bour. It is not objected that the assessor in making up his valuation has taken into account anything except the value which ought to attach to that heritable subject. Therefore I am unable to see that there is any ground for holding that the owners are to be excluded from claiming as a deduction from the gross rent ascertained by the assessor the annual cost of maintaining the subject assessed in the condition in which it was at the time of the assessment. The other findings of the Lord Ordinary are acquiesced in, and I am of opinion, for these reasons, that we should affirm the Lord Ordinary's interlocutor in so far as it deals with the two objections which were brought before this Court.

LORD M'LAREN—I concur.

LORD PRESIDENT—I also concur. I have really nothing to add to what has been said by my brother Lord Kinnear except this, that it seems to me that in this case we are bound to come to the conclusion that Lord Kinnear has proposed if we follow two cases—*Gardiner* v. *Leith Dock Commissioners* seems to me to settle the matter in respect of the third declaratory finding of the Lord Ordinary in that case. The third declaratory finding was that in estimating the yearly rent or value of the subjects, the harbour &c. dues are to be taken into account, and that finding was affirmed by the Inner House, and was also affirmed by the House of Lords. That seems to me to conclude the question here taken along with the general rule that was laid down in the *Magistrates of Glasgow* v. *Hall*. If the whole matter were open I think there might be a great deal to be said upon the question whether there should be a double deduction, but I quite agree with your Lordship that the matter is not open for us now because the *Magistrates of Glasgow* v. *Hall* has been subsequently followed in other cases, and that is certainly a rule for this Court and cannot be impugned short of the House of Lords.

LORD PEARSON was not present.

The Court adhered.

Counsel for the Complainers and Respondents — M'Lennan, K.C. — A. M. Laing. Agents—Mustard & Jack, S.S.C.

Counsel for the Respondent and Reclaimer — Solicitor-General (Ure, K.C.) — Younger, K.C.—Constable—G. Moncrelff. Agents—Mackenzie, Innes, & Logan, W.S.

Thursday, July 5.

SECOND DIVISION.

[Lord Ardwall, Ordinary.

HAMILTON *v.* THE DUKE OF MONTROSE.

Landlord and Tenant—Lease—Reduction—Damages—Misrepresentation—Warranty—Advertisement—False Statement in Advertisement on a Matter of Opinion—Essential Error—Relevancy.

A tenant raised an action against his landlord for reduction of his lease, or alternatively for damages, on the averment that whereas the farm had been advertised as "comprising a hill capable of keeping about 2000 black-faced sheep and summering 100 cattle," it was not so capable, nor of "maintaining and summering anything like these numbers. At most it could and can only properly carry 1400 sheep, and there is no summering for cattle." He pleaded (1) that he was induced to enter into the lease by the defender's false and fraudulent representations, and (2) essential error induced by the defender.

Held, affirming the Lord Ordinary (Ardwall), that the pursuer's averments were irrelevant.

Landlord and Tenant—Lease—Obligation—Contract—Breach of Contract—Damages—Personal Exception—Statement of Damage from Failure to Repair Fences—Prejudice through Want of Notice and Specification—Relevancy.

A tenant brought an action of damages against his landlord on the averment that the defender had in the lease undertaken within a reasonable time after its commencement (Whitsunday 1899) to execute all necessary repairs to the existing fences on the farm; that though repeatedly called upon to execute the said repairs he did not complete them till October 1904; that the insufficiency of the fencing, and in particular of two fences specified, had enabled the sheep to stray on to the lower ground in summer and eat the winter grazing, and that the loss thereby sustained by the pursuer, in particular in having to buy food stuffs for winter feeding, amounted to not less than the sum sued for.

Held that, there being no averment of damage such as a landlord could be called upon to meet, pursuer's averments were irrelevant.

Per LORD LOW—"I am not satisfied, however, that what was said in "*Broadwood* v. *Hunter*, February 2, 1855, 17 D. 349, "to the effect that a tenant loses his right to claim damages if he does not make a specific claim year by year and pays his rent without deduction, applies in the general case to a claim for damages in respect the landlord has failed to implement obligations undertaken by him in the lease."

On 6th June 1905 James Hamilton, dairyman, Glasgow, brought an action against the Duke of Montrose in which he sought reduction of a "pretended" missive of lease of a farm called Braval, Mounevreckie, &c., in the parishes of Aberfoyle and Port of Monteith, belonging to the defender, and a "pretended" lease entered into between the pursuer and the defender dated 15th February and 30th March, both in the year 1899, with repetition of the rents paid, under deduction of the sum of £950 or of such other sum as might be ascertained "to be a reasonable equivalent for the possession by the pursuer under the said pretended missive and lease from and since the term of Martinmas 1898, being the date of his entry to the arable ground, and the term of Whitsunday 1899, being the date of his entry to the pasture and houses;" or alternatively, payment of £2400 as damages for alleged fraudulent misrepresentation as to the carrying capacity of the farm. Secondly, the pursuer sought £200 damages in respect of the alleged failure of the landlord to repair the fences on the farm.

The pursuer averred in support of his *conclusion for reduction* that in the Glasgow Herald of 26th October 1898 and of other dates an advertisement (quoted in the Lord Ordinary's opinion) appeared of the farm whose lease was in question, describing it as "a hill grazing capable of keeping about 2000 blackfaced sheep and summering 100 cattle." "Cond (3) Upon the faith of the statements in said advertisement the pursuer offered to . . . the defender's chamberlain to lease the said farm of Braval, Mounevreckie, &c. (with part of Auchyle), all as advertised, at a rent of £350 per annum on a lease for fifteen years. After certain verbal communings his offer was accepted by the said . . . on behalf of the defender, by letter dated 10th December 1898. This letter constitutes the missive libelled. Thereafter a formal lease was drawn up and signed by the pursuer and defender on 15th February and 30th March 1899. . . . Cond (4) By the said advertisement the defender represented, and intended to represent, that the said farm of Braval, Mounevreckie, &c., was capable of maintaining about 2000 blackfaced sheep and of summering 100 cattle. The said statement was material, and the pursuer would not have entered into said contract but for it. The pursuer has since discovered and avers that the said farm was not and is not capable of maintaining 2000 blackfaced sheep and summering 100 cattle, or of maintaining and summering anything like these numbers. At most it could and can only properly carry 1400 sheep, and there is no summering for cattle. . . . (Cond. 5), The defender, or his said chamberlain, was well aware of the facts set forth in the preceding article, and the representations as to the carrying capacity of said farm made in said advertisement were so made in the knowledge that the same were false, or at least with gross recklessness and without regard to their truth or falsehood. . . . (Cond. 6). . . . The rents payable as at Martinmas 1901 and Whitsunday 1902 were paid by the pursuer under protest, and under reservation of all pleas and objections, and the payments since then were made on or about 21st November 1904, under pressure of a charge served upon him by the defender on 9th November 1904, and also under reservation of all his claims and contentions . . ."

The pursuer's averments dealing with the alleged *failure to implement the obligation as to fencing* [the portions printed in italics being added by a minute when the case was before the Inner House], were:— "(Cond. 10). By the foresaid lease the defender undertook, *inter alia*, 'and that as soon as possible and within a reasonable time after the commencement of this lease, to execute all necessary repairs to the existing houses (including shepherds' houses, but excluding cottars' houses, for the repair of which there will be no liability on the proprietor, and the same are specially exempted from the provisions of this clause) and fences on and around the farm, and also to erect a fence to enclose the unfenced part of the portion of Auchyle included in this lease.' The pursuer repeatedly called upon the defender to execute the said repairs, but the defender refused or delayed to do so, and it was not until October 1904 that the whole work undertaken by the defender was completed. The pursuer has thereby suffered great loss and inconvenience. *Inter alia*, the insufficiency of the fences has prevented him from keeping the sheep on the higher ground of the farm during the summer months, and away from the lower ground, which it is usual to keep for winter grazing. *In particular, the following fences dividing the higher and lower ground were not put in order till the autumn of* 1904, *viz., a fence running southwards from a point on the south side of Loch Drunkie, and about* 600 *yards from the west end thereof to Trombuie, and a fence running southeastwards from a point about* 150 *to* 200 *yards to the north of the shepherd's house at Upper Dounance to a point where it joins the parish boundary.* The loss, injury, and damage sustained by the pursuer in consequence of the defender's failure and delay to fulfil his said obligations, *and particularly on account of the pursuer having to purchase other food stuffs for winter feeding in place of the said winter grazing which he was thus unable to reserve*, is not less than £200, being the sum last concluded for. . . ."

The pursuer pleaded—"(1) The pursuer having entered into said missive and lease under essential error induced by the defender, and, *separatim*, the pursuer having been induced to enter into the said missive and lease by the defender's false and fraudulent representations, he is entitled to decree of reduction as concluded for. (2) The said missive and lease being reduced, the pursuer is entitled to repetition of the rents and interest paid by him as condescended on, with relative interest, under deduction of a reasonable equivalent for his possession; . . . (3) In the event of the pursuer's failure to obtain decree of reduc-

tion and restitution as concluded for, he is entitled to damages for the loss, injury, and damage caused to him by the said fraudulent misrepresentations. (4) In the like event, the pursuer is entitled to damages for the loss and damage sustained by him until the defender's obligations in regard to said . . . fences were implemented."

On 5th September 1905 the Lord Ordinary (ARDWALL) pronounced the following interlocutor:—"Assoilzies the defender from the whole conclusions of the summons except the conclusion for payment of £200: Dismisses said conclusion for £200. . . ."

Opinion.—"The ground on which the pursuer seeks reduction of the lease libelled is that he was induced to enter into it by the false representations as to the carrying capacity of the farm contained in an advertisement thereof in the *Glasgow Herald* of 26th October 1898. Among the farms there advertised to be let is the farm now tenanted by the pursuer, which is thus described in the advertisement:—'Perthshire, Montrose Estates. Farms to be let, for such number of years as may be agreed on, with entry to the ploughable lands immediately after set, and to the houses and pasture at Whitsunday 1899. (1.) Braval, Mounevreckie, &c., in the parishes of Aberfoyle and Port of Monteith, comprising a hill grazing capable of keeping about 2000 black-faced sheep and summering 100 cattle, and 230 or thereby acres of arable and meadow land.'

"It is alleged by the pursuer that the said farm cannot carry 2000 black-faced sheep and summer 100 cattle, and that, in respect of the false statements in the advertisement he is entitled to have the lease reduced.

"I am of opinion that the pursuer's statements are irrelevant. There is no warranty given that the farm would carry 2000 black-faced sheep and 100 cattle, and statements in an advertisement are not intended to be accepted by offerers as correct without inquiry, nor in point of fact do offerers for a farm accept such statements without looking into the matter for themselves; no ordinary person would. But, besides that, it appears to me that the statement complained of is merely an expression of opinion as to what the farm would carry, and, as was said in another case I shall presently refer to, was not intended to exclude, but to invite inquiries. If the pursuer desired to have the representation regarding the carrying capacity of the farm warranted he should have got it warranted or otherwise made part of the contract. Further, it cannot be said that the representations so made were *in essentialibus* of the contract. There is no dispute as to what the subject let was, and it was the pursuer's business as a prudent man to find out what were its capabilities. I may refer to the case of *Wood* v. *Tulloch*, 20 R. 477, which, although a question of the sale of a property, contains some law bearing upon the present case. I may also refer to the case of *Grieve* v. *Rutherford's Trustees*, 1871, 9 S.L.R. 60, which, although principally decided on the question of *mora*, yet contains several observations applicable to the present case. There the misrepresentation founded on as a ground of reduction was very similar to the present, namely, that 'the farms are capable of carrying about 2000 sheep besides cattle,' and the Lord Ordinary, whose judgment was affirmed by the Inner House, said that this representation was no warranty, but merely an expression of opinion on which the intending tenant should exercise his own judgment. The pursuer's counsel relied on the case of *Macpherson* v. *Campbell's Trustees*, 41 Scottish Jurist, p. 634, where issues of reduction of a lease were allowed. But when examined it appears to me that that case is an authority against the pursuer rather than for him. The misrepresentations alleged in that case were contained, first, in an advertisement, and second, in a note of particulars furnished on inquiry by the factor for the landlord, and Lord Barcaple, who was Lord Ordinary in the case, held that the statements in the advertisement could not form a ground of reduction, but that those in the note of particulars could, and apparently his view was concurred in by the Inner House, although the report does not distinctly say so. In that case the advertisement contained a clause in these terms:—'The lands are at present stocked with superior black-faced sheep and estimated to carry about 5500.' Lord Barcaple deals with this statement thus—The Lord Ordinary thinks that 'from the subject matter of the statement, and the form in which it is made, it invited, and was not intended or calculated to exclude inquiry. No person of ordinary prudence would without inquiry rely upon such a statement as satisfactory evidence of the capabilities of the farm. The Lord Ordinary is therefore of opinion that in so far as the pursuer's averments are rested upon statements in the advertisement they may be dismissed from consideration in this question of the relevancy of the action.' He then goes on to point out how the note of particulars by the landlord's factor stood in a totally different position. Taking the view I do regarding the effect of the advertisement, I do not need to enter into consideration of the question of bar raised by the fifth plea-in-law for the defender, but it appears to me that, considering that the pursuer entered on the farm in question at Martinmas 1898, that plea forms a very formidable obstacle in the way of the pursuer insisting in an action of reduction of the lease after being in possession of the farm under that lease for more than six years, and having insisted on the landlord fulfilling the obligations undertaken in the lease of which he now seeks reduction.

"With regard to the conclusions of the summons other than the reductive conclusion and the conclusions which depend on it, there is a conclusion for £2400 of damage said to have been caused by the fraudulent misrepresentations in the advertisement. I am of opinion that the defender is entitled to be assoilzied from that conclusion on the same grounds that I

have held that he is entitled to be assoilzied from the reductive conclusions. With regard to the conclusion for payment of the sum of £200 sterling, the statements in support of which are set forth in Condescendence 10, there is no relevant averment of the specific damage suffered by the pursuer in each year of the lease, or of any definite claim for damage being made on paying the rent from half year to half year. I therefore hold, on the authority of the cases *Broadwood* v. *Hunter*, 17 D. 340, and *Emslie* v. *Young's Trustees*, 21 R. 710, that there are not relevant averments to support this conclusion. It looks as if, indeed, the pursuer were barred from making any claims for damage prior to Whitsunday 1904, he having apparently paid his rent without reservation down to and including that date, and it appears from the statement in Condescendence 10 that all the repairs the want of which caused the alleged damage were completed by October 1904. However, as this is a question of relevancy, I shall merely dismiss this conclusion."

The pursuer reclaimed and argued—The lease was entered into under essential error, as defined by Lord Watson in *Menzies* v. *Menzies*, March 17, 1893, 20 R. (H.L.) 108, at p. 142, 30 S.L.R. 530. Even if the landlord were ignorant that the representations were untrue that made no difference—*Reese River Silver Mining Company* v. *Smith*, 1869, L.R., 4 E. and I. Ap. 64, Lord Cairns, at p. 79. The misrepresentations in the advertisement were material, and were imported into the contract because the missives of lease, both offer and acceptance, referred to the farm "as advertised." The pursuer's averments were relevant and proof should be allowed. *Woods* v. *Tulloch*, March 7, 1893, 20 R. 477, 30 S.L.R. 497, was to be distinguished because the misrepresentation there was not essential—*Grieve* v. *Rutherford's Trustees*, 10th November 1871, 9 S.L.R. 60, because it turned on the prolonged delay—ten years—in advancing the claim for reduction. The carrying capacity of a farm remains much the same, so in that respect the landlord could not be prejudiced by delay. That distinguished the present case from *Broadwood* and *Emslie* (*cit. infra*). [Lord Kyllachy—These two cases were referred to by the Lord Ordinary on the other branch of the case. Have you any case where it was held there was essential error or fraudulent misrepresentation on a matter of opinion? Yes, *Ferguson* v. *Wilson*, June 4, 1904, 6 F. 779, 41 S.L.R. 601.]

On the conclusion of the first speech for the reclaimer the Court intimated that they did not require to hear further argument upon the question of reduction with the alternative claim for damages, and adjourned the hearing to enable the pursuer and reclaimer to make more specific, if he thought fit, his averments in Cond. 10 as to the landlord's failure to implement the obligation on him as to fencing. The amendments given *supra in italics* were then made.

At the continued hearing it was argued for the defender—Though the fences alleged to be in disrepair had now been specified there was no averment that the landlord's attention had been called to these specific fences. There was still want of specification as to the periods when damage was sustained, and as to the amounts of money paid out for extra food. There was no averment that at the end of each year, or as each half-year's rent fell due, specific damage had been tabled before the landlord. In a proof the landlord would be prejudiced (1) by the claim not having been made year by year so as to enable him to check the damage and keep evidence regarding it, and (2) by want of specification as to what he had to meet. A claim for damage by a tenant on the ground that his landlord had not done what in his lease he contracted to do ought to be tabled each half-year when paying rent. The averments were still irrelevant—*Broadwood* v. *Hunter*, February 2, 1855, 17 D. 340; *Hardie* v. *Duke of Hamilton*, February 2, 1878, 15 S.L.R. 329; *Emslie* v. *Young's Trustees*, March 16, 1894, 21 R. 710, 31 S.L.R. 559; *Eliott's Trustees* v. *Eliott*, June 7, 1894, 21 R. 858, 31 S.L.R. 753. Here there was an obligation in the lease to put the fences in repair and this the landlord thought he had done. There was no specific promise that would cause pursuer to put off his claim as in *Johnstone* (*cit. infra*). Lord Kyllachy asked for a reference to *Callander* v. *Smith*, June 29, 1900, 8 S.L.T. 109, and *Baird* v. *Mount*, November 19, 1874, 2 R. 101, 12 S.L.R. 88.

Argued for the pursuer—He averred that the two fences now specified had not been put in order although complaints had been made. The landlord would not suffer prejudice if the averments in Cond. 10 went to proof. There was a positive obligation in the lease to put the fences in repair. That was equivalent to the specific promise of the factor in *Johnstone* v. *Hughan*, May 22, 1894, 21 R. 777, 31 S.L.R. 655, to do the operations the tenant required. The paying of rent under protest and under compulsion (Cond. 6) distinguished this case from *Broadwood* and *Emslie*, as did also the fact that loss of particular winter grazing was, unlike damage done by game or failure to burn heather, capable of ascertainment at a subsquent date.

Lord Justice-Clerk—There is no doubt or difficulty about the first question. We did not ask any further debate after the opening speech. I think it is quite clear that the statements of the pursuer are irrelevant to enable him to proceed. The only question now before us is the question regarding the conclusion for £200 damages. I agree entirely with the view of the Lord Ordinary—and that view is not at all modified by anything that has been done in the way of attempting the amendment of the record—that there is no relevant averment of specific damage suffered by the pursuer in each year of the lease or any definite claim of damage. It appears that the tenant in this case paid his rent, no doubt under protest and reservation, but paid his rent and paid interest on his

rent when he was in arrear and took no proceedings. I cannot hold that where such a claim as this is to be made, depending necessarily for the ascertainment of the facts upon what happens in each of several successive years, a party is entitled to take no steps whatever to make good any claim that he has, and thereby to place the opposite party in a position in which he has no means of leading evidence in regard to the state of matters subsisting at the times when the alleged successive claims arose. Here for a period of years there is not a word of indication to the landlord as to the actual claim that is proposed to be made; and now, even at the last, when you come to look at it you find that it is still just a claim in general terms for a sum of not less than £200, which it is said was incurred from loss by giving special food stuffs to the stock upon the farm in respect of the low ground pasture having been eaten up at the wrong season. I cannot hold that to be a relevant averment, as proper specification ought to be given in such a case. Therefore I am for adhering to the Lord Ordinary's interlocutor.

LORD KYLLACHY—I am of the same opinion. I do not think it necessary to add anything to what the Lord Ordinary has said as regards the first ground of action. I think it clear that there is no relevant case for reduction on any of the grounds suggested. As regards the conclusion for damages—damages claimed in respect of the defender's alleged failure to put the fences on the farm into proper repair—it was, I think, quite right to give the pursuer, as we did, an opportunity of making his averments more specific. He has now to some extent done so, but I think that the result of his amendment, and of to-day's discussion, has been to make it fairly clear that the kind of damage which is alleged is one which ought, on the principle of the decided cases, to have been distinctly tabled—and tabled not generally but specifically—in each year of the lease, so that, as each year's damage occurred the landlord should have had the opportunity of checking the claim each year as made and preserving the necessary evidence in connection with it. I am therefore of opinion with your Lordship that the conclusion for damages should be dismissed.

LORD STORMONTH DARLING—With regard to the reductive conclusion I entirely agree with the Lord Ordinary on the grounds which he has stated. On the other branch of the case the pursuer has done his best by proposing an amendment to make his case relevant, but I agree with your Lordships that he has failed to do so. I think that he has not stated the nature of his claim with sufficient specification to enable the landlord to meet it. Accordingly I think that his whole claim should be dismissed as irrelevant.

LORD LOW—I am of the same opinion. In regard to the question which was raised upon the alleged misrepresentation in the advertisement, I agree with your Lordships that the view taken by the Lord Ordinary is right and that he has based his judgment upon the proper grounds, so that it is not necessary to add anything to what his Lordship has said.

In regard to the claim which the pursuer makes for damages in respect that the landlord's obligation in the lease to put the fences in proper condition was not implemented, I agree with your Lordships that the pursuer has not stated a relevant case. The only specific claim, and the only claim that could possibly be remitted to proof, is confined to one matter. The pursuer alleges that by reason of two fences not being put in order he could not keep the sheep on the higher ground of the farm during the summer months, but that they strayed on to the lower ground which it is usual to keep for winter grazing, and that in consequence the winter grazing was diminished and he had to spend more money upon artificial food for his stock in winter than he would otherwise have required to do. He says in general terms that he repeatedly called upon the defender to put the fences in order, but he does not say that he ever gave the defender any notice of the particular claim which he now makes, or ever called his attention to the fact that by reason of the insufficiency of the fences in question his winter feeding was being destroyed. That being the case it seems to me that the claim is one against which the defender cannot be compelled to defend himself, because it is impossible for him to get information which is necessary to test what the real facts were. In that respect the pursuer's claim is very much like a claim for damages done to crops by rabbits, the extent of which can only be estimated while the crops alleged to be injured are still upon the ground. To that extent the present case resembles that of *Broadwood* (17 D. 340) where it was held that if a tenant intended to claim damages for injury done by game he was bound to intimate the claim while it was yet possible for the landlord to check it by inspecting the damaged crops. I am not satisfied however that what was said in *Broadwood's* case, to the effect that a tenant loses his right to claim damages if he does not make a specific claim year by year and pays his rent without deduction, applies in the general case to a claim for damages in respect that the landlord has failed to implement obligations undertaken by him in the lease.

The Court refused the reclaiming note and adhered to the interlocutor reclaimed against.

Counsel for Pursuer (Reclaimer)—Hunter, K.C.—Scott Brown. Agents—Lister, Shand & Lindsay, S.S.C.

Counsel for Defender (Respondent)—Blackburn—Hon. Wm. Watson. Agents—Dundas & Wilson, C.S.