date of their mother's death her daughters should have accumulated for them a small fortune of £5000 to each or £10,000 to the survivor. That, his main object and immediate purpose, has been effected, and so we are left free, without in a way defeating that purpose, to deal with the application of the income of the fund in the meantime as a source for providing for the maintenance and education of the daughters. Now, looking to the authorities that have been quoted, I think that in the circumstances it is desirable and appropriate that the income of this fund should be so far paid over for their benefit, and accordingly that the prayer of the petition should be granted.

LORD KINNEAR—I am of the same opinion. This cannot be represented as a case of pressing necessity, but there is no doubt that the mother of the petitioners will be able to provide for their suitable maintenance and education much more conveniently and advantageously for them and for herself if the payment is allowed, and that is a ground which the Court will always take into consideration in dealing with applications of this kind. I doubt whether we could give effect to the petition but for the consideration to which Lord Adam has adverted, for, if there were no such provision in Mr Colquhoun's settlement as that which shows that the truster thought the sum to be accumulated should be £10,000, I should have some difficulty in saying that he had not himself contemplated the question we are now considering and decided it against the petitioners, for, of course, he knew what provision he was making for their mother, and he directs that the rest of the income should be accumulated. I think, however, that the special point which Lord Adam has mentioned is extremely important, and taking the same view of it as his Lordship does, I agree in thinking that the petition should be granted.

LORD PRESIDENT concurred.

LORD M'LAREN was absent.

The Court authorised the trustees under the trust-disposition and settlement and codicils of William Colquhoun to advance and pay to the petitioners' curators the sum of £200 per annum for the maintenance and education of each of the petitioners out of the free annual income of the moneys held by the trustees for the petitioners' behoof.

Counsel for the Petitioners—H. Johnston—N. J. Kennedy. Agents—Macrae, Flett, & Rennie, W.S.

Friday, March 16.

FIRST DIVISION.

[Lord Stormonth Darling, Ordinary.

ELMSLIE *v.* YOUNG'S TRUSTEES.

Landlord and Tenant—Lease—Damages—Claim of Damages by Tenant for Breach of Conditions of Lease—Mora—Personal Bar—Tenant Barred by Payment of Rent without Deduction or Reservation.

After a tenant had been in occupation of a farm for seven years under a lease, the estate, comprising the farm, was sold. The tenant continued in occupation for three years longer, and then brought an action of damages against his former landlord for alleged loss which he had sustained during the first seven years of his tenancy by the landlord failing to keep the fences in repair and to burn a tenth of the heather on the farm each year as required by the lease. He averred that on each occasion when he paid his rent, and at various other times, he had protested orally and in writing against the landlord's failure to implement the conditions of the lease.

Held that these averments were irrelevant, and that the tenant was barred from insisting in his claim of damages, in respect that he had paid his rent during each of the seven years without deduction or reservation of his claim.

Broadwood v. *Hunter*, February 2, 1853, 17 D. 340, *followed.*

Robert Elmslie entered into possession of the farm of Wester Durris Hills, Durris, Kincardineshire, as tenant, at Martinmas 1883, under an agreement for a lease concluded by him with the proprietors, the trustees of the deceased James Young of Durris.

By the said minute of agreement it was provided, *inter alia*—"The trustees are bound to burn the heather, weather permitting, in regular strips, as near as possible to the tenth shift rotation. . . . The trustees to put the fence into repair, and supply larch posts during the lease for repairing same; also to overhaul the fencing in the spring of each year."

At Martinmas 1890 James Young's trustees sold the lands to Henry Robert Baird. Elmslie still continued in occupation of the farm of Wester Durris.

On 29th May 1893 Elmslie raised an action, in which he sought decree for payment of £250 against Young's trustees, and decree for a like amount against Baird.

He averred that the defenders had each year failed to burn the stipulated amount of heather, and had also failed to keep the fences in repair as required by the lease; that he had consequently suffered loss to the amount for which decree was sought against Young's trustees during the seven years he was their tenant, and had likewise suffered loss to the amount sued in

the case of the other defender during the three years he had been his tenant. He did not deny that he had paid his rent for each year, except the last year of his occupancy, without deduction or reservation of his claim, but stated that "on every occasion on which pursuer paid his rent, and at various other times, orally and in writing, he protested against and complained of the manner in which he was being treated in this matter, until at last the pursuer refused to pay his rent altogether, and the defender the said Robert Henry Baird raised an action in the Sheriff Court . . . to recover said rent."

The defenders Young's trustees pleaded, *inter alia*—"(2) The pursuer's averments are irrelevant, and, *separatim*, are not sufficiently specific to be admitted to probation. (3) The pursuer having paid his rent without protest or reservation, is barred from maintaining the claim which he now puts forward."

On 14th February 1894 the Lord Ordinary (STORMONTH DARLING) pronounced the following interlocutor:—. . . "Repels the first and second pleas-in-law for the defenders Dr Young's trustees, and the first plea-in-law for the defender Henry Robert Baird. . . . Allows the parties a proof of their averments in the conjoined processes, to proceed on a day to be afterwards fixed."

The defenders Young's trustees reclaimed, and argued—The pursuer was not entitled to make this claim at the end of his lease, having made no specific claim for damages, and not having made any deduction or reservation in paying his rent during all the years when he alleged he was being injured. His allegations as to having made complaints and protests were far too general. He should have specified the occasions upon which, and the persons to whom he made them. The case of *Broadwood* v. *Hunter*, February 2, 1855, 17 D. 340, showed that verbal complaints, though very specific, were not enough. There must be a formal specific claim or reservation of rent made yearly, otherwise the landlord might presume the claim was withdrawn, and omit to preserve rebutting evidence. The fact that this was a breach of a clear stipulation in his lease should have made the tenant all the more careful to reserve his claim instead of only grumbling. There was no distinction in principle between damage caused by game and this sort of damage, the one being as easy to tabulate at the time as the other—*M'Donald* v. *Johnstone*, June 12, 1883, 10 R. 959 (at p. 970); *Hardy* v. *Duke of Hamilton*, February 2, 1878, 15 S.L.R. 329.

Argued for the pursuer—Though there was no reservation of rent made by him, the tenant was not barred from his claim if he had given notice to the landlord of his intention to make a claim—*M'Donald* v. *Johnstone*. The allegations on record were not of a mere grumble on his part, but of such a notice. In the case of *Broadwood* v. *Hunter* the tenant had merely grumbled, and the Court could judge that from the facts before it. Here a proof was necessary to show the nature of the protests averred. It was not necessary for such notice to be given in writing—*Hardy* v. *Duke of Hamilton*. Further, the cases quoted by the pursuer differed from the present one, the claims in them being at common law. They had to do with damage caused by game, and, the subjects disappearing year by year, it was impossible to estimate the damage after a lapse of years. Here it was possible to estimate it now.

At advising—

LORD PRESIDENT—The defenders, Dr James Young's trustees, have put forward the plea that "the pursuer's averments are irrelevant, and, *separatim*, are not sufficiently specific to be admitted to probation."

When the case was before the Lord Ordinary an amendment of the record was proposed by the pursuer and allowed by his Lordship. It is not therefore a case in which any defects in the averments may be ascribed to a failure on the part of the pursuer to observe the points which he may be called upon to meet.

Condescendence 2 sets forth a clause in the lease by which the trustees bind themselves "to burn the heather, weather permitting, in regular strips as near as possible to the tenth shift rotation," and "to put the fence into repair and supply larch posts during the lease for repairing the same; also to overhaul the fencing in the spring of each year." The case averred on record is that for a long course of years there was each year an actionable failure on the part of the landlord to implement these obligations of his lease; and yet it is admitted that the rent was paid every year by the tenant without any reservation. The pursuer's case therefore is brought at once into direct collision with that of *Broadwood* v. *Hunter*. In order to explain his position he states on record that "on every occasion on which the pursuer paid his rent, and at various other times, orally and in writing, he protested against and complained of the manner in which he was being treated in this matter, until at last the pursuer refused to pay his rent altogether."

It is plain, on the authority of *Broadwood* v. *Hunter*, that a tenant in such circumstances has a natural and appropriate remedy against his landlord on the occasion of his rent-day. On that occasion it is his duty either to tell his landlord that he will not pay his rent till his claim for damages is satisfied, or to state a specific claim and reserve it in a definite way. Now, there is no averment on record of this having been done, but merely one of a protest by the tenant. The words are very vague, and, as I have already indicated, we are bound to criticise very closely the averments on this record, which has been already amended by the pursuer before the Lord Ordinary in view of the very plea which we have now to consider.

In my opinion the arguments which have been advanced against the relevancy of the pursuer's case are sufficient, and I am

therefore for assoilzieing the defenders, Dr Young's trustees.

LORD ADAM—The pursuer in this action was the tenant of a farm which was formerly the property of the defenders, Dr Young's trustees and Thomas Graham Young. He entered in 1883 and continued in possession till 1893, and the claim now made is for damages from the commencement to the termination of his occupancy. Three years ago the property was sold to Mr Baird, and accordingly it is for the first seven years of the period in question that liability is ascribed by the pursuer to these defenders, a liability which they deny. The pursuer's claim is founded on a clause in his lease—[*Here his Lordship quoted the clause quoted in extenso in the Lord President's opinion*]. That is to say, the high heather was to be burned in strips every year, so that in ten years the whole extent of it should be burnt. It is said that the landlord did not fulfil this obligation, and accordingly damages are asked for.

I agree that this claim is bad by *mora*. Now, the plea of *mora* is not enough by itself unless it amounts to prescription. But where, as the result of the *mora*, the defender is unable to state his defence, then I think the plea does come in. The claim made is for damages extending over ten years, and the allegation of the pursuer is that during the whole of that time there was a failure of duty on the part of the landlord. But how could the landlord, without having received some notice of claim during that period, state an adequate defence at the end of it? For example, it is stipulated that he should carry out the obligation "weather permitting." But who could now give evidence as to the weather ten years ago? The case, I hold, must fall under the principles laid down in *Broadwood* v. *Hunter*, where the answer made to the claim for damages was, "It is too late to claim now; you should have given me warning at the time when the alleged damages were being inflicted upon you." There is no allegation here of the pursuer having intimated his claim in a specific manner, or having insisted upon it in such a way as to keep it alive. All that is said is that he protested. Accordingly he left the landlord in the belief that he was not making any such claim, or at any rate that he was not persisting in it. I am of opinion, therefore, that the Lord Ordinary's interlocutor should be reversed.

LORD KINNEAR — I am of the same opinion. I think the case is ruled by *Broadwood* v. *Hunter*. To exclude the rule the tenant must show that he gave notice of his claim in so specific a form as to exclude the inference that when he paid his rent he had no claim for compensation to set off against his landlord's demand. I cannot construe the averment on record as indicating any such intimation. The pursuer brings this action against the trustees three years after they have sold the estate, and complains of damage which he has sustained ten years ago and yearly since that date. I agree that it would be a hardship upon the landlord if at this distance of time he were called upon to make a defence against such a claim. The pursuer says that owing to the landlord's breach of contract he could not pasture so many sheep upon the land as he would otherwise have done, and that there was not sufficient food for those he had. But the landlord has no possibility of refuting this statement or meeting the claim because no due notice of it was given to him during the lease. Apart, however, from this consideration, I think the rule is fixed that when a tenant has paid his rent regularly year by year, without reservation, he cannot afterwards set up a claim for abatement in the form of damages for by-past injury. Such a claim must be restricted to one year preceding the demand.

I am therefore of opinion that the Lord Ordinary's interlocutor, so far as it deals with these defenders, should be reversed.

LORD M'LAREN was absent.

The Court recalled the Lord Ordinary's interlocutor, in so far as it repelled the second plea-in-law for the defenders Dr Young's trustees, and allowed a proof, and assoilzied these defenders from the conclusions of the action. *Quoad ultra* adhered to said interlocutor, and remitted to the Lord Ordinary of new, and before answer to allow to the pursuer and the defender Baird a proof of their respective averments, and to the pursuer a conjunct probation, and proceed further as accorded.

Counsel for the Pursuer—Craigie—Kemp. Agents—Philip Laing & Company, S.S.C.

Counsel for Defenders—C. S. Dickson—W. Campbell. Agents—Blair & Finlay, W.S.

Tuesday, July 25, 1893.

OUTER HOUSE.

[Lord Low.

M'CORKINDALE *v.* CALEDONIAN RAILWAY COMPANY.

Superior and Vassal—Railway—Liability of Railway Company for Feu-Duty—Lands Clauses Consolidation (Scotland) Act 1845 (8 *and* 9 *Vict. c.* 19), *secs.* 12, 80, 107, 111, *and* 126.

Held that the provisions of the Lands Clauses Act, whereby a railway company is authorised to acquire lands without coming under any feudal relation to the superior of the lands, are not applicable to lands purchased by the company by agreement for extraordinary purposes, and conveyed by a common law title.

This was an action at the instance of Dugald M'Corkindale, heritable proprietor of the lands of Carfin, in the parish of