benefit. These rights and privileges were enjoyed by the tenant and paid for in the shape of rent by him to the landlord during the five years in question, and the latter has consequently received value for the payment.

(2.) It is to my mind quite immaterial that the obligation to furnish and pay for these privileges was not permanently binding on either Sawers or Cochran in a question between them, and might have been terminated by either. They were binding on the landlord in a question with his tenant whatever might be the rights of Sawers or Cochran in the matter. But it must be remembered that this was an annual payment for an annual benefit, paid after the benefit had been supplied, and, yet further, one which had continued for many years. Although it was not a permanent payment it could not be terminated without notice; and each year which was allowed to terminate without notice might vest a right to the payment for that year, seeing the consideration was furnished and accepted for that year. In this case no notice that he means to discontinue this payment has ever yet been given to Cochran by Sawers, and in this view the prior arrangement between them did continue to subsist for each of the five years as each year expired, and therefore it may be reasonably maintained that for each of these five years the payment became due and was a debt between Cochran and Sawers. But that is not the question here. The rights and powers of Cochran against Sawers cannot come into question, for Cochran received all he could claim, and Sawers obtained all the advantage paid for. The real question is whether Sawers can retain the advantage and leave the burden on the shoulders of the tenant.

(3.) Mr Sawers maintained that it was enough for this action that, whether the sum was due by him or not, this payment was made without and against authority, and therefore that the tenant was not entitled to credit for it or to retain his rent in respect of it. Now, even if the pursuer had taken his ground plainly and openly, had told his tenant that he was going to terminate this agreement, and to discontinue the payment to Cochran, and had warned the tenant not to pay, this would not absolutely have settled the question, as the tenant might still contend that the landlord could not withhold the payment so far as necessary to secure the stipulated privileges under the lease. But the element in this case which has chiefly weighed with me, (admitting Lord Neaves' observation on the law as to payment made by a tenant of his own hand), is that the pursuer has never made any such intimation—he has evaded all opportunity of settling the question—as to intimation he does not say anything either on the record or in his evidence. All he did was to intimate that he would not allow the abatement given by Henry Sawers; he would recognise no deduction, and would demand his full rent. His full rent has been paid as far as the former deductions were concerned; but this was not a deduction. It was no favour or advantage to the tenant; it was a burden on him. From the evidence it is quite clear that the pursuer evaded all attempts to extract from him a statement of what ground he took. He never liberated the tenant in express terms, at least from his customary payment; he knew of these payments year by year, but he never told Cochran they were not paid on his account. It was an arrangement for the landlord's convenience in Henry Sawers' time that the tenant should pay the water-rent—certainly it was not made to suit the tenants. Mr Sawers knew, and his agent knew, that the receipts were taken in the name of the landlord, but he did nothing. He never faced the question whether he could under the lease stop this contribution, and he took care to prevent such a question arising. He never spoke of this rent to his agent, and would not speak of it to his tenant, but left him in uncertainty whether that part of his arrangement with Henry Sawers remained, although the deduction were disallowed; and, now, waiting till all the payments have been safely made, and no question can now arise to his prejudice, he tries to avoid payment. This I think he cannot successfully do.

The Court pronounced the following interlocutor:—

> "Recal the interlocutor complained of; assoilzie the defenders from the whole conclusions of the summons, and decern, except as regards the periodical interest arising on the rents due by the defenders while unpaid: find that the said interest amounts to £22, 19s. 8d., and decern against the defenders therefor; find the defenders entitled to expenses, and remit to the Auditor to tax the same and to report."

Counsel for Pursuer—Lord-Advocate (Young) Q.C., and Scott. Agent—D. Milne, S.S.C.

Counsel for Defender—Solicitor-General (Clark), Q.C., and R. V. Campbell. Agent—A. K. Mackie, S.S.C.

Saturday, January 10.

FIRST DIVISION.

CHISHOLM *v.* MARSHALL.

Court of Session Act 1868, § 70.

On this case being called no appearance was made for the respondent—

Asher, for the appellant, referred to the case of *Stuart* v. *Stuart*, 16th May 1871, 9 Macph. 740.

There being some doubt as to whether the appeal had been intimated to the respondent.—

Lord President—It is the practice of the Sheriff-Clerk of Lanarkshire to mark on the record not only that an appeal has been lodged, but also that it has been intimated in accordance with the Act, and I take this opportunity of saying, what I am sure your Lordships will concur with me in thinking, that it would be very advisable if all Sheriff-clerks would adopt the same course.

The Court appointed the appellant's agent to communicate with the Sheriff-clerk, and ascertain if appeal had been intimated; and continued the case for a week.
