to these four was a gentleman who was in England—really, if I may use the expression, clearly a case of a fifth wheel to the coach. Here the reason for asking that Mr Tait should be a liquidator is not really connected with the distribution of the assets of the company, but is connected with the weighty consideration of being able to continue this business as a going business at present, and consequently making the most money out of it for both creditors and shareholders. Well then, possibly the only other matter is that it is said Mr Tait was a director, and it is hinted or said that questions may arise as to the conduct of the directors in the past. That may be so, and I think it would be a very weighty consideration against the appointment of Mr Tait as the sole liquidator. But it is not now proposed that Mr Tait should be sole liquidator. I do not wish to say anything peculiarly personal in the matter, but it is only fair to Mr Robertson Durham to say that he, the gentleman selected and put before us, is a gentleman well known to this Court, and one at the head of his profession, and one in whom the Court has every confidence. It is perfectly absurd to think that Mr Robertson Durham, knowing his duties as an officer of this Court, would ever allow to remain uninvestigated any transaction in the past because he thought it might eventually go against the interests of Mr Tait. If such things are unfortunately discovered I conceive it would be a duty which he would perform, to call attention to the matter, to say to Mr Tait that the time had now come in which his interests became conflicting, and to call upon him to resign; and if he did not do so it would be Mr Robertson Durham's duty to bring the matter before the Court, and in such circumstances as I have put I do not think it is doubtful what the Court would do. All that is speculation as to the future, and all that does not touch the real crucial point of the matter, viz., the extreme desirability of keeping these contracts running. Accordingly I am of opinion here—it is a peculiar and in many respects a unique case—that the petitioners have really made out the position they have put before us. Upon this matter of conflicting interests, there again it seems to me your Lordships' action is really backed up by the action of the persons to be considered, the creditors. As soon as it was known that Mr Tait was to lodge a petition to appoint him liquidator the creditors said "No," and the moment it was proposed to have Mr Robertson Durham along with him the creditors said "Yes," and they are saying "Yes" before your Lordships to-day. I am therefore of opinion that the prayer of the note should be granted.

LORD M'LAREN—I concur.

LORD KINNEAR—I also concur.

LORD PEARSON was absent.

The Court pronounced this interlocutor—

"Order that the voluntary winding-up of Bruce Peebles & Company, Limited, resolved on by the extraordinary resolution quoted in the note, be continued, but subject to the supervision of the Court: Confirm the appointment of the said A. W. Tait and J. A. Robertson Durham as joint-liquidators of the said company in terms of and with the powers conferred by the Companies Acts 1862-1900: Appoint the said A. W. Tait to find caution for his own actings and intromissions as joint-liquidator by a bond containing a clause consenting to the jurisdiction of the Court of Session being prorogated: Limit such caution to the sum of £500, and allow a bond for that amount by the Ocean Accident and Guarantee Corporation, Limited, to be approved by the Clerk: Find the petitioners and the said liquidators entitled to the expenses of the petition and note," &c.

Counsel for Petitioners and Liquidators – Dean of Faculty (Campbell, K.C.)—Clyde, K.C. — Sandeman. Agents — Davidson & Syme, W.S.

Counsel for English Debenture Holders (*concurring*) — Maitland. Agents — Macandrew, Wright, & Murray, W.S.

Counsel for Krauss & Sons (Respondents) —Macmillan. Agents—Gardner & Macfie, S.S.C.

Counsel for Shiells (Respondent)—Munro. Agents—W. & F. Haldane, W.S.

Counsel for other Respondents — Lyon Mackenzie & F. C. Thomson. Agents—Norman M. Macpherson, S.S.C. — Wood & Robertson, W.S.

Thursday, March 5.

FIRST DIVISION.

[Sheriff of Perth.

RAMSAY *v.* HOWISON, *et e contra.*

Landlord and Tenant—Lease—Damages—Bar—Mora—Muirburn—Claim of Damages by Tenant for Breach of Obligation in Lease—Payment of Rent without Deduction or Reservation.

In an action raised by a tenant, in the tenth year of his lease, against his landlord, to recover damages alleged to have been suffered in that and the preceding year through the latter's failure to fulfil the obligation undertaken by him in the lease to burn yearly, one year with another, a certain proportion of the moorland—*held* that the pursuer was not barred by delay, or by having paid rent and only complaining without making a specific claim, inasmuch as the damage caused by the failure to burn was cumulative, and he was entitled to wait till it declared itself and could be estimated

Broadwood v. *Hunter*, February 2, 1855, 17 D. 340, *distinguished.*

Landlord and Tenant—Lease—Verbal Let Followed by Writing—Obligation Undertaken in the Writing—Date of Obligation —Muirburn.

A moorland farm was let verbally in 1895 for a period of nineteen years. The parties negotiated for a formal lease, but were at variance, *inter alia*, on the amount of muirburn to be undertaken by the landlord. No formal lease was ever executed, but in 1902 a draft lease was signed. It declared the term of entry thereunder to be Martinmas 1895 "notwithstanding the date hereof," and provided "And with regard to heather-burning on the moorland, the proprietor hereby undertakes to burn" a certain proportion yearly, one year with another. *Held* that the obligation did not run from 1902, but from the date of entry in 1895.

On 7th July 1905 Sir James Ramsay, Bart. of Banff, raised an action in the Sheriff Court at Perth against John Howison, farmer, Fingask, Errol, for payment of £157, 10s., being the half-year's rent payable at Whitsunday 1905 for possession to Martinmas 1904 of the moorland farm of Craighead, Alyth, belonging to the pursuer, of which the defender was tenant. The rent sued for had been retained by the defender against a larger sum of damage alleged to have been incurred in 1904 chiefly in respect of insufficient heather-burning. A counter action at the instance of Howison was raised on 21st September 1905, in which he claimed, *inter alia*, two sums of £100 each in name of damages said to have been incurred in 1904 and 1905 through the defender's failure to burn, in terms of the lease after mentioned, a sufficient quantity of heather. The rent in question was consigned in bank, and in the subsequent proceedings it was handed over to the landlord, the two actions were conjoined, and the questions between the parties were tried in the action of Howison *v.* Ramsay.

In that action the defender pleaded, *inter alia* — "(4) Defender having fulfilled his obligations to pursuer under said lease, should be assoilzied with expenses. (5) Pursuer not having suffered loss or damage in consequence of any failure to fulfil his obligations on defender's part, is not entitled to damages. (7) In any event, pursuer having paid his rent for the period of his possession up to Martinmas 1904 without specific reservation of any claim for compensation, cannot now maintain such claim so far as arising prior to said term of Martinmas 1904."

Possession of the farm was taken by Howison at Martinmas 1895 on a verbal lease for nineteen years. No regular lease was ever executed, but in 1902 a draft lease was prepared and signed by both parties setting forth the conditions of the tenancy. The first half-year's rent was stipulated to be payable a year after entry, viz., at Martinmas 1896. The tenant regularly paid the rent down to Martinmas 1904, but declined to pay that falling due at Whitsunday 1905, being the rent due for the six months ending at Martinmas 1904.

By the lease in question Sir James let to his tenant the lands of Craighead, &c., "all as presently possessed by the said John Howison, . . . and that for the period of nineteen years from and after the term of Martinmas 1895, which, notwithstanding the date hereof, is declared to be the term of entry hereunder."

With regard to heather-burning, the lease provided — "And with regard to heather-burning on the moorland of the farm hereby let, it is agreed upon, and the proprietor hereby undertakes, to burn, weather permitting (except during the statutory close time from the eleventh day of April to the first day of November), one year with another, one-twelfth part more or less thereof during each year of the lease, the said heather-burning to be carried out under the supervision of the proprietor's head gamekeeper, the tenant giving the assistance of his shepherds in connection therewith: Declaring that no heather shall be burned on the lands hereby let except as herein provided for, under the penalty of Two pounds sterling per imperial acre, and at that rate for any part of an acre, of additional rent. . . ."

The extent of the farm was not stated in the lease or proved, the tenant puting it at about 3000 acres, and Sir James at about 2700. It was agreed that about two-thirds of the total acreage was under heather.

On 26th December 1906 the Sheriff-Substitute (SYM), after proof in the conjoined actions, pronounced an interlocutor containing the following findings:—"Finds in fact . . . (3) that prior to his (*the tenant's*) obtaining entry the lands had been held by a Mr Ferguson, and that there had been a want of attention to sufficient heather-burning, and that there was consequently a good deal of old heather upon the lands, . . . (17) Finds with regard to heather-burning, that in the season 1896 a considerable amount of heather-burning was done. and the moor was partially broken up, and that in 1906, after the present dispute was going on, a considerable amount of heather-burning was done, but that in the intervening years, notwithstanding complaint and objection on the part of the tenant Howison, the landlord failed to perform, taking these years together, the obligation of burning one year with another one-twelfth of the heather each heather-burning season; (18) that the seasons of 1903 and 1904, and to a considerable extent that of 1905, were wet and unsuitable for heather-burning, but the other seasons between 1897 and 1902 were more suitable, and the obligation, making proper allowance for the bad years, was capable of fulfilment; (19) that the tenant has made payment of his rent down to that payable at Whitsunday 1905 (which he consigned in consequence of the dispute, and which has since been paid under warrant of Court) without reservation in the receipts; (20) that during the earlier years of the agreement the terms of the heather-burning obligation had not been adjusted, because for some time the landlord had objected to bind himself to any definite amount of muir-

burn, and that though this may have been earlier overcome . . . the draft lease was not adjusted and approved till 11th July 1902: . . . Therefore, with these findings of fact, *Finds in law* in the conjoined actions, (1) with regard to heather-burning, that the tenant is not disentitled, having regard to the nature of the obligation, the uncertainty for some years of its position owing to the landlord's action, and the manner in which it is to be fulfilled on an average of years, from seeking damages for its breach: Assesses the damages at £100. . . ."

Note.—". . . The parties have caused serious difficulties about matters which ought to be plain. The contract between them was not adjusted till long after the possession of the farm was entered on. It still stands on an approved draft lease. Sir James Ramsay had so late as 31st December 1898 a strong objection to agreeing to any definite amount of muirburn. He wrote of that date—'I will not sign any lease which binds me to a definite amount in each year,' and 'there are other clauses that I cannot accept.' If one is to regard as settling the matter that copy of the draft lease on which Sir James founds, it could not have been till after the heather-burning season of 1902 that Sir James was induced to agree that a proportion of one-twelfth on an average should be burned each year. But perhaps before 1900 he had come round to agree to one-twelfth. On his part the tenant has not, all necessary allowance being made, so acted as to make his position safe. The acreage of the subjects let has never been agreed on. It was apparently not known to the tenant, who when he took the lease acted on his general knowledge of the place, and on an estimate of what stock he thought it would carry. A measurement has been made on the part of Sir James since the action was in Court. On what standard he and his advisers acted after he came to agree that one-twelfth of the heather be burned each year, as to the amount which should be burned in any year, it is not easy to say, unless it be that, as before that time, 'it depends very much on the assistance you give my keeper.'

"It may be said that in each year in which burning was possible some burning was done. Nearly always it was in small patches, which seems to be the practice on the Banff estate. In the first year (1896) a good deal of burning seems to have been done. The only year in which anything of a like amount was done, viz., 1906, requires, owing to the date of the litigation, to be excluded from consideration.

"For the first few years, 1896 to 1902, the tenant could hardly make a stand. For an average of one year with another has to be considered, and besides there was no agreement as to what should be burned until after several years had run. Though the lease may now show what must be held to have been agreed upon at the beginning, the question is one of the tenant's conduct. He had no bargain on which to take his stand for a definite proportion. So he must for a time stand excused for not insisting, as a condition of paying rent, on one-twelfth being burned on an average.

"In 1903 and 1904 there was no burning. But for these years the landlord stands excused. Burning was impossible to any serious extent, because a cycle of very wet years had begun. The year 1905, though a better year, was a wet year too. As has been said, an average has to be considered. It is thought that in 1905 it was not too late for the tenant to take up the ground of maintaining that he could withhold rent which had become due for possession in 1904 unless more heather-burning were done. Whether he could do so depends, of course, upon the facts. The Sheriff-Substitute is quite of opinion that it will not do for a tenant simply to complain or grumble, and at the same time make payment on clean receipts without reserving his claim. If he do so he may exclude himself from remedy, because he will have led his opponent to think that the claim is passed from and, most likely, to lose evidence which would meet it. . . .

"A very careful consideration of the proof leads the Sheriff-Substitute to the opinion that the landlord has failed to fulfil the obligation to burn one-twelfth of the heather yearly, taking one year with another, and that this failure is chiefly applicable to the part of the farm lying north of a certain division fence. . . . His verdict on the whole proof is that the obligation has not been fulfilled, taking the years 1897 to 1905, and making allowance for the bad years. It is thought that the damages ought to be assessed on this head at £100. . . ."

Sir James appealed to the Sheriff (JOHNSTON), who on 16th February 1907 pronounced the following interlocutor:—"Recals the 17th and 18th findings in fact in the Sheriff-Substitute's interlocutor of 26th December 1906, and in place thereof finds in fact—(16) That having regard to the state of the weather in the years 1903, 1904, and 1905, and the amount of heather burned in 1906, no failure upon the part of the landlord to burn heather in accordance with the provisions of the lease is proved to have occurred subsequent to the spring of 1902; (17) that the tenant claims damages in respect of the failure of the landlord to burn sufficient heather in each of the years from 1897 to 1902 inclusive; (18) that the tenant paid his rent in full without demanding any reservation in the receipt or intimating any claim for neglect of heather-burning, down to the term of Whitsunday 1905, when he consigned the half-year's rent then due: Recals the first finding in law in the said interlocutor and the relative decerniture, and in place thereof finds that the tenant is barred by delay in intimating his claim from any claim of damages in respect of failure to burn sufficient heather: Assoilzies the landlord from the conclusions for damages in respect of insufficient heather-burning. . . ."

Note.—"The tenant entered into possession at Martinmas 1895. The formal lease was not executed until July 1902. The

tenant maintains that the terms upon which he took the farm, as arranged between him and Mr Panton, the landlord's factor, were that one-tenth of the heather was to be burned annually, and that one-twelfth was ultimately substituted in the formal lease, reluctantly, on his part. The landlord's case I understand to be, that the question of what was to be the arrangement as to heather-burning was a matter of open negotiation down to the adjustment of the formal lease. I hold that the lease must be treated as speaking from the date of entry so far as fixing the landlord's obligation in the matter. But for the purposes of the present case I do not think that the date of execution of the lease can be altogether ignored. According to the Sheriff-Substitute's view of the evidence, with which I do not differ, there was no default on the landlord's part after the spring of 1902. 1903, 1904, and 1905 were bad seasons, and there was much burning in 1906. Accordingly, when the lease was signed all the failure which can be complained of had already occurred. But the lease, which is now appealed to as the record of the terms of the contract said to have been broken was executed without any intimation of a claim upon the tenant's part. That is a circumstance which cannot be altogether overlooked in determining whether the tenant waived his claim in respect of prior default. Under the lease the tenant is made liable in pactional rent throughout the tenancy for any heather burned by himself without the keepers. Prior to the date of the execution of the lease he had on three occasions so burned heather. It would not, I think, have been easy for the landlord, after signing this lease, without any intimation of a claim already accrued, thereafter to have insisted in a claim in respect of such bygone breach. Where two parties negotiate in a friendly way as to the adjustment of a lease, and then amicably sign the same when adjusted, it seems hardly consonant with what was the reasonable understanding of these parties at the time of such negotiation, adjustment, and execution, that, after the lease is signed, its terms should be appealed to to liquidate a claim for damages said to have been incurred before its date, of which claim no hint was given until after the lease was signed. However that may be, the tenant paid his rent until Whitsunday 1905 without reservation or intimation of such claim. At Whitsunday 1905, being three years after the last act of default (if there was default) on the part of the landlord, the tenant retained his rent and intimated a claim. According to the authorities on this branch of the law, this delay is a conclusive answer to the tenant's claim unless he can find some special circumstance which takes the case out of the general rule — *Emslie's Trustees*, 21 R. 710; *Broadwood*, 17 D. 340. The learned Sheriff-Substitute finds such circumstances, viz.—(1) The lease had not been finally adjusted until 1902. Now, it is perhaps somewhat difficult for the tenant to maintain, on the one hand, that the lease shall be treated as a record of the original contract, and as speaking from the date of entry, but that, on the other hand, his conduct during the intervening period shall be judged upon the footing that there was no obligation to which he could appeal. I am not disposed, however, to apply this strict logic in the matter. I proceed upon a more general ground. The tenant was not to burn heather himself, the landlord was to burn it, and to burn it to an extent to meet the reasonable requirements of good farming. That was a special point according to the tenant when he took the farm, and according to his own evidence that duty was being neglected between 1896 and 1902. But he intimated no claim, and made no reservation in paying his rent. The difficult about the adjustment of the lease might very well have justified a claim of merely a round sum, or it may be a claim or reservation of a still more general character. But I do not think that it was impossible or difficult for him to give the landlord clearly to understand that he was holding him responsible in damages for the neglect which he complains of. Further, there were five termly payments of rent after the lease was signed. There does not therefore appear to me to be anything in this aspect of the matter which interferes with the application of the principle upon which the Court proceeded in the cases above referred to; (2) the second specialty is that the obligation was to a certain extent ambulatory, 'one year with another.' There would be weight in this consideration if only one or two years were in question, but according to the tenant there had been default in six successive years, 1897-1902 inclusive, and thereafter, when the rent was paid without reservation, that default was irremediable, and the consequences of it were being felt by the tenant.

"It is suggested that even if all claim is barred in repect of loss suffered before the tenant withheld his rent, still he is entitled to damages for loss suffered since that date in respect of prior default. But where there is action imputing waiver of claim after loss has begun to accrue, I think that this imports waiver of the whole claim in respect of the default. To hold otherwise would be inconsistent with the principle of timeous notice, upon which the cases proceed.

"In the view I take of the law it is unnecessary, and would not indeed be proper, for me to determine the question whether there was default upon the part of the landlord. The evidence upon the matter, however, goes to confirm my conviction of the propriety of the rule which requires notice *de recenti* of claims of this kind. The amount burned in the immediately preceding years could in 1902 have been determined with an approximate precision which is now impossible, and other evidence now lost would have been available. . . ."

Howison appealed, and argued — The Sheriff was wrong in holding that the

appellant was barred. The question of bar was one of circumstances. It was either a question of *mora* or of waiver, and neither had occurred here. The fact that the lease was not signed till 1902 was in the appellant's favour, for a tenant could not be held barred where, as here, he was not aware of the precise nature of his rights. On the other hand, it was irrelevant for the respondent to say that he (the respondent) was under no obligation prior to 1902. By signing the lease in 1902 he validated the prior verbal arrangement as to heather-burning. Moreover, the lease specially stipulated that the possession was to date from 1895, the date of entry. It was therefore *probatio probata* of the prior verbal agreement, and the respondent was bound under it from 1895 to burn a sufficient quantity of heather yearly. The appellant after 1902 had a good lease, not from 1902 but from 1895—*Foulis* v. *M'Whirter*, January 14, 1841, 3 D. 343—and had a definite obligation on which he could found, and to enforce which he had retained the rent. Prior to 1902, the obligation not being a definite one, he was not in a position to retain the rent, but he had all along protested and made complaints, and had been assured that the proper amount would be burned. A tenant who stayed on in such circumstances could not be held to have waived his claims. This was not a case like that of *Broadwood* v. *Hunter*, February 2, 1855, 17 D. 340, relied on by the respondent, where the tenant could be tightly held down. The specialties of this case prevented the rule as to "clean receipt" being applicable. Moreover, the rule in *Broadwood* was not an invariable one—*Hardie* v. *Duke of Hamilton*, February 2, 1878, 15 S.L.R. 329; *Macdonald* v. *Johnstone*, June 12, 1883, 10 R. 959, 20 S.L.R. 651; *Johnstone* v. *Hughan*, May 22, 1894, 21 R. 777, 31 S.L.R. 655; *M'Donald* v. *Kydd*, June 14, 1901, 3 F. 923, 38 S.L.R. 697. The case of *Emslie* v. *Young's Trustees*, March 16, 1894, 21 R. 710, 31 S.L.R. 559, also relied on by the respondent, was distinguishable, for there the estate had been sold three years before the claim was made. The damage here was not capable of being ascertained yearly. Its effect was cumulative, and might not be apparent for some years. That being so, a tenant could not be held barred by waiting till the damage had declared itself. The state of the moor was the best evidence that the heather had not been sufficiently burned. In that respect there had been no loss of evidence by delay. The question was one for hill-farmers.

Argued for respondent—The Sheriff was right in holding that the appellant was barred. Prior to 1902 the tenant had made no specific complaints, though there were numerous disputes as to (*a*) the amount to be burned; (*b*) who was to burn it; and (*c*) the terms of the clause to be inserted. The appellant had made no specific claim prior to 1902. Prior to that year there was no obligation for breach of which he could claim. The obligation in the lease was not retrospective, for it was in *de presenti* terms. *Esto* that for certain purposes, *e.g.*, possession, the lease was to date from 1895, for collateral purposes, *e.g.*, heather-burning, it only dated from 1902. An improbative document did not supersede existing arrangements. The lease therefore was only binding from its date. Had the appellant stated the claim he now makes in 1902, as in fairness he ought to have done, the respondent would not have signed the lease, or if he had he would have stipulated that the obligation as to heather-burning should only apply to the future. The argument that prior to 1902 the tenant had nothing to waive cut both ways, and if he had nothing to waive the landlord could not be in breach, and there was no claim for damages. *Alternatively* if the tenant had a claim prior to 1902 he had waived it by signing the lease without reserving his claims. The damage should have been complained of at once. That was especially so when the damage was accruing yearly, and where the effect of it would be cumulative—*Hunter* v. *Broadwood*, February 2, 1854, 16 D. 441, at p. 450. Vague and general complaints were not enough; the complaint must be specific. The appellant had regularly paid the rent up to 1904, and "clean receipts" implied waiver—*Broadwood* v. *Hunter*, February 2, 1855, 17 D. 340; *Baird* v. *Mount*, November 19, 1874, 2 R. 101, 12 S.L.R. 88; *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, *per* Lord Kinnear, at p. 866, 31 S.L.R. 753; *Hamilton* v. *Duke of Montrose*, July 5, 1906, 8 F. 1026, *per* Lord Kyllachy, at 1036, 43 S.L.R. 764. The cases of *Macdonald* v. *Johnston*, and *Johnstone* v. *Hughan*, cited by the appellant, proceeded on a different *ratio*, for in these cases the complaints made were specific. The appellant had further failed to prove any damage for which the respondent was responsible.

At advising—

Lord M'Laren—This case comes before us on an appeal from the Sheriff Court of Perthshire in conjoined actions. In the first action Sir James Ramsay sued the appellant for £157, 10s., being half-year's rent due at Whitsunday 1905, and was met by a claim to retain the rent against a larger sum of damages said to be incurred in the year 1904, chiefly in respect of insufficient heather-burning.

The second action was instituted by the appellant, and in it he claims damages incurred in the year 1905. There is also a claim for repairs to the house and fences, but this part of the case was not brought under review in the Court of Session. The actions were conjoined in the Sheriff Court.

The Sheriff-Substitute awarded £100 of damage in respect of insufficient heather-burning, stating in his note that his award was made on the consideration that the tenant might have kept additional stock and that prices of late had been good.

The Sheriff found "that the tenant is barred by delay in intimating his claim from any claim of damages in respect of

failure to burn sufficient heather," and therefore assoilzied Sir James Ramsay from the conclusions under this head. In the note to his interlocutor the learned Sheriff states that in his view it is unnecessary for him to determine the question whether there was default on the part of the landlord.

It appears to me, however, that we cannot with advantage consider whether there was such delay in making a definite claim as would amount to a legal bar until we have mastered the facts of the case, including such elements as the amount of heather burned from year to year, the state of the weather in the spring months in so far as it has interfered with burning of heather, and the condition of the moor at the time when the claim was made as compared with its condition when the tenant first entered on the possession of the farm.

The omission to burn the proper quantity for two or three years might not sensibly affect the value of the farm for grazing, and again, the inability to burn heather during, say, two consecutive seasons, even if it did affect the value of the farm, would not give the tenant a claim for damage.

But the effect of the heather being allowed to grow unchecked for a series of years is cumulative, and *prima facie* it is only when the tenant begins to suffer from the abnormal growth of the heather that his claim arises. In any view it is only then that the attention of the tenant is directed to the subject and that he is in a position to estimate the damage and to formulate a claim. For this reason I think we shall best get at the justice of the case if we begin by considering whether there was in fact a failure on the part of the respondent to keep down the heather to the proper extent.

The case is further complicated by reason of the parties being at variance as to the extent of the landlord's obligation to burn the moor. There is a concurrence of testimony that in 1895, when the appellant got possession of the farm of Craighead, the moor was not in good order, and the appellant would not have taken the farm except on the condition that it was to be made suitable for pasture by yearly heather-burning. But the terms of the lease, as often happens, were not arranged when the tenant got possession, and as matter of fact the lease was not executed until July 1902, the chief cause of the delay being the difference of view between landlord and tenant as to the extent to which the burning of the heather was to be carried. The appellant claimed that one-tenth of the moorland should be burned in each year. The respondent would only undertake to burn one-fourteenth. Eventually the figure of one-twelfth was agreed on, and that figure was inserted in the lease executed in 1902.

It is maintained for the proprietor that this figure ought not to be applied retrospectively in estimating the damage under the present claim, but in my opinion there is not much substance in the argument. If the terms of the lease had been varied; if, for example, the original agreement had been to burn to the extent of one-fourteenth, and if after the lapse of, say, seven years the proprietor had agreed to the proportion of one-twelfth, plainly there would be no breach of contract in past years if the burning had been carried out in terms of the original agreement. But in the actual case there was no variation of the original contract. The contract was (by legal implication) that the moor should be burned annually to a reasonable extent. The parties were not at first agreed as to what should be considered a reasonable proportion, but eventually they agreed that one-twelfth of the whole moor should be taken as a reasonable amount of burning in fulfilment of the proprietor's obligation, and this quantity was inserted in a lease which, although only executed in 1902, gave entry as at Martinmas 1895. I think this must be taken to be an estimate on which the parties were agreed and meant to be bound, of what they considered a fair fulfilment of the proprietor's obligation to burn reasonably. When two years after the execution of the lease it was found that the pasturage had deteriorated, I think the measure of damage is the loss the tenant proves that he has suffered from the neglect to burn to the extent of one-twelfth from the beginning. In that sense I see no difficulty in giving a retrospective effect to the clause in the least, because it was not a variation but an interpretation by joint consent of the original obligation. . . .

[*After reviewing the evidence as to insufficient heather-burning, his Lordship proceeded*]—I agree with the Sheriff-Substitute that the respondent, or his gamekeeper, for whom he is, of course, responsible, has not fairly carried out the agreement with the appellant as to burning, and that the damage for the two years to which the actions relate is proved to amount to £100.

There remains for consideration the ground of the Sheriff's judgment, which is, that the appellant by paying his rent for a series of years before making a specific claim, has departed from his claim of damage for future years.

Now, I think that in applying the principle of decision in such cases as *Broadwood* v. *Hunter* to a case in which the uses of the land are different, and the conditions which determine liability are different, some caution is requisite, and it is proper to consider the principle which underlies the decisions, and to apply it with the necessary reserve to the altered conditions. There are two principles to be considered. The first is that where a proprietor is in breach of the contract of location, the tenant, and no other person, is the party entitled to sue for reparation — a principle which has lately been called in question, but may now, I hope, be held to be established. The other is that a tenant may waive his claim, and that such a waiver may be inferred from his acts, even when he has not granted an express discharge. Whether in any particular case the tenant has waived his claim is a question of fact in which all the circumstances have to be

considered. In this case, and according to the agreement, the tenant entered upon the occupation of a farm which was in very bad condition, with a legal expectation that in the course of his tenure the sheep-carrying capacity of the farm would be improved. But it was quite impossible to forecast the time when the expected improvement would be realised, because this depended partly on the weather conditions being favourable for burning, and partly on the system of burning, which to some extent was in the proprietor's discretion. If the burning was done in considerable tracts at a time there would be a sensible improvement as soon as the grass began to grow, but if it were done in small patches scattered over the moor the benefit might be eventually the same, but it would be longer in coming into operation. In any case, as the tenant entered upon an improving lease he could not reasonably make a claim of damage until after the lapse of such a period of years as would be necessary to give the system a fair trial. The most he could do would be to insist on the agreement as to burning being carried out. In consequence of the death of Mr Panton, the first factor, we have not the advantage of his evidence, but I see no reason for doubting the accuracy of the appellant's statement that he complained to Mr Panton year by year of the inefficient way in which the burning was carried out, and pressed for a more speedy fulfilment of the landlord's undertaking in this respect. In the year after Panton's death the parties were negotiating as to the terms of the written lease, and it was not until 1902, when the lease was executed, and when there had been a six years' trial of the proprietor's system of burning, that the tenant can be said to be in a condition to judge for himself whether he had the materials for a specific claim. Up to this time the utmost effect that could be given to his omission to make a claim would be that he could not claim damage for any inconvenience he had suffered in the years that were past.

Then after 1902 the case was further complicated by the occurrence of two unfavourable years for burning, but in 1904 the appellant had satisfied himself that the respondent did not mean, unless compelled by legal means, to carry out fairly his undertaking as to heather-burning. In this conclusion I think he is justified by the attitude taken up by the respondent's advisers at the proof, and also by the circumstance that in the year following the action the heather-burning was for the first time carried out in an efficient way.

Now, if the appellant had brought his action at an earlier period he would very likely have been met by the defence that the heather-burning had not had a sufficient trial, and that he could not expect in so short a time to have the farm in good condition. There is really no criterion for determining at what particular year the damage had declared itself so as to put the tenant to an election either to waive his claim altogether or to enforce it. In all the circumstances I see no sufficient evidence of waiver, and I cannot think it would be a just or equitable result that the tenant must submit during the remaining years of his lease (for this is the Sheriff's judgment) to an actual refusal on the part of the landlord to fulfil his contract because he has not enforced his rights with the utmost strictness in the past. I am therefore of opinion that we should sustain the appeal and restore the judgment of the Sheriff-Substitute, that the appellant is entitled to £100 damage sustained during the years 1904 and 1905 through the negligent performance of the respondent's obligation to burn a fair proportion of the heather year by year in terms of the lease.

The LORD PRESIDENT and LORD KINNEAR concurred.

LORD PEARSON was absent at the advising.

The Court sustained the appeal, recalled the interlocutor of the Sheriff dated 16th February 1907, affirmed that of the Sheriff-Substitute dated 26th December 1906, repeated the findings therein, and decerned.

Counsel for the Appellant — Dean of Faculty (Campbell, K.C.) — Macmillan. Agents—Carmichael & Miller, W.S.

Counsel for the Respondent—Constable—Ramsay. Agents—Gillespie & Paterson, W.S.

Saturday, March 7.

FIRST DIVISION.

JACK'S EXECUTOR v. DOWNIE.

Succession—Testament—Words Importing (1) Gift of Heritage and (2) Power of Sale.

Terms of a testamentary writing which were held to carry heritage and to confer power to sell it.

Grant v. *Morren*, February 22, 1893, 20 R. 404, 30 S.L.R. 442, *distinguished.*

David Jack died on 22nd October 1906 leaving a will in the following terms:—"I, David Jack, Christmas-card publisher, residing at Fairview Strand, in the city of Dublin, hereby revoke all wills and testaments heretofore made by me; I appoint Archibald Hunter of Roselea Drive, Dennistoun, in the city of Glasgow, to be the sole executor of this my last will and testament. I direct my said executor immediately after my death to realise all my estate and pay all my just debts and testamentary expenses. . . . [*Then followed legacies to a grandchild and to nieces.*] . . . I direct that the residue of my estate after the payment of the aforesaid legacies shall be divided equally between my wife Lucy Annie Jack, my son James Jack, and my son David Jack. I desire that my said wife Lucy Annie Jack shall have the choice of any of the furniture and books which she may desire, all remaining