered. Be the amount of the vicarage what it may, it is only the balance of the fifth part of the constant rent after deducting the vicarage, that is the parsonage teind. For, in the case of the *Duke of Douglas* v. *Officers of State*, reported by Elchies, under date July 16, 1740, this very point was decided, and though the reporter, Lord Elchies himself, was originally against the judgment, thinking that as neither parsonage nor vicarage, though separate benefices, had ever been drawn, "the values of both behoved to be proven separate from the stock," yet he says—"Upon considering the decreets-arbitral in 1629, I was more and more confirmed in the interlocutor, and that the several valuations spoken of where teinds were drawn, were meant a valuation of the teinds separate from the stock; but the separate valuation mentioned in the end of the Act 1633, where there are different titulars of the parsonage and vicarage, was meant only to distinguish the value of the parsonage from the vicarage, and that in all cases the heritor should pay a fifth part of the rent for teind, parsonage and vicarage."

This, then, is the rule of commutation introduced by the decreets-arbitral and the Act 1633, and ever since prevailing in the law and practice of Scotland. And whenever the Commissioners of Teinds have presented to them a sub-valuation "agreeable to the tenor" of the instructions of 1629, they are bound to apply this rule for the benefit of the heritor, whatever may be the effect of its application on the titular or titulars. Of course, no sub-valuation could well be "agreeable to the tenor" of the instructions, if, in the case of teind not drawn, it did not report the constant rent of the entire estate valued. But when it does so the application of the statutory rule is simple and absolute. There can, I think, be no doubt that the sub-valuation with which we are dealing in this case is "agreeable to the tenor" of the instructions under which it was made, and must receive effect as a valuation of the entire constant rent of the lands, one-fifth part of which is the limit of the heritor's liability for teind, both parsonage and vicarage. I am therefore for adhering to the Lord Ordinary's interlocutor.

The other judges concurred.

Agent for Reclaimer—James Macknight, W.S.

Agents for Respondent—Mackenzie & Kermack, W.S.

Friday, January 17.

SECOND DIVISION.

ISMEREDES *v.* COCHRANE & CO.

Sale—Delivery—Breach of Contract—Usage of Trade. Circumstances in which *held* that there had been no breach of contract in the times when certain goods were delivered or offered to be delivered, and that no usage of trade had been proved inconsistent with the manner in which the contract had been executed. Action for the price of goods delivered or offered to be delivered accordingly sustained.

This was an advocation from the Sheriff-court of Lanarkshire of two actions brought by Messrs J. I. Cochrane, & Co., merchants in Glasgow, against Antonio Ismeredes, commission merchant in Glasgow, concluding for certain sums alleged to be due by the latter under a certain contract of sale.

It appeared that on 7th February 1865 the defender entered into a contract with the pursuers, through their agent, Mr W. G. Miller, for the supply of a quantity of shawls of different specified colours, the quality to be conform to samples, and delivery to be in "about four months." Under this contract, the defender received from the pursuers various quantities of shawls prior to the month of April 1865; but on 11th April 1865 he wrote to the pursuers, complaining that, owing to the want of assortment in the colours, and the irregularity of the deliveries, his correspondents in Manchester threatened to cancel the contract with him, and stating that, if that were done, he (the defender) would be under the necessity of doing the same as regarded his contract with the pursuers. The pursuers, in reply, promised to execute the order with greater regularity in future, and deliveries of parcels of shawls continued to be made up to 10th May 1865. After that date, the defender refused to accept further deliveries, alleging that the contract had fallen by the failure of the defenders to execute it properly.

In these circumstances, the pursuers brought these actions against the defender for the price of the goods delivered, and also for the price of those of which delivery had been tendered and refused. After a proof as to the practice of trade in these matters, the Sheriff-substitute (Glassford Bell) pronounced an interlocutor finding for the pursuer in terms of the conclusions of the summons. His lordship added the following note, which more fully explains the circumstances of the case, and the details as they were disclosed in evidence.

"Although a voluminous and protracted proof has been led under the interlocutor of 25th October 1865, there is in reality nothing difficult or complicated in the questions raised in this action. The document No. 6 instructs that the defender gave the pursuers a very large order for lappet shawls on 7th February 1865, the only condition of the order being, that it was to be implemented in "about four months." The shawls were to be of power-loom manufacture, and the first thing the pursuers had to do, after receiving the order, was to purchase yarn and send it to the dyer, and then to get ready the necessary number of looms, amounting ultimately to sixty. It was thus impossible to begin to give delivery for a good many weeks; and the quantities deliverable would gradually increase as the looms came to be fully supplied with material. Strictly speaking, the pursuers were not

bound to do more than to have all the goods delivered in "about four months." They were nevertheless desirous, and had an interest to do so in reference to the terms of payment, to deliver the shawls in parcels from time to time, as they could be brought forward; and although the defender complained of the pursuers not doing this as fast as he wanted, he nevertheless took the goods as tendered down to the 12th May; after that, he maintained that he was not getting them equally assorted, or in sufficient quantities, and repudiated the bargain altogether. He had no sufficient ground, however, for such repudiation. He says that he had entered into a contract with a Manchester house to forward the shawls to them, and that they cancelled it; but he has failed to instruct what the precise terms of said contract were. It is possible he may have undertaken to give the shawls sooner than the pursuers' deliveries permitted, but the pursuers are not responsible for that, and neither the defender nor his Manchester friends seem to have stated any serious objections till the market for lappet shawls fell. The whole goods were actually delivered or tendered before the lapse of the four months, with the exception of two parcels of 262 and 368 respectively, the price of which was £517, 19s. 8d., and these two parcels were tendered exactly a fortnight after the expiry of the four months. Now, in the first place, the witness William Gemmell Miller, to whom the order was given as agent for the pursuers, has expressly deponed that he informed the defender that it would take four months and a half to implement a part of the order, and he therefore refused to receive it unless the words "about four months" were used. Then, in the next place, it is quite clear that this phrase gave a certain reasonable latitude to the pursuers over and above four months, and it is distinctly proved by a number of mercantile witnesses of the highest respectability, adduced on both sides, that in the circumstances the latitude would not in the trade be considered as abused, if it extended to not more than two or three weeks; and an equitable construction of the words would lead to the same conclusion, independent of any trade usage. The point, however, on which the defender seemed mainly to rely was the slowness of the deliveries and the absence of any attention to assortment of quantities and colours. The first answer to this is, that there is nothing in the contract tying down the pursuers to a particular mode of delivery, and it is settled law that custom of trade is powerless to overrule the precise terms of a written contract. (See Chitty on Contracts, p. 98; Addison on Contracts, vol. ii., p. 961; and Dickson on Evidence, vol. i., p. 171-5). The next answer is, that the deliveries actually given and tendered by the pursuers were such as custom of trade expressly sanctioned. The witness Mr James Melville Grant, now of Manchester, formerly of Glasgow, depones, "Looking at the order, No. 6 of process, I see nothing in it binding upon the manufacturers to deliver the goods in any particular or special way, either as to time or quantities, provided the whole are delivered within the period mentioned. Assuming the goods to have been delivered in the proportions mentioned in the paper No. 1. prefixed to the report of Commission, No. 18" (which was the mode in which they were delivered or tendered), "I should have been quite satisfied, and I consider that such deliveries and tenders would be a fair compliance with the contract, in accordance with the custom of trade." A number of other witnesses fully corroborate this evidence. Mr Walter Paterson, merchant, Glasgow, who has had thirty years' experience in the trade, depones, "When I want the goods to be delivered in large quantities, assorted colours, and regular intervals, I invariably stipulate for this in the contract. I do not think that, under the contract No. 6, the pursuers were bound to deliver in quantities half red and half blue; I think they were entitled to deliver in such quantities as to colour as they chose, provided the delivery, when completed, was half red and half blue. Looking to the accounts annexed to the summonses, I would not in my own practice have objected to them as not a fair fulfilment of the contract. I do not know of any practice of trade contrary to what I have stated." Mr James Connell, merchant, Glasgow; Mr James Alexander, commission-agent; Mr Walter Drew, manufacturer; Mr Thomas Brownlee, manufacturer; Mr John Macintosh, manufacturer; and Mr John M'Dougall, merchant, all depone to the same effect. The contrary evidence adduced by the defender is much feebler, and turns out in several instances to depend on the fact whether the goods were to be delivered bleached or unbleached; that is, in the grey state. If they are to be delivered to shippers by agents who have them already bleached, then it is usual to deliver them regularly packed and assorted. But if they are to be delivered in the grey state to agents who are to get them bleached, then it is the latter on whom the duty devolves of putting them up in assorted quantities. Now, the defender has expressly deponed, when examined as a witness *in causa*, "All the goods in the order libelled on were to be delivered to me in a grey; that is, in an unbleached state. I bleach the goods in Glasgow." Had they been assorted, therefore, before delivery, they would have been required to have been reassorted after bleaching. The defender was at first willing to pay for the goods of which he had taken delivery, under certain deductions and reservations, which the pursuers refused and were not bound to accede to, and latterly he declined to pay on any conditions, in respect of the loss he alleged he had sustained by the failure to deliver sooner. The pursuers, as has been seen, were not liable for any such loss had it existed, which, however, the defender has failed to prove. The only testimony on the subject is his own. He says he had to pay the Manchester merchant £41 odds for breach of contract; and that he estimates his loss of profit at £150. The Manchester merchant, however, being the witness Michael Adjouri, was not asked whether he had received any such sum as £41; and if he had he could only have a right to it in consequence of the defender having made a contract with him different from that which he had made with the pursuers, for the breach of which second contract the pursuers were in no way responsible. As to loss of profit, there is no particle of evidence regarding it except the defender's random statement. Had payments been made as they fell due, the defender would have been entitled to five per cent. discount; but as it is, the pursuers have a right to decree in terms of the conclusions of their respective summonses."

The Sheriff (ALISON) adhered on the same grounds.

The defender advocated.

D.-F. MONCREIFF and SHAND, for him, argued that the contract had been violated by the pursuers in three respects — (1) The different parcels of shawls had not been supplied within the four months

at regular intervals, according to the practice of trade under such contracts; (2) the parcels thus irregularly supplied had not been each of them assorted as regarded colours, according to the practice of the trade; and (3) the last supply had not been delivered, or delivery tendered, till some time after the expiry of the four months stipulated.

CLARK and THOMSON for the respondent.

At advising—

LORD JUSTICE-CLERK—The proceedings in this case originated in two actions, before the Sheriff of Lanark, for the price of goods partly delivered and partly tendered for delivery, but refused to be received by the defender. The defence stated was, that the goods were not furnished in terms of the order; that the defender rightly rejected the goods tendered but not received, because they were not tendered in terms of the contract, and, in reference to the price of the goods actually delivered, that the price was not payable, because damages for breach of contract were due to an equal or larger amount by reason of the breach of contract. The defence, in so far as relates to the goods actually received, was not supported in the pleadings before us. The defender expressed himself ready to pay for the goods received at the prices claimed, and did not insist in pleading damages against payment. The case, therefore, was confined to the justification of the refusal on the part of the defender to take delivery of the goods tendered but not received by him. We have duplicates of the order, which are substantially the same. The goods ordered are 4000 shawls. They are described by size and name. They are of different kinds. With respect to one description, it is said they are to be "half red half blue;" another as half red half blue; another that 640 are to be all red; 645 all blue; and of the only other description that they are to be half red half blue. The period of delivery is "about four months." There is on both columns a schedule for "penalty," but it is not filled in. The date of the order is the 7th February 1865. The defender had to procure yarn, and to adjust their looms to a considerable extent, which are moved by steam, in order to be in a condition to fulfil the order. The deliveries commenced on the 4th April. On the 5th and 10th of that month there were further deliveries made, and at that time, and in reference to these deliveries, the defender remonstrated against the mode in which the order was being fulfilled. The complaint is contained in a letter of the 11th April, and the answer is contained in a letter of the 15th, in answer to which our attention has been specially called, and very properly so. The deliveries were continued up to and including the 10th May. Delivery of further quantities was tendered on the 12th and 24th May, and the 7th and 22d June, and refused. The defender's case is that there was not a sufficiently full delivery made at regular intervals during the currency of the period fixed in the contract for the complete delivery, as was said to be a condition of the contract, read in accordance with the usage of trade. That the shawls were not, when delivered or tendered, assorted so as to contain an equal portion or nearly an equal portion of reds and blues; and that the delivery of the 22d June was tendered after the time fixed in the order. The proper assortment of the goods—that is, the supply of goods in quantities, so far as regards colour, corresponding, or nearly corresponding, to the numbers ordered, was said to be important, because otherwise they could not be forwarded to the Greek market, for which they were destined. It is proved that Mr Ismerides was not himself to export the shawls but had engaged to supply a quantity to a merchant in Manchester, who had given him an order for such shawls, the exact conditions of which I do not find in the proof. It must be taken as proved, so far as that may have bearing on the case, that the goods were known generally to be destined for the Greek market, but as to the precise requisites of that market, or the quantities which the Manchester correspondent of the defenders required in order to forward them, there is very little evidence. We can scarcely proceed upon the footing that there was undue delay in commencing the delivery, which was pressed in the inferior court, seeing that the two first parcels were received with objection—the case of undue delay in commencing to deliver—*i.e.*, undue delay as between the 7th February and 4th April, if it were necessary to be disposed of, is not made out. But the quantities delivered on the 4th, 5th, and 10th April were certainly not large, and they were as certainly not assorted by any thing like correspondence in the relative amount of furnishings of the same colour in each description furnished. One conspicuous example may be cited. Of one description of shawl there were in the supply of the 10th April, 4 red and 34 blue. In the former deliveries, the same disproportion in that particular description of shawl prevailed, for on the 4th April there was no red at all, while there were 14 blue; and on the 10th, the reds were 2, the blues 12; in the three deliveries the reds were 6, the blues 60. Now, such being the state of the fact, what was the subject-matter of complaint in the letter of the 11th? It is as follows—[*reads*]. Now, I think it clear that the complaint made in this letter related to the smallness of the deliveries, and not to the inequality of proportion between reds and blues. Where there was so manifest a case of want of assortment it seems to me deserving consideration that the disparity in the supplies as to colour, and a complaint of the non-fulfilment of contract, is not at all noticed. It is a circumstance at least to point to the absence of any such condition in the contract. The complaint as to quantities is met by explanations, and by a promise to make full deliveries for the future. There had been, it was said, a difficulty about the looms, which was no longer to occur, and so there was to be no further failure to make regular deliveries. The Dean, in his excellent argument to us, insisted that this was a substantial admission of a contract for regular and large deliveries, and consequently a confession of a failure to implement the contract, inconsistent with the case maintained subsequently that delivery at any time pending the period even of all the goods at once would suffice. Admitting the weight of this argument, I am not prepared to go so far as to hold the apologetic letter of the 15th as any substantial admission of *obligation*. It seems to me quite reconcilable with its being an expression of a desire to comply with the desire of the defender for fuller deliveries as wished, and an assurance as to the future proceeding from that desire, without fixing the parties to any construction of the contract, which should make this absolutely obligatory. Though the contract really did not bind the parties in that matter, a letter so framed might very well be written; and if so, it could scarcely fairly be read as imposing an interpretation upon the contract different from that which the contract would otherwise have. The question is, did the contract impose on the pursuers any

positive obligation to deliver the shawls at regular intervals, and properly assorted in each delivery, or not? The contract itself fixed a period for the delivery of the furnishings ordered. The period was "about four months." It gives the proportion of red and blue in the articles to be supplied, but it does not provide for any deliveries at intervals, or assortment in goods furnished at intermediate deliveries. It is silent on that point, and, read by itself, and without reference to anything extrinsic, the contract would be satisfied by delivery of the whole goods if delivered within the period, whatever that period may be found to be. The additional condition is sought to be made out by a proof of the usage of trade under such contracts. The proof has been received without objection, and as the result is, in my opinion, a failure on the part of the defenders, taking the evidence on both sides into consideration, to establish any clear positive consistent usage, it is unnecessary to inquire if the proof led in this case does or does not trench upon the doctrine as to written contracts not being liable to the adjection of separate conditions by parole. I am not prepared to subscribe to the view of the Sheriff that evidence of a proper usage of trade was irrelevant. Here it may be doubted if the proof led is that of usage of trade at all in the meaning of the order. It is rather opinions of traders, which is a different thing. The views of the defender's witnesses are rather statements of opinions than facts, and are very far from being consistent. One says—"I expect when I buy goods of the class mentioned in the order that they should be delivered in such assorted quantities and colours as should make a bale." The next witness says, "he would expect each delivery to comprise such quantity of colour and size as would make a bale, consisting of 150 to 200 dozens of each description." The next says that "150 dozens would be a proper delivery—600 dozens would make an ordinary bale." The next witness "would expect each delivery to consist of 250 to 300 dozen"; and the next, that he "expected that about 400 dozens, equally assorted, both in size and colour, would be delivered every week after the first delivery." This is not evidence of facts in the history of actual transactions, but conceptions or opinions of witnesses as to what they thought the import of the contract to be; and it is so loose that a Court would come to the most different conclusions according to their adoption of the views of one or the other witnesses. If a condition is to be imported from trade usage, the usage must be clear, uniform, and certain. It cannot be subject to such singular discrepances. Above all, if a bale is required, and a bale contains 500 dozen, it is not possible that 150 dozen can meet the legal requirement. The most important piece of evidence, as it occurs to me, in the case for the defender, is the statement in the examination of Mr M'Nish, one of the pursuers. Apart from the difficulty that this is evidence of opinion as to the nature of a contract, and, if read with the qualification given in the re-examination, amounts only to this, that the goods were intended to be delivered as produced—a fact which may very well consist with the intention of parties in the contract without involving obligation. One important fact proved with reference to this branch of the case is, that such conditions, if intended in such orders, are not unusually expressed. On this point, I hold the evidence of Mr Aitken, who then acted for the defender, very important. He says—"When I wish assorted deliveries, I always express it so in the order"—a view corroborated by James Alexander, who says, "I never had contracts for goods without having a regular stipulation, either verbal or written, regarding the periods of delivery, and the quantities and colours to be delivered at each instalment." If it is usual, or not unusual, to express such conditions when they are to form parts of contracts, it would be improper to admit of their being imported from views of parties as to the meaning of contracts in which the conditions are absent. It is also proved that a contract with regular periods of delivery, and fixing specific proportions of goods supplied at each delivery, is one which would be more onerous, and consequently requiring to be more highly paid for, than a contract with no such fettering conditions. On this point, I hold that the defender has not established his defence that regular deliveries in assorted quantities were required. There remains only to be considered the question as to whether the tender of the goods made on the 22d June was made timeously. The expression is "about four months." The 22d June was four months and fifteen days after the 7th February. As this expression "about" was not alleged to have any special meaning in trade, or said to have been used in any sense different from its ordinary acceptation, I should have been disposed to reject the parole evidence which has been led of the meaning to be attached to the expression on the subject as inadmissible. Evidence as to what the two parties who made the bargain intended, and evidence as to what witnesses would understand by the expression, to say the least of it, is of a very questionable nature where words are admitted, as I think, to have been used in their common acceptation. The proof of the circumstances under which the order was given and implemented is a different matter. The evidence as to the meaning of the expression when examined fails to fix any definite meaning, and certainly the sort of evidence adduced in this case would go strongly to confirm what I should conceive to be the sound rule, that the construction of expressions having no special signification—in which case witnesses are simply interpreters—is with the Court. Two witnesses for the defender affirm that where delivery is stipulated to be made in about four months, delivery must be made within the four months. Mr Paul Tanibaei, says—"I understand those words to mean all the deliveries are to be effected within four months, and not over that time." So Mr Michael Adjouri. Mr Scrini, a defender's witness, allows one week; Mr Hinshelwood, another, allows a fortnight; Mr Fletcher, a third, "ten days or a fortnight." *Per contra*, Mr Paterson, one of the witnesses for the pursuers, says—"I could not reject the goods if the balance of them was delivered from one to two months beyond the four." Mr Connel says, "the words give a latitude of four and a half months, or even more." Mr Macintosh says that "the order would be duly fulfilled if they were all delivered within five months." Exercising my own judgment in the construction of the term, as applied to the circumstances of the case as disclosed in evidence, I think that the delivery of the 22d June was not too late, but was within the latitude which must have been meant to be given by the words used, and so I cannot support the defender on this ground either; and, on the whole, my view is favourable to the pursuers. The result is an affirmance of the interlocutor, with a variation of the latter findings—especially the

finding which rejects the usage of trade as inadmissible in considering the question as to fulfilment of the order, and which apparently recognises the evidence adduced as to what is meant by the word "about" as a ground of judgment in the construction of the period of delivery.

The other Judges concurred.

The Court adhered to the judgments of the Sheriffs, holding that the contract, read by itself, had not been contravened by the pursuers; that the usage of trade relied on had not been proved to be either uniform or positive; and, as regards the last delivery, which took place fourteen days beyond the four months, that the same was fairly within the contract, in respect that fourteen days was not an unreasonable margin in a contract where "about" four months was the term specified. Their Lordships, however, varied the judgment of the Court below so as to allow to the defender 5 per cent. discount on the sums sued for as stipulated in the contract, he paying interest on the same sums from the dates when the same respectively became due.

Agent for Advocator—H. Buchan, S.S.C.

Agents for Respondents—Macnaughton & Finlay, W.S.

Saturday, January 18.

FOWLIE *v.* M'LEAN.

Lease—Furnished Lodgings—Proof—Parole Evidence—Writ or Oath—Breach of Contract. Held that a contract to take a lease of furnished lodgings for sixteen months could only be proved by writ or oath, and that such a contract could not be converted into a contract for a year, so as to get the benefit of parole evidence.

In this action the pursuer concluded for the sum of £160 as the rent of rooms in his house taken by the defender, or otherwise for that sum in name of damages for breach of contract; and also for £50 in name of damages, and as reparation for injury done by the defender to the pursuer's furniture, carpets, bedding, and other property. The leading averments are, that the pursuer, who lets his house as lodgings, in January 1867 received a lady into the house, and that, in the same month, the pursuer also took lodgings in the house at the rate of £55 per annum, that the defender so misconducted himself that the lady was driven from the house, and that she left on or about 18th January 1867, being three months before her contract for the rooms terminated.

Then follow the statements:—

"On Mrs M'Leod leaving, the pursuer and his wife expressed their dissatisfaction at defender's conduct, of the grossness of which they were then made aware, and the loss his bad behaviour had caused to them. By way of partial reparation he agreed to take the rooms which Mrs M'Leod had occupied, and those he then occupied, from that date to Whitsunday 1868, and pay for the whole rooms then taken and previously occupied by him at the rate of £10 a month, which was, according to custom and mutual understanding, payable in advance. The pursuer accepted his said offer. The defender accordingly continued in the pursuer's house on these terms till the 2d day of April 1867, when he left without any warning, and now declines to pay for the rooms, or admit his liability for the rent thereof, denying that he had entered into any contract whatever with the pursuer. The defender has thus broken his contract, to the loss, injury, and damage of the pursuer. The rent of the said rooms due by the defender to the pursuer from 18th January 1867 to Whitsunday 1868 amounts to £160, and is payable in advance, or at least quarterly in advance."

It is also said that the defender injured the pursuer's furniture. The defender denied the contract, and maintained that he was only liable for a week's rent from the time he left.

The following issues were proposed:—

"Whether, in or about January 1867, the defender entered into a contract of lease of rooms in the pursuer's house from that time till Whitsunday 1868; and whether said contract was acted on; and whether, in respect of said contract, the defender is resting-owing the pursuer the sum of £100 sterling, or any and what part thereof?

Or otherwise,

"Whether, in or about January 1867, the defender entered into a contract of lease of rooms in the pursuer's house from that time till Whitsunday 1868; and whether said contract was acted on; and whether the defender broke his said contract of lease, to the loss, injury, and damage of the pursuer?

Damages laid at £160.

"Whether, during January, February, and March of the year 1867, the defender destroyed the pursuer's furniture, carpets, and bedding, to his loss, injury, and damage?

Damages laid at £50.

The Lord Ordinary reported the issues, and added the following note:—

"The Lord Ordinary reports with reluctance the issues in this case, which present features of an unpleasant character; but, in the circumstances, he sees no other course which would forward the cause towards final judgment.

"In some of its aspects the facts in dispute might possibly and appropriately be ascertained otherwise than by jury trial under issues, but in so far as respects the conclusions for damages, that procedure appears to be the most fitting; and even as repects the character of the lease—which, if truly entered into for a period of more than a year, could not competently be proved by parole—the question must, as the Lord Ordinary thinks, be left over to arise and to be determined in the course of the trial, or by such proof as may be allowed."

Campbell Smith and M'Lennan for pursuer.

Watson and Balfour for defender.

At advising—

Lord Justice-Clerk—There are three issues proposed to us as raised under the record in this case. As to the third issue we have already intimated our views; it will, however, fall to be altered in expression so as to quadrate better with the record. As to the two first issues, they propose to put to the jury whether a contract was entered into whereby the defender engaged to take certain furnished rooms in the pursuer's house, from January 1867 to Whitsunday 1868, and is indebted in the amount of alleged rent, or in damages for non-implement of the contract. The counsel for the pursuer very candidly and properly admitted that the contract which he sought to establish was one which was not in writing, and that he proposed to prove it by parole alone; and we must deal with the case upon that footing. There