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

is no reference to the defender's oath tendered, and if not tendered, the question necessarily arises whether such a contract can be established to any effect by parole. If it cannot, it would be a grave error to send the case to a jury, for the proceeding would be productive of no other result than the accumulation of unnecessary expense. Such a contract, to the effect of binding the parties to it, is certainly not provable by parole. It is a contract of lease for a longer period than a year, and, as to the valid construction of such contracts, writ is required as a solemnity. There is no contract set out in the record which can be proved by parole, and consequently, according to strict form, there is no issue capable of being extracted from the record, as it stands, as to which a jury, in return to an issue sent to them, can return an affirmative verdict so as to be the foundation of a right to inforce implement or to recover damages in the case of a breach of contract. Accordingly, the pursuers' counsel does not adhere to the proposition that we should adopt the issues as sent to us by the Lord Ordinary, but proposes that we should direct an issue, not as to a contract between January 1867 and April 1868, but for a year from the date of the alleged contract —that is, down to 18th January 1867. The *ratio* being, that though verbal agreements of lease may be invalid for a period longer than a year they may be sustained for one year. As indicated already, I doubt how far, under the averments as they stand, we could grant an issue involving the assertion of a twelve months' lease ; but, apart from that consideration, I am not prepared to assent to the doctrine that a lease of furnished lodgings for sixteen months which is invalid, will be held binding for twelve, especially seeing that the rent is, according to the averment, payable monthly. There is a manifest distinction between leases in land, the ordinary endurance of which is from year to year, and the letting of furnished lodgings, the leases of which have an ordinary term of one week or four. The case of *Buchanan*, so much relied on by the pursuer, is not an authority on this point favourable to him In that case the Court, having directed the Lord Ordinary to inquire into damages which might be claimed against a party resiling from a five years' lease, in effect modified the damage to a year's rent, manifestly because the lessors in a reference to a subject of which the ordinary tenure was a year, were to that extent to be held as prevented from having a tenant. If it be a question of "damages for resiling," or what may perhaps more properly be described as a claim for loss incurred on the assumption of the contract being valid by the party who was proceeding to act in reliance on it, the amount of allowance would, on the *ratio* adopted in Buchanan's case, be not a year's rent but the rent of a month only. But it is unnecessary to determine this, as another objection against the claim to any extent arises on the application of the law as established by the decision in *Walker* v. *Flint*, where it was held that a verbal contract of lease for a longer term than a year required to be proved by writing or oath of party, so that *rei interventu* it should become binding. There is no averment here of any such *rei interventus* as would make any lease of extraordinary indurance binding. It is a mistake to say that mere possession is *rei interventis* such as to make the contract complete. What is required to constitute a *rei interventus* in such cases is the doing of acts which, from their nature, can be referred only to a contract for a period longer than a year. But here no writing exists, and oath of party is not as yet tendered, so that it seems impossible for the pursuer to make out a contract for sixteen months without writing or oath of party. If no contract for sixteen months can be proved, it follows that the pursuer cannot establish his case, which implies the existence of a valid contract for sixteen months before it can be set up or converted into a contract for twelve. It is argued, and very plausibly, that though a sixteen months' contract of lease cannot be proved substantively, and to the effect of supporting an action for implement, it may be so to the limited effect of instructing a twelve months' contract. The doctrine as to the admissibility of parole evidence being, it is argued, to be regulated on the principle that contracts touching heritage, which are invalid because of the non-intervention of writing, may be founded on to the effect of supporting a claim on the agreement to a different effect. It is enough to say that in the cases referred to there is no implement sought, and no damages for a breach in the proper sense of the term. In the case of *Walker*, 2 Sh. 373, and in that of *Bell*, 3 D. 1201, the action was sustained not as for a breach of contract, but for indemnification of expense into which the party has been led in reliance on what may be considered the implied assurance of the other that there was a contract, when there was really none. The case of an equitable claim for indemnification in consequence of being misled or deceived into a specific amount of expenditure, is not the case of an actual contract proved, so as to be operative *proprio vigoro* to any effect. Here there is no case laid for any equity—no expenditure claimed as outlay permitted and induced on the faith of a supposed contract; it is a case on which partial implement is asked, or general damage claimed as for a breach of a contract said to bind for a portion of the entire period. If your Lordships concur in these views, we should pronounce findings accordingly, and allow the pursuer to state his views as to further procedure.

The other judges concurred.

Agent for Pursuer—W. Milne, S.S.C.

Agents for Defender—J. & J. Gardiner, S.S.C.

Saturday, January 18.

OUTER HOUSE.

(Before Lord Kinloch.)

A. *v.* B. AND C.

Husband and Wife—Divorce—Adultery—Co-Defender —Expenses. Circumstances in which decree of divorce granted in absence of the defender, and the co-defender found liable in expenses.

This was an action of divorce at the instance of the husband against the wife and another, on the ground of adultery. There was no appearance for the defender. For the co-defender appearance was made, and a proof led. At the debate on the proof no serious question was raised as to the alleged adultery having been proved, but, with regard to the expenses,

Scott and Brand, for the pursuer, argued that he was entitled to decree for expenses against the co-defender, in respect (1) he knew the defender was a married woman ; (2) he had caused the expense by a wrong in which he was directly concerned ; and (3) it is the rule in England, unless in very exceptional cases, to hold the co-defenders liable in ex-