meaning of the Act 1902. The statute itself affords us no means of ascertaining what is meant by the expression "first motive power." Evidence upon the point has been adduced in several of the cases that have come before us (e.g., Etna Iron and Steel Company v. Assessor for Lanarkshire, 1919 S.C. 474; Guardbridge Paper Company v. Assessor for Fife, 1921 S.C. 634), but I do not recollect any explanation being given that appeared to me satisfactory. The view taken by your Lordship has the advantage that it is susceptible of easy practical application, but it appears to me that it may lead to certain anomalies as between different works engaged in the same trade. For example, if the essential motive power in two works connected with the same industry is electricity, the rateable machinery will be different according as a manufacturer produces his own supply of electric current or purchases from a power station. I have also difficulty in seeing that electricity is altered from first to second motive power where it is passed through a rotary converter with the result that a different type of electric current is produced.

The Court were of opinion that the determination of the Valuation Committee was right.

Counsel for the Steel Companies — Solicitor-General (Murray, K.C.)—Gentles, K.C.—Keith. Agents—J. W. & J. Mackenzie, W.S.

Counsel for the Assessor—Watson, K.C.
—Cooper. Agents—Ross, Smith, & Dykes,
S.S.C.

COURT OF SESSION.

Friday, March 17.

FIRST DIVISION.

A lease under which the tenant

[Lord Sands, Ordinary.

PENMAN v. MACKAY.

Lease—Contravention—Tenant's Option to Purchase during Continuance of Lease —Exercise of Option by Tenant while in Breach of Conditions of Lease—Whether Option Validly Exercised.

acquired an option to purchase the premises during its continuance provided that any breach of its conditions should entitle the proprietrix in her option to put an end to it. The lease prohibited assignation without the written consent of the proprietrix, and required the tenant to continue carrying on his business in the premises. The tenant having transferred his business to a limited company the proprietrix notified the tenant of the breach, and without taking any immediate steps to terminate the lease entered into negotiations with him as to the terms on which she would accept the assignees as tenants. While the negotiations were

pending the tenant gave notice of his

intention to exercise the option to purchase. *Held (rev.* judgment of Lord Sands, Ordinary) that as the pursuer had disabled himself from implementing the conditions of the lease by not carrying on the business, and also by having transferred it to a limited liability company, he was not entitled to take advantage of that situation by exercising the option to buy, and that accordingly the notice was not a valid exercise of the option to purchase.

Andrew Clark Penman, motor carriage builder, Ayr and Dumfries, pursuer, brought an action against Mrs Helen Mossman or Mackay, Ayr, defender, concluding for declarator "that the pursuer has validly exercised an option competent to him under and in terms of the lease entered into between the defender... and the pursuer... to purchase from the defender as at the term of Whitsunday 1922 a property situated in Ayr... of which the subjects let by the said lease situated at 15 Beresford Terrace, Ayr, form a part, all on the terms and conditions set forth in the said lease."

The parties averred, inter alia—"(Cond. By lease dated 20th and 25th February 1913, entered into between the defender with consent of her husband on the one part and the pursuer on the other part, the defender let to the pursuer the said sub-jects situated at 15 Beresford Terrace, Ayr, for the space of ten years from Whitsunday 1913 at the rent of £120 per annum. The said lease excludes sub-tenants and assignees, legal or conventional, except with the written consent of the proprietrix. It also provides that the pursuer shall continue to carry on his business as motor agent and repairer, &c., in the premises. It further provides that if at any time during the currency of the lease the pursuer shall contravene any of the prohibitions or conditions of the lease the defender 'may in her option put an end to this lease.' further provides by clause 8 thereof as follows:—'In the event of the proprietrix during the continuance of this lease desiring to sell the property of which the subjects hereby let forms. jects hereby let form a part, consisting of front building of two storeys and attics, garage, offices, and workshop behind and garden attached, she shall first offer the same to the tenant at the price of £4500 sterling, and failing his acceptance of her offer she shall be entitled to dispose of the property to any other party, subject always to the rights of tenancy under this lease. Should the property not be sold as above, the tenant shall during the continuance of this lease have the option of purchasing same at the said price of £4500 on giving the proprietrix six months' notice before a term of Whitsunday of his intention so to do.' (Ans. 2) Admitted. The lease is referred to for its terms. The said lease provides in article 2 thereof—'The tenant shall not during the currency of this lease leave the said premises or any part thereof vacant, and shall continue to carry on his business as motor agent and repairer, &c., therein'; and in article 3 thereof — 'If at any time

during the currency of this lease the tenant shall contravene any of the prohibitions or conditions hereinbefore or after written . . . then and on the occurrence of any of these events the proprietrix shall be entitled not only to recover from the tenant all loss and damage she may thereby sustain, but also and in addition thereto may in her option put an end to the lease.' The lease further provides by article 9 thereof as follows: — The tenant binds himself and his foresaids to remove from the premises hereby let at the expiry or earlier termination of this lease without warning or process of removing . . . but without prejudice to the proprietrix's right to take legal proceedings for their removal. (Cond. 3) In 1920 the pursuer made an arrangement with his brother Maxwell Penman, who carried on business as a motor car manufacturer at Castle-Douglas and Dalbeattie, for the formation of a private limited liability company to take over the assets and rights of the businesses of the pursuer and his said brother. The said company was incorporated on 18th June 1920 under the name of A. C. Penman Limited, and the business carried on by the pursuer at 15 Beresford Terrace, Ayr, was thereupon transferred to it. . . . Quoad ultra the defender's statements in so far as not coinciding herewith are denied. (Ans. 3) Admitted. . . . The said transfer operated as an assignation of the said lease, and the rights of the pursuer thereunder did accordingly thereupon cease and determine. (Cond. 4) No formal intimation of the transfer of the said business was sent to the defender, but she was well aware of it and took no objection until December 1920. The defender carries on a business in premises adjoining those let to the pursuer, and her household have access through the garage to a garden in the rear of the premises. The rent due at Martinof the premises. The rent due at Martin-mas 1920 was paid by the limited company by cheque and was accepted without question. Business advertisements by the company appeared in the local newspapers subsequent to June 1920. With reference to the defender's explanations in answer it is admitted that there is a separate access to the said garden, and that the said cheque was delivered to the defender. Quoad ultra the defender's explanations so far as not coinciding herewith are denied. (Ans. 4) Admitted that no intimation of the transfer of the said business was sent to the defender, that defender carries on a business in premises adjoining those let to pursuer, that a cheque signed 'p. A. C. Penman, Ltd., John S. Penman, was received by defender in payment of the Martinmas 1920 rent, and that in December 1920 she took objection to the presence of the said company on the premises. Quoad ultra denied. Explained that the usual access from the house to the said garden is separate from that referred to in the condescendence, that the said cheque was delivered to her at her house accompanied by an invoice in name of pursuer only, and that the presence of the word 'Ltd.' on said cheque was unnoticed by the defender, and that not until after the receipt of a letter by defender's husband,

dated 10th December 1920, and signed 'pro A. C. Penman, Ltd., James B. Penman, was the said transfer in any way brought to the notice of the defender. Not known when or what business advertisements by the company appeared in the local newspapers subsequent to June 1920. (Cond. 5) On or about 13th December 1920 the defender's husband, on behalf of the defender, had a meeting with the pursuer and stated that the pursuer had contravened the lease by turning the business into a limited liability company. He said that he was not making any difficulties about the contravention but asked for an increase in the rent. The pursuer promised to consider the matter, and after so doing wrote to Mr Mackay on 23rd December in terms of a copy letter, which will be produced, stating that as it would take some time to make arrangements he thought it would be better for him to intimate formally his intention to purchase the county garage property in terms of the lease. On the same day the pursuer's solicitors on his behalf formally intimated to the defender that the pursuer intended to purchase the subjects at the term of Whitsunday 1922 in exercise of the option conferred upon the pursuer by the eighth paragraph of the lease. A copy of the said intimation will be produced. The defender's statements in answer, so far as not coinciding herewith, are denied. In particular, it is denied that at the meeting of 13th December 1920 the defender's husband stated that he claimed and reserved defender's right to exercise her option to put an end to the lease. (Ans. 5) The meeting of 13th December 1920 is admitted, and that defender's husband at said meeting pointed out to pursuer that the limited company had no right to occupy the premises and that pursuer had contravened the lease. He claimed and reserved the defender's right to exercise her option to put an end thereto, failing an arrange-ment between the parties which he then proposed. The defender admits the receipt of the said letter and the intimation of 23rd December 1920, which are referred to for their terms. Quoad ultra denied. (Cond. 6) On 27th December 1920 the defender's agents replied to the said intimation alleging that the pursuer had contravened the conditions of the lease by disposing of his business to a limited company, and that the lease itself was broken in 1914, and intimating that the defender's rights 'in consequence thereof are reserved.' There was in fact no breach of the lease in 1914, but in that year a verbal arrangement was made between the parties whereby the pursuer obtained possession of an additional part of the property upon payment of an addition of £20 yearly to the Certain alterations were made in rent. order to give the pursuer occupation of the said additional premises, and it was further understood between the parties that if ever the pursuer exercised the option competent to him under the lease he would pay the cost of the said alterations in addition to the purchase price of £4500 agreed upon in the lease. The pursuer's option as contained in the lease remained and remains unaffected, but he has all along been and is

willing to carry out the understanding above mentioned. (Ans. 6) The letter of 27th December 1920 is referred to for its The verbal arrangement referred tois admitted. Quoad ultra denied. (Cond. 7) Following on the foresaid correspondence further negotiations took place between the parties, but they came to nothing. On 1st March 1921 the defender's agents sent to the limited company a formal intimation that failing their removal from the premises belonging to the defender and 'presently illegally occupied by you at 15 Beresford Terrace, Ayr, within two weeks from this date, an action of ejection will be raised against you.' On or about 5th March 1921 the pursuer had a meeting with the defender's husband, when the latter stated that as the lease had been broken he claimed a payment of £500 in cash, in consideration of which he said the pursuer would be permitted to sit on at the current rent and complete in May 1923 the option which he had exercised. With reference to the answer, the letter of 1st March 1921 is referred to for its terms. Quoad ultra no admission is made. (Ans. 7) Admitted that negotiations took place as alleged. The correspondence is referred to. On said 1st March 1921 the defender's husband on her behalf wrote to pursuer stating that as the latter did not think it worth while coming to an arrangement he was to act on defender's legal rights. This was an intimation of an intention to exercise the option, and was an exercise of defender's option to terminate the lease already claimed, subject to a settlement between the parties. The intimation of an intention to eject is admitted, and referred to for its terms. Admitted that at the to for its terms. Admitted that at the meeting of 5th March 1921, terms on which the defender might consent to the lease being acted on, and to allow pursuer to sit on and exercise his option, were discussed. No arrangement was come to. Quoad (Cond. 10) The defender ultra denied. . . . maintains that the pursuer has not validly exercised his said option to purchase said premises, and the pursuer believes and avers that she intends, if successful in the said action of ejection, to endeavour to dispossess the pursuer of the said subjects. The pursuer has validly exercised the said option and is entitled to continue in possession of the premises as tenant until the term of purchase. . . (Ans. 10) Admitted that defender maintains that the pursuer has not validly exercised his option to purchase said premises, and intends to dispossess the pursuer of the said subjects. Quoad ultra Explained that in any event in denied. view of the option in favour of the defender, which she has exercised and exercises, to put an end to the lease in terms of article 3 thereof, the pursuer is precluded from carrying out his intention of which he has given notice to purchase the subjects at Whitsunday 1922, and that the pursuer has amitted his right to exercise the option under the said lease.

The pursuer pleaded—"1. The pursuer having validly exercised the option competent to him in terms of the said lease, decree of declarator should be granted as

concluded for. 2. The defences being irrelevant, decree should be granted de plano.

The defender pleaded, inter alia—"1. The averments of the pursuer being irrelevant and insufficient to support the conclusions of the summons, the action should be dismissed. . . . 4. The said contract being terminable at the instance of the defender, and she having duly exercised her right to terminate the same, and the whole rights and obligations in favour of the pursuer under said lease being concluded, the defender should be assoilzied from the conclusions of the summons. 5. Separatim-The pursuer having incurred an irritancy of the said lease prior to giving notice on 23rd December 1920 of an intention to purchase the subjects, and the defender having duly exercised her option to terminate the tenancy, the said notice is inept and the defender should be assoilzied. 6. Separatim—The pursuer having contravened the terms of the said lease, and being in consequence thereof bound to remove from the said premises prior to the expiration of the six months' notice of an intention to purchase the property, never acquired or could acquire any right to purchase the same under the terms of the said lease, and the defender should be assoilzied. 8. The defender having founded upon her rights in respect of the said breach of contract, both prior to and at the time of said notice of 23rd December 1920, the said rights are in no way affected by the said notice. 9. The pursuer having incurred a conventional irritancy of the said lease, is not entitled to purge the same. 10. The said lease having been actually or in effect assigned to the said company as at the transfer of the said business, the contract between pursuer and defender therein contained did thereupon ipso facto come to an end.

On 26th January 1922 the Lord Ordinary

(SANDS) granted decree as craved.

Opinion. — "The pursuer became the tenant of certain premises in Ayr under a lease granted by the defender in 1913 for ten years to Whitsunday 1923. The lease contained a stipulation that if the defender should at any time during its currency desire to sell the premises she should be bound to offer them to the pursuer, who had a right of pre-emption, at a price of £4500. On the other hand if the pursuer wished at any time during the currency of the lease to buy the premises, he might do so at the said price on giving notice to the defender six months before a term of Whit-The lease contained a stipulation sunday. prohibiting the pursuer from assigning it. Such attempted assignation, however, did not ipso faoto bring the lease to an end, as it was in the defender's option whether she should irritate it.

"In 1920 the pursuer entered into an agreement with his brother for an amalgamation of businesses and the carrying on of this amalgamated business as a limited company. This company entered into possession of the premises here in question, and the defender maintains that this was in effect an assignation of the lease. In December 1920 the defender was aware of

what had been done. She did not forthwith exercise the right to irritate the lease. But she pointed out to the pursuer that the assignation was a contravention, and suggested an arrangement for an increased rent. Upon 23rd December 1920 the pur-suer gave formal notice in terms of the lease of his exercise of his right to purchase the premises at Whitsunday 1922. defender maintains that this notice was ineffectual because under the lease the option to purchase was given to the tenant, and the pursuer having done what was equivalent to an alienation from himself of the lease was no longer tenant. I do not think that this contention is sound. The defender had not recognised the assignation, and unless it was so recognised it was null and the pursuer was still tenant. The defender puts the matter upon bar. The pursuer, she says, is barred from maintaining that he had the rights of a tenant. There might be something in the contention if the pursuer, having assigned the lease, had taken up the position that he was entitled to do so-that the assignees were now the tenants. But the pursuer did not take up this

position. "The pursuer was still tenant under the The notice was in conformity with the lease, and accordingly the pursuer became the purchaser of the subjects as at Whitsunday 1922. The defender, however, maintains that the pursuer's right as pur-chaser was forfeited on the irritancy of the lease of which the defender gave notice upon 1st March 1921. The irritancy of a contract, however, operates from its date and does not affect rights which have already been completed under it at a prior date. The defender appeals to the well-recognised principle of law that a party who is in failure in the discharge of his obligations under a contract cannot enforce the the terms of that contract against the other party. But this rule does not imply that a party who at some stage has broken some stipulation of a contract has thereby forfeited all his rights under or derived from the contract. The measure of the rule I take to be that the party who is in breach and persisting in the breach cannot insist on fulfilment by the other party. That, however, does not seem to be the situation. In the view that it was effectually irritated the contract of tenancy came to an end upon 1st March 1921, and in that view I do not see how it can be maintained that the pursuer as being in refusal to fulfil his part of the contract is barred from insisting in rights which were completed during its subsistence. On the other hand, if the contract of tenancy be not regarded as at an end the pursuer now offers to fulfil it according to its terms.

"The infringement in respect of which the defender claimed right to irritate the lease was committed before the notice of purchase was given. But I do not think that this affects the question. It seems to me that the case would have been on the same footing if the infringement had taken place after the notice but before the term of entry under the purchase, and the defender.

der had then irritated the lease. The defender must make good that it was a condition-precedent of the completion of the purchase that the lease should not be irritated before the term of entry on sale. In judging whether it can be so held I think regard must be had to the consideration of how far the option of purchase was inter-woven with the lease. That there was a certain relation between the two there is no doubt. The option of purchase was given to the tenant under the lease, and it was to be exercised during the subsistence of the lease. But on the other hand it was not an ancillary obligation, but was of a separate and independent character. I was referred to the case of Rafferty v. Schofield, 1897, L.R., 1 Ch. 937, which very much resembles the present. There, as here, there was a covenant of tenancy, an irritancy, and an option to purchase on notice. The tenant had become exposed to the risk of irritancy when his notice to purchase was given, but the irritancy was not declared until after the notice had been given. It was held that, as there was no condition-precedent to the exercise of the option of purchase that the defendant should not have committed any breach of the conditions of tenancy, the option to purchase was well exercised and a binding contract thereby made for the sale and purchase of the property, and that the termination of the leasing part of the agreement by the notice given to the defendant for breach of its conditions did not destroy or affect the contract of sale created by the exercise of the option to purchase.

"There has been no renunciation of pro-

"There has been no renunciation of probation, but both parties invited me to decide in their favour on their pleadings. For the reason I have indicated I am of opinion that the pursuer is entitled to decree as concluded for with expenses."

The defender reclaimed, and argued-The option to purchase had not been validly exercised. (1) The pursuer had not at the time the status of tenant, and had no right to exercise the option. Under the assignation the assignees were tenants under the resolutive condition of the proprietrix consenting, while the only right which the pursuer had in the tenancy was subject to the suspensive condition of the proprietrix refusing the assignees without irritating the lease. Neither of these conditions had been purified. The proprietrix had not waived her right to terminate the lease by entering into negotiations upon the basis of a conditional recognition of the assignees, and when she did exercise the irritancy it operated retro to the date of the infringement-Dobie v. Marquis of Lothian, 1864, 2 Macph. 788 (vide opinion of Consulted Judges and opinions of Lord President and Lord Deas); Rankine on Leases, pp. 697, 698; Bidoulac v. Sinclair's Trustee, 1889, 17 R. 144, 27 S. L. R. 93. By failing to carry on his business in the premises the pursuer had ceased to be tenant. He had incurred a conventional irritancy which was unpurgeable and operated ipso facto. (2) Esto that notice to purchase had been given, it was not effectual. The meaning of article 8 of

the lease was that the acquisition by purchase must take place during the continu-ance of the lease, whereas the lease had been terminated by the defender before the acquisition under the notice could take place. (3) The pursuer could not insist on the defender performing the contract while the defender performing the contract while he himself was in breach of an important part of it—Turnbull v. M·Lean & Company, 1874, 1 R. 730, 11 S.L.R. 320; Dingwall v. Burnett, 1912 S.C. 1097, 49 S.L.R. 882; Ran-kine on Leases, p. 327. The case of Rafferty v. Schoffeld, 1897, 1 Ch. 937, which the Lord Ordinary had followed, was inapplicable. There the infringement was of a simple building condition, and the irritancy would have had a penal effect. The only bearing of that decision on the present case was that the exercise of the option was intimated before the landlord terminated the lease. Mere precedence in time could not, however, be decisive. Further, in that case the lease and the option to purchase had been treated as separate contracts, whereas the Scotch rule was to treat all the stipulations in the lease as one contract.

Argued for pursuer and respondent—(1) The pursuer was tenant when the notice to purchase was given. He and not the assignee was the person bound by the lease, and he remained so until the landlord accepted the assignee or terminated the lease. Dobie v. Marquis of Lothian only decided that the consent to the assignee operated retro. There was no authority for the view that the irritancy did so. (2) The defender's contention that the option was not exercised during the continuance of the lease meant that an irritancy incurred after the exercise of the option would enable the landlord to cut down the purchase. The correct interpretation of article 8 was that the notice concluded the agreement of sale, the date being that of the notice. The option to purchase had therefore been validly exercised by the pursuer as tenant during the currency of the lease and could not be cut down by the proprietor subsequently taking advantage of the irritancy. There was a concluded agreement from which neither party could withdraw. The which neither party come with a contention that the irritancy operated ipso contention that the irritancy operated ipso authority. The facto was not founded on authority. question was one of construction—Gloag on Contract, p. 783. There was nothing in the lease from which such a result could be implied, and if the parties had intended the irritancy so to operate they could easily have said so. In Bidoulac v. Sinclair's have said so. Trustee the agreement was essentially different. (3) The pursuer though himself in breach of the contract, was entitled to found on it so long as the defender in knowledge of the facts delayed to take advantage of the breach—Bell's Principles, sections 70, 71. If one party did not take advantage of the other's breach, the contract still subsisted and either party might found on it. Here the defender had entered into negotiations in the knowledge that the pursuer might exercise the option. There were really two contracts here without any natural or special connection. If the irritancy of the lease operated retro that could not affect

the contract of sale—Rafferty v. Schofield, 1897, 1 Ch. 937; Woodall v. Clifton, 1905, 2 Ch. 257, per Romer, L.J., at page 279. (4) In any event the irritancy here was of a penal nature, the effect of which was always in the control of the Court, which was slow to enforce an irritancy which would cause hardship to a party who was prepared to carry out the substantial part of the contract—Forsyth and Johnston v. Kennedy, 1708, M. 7255; Hannan v. Henderson, 1879, 7 R. 380, 17 S.L.R. 236; Cassels v. Lamb, 1885, 12 R. 722, 22 S.L.R. 477.

LORD PRESIDENT—The whole question in this case is this—Was the option to purchase which was given to the tenant under the lease effectually exercised by the pursuer by the notice of 23rd December 1920? In the month of June previously the pursuer had sold the business which he carried on in the premises let to him to a limited liability company. Among the assets of that business was the lease itself. The lease both prohibited assignation, except with the written consent of the proprietrix (the defender), and required the pursuer to carry on the business of which he was owner at the commencement of the lease in the premises let. As a result of the transaction with the limited liability company the pursuer thus incurred a double contravention of his lease, entitling the defender under clause 3 to bring it to an end and to sue for damages.

The pursuer avers in condescendence 5 that when this came to the defender's notice in December she pointed out to the pursuer that he had contravened the lease, and intimated that she was willing to make no difficulty on that head but demanded an increased rent. I cannot read that demand otherwise than as the counterpart of the defender's abstention from exercising her right to bring the lease to an end. The pursuer, who as appears from the letters of 10th and 23rd December was acting with the full authority of the limited liability company, expressed his willingness to negotiate new terms with the defender, but immediately thereafter he gave notice of his exercise of the option to purchase. The formal notice was in his own name, and apparently proceeded on the view that the limited liability company would not be accepted as tenant in his place. In answer the defender reminded the pursuer that by the disposal of his business he had incurred a contravention of the lease, but she did not actually bring the lease to an end or take steps for that purpose. It is, however, in my opinion, clear that her right to do so was in reserve. It was only because of it that she was in a position to demand an increase of rent, and she certainly had not passed from her right. The pursuer maintains that his averments in condescendence 5 mean that the defender had limited her objection to accepting the limited liability company as tenant, and had waived or was not asserting her right to bring the lease to an end. It is, in my judgment, impossible so to read these averments. The contravention complained of is described as consisting in "turning the busi-

ness into a limited liability company." This unequivocally covers both limbs of the double contravention which had been committed, and-whether the limited liability company was to be accepted as the tenant or not - the pursuer had disabled himself from implementing the condition of the lease by which he was required to carry on in the premises let the business which he had disposed of to the company. Therefore when the pursuer agreed to negotiate, he did so on the footing that he was admittedly in contravention of the lease, and that the defender was willing not to proceed immediately to her rights on the faith of his professed willingness to adjust new terms with her. The parties, in short, were agreed to remit the question of the future of the tenancy to negotiation instead of at once submitting it to termination in accordance with the contractual rights of parties.

Now if in accordance with that understanding the defender refrained from immediately using her right to bring the lease to an end, the pursuer (who had broken it) was not entitled to take advantage of the situation by exercising the option to buy. It is clear that if the defender had stood on her legal rights and had formally intimated that she brought the lease to an end, or that she was about to institute proceedings to recover possession, it would have been too late for the tenant to insist on exercising an option given him under the very contract which he had repudiated. It is, I think, equally clear that he is barred from taking advantage of the defender's post-ponement of the crucial steps pending perotiations about new terms. The point negotiations about new terms. is sufficiently, although not perhaps artistically raised in the eighth plea stated for the defender. I think therefore that the interlocutor reclaimed against ought to be recalled, and that the defender's first plea-inlaw should be sustained, the action being dismissed.

LORD MACKENZIE—I arrive at the same conclusion as your Lordship. It was admitted in argument that at the date when the tenant professed to exercise the option given him under article 8 of the lease he was in breach of his contract, more particularly in breach of the provisions of article 2, by not carrying on the business. He was also in breach of his contract, in my opinion, by having transferred the business to the limited liability company. Either of these breaches would have entitled the landlord to put an end to the lease under the provisions of article 3.

The question we have to consider and determine is whether the tenant being in breach of his side of the contract can exercise the option provided to him by article 8 during the period when the landlord is, with his consent, considering whether the contract is to be terminated or not. I think that a person so in breach cannot exercise the option. The pursuer had by his own action put himself into such a position that he had stripped himself of his title to give a clean notice to the landlord under article 8. It could only be a notice subject to more than one condition. I think that the case

may be decided with reference to the wellestablished doctrine of our law, which is an equitable doctrine, that if a party to a contract seeks to plead a clause in his favour, he cannot do that when he himself is in breach of a material stipulation in the contract. That was just the position in which Mr Penman was when he instructed his agent on 23rd December 1920 to write the letter giving notice that he intended to purchase. That, in my opinion, is sufficient to determine the case adversely to the pursuer.

LORD SKERRINGTON—I have come to the conclusion that this case is really a simple one, though it assumed an appearance of complexity owing to the form in which it was raised and also to the number of questions which, though I now regard them as irrelevant, were quite properly discussed on

both sides of the bar.

The question which we have to decide is whether the formal notice of 23rd December 1920, given by the pursuer's solicitors to the defender, was a valid exercise of the option to purchase conferred upon the tenant by article 8 of the lease. If the option was validly exercised, its consequences to the proprietrix were very serious, because it disabled her from selling the property to any other person, and compelled her to retain it for seventeen months in order that she might be in a position to convey it to the pursuer at the term of Whitsunday 1922. I emphasise this point because it indicates the reason why I think that the option was not effectually exercised by the The tenant had no notice in question. right, in my judgment, to exercise the option in such a way as to subject the proprietrix to a conditional contract for the sale of the property. He had, however, by his conduct disabled himself from purchasing it except conditionally. Having assigned the lease to a limited company which he had placed in possession of the premises, his title to exercise the option would fall if the proprietrix should elect to accept the company as her tenant. On the other hand, if the proprietrix should elect not to accept the company as her tenant, then on the most favourable view for the pursuer he would not be entitled to avail himself of the option, unless and until he had shown that he was willing and able to perform his part of the contract of lease by occupying the premises for the purposes of his business and by ejecting the company to which he had illegally given possession. In either event the option was not well exercised by the notice of 23rd December 1920.

Lord Cullen—As I construe article 8 of the lease, the exercise of the option involved the giving of an unqualified notice capable of making a depræsenti contract of purchase and sale. Now the notice of 23rd December 1920, although in its terms absolute, was not so in its operation and effect under the circumstances which attended it. The pursuer had assigned the lease to the limited liability company, and according to the law as laid down in the case of Dobie v. Marquis of Lothian, (1864) 2 Macph. 788, it was a valid

assignation as between him and the company. The assignation had been in no way withdrawn, but was under consideration of the landlord. In these circumstances it seems to me clear that the pursuer was not in a position to give anything but a hypothetical or contingent notice intended to meet a case which might never happen, viz., the case of the assignees being finally refused by the landlord. Accordingly the notice was not a good notice under article 8, and I think the pursuer's action fails.

The Court recalled the interlocutor reclaimed against, sustained the first plea-inlaw for the defender, and dismissed the action.

Counsel for the Pursuer and Respondent—Brown, K.C.—Graham Robertson. Agents—J. W. & J. Mackenzie, W.S.

Counsel for the Defenders and Reclaimers—Fleming, K.C.—Lillie. Agents—Dalgleish, Dobbie, & Company, S.S.C.

Saturday, February 25.

FIRST DIVISION.

CALEDONIAN RAILWAY COMPANY v. CORPORATION OF GREENOCK.
GLASGOW AND SOUTH-WESTERN RAILWAY COMPANY v.
CORPORATION OF GREENOCK.
(Reported ante, 1917 S.C. (H.L.) 56, 54 S.L.R. 600.)

Expenses — Taxation — Fees to Counsel in Outer and Inner House—Separate Cases Taken Together — Proof Fees — Inner

House Fees-Watching Fees.

Separate actions raised by A and B, railway companies, against the same defenders for damages caused by flooding were taken together without being conjoined. The cases were of considerable magnitude and complexity. At the proof in the Outer House A's evidence occupied 5½ days, B's 1½ days, and the defenders' 5½ days, both pursuers being represented by separate counsel. In the Inner House A was represented by two senior and one junior counsel, and B by one of the same senior counsel and by the same junior counsel. On objections to the Auditor's reports on the pursuers' accounts of expenses, held (1) that in the circumstances of the case (a) there was no ground for limiting either of the pursuers' counsel to a watching fee, (b) there was not sufficient justification for discriminating between A and B in the scale of fees allowed in the Outer or in the Inner House; and (2) that for the Inner House the appropriate fee for one junior counsel should be allowed, regard being had to the fact that he was representing separate interests, and fees fixed at 18 guineas for the first day, 15 for each subsequent day, and 7 for half-days, one-half to be charged in each account.

Observations (per the Lord President) upon the principle which ought to guide the Auditor in taxing fees paid to counsel; upon "normal" and "proper" fees; and upon the effects of such precedents as that of Goodwins, Jardine, & Company v. Brand & Son, 1907 S.C. 965.

Expenses—Taxation—Expert Witnesses— Investigations Previous to Trial or Proof—Consultations with Counsel as to Line of Expert Evidence—Table of Fees (C.A.S., 1913. K iv. 1. Ann. I. v. 3 (2).

-Consultations with Counset as to Line of Expert Evidence—Table of Fees (C.A.S., 1913, K iv, 1, App. I, v, 3 (2).

The Table of Fees (C.A.S., 1913, K, iv, 1, App. I, v, 3 (2)) provides—"... And in cases where it is found necessary to employ professional or scientific persons such as ... engineers, land surveyors, or accountants to make investigations previous to a trial or proof in order to qualify them to give evidence thereat, such additional charges for the trouble and expenses of such person shall be allowed as may be considered fair and reasonable..."

In cases which were of considerable magnitude and complexity, necessitating assistance from expert witnesses, held that in the circumstances a charge for consultations of expert witnesses with counsel as to the line of expert evidence, or as to the material of such evidence, was admissible under the Table of Fees, and accounts remitted to the Auditor to make such additional allowances for such consultations, if any, as he might see fit.

The Caledonian Railway Company, pursuers, brought an action against the Corporation of Greenock, defenders, to recover compensation for £5000 damage done to their property by flooding due to the opera-tions of the defenders on the West Burn of Greenock in their Lady Alice Park. The Glasgow and South-Western Railway Company, pursuers, brought a similar action for £1500 damages against the Corporation of Greenock, defenders. The cases without being conjoined were taken together, and on 14th May 1914 the Lord Ordinary (DEWAR), after a proof, pronounced interlocutors in both cases finding the defenders liable in certain sums to the pursuers and in expenses. The defenders reclaimed, and after the case had been argued before the First Division minutes of debate were ordered to be submitted to the whole Court. On 8th July 1916 the First Division in conformity with the opinions of a majority of all the Judges pronounced interlocutors adhering, and found the defenders liable in additional expenses since 14th May 1914. The defenders appealed to the House of Lords. On 23rd July 1917 their Lordships dismissed the appeals and affirmed the interlocutors appealed from.

The proof occupied from 28th to 31st October 1913, and from 17th to 20th and from 24th to 27th February 1914, the evidence for the Caledonian Railway Company, which was taken first, occupying 5½ days, that of the Glasgow and South-Western Railway Company 1½ days, and that of the defenders 5½ days. The Auditor allowed for senior and junior counsel for the Caledonian