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

Bothwell and county of Lanark, who purchased the same with entry as at the term of Martinmas 1891, against the Caledonian Railway Company, concluding for payment of feu-duties in respect of a portion of the said lands acquired by the defenders from a vassal of the pursuer's author.

The pursuer averred—"By feu-contract dated February and recorded March 1878, Alexander Gray Simpson, then of Carfin (the pursuer's author), feued to George Macalister, iron merchant and iron manufacturer, Carfin, Motherwell, a part of the estate of Carfin, extending to 3¾ imperial acres or thereby, for the feu-duty of £75 sterling yearly, payable half-yearly, with a duplication of the said feu-duty at the expiry of every nineteenth year from the term of Whitsunday 1873, which was thereby declared to be the term of entry to said subjects. . . . (Cond. 3) In May 1880 the said George Macalister disponed to the Caledonian Railway Company a piece of ground extending to 513 decimal or one-thousandth parts of an imperial acre or thereby, being part of the portion of said lands of Carfin feued to him. . . . The said disposition is not granted by virtue of any statutory power contained in the defenders' special Acts or in the Lands Clauses Acts. It is a common law deed proceeding on a private arrangement between the granter and the defenders, and it recognises the defenders' liability for the feu-duties as now sought to be enforced, while it confers thereagainst only a right of relief against the granter. . . . The feu-duty is not sufficiently secured over the remaining part of the ground not disponed to the defenders. . . . The defenders are liable for the whole feu-duty due in respect of the land feued to the said George Macalister by the said feu-contract from and after the term of Martinmas 1891, being the date of the pursuer's entry, viz., the half-year's feu-duty due at Whitsunday 1892 and the half-year's feu-duty due at Martinmas 1892. By the terms of the said feu-contract there also became due and payable to the pursuer at the term of Whitsunday 1892 a duplication of the said feu-duty, for which the defenders are also liable."

The defenders denied liability, on the ground that "by section 126 of the Lands Clauses Consolidation (Scotland) Act 1845 it is provided that in the event of lands being used or taken for the purposes of the special Act the company shall not be liable for any feu-duties or casualties to the superiors thereof. The lands here taken by the defenders are used and were taken for the purposes of the special Act, and form part or portion of lands held by the same owner under the same title. Explained further, that the defenders are willing, and offered before the present action was raised, to pay to the pursuer compensation in respect of the portion of feu-duty and duplications affecting the piece of ground taken by them."

They explained "that the said piece of ground was conveyed to them in consideration of the price of £670, 5s. 11d., and was taken and used by them for the purposes and under the powers of Caledonian Railway (Additional Powers) Act 1874, and the Railways Clauses Consolidation (Scotland) Act 1845, therewith incorporated [*see sections quoted in the Lord Ordinary's note*], and was used for the construction of railway No. 1 authorised by the first mentioned Act, and for making and providing additional station and siding accommodation in connection therewith. By the said disposition the disponer further bound himself, his heirs and successors, to free and relieve the defenders and the area of ground disponed of all incumbrances affecting the same, and of all feu-duties, periodical duplications of the same, casualties of superiority, land tax, minister's stipend, and all other existing public and parochial burdens (except as thereinafter mentioned) effeiring to the said area, not only at and preceding the date of entry (11th November 1879), but in all time thereafter, all of which were by said disposition charged exclusively upon the remainder of the disponer's said lands and others not conveyed to the defenders."

The pursuer answered—"The special Act of 1874 does not include the piece of ground now in question. The compulsory power under that special Act ended in 1877, long before the recorded disposition under which the defenders hold the ground, with entry as from Martinmas 1879. Even if their disposition had been in the statutory form for railway companies, and had followed on compulsory sale (which is not the case), the defenders possess the ground under liability for the whole charges thereon until due redemption thereof or compensation given therefor."

The pursuer pleaded—"(2) The defenders being disponees infeft and in possession under the ordinary law, are liable for the total amount of the *reddendo* in the feu-contract. (3) *Separatim*—The defenders are in any event liable, under the Lands Clauses Consolidation (Scotland) Act 1845, for the total amount of the charges on the ground in their possession, being the sums now sued for, until due redemption of the same and full compensation for the superior's rights is given."

The defenders pleaded—"There being no feudal relation between the pursuer and the defenders the action is incompetent, and the defenders should be assoilzied. (2) The action is incompetent in respect of the provisions of the Lands Clauses Consolidation (Scotland) Act 1845."

By interlocutor dated 25th July 1893 the Lord Ordinary (Low) found the defenders liable as concluded for.

"*Opinion.*—By feu-contract dated and registered in 1878, the pursuer's author feued to George Macalister 3¾ acres of the lands of Carfin. By disposition dated and recorded in 1880, Macalister sold a portion of his feu to the defenders.

"The pursuer, as superior, now sues the defenders for payment of feu-duty. The defence is that the lands acquired by the defenders being only a part or portion of the estate, the defenders are, in terms of

the 126th section of the Lands Clauses Consolidation Act 1845, not liable for any feu-duties or casualties to the superior thereof. The defenders maintain that all that the pursuer can claim is compensation for the portion of the feu-duty and duplications affecting the piece of ground acquired by them in conformity with the provisions contained in the fasciculus of clauses of the Lands Clauses Act from the 107th to the 111th.

"The question appears to me to be, whether the provisions of the Lands Clauses Act, whereby a railway company is authorised to acquire land without being in the position of holding of a superior, are applicable to this case.

"The piece of land in question was not acquired by the defenders in the exercise of the compulsory powers conferred upon them by their Act (the Caledonian Railway Company (Powers) Act 1874), but was purchased by agreement after the expiry of the compulsory powers for extraordinary purposes under the 19th section of their Act, and the 38th section of the Railways Clauses Consolidation Act 1845.

"The last-mentioned section enacts that 'It shall be lawful for the company, in addition to the lands authorised to be compulsorily taken by them under the powers of their or the special Act, to contract with any party willing to sell the same for the purchase of any land adjoining or near to the railway, . . . not exceeding in the whole the prescribed number of acres, for extraordinary purposes.'

"The 19th section of the defenders' Act provides that 'The quantity of land to be acquired by agreement by the company for the extraordinary purposes mentioned in the Railway Clauses Act shall not exceed five acres in addition to the lands which they are authorised by the Act to take compulsorily.'

"The land was therefore acquired only by agreement, and could not have been acquired except by agreement, and the disposition in favour of the defenders is a common law disposition, and does not bear to be granted in pursuance of nor does it refer to any Act of Parliament.

"*Prima facie*, therefore, this case is not one to which the Lands Clauses Act applies. The object of that Act, as stated in the preamble, is to comprise in one general Act provisions 'relative to the acquisition of lands in Scotland required for undertakings or works of a public nature, and the compensation to be made for the same,' and the first enactment in the statute is, that it shall be incoporated with any Act of Parliament 'which shall authorise the taking of lands for such undertaking.' I think that it is clear that the 'acquisition' or 'taking' of lands there referred to is 'acquisition' or 'taking' not by voluntary agreement but by authority of an Act of Parliament, and by virtue of the compulsory powers thereby conferred.

"The defenders, however, pointed out that the 12th section of the Lands Clauses Act refers to the purchase of lands by agreement for extraordinary purposes, and that the sections upon which they specially rely (viz., the 80th, the 107th to 111th, and the 126th) are, so far as their terms or the general headings under which they fall are concerned, equally applicable to lands taken by agreement as to lands taken by compulsory powers, seeing that they refer to any lands taken or used by the promoters.

"The first observation which occurs to me upon that argument is, that the 12th clause does not confer upon the promoters authority to acquire land by agreement for extraordinary purposes, but only authorises persons under disability to sell to the promoters, if the latter by the special Act are authorised to acquire land for extraordinary purposes. Now, in this case the person who sold to the defenders was not under disability, and therefore he did not need the authority given by the 12th section, and it seems to me that in carrying through the transaction it was not necessary to appeal to a single provision of the Lands Clauses Act.

"But, further, I am of opinion, that even where lands are taken by agreements for extraordinary purposes from a person under disability, the sections of the Lands Clauses Act relied on by the defenders would not apply if a common law title was taken. If a statutory title was taken the case might be different, and I express no opinion as to the result in such a case.

"But in all cases where lands are acquired by agreement for extraordinary purposes upon a common law title, I am of opinion that the common law rules in regard to the relation of disponer and disponee and of superior and vassal remain in force.

"In the first place, the reason for the exceptional tenure established for the case of lands for the acquisition of which compulsory powers are conferred fails in such a case.

"Where lands are so essential for the carrying out of a public undertaking, that it is necessary that compulsory powers to acquire such lands should be given, the Legislature has recognised the expediency of keeping the lands free from the risks attendant upon a feudal title.

"The case is different in regard to lands not essential to the carrying out of the undertaking, but which it is expedient that the company should subsequently acquire for extraordinary purposes. The Legislature has in such a case authorised the company to acquire the land by agreement, but by agreement only. If the company cannot make a bargain with the owner of the land, the Acts of Parliament do not aid them. Now, if the acquisition of land for extraordinary purposes is left to bargain and agreement, it seems to me that it would be an anomalous state of matters if the disposition by which the agreement was carried into effect were to go beyond the ordinary legal results of the agreement, and confer upon the disponee an extraordinary and exceptional title which placed him beyond the reach of the common law in regard to the tenure

of land. Such a result could, I think, only be affirmed if it was expressly enacted by statute, and I am unable to find that the Lands Clauses Act contains any such enactments. The 12th section of the Act seems to me to have been introduced for the sole purpose of enabling heirs of entail and other persons under disability to enter into agreements for the sale of land required for extraordinary purposes, while I think that the clauses in regard to tenure, upon which the defenders found, were intended to apply only to the case of lands which the promoters were by Act of Parliament authorised to take, in the sense that they were authorised to take them compulsorily, and whether the owners agreed to sell or not.

"I am confirmed in the conclusion at which I have arrived by the opinion of Lord Justice-Clerk Inglis in *Macfarlane* v. *The Monkland Railway Company*, 2 Macph. 519, and of Lord Kinnear in *The Magistrates of Inverness* v. *The Highland Railway Company*, 30 S.L.R. 502."

Counsel for Pursuer—Vary Campbell. Agent—Keith R. Maitland, W.S.

Counsel for the Defenders—C. S. Dickson—Dundas. Agents—Hope, Mann, & Kirk, W.S.

Friday, March 9, 1894.

FIRST DIVISION.

[Lord Low, Ordinary.

KIDSTON AND ANOTHER *v.* CALEDONIAN RAILWAY COMPANY.

Reparation—Negligence in Constructing Sewer—Injury to Buildings—Abnormal Rainfall — Damnum fatale — Verdict Contrary to Evidence—New Trial.

Certain owners of house property in Glasgow brought an action of damages against a railway company, on the ground that their houses had been injured owing to the negligent and unskilful manner in which the company had carried out certain operations for the construction of a sewer in the street in which the property was situated. It was proved that in making the necessary excavation the company had adopted a known and approved method of work, which in the opinion of their engineers was the safest in the circumstances, and had exercised all usual precautions in carrying on the work, but that, owing to an abnormal rainfall, the earth behind the sheeting of the trench had been washed away, and a subsidence caused which injured the pursuers' houses. The jury returned a verdict for the pursuers. The Court *granted* a new trial, on the ground that the verdict was contrary to evidence, the defenders having exercised all reasonable and proper care, and the injury having been caused by an occurrence of so unusual a nature, that they could not be expected to foresee and provide against it.

The Caledonian Railway Company in August 1892, in the course of operations authorised by the Glasgow Central Railway Act 1888, sec. 41, sub-sec. L, cut a trench about 28 feet deep in Stevenson Street, Glasgow, between the centre of the street and the south pavement, for the purpose of diverting a sewer which interfered with an underground railway in course of construction. Upon 23rd August while the trench was open there was an abnormally heavy downpour of rain in consequence of which the street and trench were flooded, the soil behind the sheeting on the north side of the trench was washed away, an old sewer was broken, the struts canted over, and the houses fronting the pavement on the south side subsided.

Colonel A. F. Kidston, 42nd Highlanders, and Mr Robert M'Lure, writer, Glasgow, joint proprietors of the houses, brought an action of damages for £3000 against the Caledonian Railway Company, in which they averred, *inter alia*, that "the subsidence of the street which brought down the walls of the pursuers' property, and otherwise damaged their tenements, was caused by the unskilful and negligent manner in which the defenders, or those for whom they are responsible, excavated the soil in front of the tenements. In particular, the defenders proceeded to construct the sewer in front of the pursuers' property by open casting instead of tunnelling. The method of construction by open casting is extremely dangerous at such a depth; the only safe method is by tunnelling. Further, the defenders conducted the open casting in a careless and inefficient manner. . . . In addition, there were no precautions taken to divert the rainfall from the trench. Upon the day of the accident there was a considerable fall of rain, and in consequence of the failure of the defenders to construct a dam, or to use some other well-known contrivance to force the rain into the nearest open grating, the rain found its way into the trench, washed away the earth behind the sheeting, and caused the sheeting to collapse, and a subsidence took place. The said rainfall was not abnormal, and was one of the dangers which the defenders should have anticipated, and taken proper precautions to meet. The defenders were bound, in the exercise of their statutory powers, to execute the works with skill and care, and, looking to the excessive depth of the cutting, its proximity on the one side to the pursuers' property, and on the other to the existing old sewers, and further to the treacherous nature of the strata through which it ran being constructed, and to use the best known methods for protecting the properties adjoining the works from injury by subsidence or otherwise. In this they failed as above mentioned, and carried on the work unskilfully, negligently, and recklessly, and thereby caused the injury to the pursuers' property."

The pursuers pleaded—"(1) The defenders