this Court is a matter on which it is unnecessary to give any opinion, but I may say that I think it quite possible that even in that case the jurisdiction would be sustained. That, however, is not a point requiring to be determined here. I am for adhering to the interlocutor of the Lord Ordinary.

Lord Deas—I have not the smallest doubt that the defender being confirmed executor of the estates of the late Mrs Howie, which is a Scots estate, is subject to the jurisdiction of the Courts of Scotland in an action connected therewith, so long as the estate is not yet wound up. The case of *Lady Baird Preston* affirmed the principle that where the administration is there the person who administers is answerable. That is a sound general proposition.

Lord Mure concurred.

Lord Shand—If an estate is under the charge of a Scots executor, and has been administered under a Scots confirmation, I am of opinion the executor may be called on at any time to account for it in Scotland. The administration is in this country, and is subject to the Courts and according to the law of this country affecting executors, and therefore though the administrator may go abroad during the course of the administration, I hold that he continues subject to the jurisdiction of this Court in respect of his administration. The executor takes the benefit of a Scots decree of confirmation, and it appears to me to follow he is answerable in the Courts of this country for an accounting in reference to the executry estate. If the *dictum* of Lord Fullerton which was referred to is to be regarded as an authority to the contrary, I must, with deference to his Lordship's view, express my dissent from it. The case of *Robson* v. *Walshaw* was a very special case indeed. It is clear that the defender in that case was acting under English letters of administration, and that his decree-dative as a Scots executor was merely ancillary to the decree of administration which he had obtained in England. That case, therefore, does not affect the more general question raised here. The *dictum* of the Lord Chancellor in the case of *Lady Baird Preston* is an authority which bears out the view which I have expressed, but which I should have adopted even though such authority for it had not existed.

The Lords adhered.

Counsel for Pursuers—Mackintosh—Pearson. Agents—Mill & Bonar, W.S.

Counsel for Defenders—Trayner—Dickson. Agents—J. & A. Hastie, S.S.C.

Saturday, July 1.

FIRST DIVISION.

[Lord M'Laren, Ordinary.

MACDONALD *v.* BUTLER JOHNSTONE.

Lease—Damages caused to Tenant by Operations of Landlord—Where Specific Complaint made but Rent Paid without Reservation.

An agricultural tenant who had during the years to which his complaint referred paid his rent and accepted receipts without any reservation of his claim for damages, brought an action of damages against his landlord for injury said to have been caused to his crops by flooding due to drainage operations of the landlord on a piece of ground adjoining his farm. It appeared from the correspondence between the parties that during so much of the period during which the damage was said to have been caused as the pursuer appeared to have been aware of the alleged cause of the damage to his crops, he made specific written complaint to the landlord of the result of the operations in question. The Court in the circumstances *allowed* a proof before answer of the pursuer's averments.

Entail—Representation—Damage from Acts done prior to Succession of Heir of Entail.

A tenant brought an action against his landlord, an heir of entail who succeeded to the entailed estate in 1873, for damage said to have been caused from and after the year 1867 by certain drainage works executed by the defender's predecessor, and which had been maintained by him. *Held* (*per* Lord M'Laren, Ordinary, and *acquiesced* in) that inasmuch as the defender did not represent the preceding heir of entail he was not connected by any relevant averment with the author of the damage, and that the action, so far as it concluded for damages caused before the defender's succession in 1873, was irrelevant.

In this action Donald Macdonald, tenant of the farm of Culcraigie, Ross-shire, sued his landlord Mr Butler Johnstone, heir of entail in possession of the lands of Contullick and Culcairn, on which his farm was situated, for damages to the amount of £1415, 12s. 6d. alleged by him to have been caused by the flooding at intervals during a series of years of a portion of his farm amounting to 25 acres. This flooding he alleged to have been caused by certain drainage operations of the defender which had been executed on his property after the pursuer entered into his lease.

The pursuer's lease began in 1864. The rent was £270, and a system of rotation of crops was prescribed. Power was reserved to the landlord to execute all necessary operations for the purpose of draining the estate on paying surface damage to the tenant, the damage to be ascertained by arbitration.

The defender succeeded to the entailed estates in 1873.

The farm was bounded on one side by a wooded hill, the property of the defender.

The pursuer averred that when he entered on the farm, and for some years thereafter, the drainage was quite satisfactory; but from and

after the year 1867 he began to find the drainage inadequate, with the result that the 25 acres of the farm already alluded to were often much flooded. He was unable to discover the reason of this damage till on an occasion in 1877, when he observed that a very considerable alteration had been made by the proprietor in the drainage of the wooded hill by which his farm was bounded, with the result that whenever there was an excess of moisture a great additional flow of water was brought into the drains of the farm so as to choke them and to flood the fields. The pursuer further alleged that he had straightway communicated with the factor of the proprietor on the subject, and that some operations had been done to improve the state of matters, but that no material improvement had resulted. He had thereafter carried on a long correspondence with Messrs Lindsay, Jamieson, & Haldane, C.A., Edinburgh, who were acting on behalf of the proprietor, with reference to the damage, in the course of which he offered to refer the question of compensation to be awarded to him to arbitration. This offer being refused he brought this action. Besides the sum of £1415, 12s. 6d. above mentioned, he also claimed £50 for damage caused by the bursting of a drain on a part of the farm other than the 25 acres to which the major part of the damage was caused. The bursting of this drain he alleged to be due to the same operations of the proprietor as had caused the damage to the 25 acres.

The defender denied that any damage had been caused to the pursuer by his operations, and attributed any damage that had arisen from the wet state of the farm to the fault of the pursuer in not keeping the drains on his own farm clear. He averred that the pursuer in paying his rent (which had been regularly done during all the years of the pursuer's tenancy) had accepted receipts therefor without ever reserving a claim of damages. He pleaded (3) that "the pursuer having regularly paid his rent, and accepted receipts therefor without reservation of his claim, is barred from now insisting in it." He also pleaded that inasmuch as he himself did not represent the previous heirs of entail, he could not in any event be liable for the period anterior to his succession to the estate.

The Lord Ordinary (M'Laren) sustained the latter plea, and further found that the pursuer was "barred from insisting in his claim of damages except as regards crop 1881, and to that extent sustains the defender's third plea-in-law." *Quoad ultra* his Lordship allowed a proof.

He added this opinion:—"In this action the pursuer, who is a tenant of the defender under a lease granted by the defender's mother in 1864, claims damages for injury sustained through the flooding of a part of his farm, extending to 25 acres, during the years from 1867 to 1881 inclusive. The particulars of damage, amounting in all to £1415, 12s. 6d., are set forth in the condescendence.

"The defender acquired right to the estate by special service as heir of entail, dated 2d June 1873. Under that title he does not represent his mother, the preceding heir of entail, and it is not said that he represents her under any other title, active or passive. He is therefore not connected by any relevant averment of title with the author of the damage, supposing such damage to have been caused by the act or fault of the preceding heir of entail. This consideration excludes the claim in so far as founded on damage done before June 1873.

"With regard to the damages claimed for the period of the defender's ownership, I am of opinion, for the following reasons, that the claim must be limited to the last year sued for, that is, to the damage alleged to be done to the crop of the year 1881.

"The pursuer alleges that his fields have been flooded in consequence of the drainage of the defender's woods being thrown on to his farm. The drains, according to this statement, were formed and completed sometime after the commencement of the pursuer's lease, and adequate provision was not made for carrying away the surplus water by a main drain connecting the wood with the neighbouring stream. Hence the overflow of which the pursuer complains. According to his own statement, the pursuer only discovered the cause of the flooding in the year 1877, and if he had then brought his action it it would have been open to him to show that he was excusably ignorant of the cause of the damage until that time. But the pursuer did not take proceedings to constitute his claim until the present year. Although in the years 1877 and 1879 the pursuer corresponded with the defender's factor and agents on the subject of his claim, which he expressed his intention of enforcing, he regularly paid his rent without attempting to enforce his claim by a set-off, or reserving his right to constitute it by action.

"I am not of opinion that the correspondence is sufficient to save the claim from the operation of the rule laid down in *Hunter* v. *Broadwood*, 17 D. 340. That rule is founded on the consideration that a creditor, or one who considers himself to be a creditor, in a sum of money will not in general make payments to his debtor of a larger sum without endeavouring to obtain payment of his claim by set-off, or at least reserving his right to recover it in competent form. If he pays without such reservation, the party receiving payment may reasonably presume that the counter claim is not insisted on. This presumption, which is strong even in the case of a single payment by an alleged creditor to his debtor, becomes absolute when a series of payments are made regularly and periodically without deduction or reservation.

"It is admitted by the defender that the claim, so far as applicable to the last crop and year, is not barred, because it is not certain that the amount of damage was ascertained at Martinmas, when the pursuer made his last payment of rent. As regards previous years, I think it is barred.

"In this question I cannot draw a distinction between a claim of damage by flooding and a claim of damage by game. In the present case it would be difficult, if not impossible, for the proprietor to rebut the evidence which the pursuer might lead as to the extent of the damage and its cause. Having been induced by the pursuer's conduct to believe that the claim was not to be pressed, the defender had no occasion to employ persons of skill to qualify themselves to give evidence in the case. He cannot now make inquiry as to the existence of the alleged damage or its cause, because the means of discovery no longer exist. In short, there cannot be a fair

trial of the question of fact raised by the pursuer in his summons, and any disadvantage resulting from this cause must fall upon the party who by his own default or delay has brought the case into this position.

"I shall therefore sustain the defender's second plea, and also the third plea, except as to the damage done in 1881, being the year preceding the action."

The pursuer reclaimed, and argued—That the correspondence between the parties prior to the raising of the action showed that there had been a distinct claim made each year (and indeed oftener) by the tenant. When this was the case, as distinguished from "mere general grumbling" —*vide Hardy* v. *Duke of Hamilton*, February 2, 1878, 15 Scot. Law Rep. 329 (Lord President's opinion)—the principle of *Broadwood* v. *Hunter*, quoted by the Lord Ordinary, did not apply. With regard to the period before 1873, when the defender succeeded to the estate, the pursuer acquiesced in the judgment of the Lord Ordinary.

The correspondence produced by the pursuer consisted of letters written at intervals during the years 1877, 1878, 1879, 1880, and 1881, when the pursuer's claim was pressed by him, but denied by the defender. For a delay in attending to the matter of some months' duration it was not disputed that the defender was responsible.

The Lords, after hearing counsel on the correspondence between the parties, and without delivering opinions, recalled the interlocutor of the Lord Ordinary in so far as it found pursuer barred from insisting in his claim of damages for the period subsequent to the year 1873, and allowed parties a proof of their averments, reserving the defender's third plea-in-law.

Counsel for Pursuer—Trayner—Guthrie. Agents —Paterson, Cameron, & Co., S.S.C.

Counsel for Defender—Murray. Agents—Tods, Murray, & Jamieson, W.S.

HIGH COURT OF JUSTICIARY.

Monday, July 3.

(Before Lord Justice-Clerk and Lord Craighill.)

H. M. ADVOCATE *v.* WILSON.

Justiciary Cases—Theft—Relevancy.

A person obtaining the goods of another fraudulently, and not by lawful contract, and pawning them, is guilty of theft, because the property does not pass to him.

Where a prisoner was charged with having, by means of fraudulent representations and pretences (which consisted in professing to a traveller for a firm of jewellers that he was doing a large business, and in showing the traveller fictitious entries in his books calculated to show that his transactions were important and numerous, he well knowing that such entries were false and fictitious), obtained from the traveller delivery of a number of articles of jewellery on approbation, which he thereafter pawned—*held* that he was relevantly charged with theft.

Fraud—Fraudulent Acts by Persons on Eve of Bankruptcy—Act 43 *and* 44 *Vict. c.* 34 (*Debtors (Scotland) Act* 1880), *sec.* 13—"*Pawning, Pledging, or Disposing of otherwise than in the ordinary way of Trade.*"

Section 13 of the Debtors (Scotland) Act 1880 enacts that "the debtor in a process of sequestration or cessio shall be deemed guilty of a crime and offence . . . in each of the cases following" . . . (5) "If within four months next before such presentation" [of a petition of sequestration or cessio] "he pawns, pledges, or disposes of, otherwise than in the ordinary way of trade, any property which he has obtained on credit, and has not paid for."

Question — Whether, in libelling on this provision of the statute, it is sufficient for the prosecutor simply to take the words of the statute without setting forth the manner in which the goods are said to have been fraudulently disposed of?

The Debtors (Scotland) Act 1880 (43 and 44 Vict. c. 34) provides by section 13 as follows:—"The debtor in a process of sequestration or cessio shall be deemed guilty of a crime and offence, and on conviction before the Court of Justiciary, or before the Sheriff and a jury, shall be liable to be imprisoned for any time not exceeding two years, or by the Sheriff without a jury for any time not exceeding sixty days, with or without hard labour (A), in each of the cases following, unless he proves to the satisfaction of the Court that he had no intention to defraud—that is to say, 1, If he does not to the best of his knowledge and belief fully and truly disclose the state of his affairs in terms of the Bankruptcy (Scotland) Act 1856 or the Cessio Acts, as the case may be: 2, If he does not deliver up to the trustee all his property, and all books, documents, papers, and writings relating to his property or affairs which are in his custody or under his control, and which he is required by law to deliver up, or if he does not deal with and dispose of the same according to the directions of the trustee: 3, If after the presentation of the petition for sequestration or cessio, or within four months next before such presentation, he conceals any part of his property, or conceals, destroys, or mutilates, or is privy to the concealment, destruction, or mutilation of, any book, document, paper, or writing relating to his property or affairs: 4, If after or within the time above specified he makes, or is privy to the making of, any false entry in, or otherwise falsifying, any book, document, paper, or writing affecting or relating to his property or affairs: 5, If within four months next before the presentation of the petition for sequestration or cessio he pawns, pledges, or disposes of, otherwise than in the ordinary way of trade, any property which he has obtained on credit and has not paid for."

William Wilson was charged with the crime of theft, as also falsehood, fraud, and wilful imposition, as also of the crime and offence set forth in subsection (A) 3, of the crime and offence set forth in subsection (A) 4, and of the crime and offence set forth in subsection (A) 5 of section 13 of the Debtors Act above quoted, in so far as (1) having carried on business as a jeweller in Edinburgh between May 1880 and 22d November 1881, he did at a time libelled "wickedly and feloniously, falsely, fraudulently, and wilfully represent and