not grip sufficiently." Now the question just is, Was this man entitled to go on working with such implements knowing the danger of doing so?

That question is decided in the negative in the cases of *Crichton* v. *Keir* and *M'Neill* v. *Wallace & Co.*, and I therefore think that the action should be dismissed as irrelevant. If all the pursuer says is true, and I had been directing a jury on the facts of the case, I should have told them to find for the defenders.

LORD DEAS—I am inclined to agree with the Lord Ordinary in thinking that this case is distinguishable from those of *M'Neill* and *Crichton*, and that the question here is one for the jury. Whether in the circumstances the pursuer should have refused to work would, in my opinion, and as the Lord Ordinary says, depend upon the facts of the case as they came out at the trial.

LORD MURE—The law on this point is distinctly laid down in the case of *Crichton* v. *Keir*, and even more forcibly in *M'Neill* v. *Wallace & Co.* What the pursuer here neglected to do was to see that what he told the foreman ought to be done was done before he went on working. The question is whether he was entitled to go on working with his former implements until new ones were provided. Now, the Lord Ordinary, as I understand his note, does not dispute the soundness of the law laid down in these cases, the only thing which weighed with him being the question whether the pursuer was aware of the danger he was incurring by going on working with the implements he had. At first I felt that difficulty myself, but after considering the various statements made by the pursuer on record, I think we are bound to come to a decision in accordance with that in *M'Neill* v. *Wallace & Co.* In the 2d article of the condescendence the pursuer states that he knew quite well what "sprags" were; then that he knew those he had were insufficient. Moreover, the answer to the defender's counter-statement is—"Admitted that the pursuer was well acquainted with the work and the 'sprags' required." That being so, in condescendence 4 he goes on to describe the accident. Now, having stated that the implements he had were known by him to be insufficient for his purpose, I cannot doubt that he brings himself within the rule laid down in the cases I have mentioned. I think the action is irrelevant.

LORD SHAND—I am of the same opinion. There are three averments made by the pursuer, which, taken together, are material as showing a want of relevancy in this action.

The pursuer says (1st) that the accident was caused by his using insufficient and unsuitable wood; (2d) that he was well acquainted with the nature of the work to be done, and with the kind of wood required for doing it; and (3d) that he knew that there was no proper wood for making those "sprags," and that he had twice complained about the want of it to the foreman, who on the last occasion told him that he would get suitable wood. In these circumstances the pursuer went on working in the face of known danger, and it is decided in the cases of *Crichton* v. *Keir* and *M'Neill* v. *Wallace & Co.* that a workman who does that takes the risk of an accident occurring, and if one does occur, has no claim for damages.

The pursuer might no doubt have made his record here relevant, but it would have done him no service, for if he had concealed the fact that he was aware of the kind of wood which was required it would have come out at the trial, and if so the jury would have been bound to bring in a verdict for the defenders.

I think therefore the action should be dismissed as irrelevant.

The Court recalled the interlocutor of the Lord Ordinary and dismissed the action as irrelevant.

Counsel for Pursuer and Respondent—Nevay. Agent—John A. Robertson, S.S.C.

Counsel for Defenders and Reclaimers—J. P. B. Robertson—Dickson. Agents—Webster, Will, & Ritchie, S.S.C.

Tuesday, June 12.

FIRST DIVISION.

[Lord M'Laren, Ordinary.

MACDONALD *v.* BUTLER JOHNSTONE.

(*Ante*, vol. xix. p. 770.)

Lease—Damage to Tenant from Operations of Landlord—Entail—Obligations of Succeeding Heir of Entail—Bar—Rent Paid without Reservation but Distinct Complaint.

In 1867 an heir of entail executed drainage operations within a plantation on the estate, the effect of which was to send down an excessive quantity of water on to a lower portion of the estate, consisting of a farm let by him in 1864 to a tenant on a lease for nineteen years. In consequence of these operations parts of the farm were from time to time flooded, and the crops injured. The heir of entail died in 1873, and in 1877 the tenant of the farm intimated to his landlord, the succeeding heir of entail, that he claimed compensation for the damage caused by these drainage operations. A correspondence followed, which lasted until 1881, throughout which the tenant repeatedly pressed his claim but paid his rent without any reservation. An action of damages was raised in 1882 by the tenant against the landlord, concluding for damages for injury to crops during the years 1867-1881. *Held* that the defender was liable in damages for the years succeeding 1877, in which he was first made aware by the tenant of the state of the farm caused by the drainage operations, and that, having regard to the correspondence in which the pursuer pressed his claim, the action was not barred by his having paid his rent for those years without reservation.

This was an action at the instance of Donald Macdonald, tenant of the farm of Culcraigie, Ross-shire, against his landlord Mr Butler Johnstone, heir of entail in possession of the lands of Contullich and Culcairn, on which the farm was situated, for damages to the amount of £1415, 12s. 6d. alleged by him to have been caused by the flooding of portions of his farm extending to

25 acres at intervals during the years 1864–1881. This flooding he alleged to have been caused by certain drainage operations of the landlord which had been executed on his property after the pursuer entered into his lease. The pursuer entered on his lease in 1864, and the defender succeeded to the entailed estates in 1873.

The defender pleaded—"(2) The defender not representing the previous heirs of entail, the present action should be dismissed, and *separatim*, he cannot in any view be subjected in liability for the period anterior to his succession. (3) The pursuer having regularly paid his rent and accepted receipts therefor without reservation of his claim, is barred from now insisting on it."

The Lord Ordinary (M'Laren) on 3d June 1883 pronounced this interlocutor—"Sustains the second plea-in-law for the defender: Finds that the pursuer is 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* allows to both parties a proof of their respective averments." The opinion delivered by his Lordship is given in the previous report of the case.

The pursuer reclaimed against this judgment, but acquiesced in it so far as it found that the defender was not responsible for the period before 1873, when he succeeded to the previous heir of entail. The First Division, after hearing counsel on the other pleas sustained by the Lord Ordinary, and on the correspondence (the more important letters in which are printed below), recalled the interlocutor in so far as it found the pursuer barred from insisting in his claim of damages for the period subsequent to 1873, and allowed the parties a proof of their averments, reserving the defender's third plea-in-law.

A proof was accordingly taken by the Lord Ordinary, the import of which was as follows:—The pursuer's farm, which extended to about 170 acres, was bounded on the north-west by a plantation of 312 acres known as the Countlich Wood, from which it was separated by a public road. On the east it was bounded by the Countlich Burn; the Culcraigie Burn, which was in the lowest part of the ground, ran through the centre of the farm from west to east, and flowed into the Countlich Burn. In 1864, when the pursuer entered on his lease, the drainage of this wood was very defective. Between 1864 and 1873, during the period when the defender's mother was heir of entail in possession of the estate, the wood, which consisted of a number of rapid ascents with intervening flats, was thoroughly drained by cutting open or surface drains so as to lead branches into all the flat portions which would naturally be wet. Some portion of the water from the wood had been in use formerly to find its way down to the farm, but as a result of making new drains the whole of the water with a small exception was carried under a road and on to the pursuer's ground. In 1877 a number of new shallow open ditches and surface drains were made, and the larger drains were built up where their sides had become broken down. The farm drains, which were 12-inch square stone drains with large covers, were not sufficient to carry the whole water so delivered from the wood, and therefore in time of spates the pursuer's farm was flooded in different places, extending in all to 25 acres. It was shown, however, that the pursuer had not made the most of the farm drains, and had done very little to keep them clear and free from silt. The grieve's evidence was that on two occasions only in the year 1874 had men been employed by the pursuer on the drains, at a total cost of £3, 10s.

The first occasion on which the pursuer complained to Mr Binning, the defender's factor, was by letter dated 17th May 1877:—"I have repeatedly spoken to you, as I did to your predecessors, on the subject of the injury to the drains of my farms of Culcraggie by the drainage into them of the wood of Countlich, and, as you are aware, have been repeatedly put off by promises of redress when Mr Butler Johnstone came to the country. No remedy, however, has been given, and I cannot let the matter remain unsettled any longer. When I got possession of my farm the drains were quite sufficient, and for some years thereafter they remained so; but about eight years ago I found they had become choked up, and otherwise did not drain my land. It was some time before I discovered the cause, and went to great expense in trying to make the drains work. At last, however, it was discovered that the wood above mentioned had been drained, and the drainage thrown into the drains on my farm, which were quite insufficient to carry it off, and in consequence I have suffered great loss, which I cannot estimate at less than £100 per annum."

Mr Binning's answer, dated 10th July 1877, was in these terms:—"I duly received your letter of 17th May last, and the matter has been under consideration. You set out by saying that you had repeatedly spoken to me and to my late father on the subject. I can only speak for myself, and I regret that I must offer a contradiction to this statement, and say that your letter was the first intimation to me on the point, and that all that passed between us was that you had asked that Mr Butler Johnstone should execute additional drainage on your farm; but this had no reference whatever to water from Contullich Wood." . . .

The pursuer then on 14th July 1877 wrote—"I think, on consideration, that you will recollect that I spoke to you several times on the subject of my drains not working. I may not have mentioned that this was due to the draining of Contullich Wood, because it was only lately that I discovered the cause." . . .

At a meeting in August the defender's factor offered to have the drains examined and cleaned out, without admitting that there was any obligation on the landlord to have it done, but the offer was not accepted.

Following on these letters there was a correspondence between the pursuer and his agents, Messrs Macandrew & Jenkins, on the one hand, and the defender's factor and Messrs Lindsay, Jamieson & Haldane, his commissioners, on the other, which was continued down to 24th February 1879, when Messrs Lindsay, Jamieson, & Haldane wrote to the pursuer's agents—"On the whole matter, therefore, we cannot admit any liability on the part of the landlord, and cannot ask him to go into any reference on the subject, but we are willing to listen to any reasonable proposal by Mr Macdonald." During all the years of his lease the pursuer paid his rent and took receipts without any reservation of his claim for damages.

On 17th November 1882 the Lord Ordinary (M'Laren) pronounced this interlocutor:—"Finds that the pursuer has sustained damage through the undue exercise of the reserved powers of the defender since he became proprietor of the farm of which the pursuer is tenant: Assesses such damage at £200, for which sum decerns against the defender for payment to the pursuer, with interest, as concluded for: Finds the pursuer entitled to expenses," &c.

"*Opinion.*—This case has been the subject of much anxious consideration, with reference to the evidence as well as to the principles of law involved in it. I am asked to award damages at the instance of a tenant against his landlord for injury to his fields through acts of the landlord in bringing a quantity of water from a higher level into the tenant's drains greater than these drains were adequate to carry away. I have not been referred to any judicial precedent for a claim of this description, though from the correspondence in the cause and from other sources I think it probable that such claims have been admitted in practice or made the subject of reference or compromise. I must, however, for the purposes of the present case, endeavour to ascertain the limits of a landlord's reserved powers in relation to the use of the lands let to a tenant, because the question here must be, whether the defender has exceeded those limits to the injury and damage of the pursuer.

"There is not much doubt as to the powers of a proprietor, in competition with neighbouring proprietors, to dispose of the surface-water which is precipitated from the atmosphere upon his estate. Surface-water, if not interfered with, will of course descend to a lower level by the operation of natural causes; and the obligation of the inferior tenement to receive the water flowing or percolating from the superior tenement, is, under the name of natural servitude, an obligation perfectly settled and understood. By the effect of drainage it is undoubtedly true that this natural servitude has been rendered more burdensome; because by it the surface-water is carried away more rapidly and in greater volume. But, provided the drains are not so laid as to carry the water in a direction different from the natural flow and outfall, I apprehend that the inferior proprietor will be bound to receive the outflow of the artificial drainage, and to submit to the consequent inconvenience, or to provide, at his own costs and charges, for carrying away the water. It is, of course, understood that the superior proprietor must consult the convenience of the inferior proprietor, as far as possible, which he will in general do by discharging his drainage into the nearest drain or natural water-run of the inferior tenement, and not by leading it into the middle of his neighbour's field.

"This natural servitude, which is nothing more than the recognition of a natural law, is, I conceive, inseparable from the ownership of land, and therefore, for example, if Mr Macdonald, the pursuer of the action, had purchased his holding, or had taken it in feu-farm, instead of on a nineteen years' lease, the defender would have been entitled to improve the drainage of his plantations in any way he pleased, discharging the water at the outlets previously in use, and the purchaser or feuar would have had no claim of compensation either for the flooding of his land or for the cost of enlarging his drains so as to prevent such flooding. I do not refer to the authorities establishing these propositions, which I understand are not in dispute. But I stop here to observe that by the general extension of drainage throughout the arable estates of this country the natural servitude is virtually resolved into an obligation on the part of each proprietor to provide artificial channels for carrying the superfluous water of adjacent lands on to the next estate, or the next stream capable of receiving it. The servitude may thus be a cause of considerable expense to the servient proprietor, for which, however, he is indemnified by the correlative benefit which he receives in sending his own drainage to other lands, and which, at all events, he can in general charge upon his estate.

"In considering the law of natural servitude as it affects two tenants holding of the same landlord, or as it affects a tenant where the landlord is himself in the occupation of the superior tenement, I feel bound to exclude entirely that particular view of the operation of the law which is summed up in the preceding sentence. A principle which would lay upon a tenant under a nineteen years' lease, or on a yearly tenant (for the cases are really indistinguishable), the duty of protecting himself against an artificial influx of water by the formation of drains at his own expense must in my opinion be wrong. A tenant cannot be supposed to contemplate liability to expenditure of an exceptional and permanent character as a condition of his holding. If this is conceded, the question is reduced to a single alternative. Either the tenant without notice given, or right reserved in the lease, is bound to submit to any amount of injury which the landlord may occasion through the exercise of his right of draining his lands of higher elevation, or he (the tenant) is entitled to be indemnified by the landlord against injury consequent on an artificially increased efflux of waters from these lands. This indemnity may be given in two ways—by enlarging the leading drains, or by an allowance for damage done, such as is claimed in the present action.

"1. It is argued for the proprietor that the tenant must submit to the injury, because just as in the case of neighbouring proprietors it is for the common interest that lands should be drained, which they would not be if each proprietor had a right to object to increasing the natural burden. I agree that as between proprietors this extension of the strictly natural servitude is founded on considerations of mutual interest or advantage, because all proprietors in different degrees derive benefit from it, and because if lands are to be drained at all it is a servitude of necessity. But I do not see the necessity for a proprietor during the currency of a particular lease undertaking drainage operations which are to render part of his tenant's possession valueless. He may wait until the lease is expired and try to find a tenant who will agree to pay rent for fields flooded by drainage. Or, which seems more reasonable, he may offer to make proper outfalls for the drainage, arranging that the work shall be done when the tenant's land is not under crop. It was urged that a landlord has no right to enter his tenant's lands for the purpose of making or improving drains, and consequently is under no obligation to do so. I think this reasoning is fallacious. It is not a

question of obligation, but of condition. The landlord is not to bring water upon his tenant's farm unless on condition of providing means for carrying it away. If the tenant were so foolish as to refuse access for this purpose, a different kind of question would be raised.

"2. It will be admitted that the landlord is not bound (in the absence of special agreement) to drain his tenant's lands, or even to restore drains which fall into disrepair, because the farm is held to be taken with reference to its existing capabilities of production. I think the same reason will entitle the tenant to the protection of the law against acts of the landlord materially lessening the productive capacity of the farm and its value to him. This principle has been recognised in cases in which a landlord has been held liable in damages for an increase *plus quam tolerabile* in the quantity of game which he maintains in the exercise of his reserved right of sporting. The rule may be conveniently referred to an implied warranty on the part of the landlord not to injure the tenant's estate by his voluntary acts or deeds. Such a principle is not, in my opinion, inconsistent with the law laid down in *Laurent* v. *The Lord Advocate*, March 6, 1869, 7 Macph. 607—that a landlord is not bound to compensate a tenant for loss of custom during the continuance of building operations on the adjoining tenement.

"3. I therefore come to the conclusion that the pursuer's claim is well-founded in principle, but I am also of opinion that, except to a very limited extent, it is ill-founded in fact. There is some evidence that the fields alleged to be damaged were dry and in good condition at the commencement of the lease. This, however, rests on the recollection of the pursuer and one or two friendly witnesses, and it is certain that for some years before the defender came into the entailed estate the fields in question were injuriously affected by the same causes, if not in the same degree, as they were since Mr Butler Johnstone's succession to the estate. In his condescendence the pursuer estimates the damages for these two periods at the same annual sum per acre. If he had known that an heir of entail does not represent his predecessor, he would probably have shaped his claim differently. It is also certain that the drains complained of were badly constructed from the beginning, because while there are five branch-drains converging to a common outlet, the outlet through which the water of these branches has to pass is of no larger diameter than the branches, and is consequently quite incapable of carrying away their contents when full. It appears that whenever the drain has been tested, the outfall has been found running clear and full, fed by one or two of the branches while other branches were completely choked with an insufficient outfall. I think this was a necessary result of such a system of drainage, because on every occasion of a flood the water held back in the branches would be depositing the sand held in suspension, and there never could be a free and unchecked flow sufficient to scour the branch drains. It is probable that for many years the branch drains have been in a more or less congested state, resulting in leakage or bursting of the drain and flooding of the fields. For such damage, so far attributable to the defective construction of the drains, no legal responsibility attaches to any party. The pursuer, when he took the farm, must be held to have accepted the drains as they stood.

"I think that from the construction of the drains in question, and from the history of the case, it may be inferred that these drains were intended to receive the natural flow of water from the defender's plantation. That the drainage of the plantation has been improved during the pursuer's lease I do not doubt. It is not of much consequence, in my view of the case, whether the expenditure of labour under this head took the shape of the formation of new drains, or of deepening and widening the existing drains. In either case the rainfall of the plantation was more rapidly conveyed away from the plantation and into the pursuer's farm. But it is of consequence to observe that the improved drainage of the plantation is proved by the evidence of Mr Forbes, formerly factor, to have been begun, and for the most part executed by the former proprietor and heir of entail. Mr Butler Johnstone was not bound to make compensation for injury to crops done by his predecessor in title. Was he then bound to fill up the plantation drains which his predecessor had made, so that further damage should be prevented? I do not think so. This would have been a dilapidation of the estate, which a limited owner is not entitled to make. The defender's position of greatest safety was in doing nothing, leaving it to the tenant to make good his claims against the predecessor if he could for actual and prospective damage.

"4. But it is proved that the defender has employed labourers upon the plantation drains; and while there is some conflict of evidence on the subject, I think the result is that there has been something beyond mere cleaning and repair; that there has been new work, causing an increased flow of water towards the pursuer's fields. My chief difficulty is in separating the damage consequent on the defender's operations from that which is attributable to the causes already mentioned. According to the words of the pursuer's claim in condescendence 7, there has been no increase of flooding since the defender's succession in 1873, because in the condescendence the pursuer estimates the damages at a uniform rate for the whole period subsequent to 1867, namely, at one-half of the value of each of the crops growing on the damaged fields during that period. His witnesses to damage give their evidence in conformity with the claim.

"Notwithstanding what these persons say, I think the general tenor of the evidence, and particularly that of Mr Mackintosh, the shooting tenant, is to the effect that the damage has been increasing, and that the increasing wetness of the land was not entirely due to bad seasons. I think also that the defender's representatives were satisfied as to the fact of damage, while reserving all defences involving matter of law. This is not a case for merely nominal damages. Indeed, I think it is not a case in which nominal damages could be given, because there is no invasion of the tenant's right, and damages are only due, if due at all, in respect of some substantial injury resulting from the undue exercise of the proprietor's reserved powers. Then the claim must be limited to eight years at most; because the damage, if any, in the year 1873 was due to the acts of the previous proprietor, who died in that year. I have no means of separately estimating

the damage occasioned by the defender in each year of his possession of the entailed estate. I cannot make it higher than £25 per annum, because I am convinced that the chief part of the injury complained of is attributable to the defective construction of the farm drains, and to the improvement of the hill drainage effected by the late proprietor. I shall, however, allow £200 as the best approximation I am able to make.

"I say nothing on the question of waiver, because I think the evidence taken on this subject is inconsistent with the motion that the claim was abandoned. The pursuer did not reserve his claim when he made payment of rent, because he was advised that it was not a claim which he was entitled to set off against the obligation to pay rent.

"The interlocutor will find the pursuer entitled to £200 of damages, with expenses."

The defender reclaimed, and argued — The defender was not bound to remedy damage caused by the drainage operations of the preceding heir of entail—*Dillon* v. *Campbell*, 1780, M. 15,432; *Webster* v. *Farquharson*, Bell's 8vo Cases, 207; *Fraser* v. *Fraser*, May 29, 1827, 5 S. 673, *aff.* 5 W. & S. 69; *Tod* v. *Moncrieff*, Jan. 14, 1823, 2 S. 104, *aff.* 1 W. & S. 47; Sandford on Entails, 331. The pursuer's claim must be based either on (1) the law of neighbourhood, in which case it would be excluded by the principles laid down in *Laurent* v. *Lord Advocate*, March 6, 1869, 7 Macph. 607; *Campbell* v. *Bryson*, Dec. 16, 1864, 3 Macph. 254; *Wilsons* v. *Waddell*, Dec. 1, 1876, 4 R. (H. of L.) 29; or on (2) breach of contract, in which case the evidence showed that the defender has not broken his contract. Besides, the pursuer had paid his rent and taken receipts down to the year 1881 without making any reservation, and was therefore barred from now insisting in his claim—*Hunter* v. *Broadwood*, Feb. 2, 1855, 17 D. 340; *Baird* v. *Mount*, Nov. 19, 1874, 2 R. 101. It was to prevent such questions arising after a lapse of time that the Court laid down the rule in *Broadwood's* case, the principle of which was not that of waiver, but rather that of equitable limitation, to prevent the landlord suffering prejudice from the delay of the tenant. In any event, the pursuer could recover for the period prior to May 1877, when he first intimated his claim for damages.

The pursuer replied that he had suffered loss since 1873 from water coming down from Contullich Wood on to his farm, for which the defender was liable, (1) because of his failure to put right what was done by his predecessor in title, and (2) because of his operations since 1873, which were a breach of contract—*Wemyss* v. *Wilson*, Dec. 2, 1847, 10 D. 194; *Wemyss* v. *Gulland*, Dec. 2, 1847, 10 D. 204; *Campbell* v. *Kennedy*, Nov. 25, 1864, 3 Macph. 121; *Morton* v. *Graham*, Nov. 30, 1867, 6 Macph. 71; *Inglis* v. *Moir's Trustees*, Dec. 7, 1871, 10 Macph. 204; *Wood* v. *Paton*, March 20, 1874, 1 R. 868; *Reid* v. *Baird*, Dec. 13, 1876, 4 R. 234. The terms of the correspondence prevented the claim of the pursuer being barred—*Hardie* v. *D. of Hamilton*, Feb. 2, 1878, 15 S.L.R. 329.

At advising—

Lord President—We have heard this case at great length, and if it were necessary to examine the evidence in detail, we would require to take time to consider it. But seeing that the evidence is quite fresh in our minds, I think we are quite in a position to judge of the facts without further delay.

The case, in so far as regards the greater part of it, is not difficult. The pursuer is tenant of a farm of about 170 acres which he holds under the defender, and held under the defender's predecessor as heir of entail in possession of the entailed estate. Adjoining his farm and situated higher is a plantation of 312 acres. In 1864, at the time the pursuer entered on his lease, the condition of the plantation is described by the witnesses as having been full of water, so much so, that there were a number of small ponds all about, and nothing had at that time been done to effect a drainage of the wood.

The drainage of the wood was an obvious improvement for the heir of entail, and one for which the heir of entail was to be commended for entering on, whenever it might be done; but as the farm of the pursuer was immediately adjoining, and was situated upon inferior ground, it must have occurred to any person draining the plantation that it was very necessary to look after the interests of the farm. Now, on the farm there were a few main drains, but no regular system of drainage, at least not according to our modern notions of what drainage should be, and therefore it was all the more indispensable that the proprietor should take proper care that the farm which lay below should not be inundated. It was not by one great flood that the water had been accumulated, but year by year, and the operation of draining the wood had the effect of bringing down the whole water in one body, whereas previously when the wood was undrained, much of the water which had accumulated went off by evaporation; when however the stagnant pools were drained, the evaporation stopped—for where there is thorough drainage there can be very little evaporation—and the whole of the water from the wood, part of which had previously evaporated, found its way down to the lower level. The result of the operations completed in 1868 by the heir of entail then in possession shows that they were conducted with an entire and wrongful disregard for the interests of the pursuer. These operations were begun in 1867, and that their effect was injurious to the farm I am not disposed to doubt. The heir of entail who conducted these operations died in 1873, and was succeeded by the defender, who is not shown to have had any knowledge of the operations of 1867, and we must take it that he came in as a stranger, who found on the one hand an ill-drained farm in a bad condition from wetness, and on the other a systematic drainage in the extensive plantation. He had nothing to do, so far as he was aware, with the wetness of the farm; he had received no notification of damage resulting from it, and was therefore under no obligation to remedy it, while he had a material interest to maintain the drainage of the plantation which he found in existence. So far as I see, he did nothing but maintain the existing system. He scoured from time to time the drains that were there, and may have added some small surface branches to the main drains in the wood itself, but he cannot be said to have extended or added to the system of drainage until 1877 or thereabouts. Thus, then, it appears that up to that time the defender had no reason to sup-

pose that he was committing a breach of contract or inflicting a legal wrong, and under one or other of these heads the pursuer must claim.

If there is not breach of contract or legal wrong, then there is no liability for damage. The tenant says there was breach of contract, because he contracted to take a dry farm and now has a wet one. If there had been no change in the ownership of the farm, that would be a very strong argument, but then he did not contract with this proprietor. When this proprietor succeeded, the tenant had a wet farm, and so far as the defender knew, was contented with it. Therefore it is vain to say there was a contract between the pursuer and the defender that the defender should have a dry farm, for the present defender knew nothing of the state of matters when the contract was entered into.

But it is said that although there is not a breach of contract, yet there is a legal wrong, and that it has been done by continuing the drainage in such a way as to injure the pursuer and to make the landlord liable. I should not have much doubt that if the succeeding heir of entail had extended the system of drainage, and had seen the evil effects of it, he would be liable for the consequences. Or, again, if the heir of entail succeeding to the estate, and to the system of drainage as part of it, is certiorated by the tenant that an injury is going on which was commenced by his predecessor, and that no reparation has been made or remedy provided, then I think the burden would be on the succeeding heir of entail, as landlord, to do something which would prevent the continuance of the damage. Here we have neither of these cases; there has been no extension of the system of drainage, and no notification that the predecessor had caused damage, or that the tenant had been injured. In these circumstances the defender from 1873 until 1877 did nothing but what a prudent owner would have done in the state of knowledge which he possessed—that is to say, he maintained a good system of drainage which had been handed down to him in the plantation, in ignorance that it was the cause of injury to anyone, and therefore he cannot be held liable in damages for that period, for he was neither committing a breach of contract nor a legal wrong.

But the case is different when we get to 1877, for then it appears that there was something like new work, and not mere keeping up and scouring. The result was that the drainage was more effectual and more injurious, and simultaneously with that was tabled a distinct complaint by the tenant of injury to the farm. No complaint was ever made before; that is clear from the terms of the correspondence, because although in his letter of 17th May 1877 to Mr Binning, the defender's factor, the tenant says that he had repeatedly spoken to him on the subject, we find that when the factor writes a letter saying that it is the first intimation he has ever had, the tenant in his next letter of 14th July 1877 withdraws his previous assertion—"I may not have mentioned that this was due to the draining of Contullich Wood, because it was only lately that I discovered the cause." So that he had never mentioned to the factor nor to anyone else that he attributed the bad condition of the farm to the Contullich Wood.

From that time it became the duty of the landlord to redress the injury done to the tenant, and probably the most successful and prudent way would have been to drain the farm—certainly it would have been the best in the end. But there was another mode that the landlord might have tried, which at all events would have remedied the evil to a great extent, although it might not have been so effectual or satisfactory, and that was to carry the water down the side of the road. Neither of these methods, however, was adopted, and I think that from that date the landlord was liable. But there was no complaint made until the middle of 1877, by which time it was clear that nothing could be done to protect the crop of that year, for it was by that time sown and partly grown. The pursuer therefore is not entitled to claim compensation for 1877 any more than he is for the years 1874, 1875, or 1876, but I think he is entitled to claim for 1878, 1879, 1880, and 1881.

I may say, in conclusion, that I do not think the plea of bar here put forward is of any avail, for there was a correspondence continuing for two years between the tenant and the factor and the respective agents for the parties. In that correspondence the tenant distinctly tabled a claim for compensation for continuing damage, which must go on till measures are taken to remove it. There was then a cessation of further correspondence for a period of about two years, from February 1879 until December 1880. But unless there were some prospect of coming nearer to a settlement it would have been idle to continue to correspond; for in February 1879 there are two last letters on both sides which show distinctly the point at issue between the parties, the first stating very plainly the injury and its cause, which met in the second letter by the statement of the landlord's agents that they cannot admit liability or enter into a reference.

There could be no bar after that except by a formal withdrawal of the claim. It was not a claim for past years, but a continuing claim for injury during the rest of the lease if not remedied.

I think the defender should be found liable for the last four years of the lease, and so far I would propose to adhere to the judgment of the Lord Ordinary; I adopt also the rate at which the Lord Ordinary has assessed the damage, viz., £25 per annum.

I will further say, in conclusion, with reference to the pursuer's evidence, that although he may not have himself known his position as he would have done had he been solely engaged on the farm and on nothing else, yet that is not a matter for which the defender should suffer. On the other hand, I do not think that the most has been made of this farm, for I think much might have been done on the tenant's part by keeping the drains clean to obviate some of the damage which has been done.

Lord Deas concurred.

Lord Mure—I agree that in the circumstances the pursuer is in a position to claim damages for the excess of water which was brought on to his farm from the wood.

It is quite plain that the original system of drainage on the farm was not meant to carry off the water from the wood; but in 1867 and 1868

the landlord takes steps to drain the wood, and brings across the road and down on to the pursuer's farm a larger body of water than formerly. The drains on the farm are not able to hold this water which is brought down, and so become flooded, and for the damage caused by this the proprietor is liable. In 1873, however, there is a new proprietor, the succeeding heir of entail, and all he knows about the drainage is that he finds a wet farm and a dry wood. He being the proprietor of the wood is quite satisfied, and until 1877 there is no complaint made by the tenant. The defender therefore was in ignorance of the state of the case, for he was not aware that the condition of the farm had been changed from dry to wet by his predecessor.

But then even after the complaint he takes no steps; and I think that he was bound after the complaint to make reparation for the continuing damage if he continued to throw down a larger body of water on the farm than it should naturally have received.

On the question of what is the proper amount of damages, while I think that the claim should only be allowed for four years, I see no reason to differ from the Lord Ordinary with regard to the rate per annum at which they should be calculated.

Lord Shand—I am of the same opinion. I think that from the time the pursuer complained of the state of matters and called on the defender to put it right, the defender was in the position of causing an injury which he was bound to remedy. His predecessor was entitled to drain the wood, but as landlord was equally under an obligation not to place the tenant in circumstances of disadvantage, and therefore in draining the wood was bound to keep the water off the farm, or carry it through by means of proper drains.

That is the case in reference to the person who executed the works. With regard to her successor, the present defender, I think that when he found the tenant suffering from this disadvantage, and declined as heir of entail to provide any remedy, he must be held liable in damages for the period subsequent to the complaint.

The only difficulty that I have felt about the case arises from the fact that the tenant did not bestir himself, and endeavour to make the drains on the farm work as well as possible. I think that he should have shown that he did his best to carry off the water.

On the other hand I have come to the conclusion that, even doing his best, the quantity of water was overpowering; and in arriving at that conclusion I am content to take into consideration only the water that the tenant could not carry off by means of the drains he had on the farm.

On the question of bar or acquiescence, which rests upon the absence of any reservation by the tenant when paying his rent, I think that when the terms of the correspondence are considered it is seen that the principle of the case of *Broadwood* has no application to this case.

The Court pronounced this interlocutor:—

"The Lords having considered the cause, and heard counsel for the parties on the reclaiming-note for the defender against the interlocutor of Lord M'Laren of 17th November last, Recal the said interlocutor: Find that during the years 1878, 1879, 1880, and 1881 the pursuer has sustained loss and damage through the operations of the defender: Assess the damage at £100, and decern against the defender for payment to the pursuer of said sum: Find the pursuer entitled to expenses, modified at two-thirds of the taxed amount," &c.

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

Counsel for Defender and Reclaimer—Pearson—Graham Murray. Agents—Tods, Murray, & Jamieson, W.S.

HIGH COURT OF JUSTICIARY.

Wednesday, June 13.

(Lord Justice-Clerk, Lord Young, and Lord Craighill.)

ROBERTSON *v.* THE LOCAL AUTHORITY OF PERTHSHIRE.

Justiciary Cases—Contagious Diseases (Animals) Act 1878 (41 and 42 Vict. c. 74)—Person in Charge of Animals—Bowing Contract.

The Contagious Diseases (Animals) Act 1878 lays upon the person "having in his possession or under his charge" an animal affected with contagious disease, the duty of reporting the existence of such disease to the police. A tenant of a farm had let out a number of cows to his nephew on a contract that he should be paid a certain sum for the milk of each cow, and that any that died should be replaced, the nephew occupying the farm-house while he himself lived some miles away. The cows having become infected with a contagious disease, and no notice having been given by the tenant of the existence thereof, *held* that he was rightly convicted of the offence of not giving such notice.

The Contagious Diseases Animals Act 1878 (41 and 42 Vict. c. 74) provides by sec. 31—"Every person having in his possession or under his charge an animal affected with disease, shall, as far as practicable, keep that animal separate from animals not so affected, and shall with all practicable speed give notice of the fact of the animal being so affected to a constable of the police establishment for the police district or area, county, borough, town, or place wherein the animal so affected is."

This was an appeal brought by William Robertson, farmer, Oliverburn, in the parish of Kilspindie, Perthshire, against a conviction obtained against him by the Local Authority of the County of Perthshire constituted under the Contagious Diseases (Animals) Act 1878.

A complaint was brought in the Justice of Peace Court by the respondents against the appellant and his nephew John Robertson, dairyman, Perth, and residing at Oliverburn, under the Summary Jurisdiction (Scotland) Acts 1864 and 1881, that they had "both