the law in which, as a rule, there is no difference between the law of England and that of Scotland; and it is certainly desirable that the law of the two countries should be the same. Therefore if, as I understand to be the case, your Lordships' opinion is that the rule of the common law of Scotland is the same as the English statutory rule, I am ready to concur.

What, then, is the result of applying the rule to this case? The element of intention is not altogether excluded, but its scope is very much restricted, because the rule makes it imperative upon the Court to construe Mrs Bruce's will "to include" all the personal estate which under her husband's settlement she had power to appoint. I think that that practically means that Mrs Bruce's will must be read as if she had actually defined the residue of her estate as including all the funds which she had power to appoint, and, if so, I agree that she must be held to have exercised all the powers.

LORD PEARSON—I am of opinion in this case that the power of appointment has been effectually exercised; and I entirely concur in the reasons for that opinion which have been expressed by your Lordship in the chair and Lord Kyllachy.

The Court adhered.

Counsel for the Pursuers and Reclaimers—The Solicitor-General (Ure, K.C.)—Wilton. Agents—Henderson & Mackenzie, S.S.C.

Counsel for the Defenders and Respondents—Younger, K.C.—A. R. Brown. Agent—Arthur B. Paterson, W.S.

Tuesday, June 26.

FIRST DIVISION.

[Lord Stormonth Darling, Ordinary.

BURGHEAD HARBOUR COMPANY, LIMITED *v.* GEORGE (COLLECTOR OF DUFFUS PARISH).

Valuation Acts—Valuation Roll—Conclusive Evidence of Annual Value from which Deductions to be Made—Poor-Rates—Assessment—Harbour.

Held that in assessing a harbour for poor-rates a parish council is bound to accept as conclusive the annual value as appearing in the valuation roll, and to make therefrom the deductions allowed by section 37 of the Poor Law Amendment (Scotland) Act 1845, whatever deductions may already have been made by the assessor in arriving at such annual value. *Edinburgh and Glasgow Railway Company* v. *Meek*, December 10, 1864, 3 Macph. 229, and *Magistrates of Glasgow* v. *Hall*, January 14, 1887, 14 R. 319, 24 S.L.R. 241, *followed.*

Poor—Poor-Rates—Harbour—Rights and Powers Below Low-Water Mark—Deductions from Annual Value—Expense of Dredging Harbour—Poor Law Amendment (Scotland) Act 1845 (8 *and* 9 *Vict. c.* 83), *sec.* 37—*Valuation of Lands (Scotland) Act* 1854 (17 *and* 18 *Vict. c.* 91).

A parish council refused to allow as a deduction from the annual value of a harbour, under section 37 of the Poor Law Amendment (Scotland) Act 1845, the average cost of dredging the harbour, on the ground that such expense was not incurred in maintaining the lands and heritages, the subjects of assessment, but was an expense of carrying on business incidental to an incorporeal right of harbour in the harbour company not included in the entry in the valuation roll, or alternatively was expenditure in operations on the *solum* of the sea below low-water mark which did not form part of the harbour as that subject fell to be and was entered in the valuation roll.

Held that the average cost of dredging was a proper deduction, inasmuch as (1) it was an expense necessary for maintaining in use the wharves, &c.; and (2) harbour was a complex heritable subject, duly entered in the valuation roll, which embraced any right such as was now sought to be distinguished, and required for its maintenance such expense. *Adamson* v. *Clyde Navigation Trustees*, June 26, 1863, 1 Macph. 974, June 22, 1865, 3 Macph. (H.L.) 100; *Mersey Dock and Harbour Board* v. *Jones*, June 22, 1865, 3 Macph. (H.L.) 102, note; and *Gardiner* v. *Leith Dock Commissioners*, June 17, 1864, 2 Macph. 1234, March 12, 1866, 4 Macph. (H.L.) 14, 1 S.L.R. 213, *commented on.*

Poor—Poor-Rates—Deductions—Insurance where no Premiums Paid—Rates and Taxes—Whether Actual or Average—Whether Owners Only or both Owners and Occupiers—Poor Law Amendment (Scotland) Act 1845 (8 *and* 9 *Vict. cap.* 83), *sec.* 37.

Held (*per* Lord Stormonth Darling, Ordinary, and acquiesced in) (1) that in calculating over an accepted number of years the "probable annual average cost of insurance" for deduction from the annual value, under section 37 of the Poor Law Amendment (Scotland) Act 1845, prior to assessing, no allowance fell to be made for insurance in years in which no premiums had been paid or money set aside in lieu thereof—*Glasgow Gas Light Company* v. *Adamson*, March 23, 1863, 1 Macph. 727, *distinguished;* (2) that the rates, taxes, and public charges which fell to be deducted under the section were those actually payable and not an average estimate thereof; and (3) that where the owner was also the occupier the proportion of taxes deductible was the owner's proportion only.

The Poor Law Amendment (Scotland) Act 1845 (8 and 9 Vict. cap. 83), section 37, enacts—"In estimating the annual value of lands and heritages the same shall be taken to be the rent at which, one year

with another, such lands and heritages might in their actual state be reasonably expected to let from year to year, under deduction of the probable annual average cost of the repairs, insurance, and other expenses, if any, necessary to maintain such lands and heritages in their actual state, and all rates and taxes and public charges payable in respect of the same . . . ."

The Burghead Harbour Company, Limited, 1 North Street, Elgin, complainers, brought a note of suspension and interdict against Joseph Stuart George, Collector of Poor Rates for the Parish of Duffus, in the county of Elgin, respondent, in which they sought to restrain him from proceeding further or enforcing a notice of assessment, dated 22nd November 1902, a sheriff's warrant authorising him to poind the complainers' goods for non-payment of the sum in the notice, and an execution of charge following thereon.

The notice of 22nd November 1902 intimated to the complainers that they were assessed for the year Whitsunday 1902 to Whitsunday 1903, under the different Acts of Parliament, as owners and occupiers of the following lands and heritages:—

Burghead Harbour (Shore dues of).

1. *Owner.*

Poor Rate, . .	9¾d.	
School Rate, .	8¾d.	1s. 7d. per £1.
Cemetery Rate,	¼d.	
Registration Rate,	¼d.	

Of the annual value of £310, 10s. £24 11 7½

2. *Occupier.*

Poor Rate, . .	9¾d.	
School Rate, .	8¾d.	1s. 7d. per £1.
Cemetery Rate,	¼d.	
Registration Rate,	¼d.	

Of the annual value of £310, 10s. 24 11 7½

Total £49 3 3

The annual value stated in the notice was arrived at by making a deduction of 50 per cent. for allowances under sec. 37 of the Poor Law Amendment (Scotland) Act 1845 (*v. sup.*) from the valuation appearing in the valuation roll for the year to Whitsunday 1903. The complainers maintained that they were entitled to deductions which would give them total exemption from such rates and, *inter alia*, to the following:—

I. *Repairs and Maintenance.*

(1) Repairs and material,	£118 14 0	
(2) *Expenses of Dredging.*		
(*a*) Wages . .	142 15 8	
(*b*) Upkeep of dredger	122 9 6	
	£265 5 2	
(3) Lighting, &c. . .	14 5 2	
		£398 4 4
II. *Insurance* . . .		83 17 8
. . . . .		
IV. *Rates and Taxes.*		
Income Tax . .	£43 2 6	
Burgh Assessments .	157 0 7½	
Poor, School, and other rates	35 11 7½	
County Assessments .	15 11 4	
		251 6 1

The complainers pleaded—"(1) The amount stated in the valuation roll, made up by the assessor as the annual value of the undertaking of the complainers, is conclusive as regards the respondent, and he is not entitled to re-open that valuation or to inquire as to the basis upon which the same was made up. (2) The complainers being entitled to deductions under sec. 37 of the Act 8 and 9 Vict. cap. 83, for which the respondent refused to give them credit, the proceedings complained of ought to be suspended and interdict granted against the respondent as craved."

On 26th May 1903 the Lord Ordinary (STORMONTH DARLING), before answer, made a remit to John Stuart Gowans, C.A., Edinburgh "to consider and report with special reference to the statements and pleas of parties as to the probable annual average cost of the repairs, insurance, and other expenses, if any, necessary to maintain the complainers' subjects assessed in their actual state, and the rates and taxes and public burdens payable in respect of the same, it being the object of this remit to ascertain the deductions to be made in terms of the 37th section of the Poor Law (Scotland) Act 1845, and to report upon any other matter which either party may consider material to the question at issue."

On 28th June Gowans reported that having examined the complainers' books, &c., in his opinion the annual average cost during the five years ending 31st May 1903 of the repairs, insurance, and other expenses was £399, 16s. 6d., that in his opinion that sum was the deduction in respect of such repairs, &c., which fell to be made from the valuation before assessment in terms of section 37 of the Act, and that it included the average amounts paid by the complainers for "(1) Materials, wages, and tradesmen's accounts in connection with repairs of harbour and upkeep of dredger. (2) Wages in connection with dredger. (3) Coals and firewood for dredger. (4) Insurance, including insurance on dredger. (5) One-half of harbourmaster's salary."

The reporter further stated—"The reporter understands from reading the case of *Edinburgh and Glasgow Railway Company* v. *Hall*, 4 Macph. 301, that income tax is not one of the rates, taxes, and public charges payable in respect of land and heritages which under the 37th section of the Poor Law (Scotland) Act 1845 fall to be deducted in estimating the annual value of such lands and heritages. If that tax is deducted . . . the annual average of taxes paid during the four years ending 15th May 1902 amount to £269, 1s. 1d., whereof there is applicable to owner £100, 17s. 11d., and occupier £168, 3s. 2d.

"The respondent contends that an average of rates and taxes is not a proper deduction, but that the deduction should be the taxes of the year in question. He refers to the case above quoted of *Edinburgh and Glasgow Railway Company* v. *Hall*. The rates and taxes exclusive of income tax under Schedule D, but inclusive of property tax Schedule A, paid and assessed during the year ending 15th May 1903, are as follows:—

	Owner.			Occupier.			Total.		
Paid—	£	s.	d.	£	s.	d.	£	s.	d.
Property Tax, Schedule A .	1	13	6		...		1	13	6
County Assessments . .	10	12	8	4	0	6	14	13	2
Burgh Assessments . .	31	7	5½	103	2	11¼	134	10	4¾
Parish Rates .	1	16	1	0	13	4	2	9	5
	45	9	8½	107	16	9¼	153	6	5¾
Unpaid, but consigned in Court—									
Parish Rates .	24	11	7½	24	11	7½	49	3	3
Total, .	70	1	4	132	8	4¾	202	9	8¾

"The respondent further contends that only the owners' proportion of taxes forms a deduction from the gross rental for the purpose of ascertaining the net rental, and quotes the case of *Wilson* v. *Pumpherston Oil Company*, 3 F. 1099.

"In the course of the remit the respondent contended that it was the reporter's duty to ascertain what was the assessable value of the shore dues of Burghead Harbour which should be entered or which should have been entered in the valuation roll of the county of Elgin for the year ending at Whitsunday 1903, and that it was the reporter's duty to ascertain how the assessable value of £621 for the year ending at Whitsunday 1903, as averred in statement 2 of the statement of facts for the complainer, had been arrived at, and what deductions had been made in fixing that sum.

"The reporter is of opinion that this matter is outwith the remit, and that in view of the cases *The Magistrates of Glasgow* v. *Hall*, 14 R. 319, and *The Pumpherston Oil Compny, Limited* v. *Wilson*, 38 S.L.R. 830, the respondent is bound to accept the valuation appearing in the valuation roll, and is debarred from inquiring what deductions fell to be made in making that valuation.

"The sum of £621 is the yearly rent or value of the lands and heritages belonging to the complainers as fixed by the Assessor for the County of Elgin for the year ending Whitsunday 1903, although that sum is entered in the valuation roll as 'shore dues of Burghead Harbour.'

"The respondent contends that the lands and heritages in respect of which the complainers are assessed consist of quays, wharves, sheds, buildings, and other heritages, but that the part of the sea below high-water mark, which is included within the boundaries of the harbour, is no part of the lands and heritages belonging to the complainers. Following on this contention he objects to any sums being deducted in respect of dredging operations.

"The reporter has not been able to adopt this view."

Both parties lodged objections and answers to the report.

The complainers maintained, *inter alia*, (1) that the probable average cost of insurance proposed to be allowed was insufficient inasmuch as for the first three of the five years taken by the reporter the dredger, which for the last two of the five years was insured and would in the future be insured at a premium of £80, had not been insured, and so £80 for each of the first three years should have been added, and (4) that (*a*) an average of the rates and taxes should be taken to arrive at the deduction therefor, and (*b*) the rates and taxes to be included should not be the owner's proportion only but both owner's and occupier's.

The respondent objected to the report, *inter alia*, on the following grounds:—(Obj. I). That the report did not contain information which would have enabled him to show that the deductions allowed by the reporter had already been taken into account by the assessor in stating the yearly rent or value of the subjects in the valuation roll at £621; for example, while the subjects were entered in the valuation roll for that year as "Shore dues of Burghead Harbour, £621," the shore dues for that year amounted to £2251, 19s., while the profits in each of the preceding four years, on which income-tax had been paid, were as follows:—1898-9, £795; 1900-1, £952; 1901-2, £804; 1902-3, £795. (Obj. II). The respondent also objected to the sum of £399, 16s. 2d. allowed by the reporter for deductions as excessive, and averred—"The lands and heritages at Burghead Harbour belonging to the complainers, entered in the valuation roll, consist of quays, wharves, sheds, offices, a steelyard, and a pier, these being the only subjects legally assessable. Of these, the sheds, offices, and steelyard are separately entered in the valuation roll, and the quays, wharves, and pier are the subjects covered by the entry therein of 'Shore dues of Burghead Harbour,' and are the subjects the assessment of which is in question in the present case . . . The complainers have right under their statutes, and subject to the supervision of the Board of Trade, to dredge and deepen the portion of the sea included within the boundaries of the harbour, but the sea within the harbour boundaries is no part of the lands and heritages belonging to the complainers. The respondent accordingly submits that there should be disallowed all items of expenditure which do not relate to the complainers' lands and heritages as above mentioned, and that the whole expenses connected with the dredger and with dredging should be disallowed in respect (1) they are ordinary working expenses and not repairs or expenses within the meaning of the statute, and (2) they are not operations upon the complainers' lands and heritages assessed under the said entry. The respondent also maintains that the one half of the harbourmaster's salary which the reporter proposes to allow as a deduction under head 5 ought to be disallowed. The harbourmaster's salary is entirely an expense of the complainers' business, and has no relation to the deductions allowed by the statute. It is in no sense an expense of the upkeep of the harbour as an assessable subject." (Obj. III). The respondent maintained that the proper deduction for rates and taxes was (*a*) not an average, but the rates and taxes for the particular year, and (*b*) the proportion of

the rates and taxes payable by the owner, and not both that payable by the owner and that payable by the occupier.

On 19th January 1905 the Lord Ordinary (STORMONTH DARLING) pronounced an interlocutor repelling the complainers' objections, and also objections 1 and 2 for the respondent, and sustaining objection 3 for the respondent.

Opinion.—"This suspension raises the question whether the complainers, as proprietors of the harbour of Burghead, in the parish of Duffus and county of Elgin, have received from the respondent the full amount of deductions to which they are entitled, under the 37th section of the Poor Law Amendment Act 1845, before being assessed for poor and other parochial rates (levied on the basis of the poor rate) for the year from Whitsunday 1902 to Whitsunday 1903. That section provides that . . . [*quotes section*] . . .

"The yearly rent or value of the lands and heritages belonging to the complainers was fixed by the Assessor for the County of Elgin, according to the valuation roll made up by him for the year ending at Whitsunday 1903, at the sum of £621; and the respondent as collector of poor and other rates for the parish of Duffus, intimated to the complainers that he had assessed them as owners and occupiers of lands and heritages of the annual value of £310, 10s., being a deduction of 50 per cent. from the amount appearing in the valuation roll, in respect of the allowances mentioned in the 37th section. The complainers, on the other hand, came into Court maintaining that, if the full statutory deductions were allowed, they would be entitled to total exemption from the rates.

"I followed the usual course of making a remit to a man of skill—in this case Mr Gowans, C.A., Edinburgh—to examine the complainers' books, and to report as to the items of expenditure mentioned in the statute. He reported that, in his opinion, the sum of £399, 16s. 2d. was the probable annual average cost of the repairs, insurance, and other expenses necessary to maintain the subjects of assessment in their actual state; and he further stated alternative views of the amount of rates, taxes, and public charges payable in respect of the same, the alternatives depending on whether these burdens were to be taken, like the repairs, on an average of years or for the year of assessment, and whether they were to include all rates or only rates payable by the owner. Both parties lodged objections and answers to his report; and I shall deal with these in their order, beginning with the objections made by the respondent, as being the most important. But before doing so I may make this general observation, that the whole matter is one of statute, as interpreted by decision. Counsel for the respondent indicated that the course of decision has resulted in deductions being allowed to so large an amount as practically, in the case of some industrial undertakings, to make the subjects not worth assessing. If so, I can only say that the remedy must be sought, not by asking the Court to go back on decisions which have been acted on for half a century, but by the action of Parliament.

"This preliminary observation has a special bearing on the first objection for the respondent, in which he complains that the report does not contain certain information which he thinks would have enabled him to show that the deductions allowed by the reporter had already been taken into account by the assessor in fixing his valuation of £621. But the case of *Magistrates of Glasgow* v. *Hall*, 14 R. 319, followed in *Pumpherston Oil Company* v. *Wilson*, 3 F. 1099, settled that this Court has no jurisdiction to review the assessor's valuation or to inquire into the process by which it was reached, and that the deductions allowed by the Poor Law Act must be made from the sum entered in the valuation roll. It seems to me, therefore, that the reporter was quite right to refuse the respondent's demand. Counsel for the respondent conceded that if the information were supplied neither I nor the Inner House could make any use of it. But he suggested that it might come to be useful if he carried the case further. That seems to me not a good reason for sustaining his objection. If the House of Lords should be appealed to, and should desire the information, their Lordships have ample power to make an order by which it can be obtained.

"The respondent, by his second objection, takes exception to the items of expenditure allowed by the reporter for dredging the harbour, including the upkeep of the dredger itself and the wages paid in connection with it. The argument is that dredging is not an expense necessary to maintain in their actual state the lands and heritages which are the subjects of assessment, because the right of harbour, which is an incorporeal right, is not within the definition of 'lands and heritages' as contained in the Poor Law Act. That is quite true; and I hardly think it is a sufficient answer to that argument to say that the Valuation Act of 1854 does (by section 42) contain the word 'harbour' as within the enumeration of 'lands and heritages.' Moreover, it must be admitted that judicial opinion has not been uniform on this formal point. I call it so, for it is a point much more of form than of substance. It has twice at least been urged—in the *Leith Dock Commissioners* case and in the *Clyde Trust* case—and on both occasions on behalf of the harbour authorities, for the purpose of resisting assessment. It has never before, so far as I am aware, been urged by the rate-collector as a reason for refusing to allow harbour expenditure to be deducted from annual value.

"In the *Leith* case (2 Macph. 1234) Lord Jerviswoode, who was the Lord Ordinary, expressed (at p. 1239) his concurrence with the opinion of Lord Rutherfurd in a former *Leith Dock* case to the effect that 'the interpretation clause of the Poor Law Act was not intended to be exclusive of all it did not contain,' and therefore that a right of harbour granted by the Crown 'must be dealt with as heritage in the sense of the

statute and as assessable accordingly. Lord President M'Neill, in moving that the Lord Ordinary's interlocutor should be adhered to, said simply (at p. 1242), 'Then there arises an important question whether these subjects are in their own nature to be regarded as lands and heritages in the sense of the Poor Law Act. I have no doubt they are, so far as use is made of them.' When the case went to the House of Lords, it appears from the report in 4 Macph. (H.L.), at p. 16, that Lord Advocate Moncreiff urged as part of his argument on behalf of the appellants that the Scotch Poor Law Act did not include harbours in the enumeration of assessable property, and that a right of harbour was an incorporeal right and could not be included in the corporeal property therein defined. But the respondent's counsel were not called upon, and Lord Chancellor Cranworth, apparently dismissing the idea that there was any difference between the laws of England and Scotland on that matter, said (at p. 18 of 4 Macph. H.L.), 'It must now be held in Scotland, as in England, that the commissioners or trustees of docks, harbours, wharves, and everything of that sort, are liable to be rated in respect of their receipts, whether in the form of dues or otherwise, and whatever be the purposes to which the receipts are applied.' In the case of *Adamson* v. *Clyde Navigation Trustees*, 1 Macph. 974, it was decided that the trustees were not liable to be assessed in respect of the river and incorporeal right of harbour, as subjects apart from the wharf, quays, and other accommodation of which that harbour consisted, and Lord Justice-Clerk Inglis explained (at p. 987) that he did not read the Clyde Acts as vesting the trustees with any *jus incorporale*, by which they could be said to be, in the common law sense of the term, proprietors of the right of harbour. So far as that consideration affected his Lordship's opinion, it would not apply here, because the complainers undoubtedly represent the original grantee of the harbour of Burghead. But it is right to add that his Lordship did not proceed entirely upon that view. Lord Cowan based his opinion solely on the ground that a right of harbour was not in express terms within the Poor Law Statute; Lord Benholme concurred with the Lord Justice-Clerk; and Lord Neaves held that an incorporeal right of harbour was no more assessable than a right of copyright. The case went to the House of Lords, but only on the general question whether the Clyde Trustees were exempted from assessment altogether by reason of their holding for public purposes, and the judgment of this Court was affirmed, without reference to this special point. If, therefore, the question were directly raised whether an incorporeal right of harbour was an assessable subject under the Poor Law Act, it could not be said to be finally settled, there being conflicting opinions of eminent judges, resulting in a Second Division judgment one way in 1863 and a First Division judgment the other way in 1864, both of which were affirmed by the House of Lords, but without this particular point being raised at all in 1863, or very seriously considered in 1864.

"I must apologise, however, for being decoyed by professional interest into a discussion which, as regards the question here, is really academic. For what does it matter to the deduction for dredging whether the complainers are assessable on the incorporeal right of harbour or not? They are undoubtedly assessable on the physical structures connected with the harbour, which are expressly mentioned (as quays, wharves, and so on) in the Poor Law Act, and which derive their whole use and value from being pertinents of a harbour. The entry in the valuation roll of 'Burghead Harbour (Shore Dues of)' may not be very accurate, for the dues are not the assessable subject, they are the source of value which the subject possesses. But the respondent can hardly complain of the entry, for he accepts it, and is bound to accept it, as conclusive of value, and without it there could be no assessment. What he does say is that no expenditure can be allowed as a statutory deduction unless it is made on the actual physical structure which is the subject of assessment. But where does he find the warrant for that in the language of section 37? It does not say that the 'repairs, insurance, and other expenses' must be made on the actual lands and heritages, but that they must be 'necessary to maintain such lands and heritages in their actual state.' Now, what is more necessary to maintain quays and wharves in their actual state (that is, in a state to command the hypothetical rent) than an operation which is intended to prevent the accumulation of silt, and so to keep the way open for ships to reach the wharves and quays? How could their value, which it is proposed to assess, be preserved without such an operation? I quite agree that dredging might be carried much further than the mere preservation of the *status quo*. It might really mean deepening or enlarging. But then we have the uncontroverted statement of the reporter that he has allowed nothing of the nature of capital expenditure, and therefore I have come to the conclusion that in fixing the sum of £399, 16s. 2d. he has rightly apprehended the nature of the inquiry with which he was charged, and that the second objection for the respondent must also be repelled. There might have been a question about the half of the harbourmaster's salary, but it appears that he acts as skipper of the dredger, and therefore this proportion of his salary is in the same position as other wages in connection with the dredger, and is truly part of the cost of working it.

"This is the natural place at which to notice the first objection for the complainers, which seeks to enlarge the allowance of £399, 16s. 2d., of which I have just expressed my approval. The objection is that the reporter, in taking, with the assent of the parties, five years as a reasonable period from which to strike an average, has stated the premiums of £80 paid for insuring the

dredger only for the two years 1902 and 1903, in which these premiums were actually paid, and that he ought to have added, contrary to the fact, £80 for each of the first three years of the period, with the result of increasing the total average from £399, 16s. 2d. to £447, 16s. 2d. All I can say is that if the reporter had done so I think he would have gone wrong. The complainers cite the case of *Glasgow Gas Light Company* v. *Adamson*, March 23, 1863, 1 Macph. 727, in which apparently a sum was allowed for insurance although no premiums were paid, on the footing that the company were their own insurers. But it appears from the Lord Ordinary's interlocutor (p. 729) that a sum was annually laid aside to meet the risk of destruction by fire. That being so, it may have been correct to describe the company as 'their own insurers'; but I should demur altogether to such a phrase being used where the owners of perishable subjects neither insure nor make any provision in lieu of insurance but simply take their risk of fire. I fail to see why in such a case they should get any deduction under the head of insurance. And where a period of years has been adopted as affording a fair basis for an average I think it would be wholly misleading to take any but the actual figures which the books of the owners supply. No doubt the phrase in the 37th section is 'the probable annual average cost,' but the word 'probable' must be read in connection with the word 'average,' and if an average of years is to be taken, it must be taken correctly as affording a test of probability. The complainers say that it is their intention to maintain this insurance in future. That may be; and if they carry out their intention they will be entitled to get the benefit of it at the end of five years from the time when they began to insure at that figure. But at present the experience of the five years down to 1903 is against them, and, having assented to that period as a fair test of actual outlay, and accepted it as regards some items of expenditure, they are not entitled to repudiate it as regards other items merely because imaginary figures would suit them better. I shall therefore repel the first objection for the complainers. They did not press their second and third objections, and these also I shall repel.

"That only leaves the third objection for the respondent, which may be taken along with the fourth objection for the complainers. Both refer to the reporter's method of dealing with the deduction allowed by section 37 for all rates, taxes, and public charges payable in respect of the lands and heritages. He has not expressed an opinion as to the proper method of dealing with these, but he has given alternative figures which enable me to dispose of the question between the parties. The contention of the respondent, as stated in his third objection, is twofold. He says (1) that the rates, taxes, and public charges to be deducted under section 37 are not to be estimated on any annual average but are to be those actually payable for the year of valuation; and (2) that it is only the owner's taxes that ought to be deducted. I agree with the respondent in both of these contentions. With regard to the first point, I think that the grammatical construction of the section requires you to hold that the words 'all rates, taxes,' &c., are governed by the words 'under deduction of,' and not by the words 'the probable annual average cost of.' I also think that the presumable intention of the section points to the same conclusion, for the taxes actually payable for the year are capable of precise ascertainment, and there is no necessity for resorting to a hypothetical estimate, as there is in the case of repairs and expenses of maintenance. That was the judgment of Lord Kinloch in the case of *Edinburgh and Glasgow Railway Company* v. *Hall*, January 19, 1866, 4 Macph. 301, at p. 306, and that part of his Lordship's interlocutor was not reclaimed against.

"The second part of the respondent's contention may be more doubtful, and there is no decision on the point, although it is significant that in *Pumpherston Oil Company (Limited)* v. *Wilson* (*supra cit.*) the company, who were owners and occupiers of chemical works, admitted that only owner's and not occupier's taxes fell to be deducted from the valuation. The complainers also refer to that case for certain observations made by Lord Kinnear about the difficulty of distinguishing between the outlay which a landlord ought to make and the outlay which a tenant ought to make in repairing a complex heritable subject. But there is no such difficulty about public charges, which are separately imposed upon owners and occupiers, even when the owner happens to be in occupation. Lord Kinnear conceded 'that as a rule the deductions contemplated by the statute are those required by the outlays of the proprietor.' In saying so his Lordship had specially in view the deductions allowed for repairs and other expenses. But it seems to me that the same may be said of the deductions allowed for public charges, because the intention is the same in both cases, viz., to get at the burden on the gross rental hypothetically received by the landlord. In short, the whole conception of the section is that there is an imaginary tenant, and that the sum in the valuation roll is the rent which he might be expected to pay. If this be so I think it would be absurd to deduct from the amount supposed to be received by the landlord not merely his own rates and taxes, which are, properly speaking, 'payable in respect of the lands and heritages,' but also the rates and taxes payable by the occupier in respect of his occupation. The complainers argue that the section makes no distinction between owner and occupier, and that consequently all rates and taxes must be deducted. But that argument goes too far, because it was held in the second case of *Edinburgh and Glasgow Railway Company* v. *Hall*, June 29, 1866, 4 Macph. 1006, 2 S.L.R. 159, that, notwithstand-

ing the generality of the words used in the section, property and income-tax charged on income derived from lands and heritages is not deductible. In short, the section must be read consistently with its manifest purpose, and that purpose being to ascertain the amount of nett receipts which the owner would draw from the subjects if he had a tenant, it seems to me that only the owner's rates and taxes for the year ending Whitsunday 1903 can be deducted. I shall therefore sustain the respondent's third objection and repel the complainers' fourth objection.

"The result, I suppose, will be to add the sum of £68, 7s. 10d. to the sum of £399, 16s. 2d. (together £468, 4s.) as the total sum to be deducted from the valuation of £621."

The respondent reclaimed against the Lord Ordinary's interlocutor in so far as it repelled 1 and 2 of his objections.

Argued for reclaimer—The assessment here was on "lands and heritages" in terms of the Poor Law Act of 1845 (8 and 9 Vict. cap. 83), and the deductions allowed were those specified in sec. 37 thereof. Two questions arose, viz., (1) Did the incorporeal right of harbour fall under "lands and heritages"; and (2) were the expenses deducted such as sec. 37 contemplated, *i.e.*, those necessary to keep the subject in its actual state, or such as it did not, *i.e.*, expenses incidental to the carrying on of a business? The subjects assessable were "lands and heritages," and it must be presumed that the assessor had valued the appropriate subjects. From dicta in the following cases it appeared that an incorporeal right such as a right of harbour was not assessable—*Adamson* v. *Clyde Navigation Trustees*, January 27, 1860, 22 D. 606; June 26, 1863, 1 Macph. 974; *affirmed* June 22, 1865, 3 Macph. (H.L.) 100; *Clyde Navigation Trustees*, July 22, 1866, 4 Macph. 1143. No deduction was therefore to be made for expense incurred in connection with the incorporeal right of harbour and the cost of dredging must come out. Further, the statute contemplated expenses incident to keeping the harbour in its actual state, not such as were incidental to making it a profitable or revenue-earning subject. *Esto* that the harbour was assessable, the only deductions which the complainers were entitled to make were the expenses of keeping the docks, wharves, and quays in their actual state—Poor Law Act 1845, secs. 34 and 37; Valuation Act 1854, sec. 41; and actual state meant physical state. What was being dredged here was the *solum* below low-water mark. That was not part of the harbour as entered in the valuation roll. The only repairs deductible were such as were actually made on the quays, wharves, &c., *i.e.*, the actual subjects. These subjects alone were assessable as lands and heritages. As to repairs, &c., the cost of which was deductible under sec. 37 of the Poor Law Act, reference was made to *Edinburgh and Glasgow Railway Company* v. *Meek*, December 10, 1864, 3 Macph. 229; *Magistrates of Glasgow* v. *Hall*, January 14, 1887, 14 R. 319, 24 S.L.R. 241; and *Pumpherston Oil Company (Limited)* v. *Wilson*, July 19, 1901, 3 F. 1099, 38 S.L.R. 830.

Argued for the complainers—The Lord Ordinary was right. The assessor had followed the usual practice of valuing the harbour as a whole. The harbour fell to be regarded as a *unum quid—Ayr Harbour Trustees* v. *Assessor for Ayr*, May 25, 1894, 21 R. 807, 31 S.L.R. 726. That course was warranted by section 42 of the Valuation Act of 1854. The theory that there was an incorporeal right of harbour which was not assessable was negatived by the House of Lords in *Leith Dock Commissioners* v. *Miles*, March 12, 1866, 4 Macph. (H.L.) 14, 1 S.L.R. 213; also in *Gardiner* v. *Leith Dock Commissioners*, June 17, 1864, 2 Macph. 1234. Reference was also made to *Cuninghame* v. *Assessor for Ayrshire*, March 30, 1895, 22 R. 596, 32 S.L.R. 453; and *Mersey Docks* v. *Liverpool*, November 19, 1873, L.R. 9 Q.B. 84. The dredging was necessary to keep the harbour open, and was not done merely for profit-earning purposes. The duty of keeping their harbour open was a common law obligation on those having a grant of harbour—Bell's Prin. 654; *Officers of State* v. *Christie*, February 2, 1854, 16 D. 454.

At advising—

LORD KINNEAR—This is a suspension of a charge for payment of poor rates at the instance of the Inspector of Poor of the parish of Duffus against the Burghead Harbour Company, Limited, who are according to their own statement the proprietors of the harbour. The complainers bring the suspension on the ground that they are entitled to have certain deductions made from the valuation of the harbour as ascertained by the assessor under the Valuation Act. The Lord Ordinary for the purpose of ascertaining the facts upon which the question arose made a remit according to the ordinary course of proceeding to an expert . . . [*quotes remit.*] . . . The questions in dispute between the parties are raised in the form of objections to Mr Gowan's report. The Lord Ordinary has disposed of these objections by various findings for and against either party, but there are only two of his Lordship's findings which are brought to review before this Court, the parties having acquiesced in the judgment in all other respects. The deduction claimed by the complainers are deductions of the amount of moneys expended by them in repairing and maintaining the harbour—deductions to which they are entitled under the 37th section of the Poor Law Act of 1845—and the two objections which still remain for consideration are, first, that the whole of the deductions which the Lord Ordinary allows have already been taken into account by the assessor in making up the valuation, and that they cannot be allowed a second time, and secondly, that certain items alleged to be items of expenditure falling under the 37th section of the Act, involve expenditure outside the limits of the heritable subject, which alone, according to the argument, can be assessed, being

expenditure on dredging the harbour which it is said, ought not to have been sustained, because they are not expenses for maintaining the lands and heritages assessed in their actual condition. The first point although it is formally insisted in was not seriously pressed by the counsel at the bar, who admitted that it must be taken as settled by decisions that are binding upon this Court in the cases of the *Edinburgh and Glasgow Railway Company* v. *Meek*, and the *Magistrates of Glasgow* v. *Hall*. The rule established by these decisions, which it is, I think, conceded we at least must follow, is thus explained in the latter. It is shown that starting with the liabilities created by the Poor Law Act, there are two duties imposed upon the collector of poor rates or on the parochial board by that statute. They were required in the first place to estimate the annual value of the land and heritages, taking such value as the sum at which one year with another they might in their actual state be reasonably expected to let, and that rent having been ascertained they were directed, secondly, to make the deductions which I have already mentioned to your Lordships. These were their two duties. It was further held that the first of these duties was transferred from the assessing board to the assessor created by the Valuation Act of 1854, but that the second duty was not so transferred, that the valuation prepared by the assessor in terms of the Act of 1854 must be taken as conclusive evidence of what is the gross rent or annual value of the lands and heritages in question, and that the Court has no jurisdiction to inquire whether that valuation has been rightly or wrongly made. It is taken as conclusive, and that being accepted the collector of the poor rates of the collecting parish must then go on to perform the second duty, which was originally laid upon the poor law authorities by the 37th section of the Act, of making the deductions to which the person assessed has right from the gross rental or value already ascertained by the assessor. This is the effect of these decisions, and it is admitted that they are binding upon the Court. The first objection of the respondent must therefore be repelled, although if the question were open it might require serious consideration.

The second objection raises a question of a different kind. It is said that in deducting the expense of repair the Lord Ordinary following the report has allowed a deduction of the expense of dredging, including the cost of keeping up the dredger itself, which does not properly fall within the description of expenditure on the lands and heritages assessed; and the ground upon which that is maintained is that this harbour consists not only of quays, wharves, sheds, offices, and piers, but also embraces the right which the complainers have in their title of dredging a portion of the sea included within the harbour boundaries, and that portion of the sea is not part of the lands and heritages belonging to the complainers; therefore it is said this expense of dredging which is not incurred in maintaining the heritable subjects is not a proper deduction from the gross value allowed by the assessor. The answer which the Lord Ordinary makes to that argument is a short one, but it seems to me to be perfectly conclusive. His Lordship says—"What does it matter to the deduction for dredging whether the complainers are assessable on the incorporeal right of harbour or not. They are undoubtedly assessable on the physical structures connected with the harbour which are expressly mentioned (as quays, wharves, and so on) in the Poor Law Act, and which derive their whole use and value from being pertinents of a harbour. . . . Now, what is more necessary to maintain quays and wharves in their actual state—that is, in a state to command the hypothetical rent—than an operation which is intended to prevent the accumulation of silt, and so to keep the way open for ships to reach the wharves and quays?" I entirely agree that the expense of keeping the harbour clear is necessary to maintain it in a condition in which it can be used as a harbour, and therefore in a condition in which the proprietors are enabled to levy dues. But as the argument was pressed upon us and was founded upon a view of certain decisions to which the Lord Ordinary himself gives some countenance, it may perhaps be proper to examine it a little more closely in order to see whether it has really any foundation. The Lord Ordinary states it in an early part of his opinion when he says—"The argument is that dredging is not an expense necessary to maintain in their actual state the lands and heritages which are the subjects of assessment, because the right of harbour, which is an incorporeal right, is not within the definition of 'lands and heritages' as contained in the Poor Law Act." I must confess that I do not understand what is precisely meant by the statement that a harbour is an incorporeal right. The distinction between corporeal and incorporeal in the Roman law from which our law borrowed it, and as it is explained also in our own text writers, is not a distinction between rights; it is a distinction between things. *Res corporales* are, according to the legal definition, physical things which can be touched; and *res incorporales* are things that do not admit of being handled, but consist *in jure*, and so are more properly rights than subjects — I am quoting the definition of Mr Erskine—such as rights of property, rights of servitude, succession, and so on. All rights therefore are incorporeal, and the distinction really is not between two kinds of right but between things which are objects of right and the legal conception of the right itself. I therefore have some difficulty in following the argument which is based on this alleged distinction. If it means that a harbour is not *res corporalis*, so that it is not included in the category of rights which are summed up by "lands and heritages" I must respectfully dissent from that proposition altogether. I think the right of harbour is perfectly well known to the law of

Scotland as a heritable right, and that the subject, or rather object, of the right is a physical thing. The general rule of course is that harbours are vested in the Crown, by whom alone they can be erected or held, but then it is very familiar law that the right may be granted either by charter followed by infeftment or by Act of Parliament in favour of individuals or public bodies. With both these kinds of right we are perfectly familiar; and when that right has been so created in the subject there is no question so far as I understand the law as to what it embraces. It comprehends, according to the statement in Bell's Principles, in the first place, the natural access which makes safe a landing-place, and of course includes piers, wharves, and all physical structures which were erected for the purpose of making the landing-place convenient and safe; secondly, it includes artificial operations by which the harbour is improved for the convenience of navigation, and the power and privilege of monopoly within the bounds of the harbour; and third, it includes the right to levy duties for the maintenance of the harbour. These, according to Bell's statement, are the component elements of the heritable right of harbour, and it does not appear to me doubtful that that kind of subject is *res corporalis*, a heritable subject perfectly well known to the law, and that the right to levy duties which is attached to it is an incident attached to that right which gives it its value. Accordingly, the question whether a harbour can be included within the term "lands and heritages" does not appear to me, so far as I can find, to have been raised as really a disputable question until the case to which I shall advert immediately. If it could have been raised at any time I think it cannot possibly be raised now, because the Valuation Act in the definition of lands and heritages includes in terms ferries, piers, harbours, quays, wharves, and docks. It appears to me therefore we must take it that a harbour is a heritable subject included within the description of lands and heritages and therefore assessable. In the series of cases in which it was held in this Court, as it was at the same time held in England, that harbour trustees were not assessable for poor rates, the ground of exemption was not that the harbour is not in itself a land and heritage subject to assessment like any other heritable property, but that the whole revenues of the harbour being specially appropriated for public purposes there remained nothing in the hands of the trustees or commissioners which could possibly form the subject of assessment. That was the view which obtained both here and in England, but which so far as this Court was concerned was finally and conclusively rejected in the case of *Adamson* v. *Clyde Navigation Trustees*. In that case it was held that the harbour as a heritable subject in the hands of the Clyde Navigation Trustees was liable to assessment because the trustees were owners and occupiers of lands and heritages, and that they had no such exemption as had been maintained in consequence of the special appropriation of the duties they were entitled to levy. That judgment was affirmed by the House of Lords in accordance with the decision of that House in the case of the *Mersey Docks* v. *Jones*, in which the same doctrine was laid down. But then it is said that the point which the respondent maintains now was decided in his favour in a later stage of the case of *Adamson* v. *The Clyde Navigation Trustees;* and that is a view which the Lord Ordinary is disposed to take. I respectfully differ from it. After the question had been decided whether the Clyde Trustees were exempt from assessment altogether or not, it became necessary to determine what the subjects were which were assessable in terms of the statute; and the Court held without difficulty that the ferry, quays, wharves, docks, and a variety of moveable machinery which had become heritable by situation, were fairly within the description of "lands and heritages" and must be assessed. But two points were taken by the assessor which the Court declined to sustain. In the first place, it was said that in assessing the Trustees there must be taken into account the dues which were leviable for navigation in the river Clyde from its mouth to Glasgow Harbour; and in the second place, it was said that apart altogether from the heritable subjects which constituted the physical harbour there was what was called the incorporeal right of harbour, which ought to be taken into account also. As to the first of these two points it was held in the first place that the Clyde being a navigable river the Trustees were not owners and occupiers of lands and heritages in the sense of the statute at all. Whether the decision was altogether in accordance with what was laid down in the *Mersey Dock Trustees* v. *Jones* may perhaps be a question, but it is not a question which we have to consider in this action, because it has no bearing whatever upon the only point in dispute between the parties. The second point is said to decide the question. The Court also rejected the view that there was to be taken into account what was called the incorporeal right of harbour, but that was upon the ground, as is very clearly explained by Lord Justice-Clerk (afterwards Lord President) Inglis that on an examination of the statute he could not find that there was any such incorporeal right. There was no incorporeal right so far as he could find separate from the right in the physical subjects which the Clyde Navigation Trustees held in property. It is quite true, as the Lord Ordinary points out, that Lord Neaves, who expresses his entire agreement with everything the Lord Justice-Clerk says, goes on to say that an incorporeal right of harbour was no more assessable than a right of copyright. That observation must of course be referred to the argument which he was considering. It is only a lively way of saying that *res incorporales* are not lands and heritages. I do not see any ground for thinking that his

Lordship meant to lay down as a general rule of law that every harbour included or consisted of an incorporeal right which could not be made the subject of assessment. That was not a matter before him. It really came to nothing more than this, that if there were any right separate and apart from the right to physical structures which form the physical harbour, that was not a right which should be taken into account, because the thing to be assessed was the heritable subject which fell within the description of lands and heritages. But then whatever view might be taken of these two findings of the Court, it would not in my opinion have any direct bearing upon this question, because it was not the question which we are now considering. The point which is now made for the respondent is that the harbour includes a certain right in land covered by water below low-water mark, that that is not an assessable subject because it is incorporeal and because no part of the sea beyond the foreshore is within the parish which forms the assessable area, that this part of the subject cannot have been taken into account by the assessor in making his valuation, and that therefore no deduction ought to be made in respect of expenses incident to the exercise of any right the trustee may have in it. Now that question, which did not arise in *Adamson* v. *Clyde Navigation Trustees*, was raised directly in the next case — *Gardiner* v. *Leith Dock Commissioners*. I cannot quite agree with the Lord Ordinary in his observations upon that case when his Lordship says that the matter was not treated thoroughly or carefully either here or in the House of Lords, but was treated as a subject of no importance. I think that is hardly so. The objection taken was that no assessment could be leviable in respect of land gained from the sea, or for docks or works erected on such land, and that no such subjects if situated beyond high-water mark could be assessed for poor-rates. That objection was very fully considered in the very careful judgment of Lord Jerviswoode, who was the Lord Ordinary in the case, and the Lord Ordinary comes to the conclusion that there is no authority and no reason sufficient to support the proposition. His Lordship says—"He is not aware that it has ever been held that such property was extra-parochial, and if it be not so, within what parish can it be situated other than that in which the shore itself, from which the works extend, lies, unless indeed express evidence of the contrary be adduced." Accordingly his Lordship rejected that contention, and his opinion was affirmed in the Inner House. It is quite true, as the Lord Ordinary says, that the opinion of Lord President M'Neill in affirming it is very concise, but it is not the less deliberate and authoritative on that account. His Lordship says—"I think that view (that is, the view that part of the harbour was below high-water mark) is quite untenable"—and accordingly it was held that the whole harbour was assessable. But when the case went to the House of Lords the law was stated in a perfectly clear and distinct manner, because Lord Advocate Moncreiff pressed upon the House of Lords the argument which we have heard in this case, and which was pressed upon the Second Division, that because a right of harbour was an incorporeal right it could not be included in the corporeal property enumerated in the Poor Law Act. That argument was very distinctly rejected by the House of Lords. The Lord Chancellor said—"In the last session of Parliament, after a very elaborate consideration of the subject by all the Judges, the question was finally decided by your Lordships' House in favour of the rateability of all trustees or commissioners having harbours, docks, wharves, and other property of the same sort in their possession in respect of which they levied harbour dues, tolls, or other sums of money. It was held that all these were on the correct construction of the statute of Elizabeth in England (and there is no substantial difference in the language of the statute which regulates the poor law in Scotland) liable, with the single exception that as the Crown is not mentioned in the Poor Law Acts the Crown is not bound." I take that to be a perfectly clear decision of the House of Lords that harbours are lands and heritages in the sense of the Poor Law Act, and therefore assessable, as they are undoubtedly lands and heritages within the definition of the Valuation Act. Then his Lordship goes on to say that he had thought this question had been finally determined the year before in *Adamson's* case, but the Lord Advocate had shown that there were some matters which had been held to be chargeable in the *Mersey Dock* case, and which had not formed the subject of appeal in *Adamson's* case, and therefore had not been decided by the House of Lords. But then his Lordship says that what was deficient in *Adamson's* case would now be added in this case. Now, what was added by the case which he calls this case to the decision in *Adamson's* case, except that liabitity extended not only to the harbour, wharves, and similar structures on shore but extended also to whatever dues might be shown to be attachable to the use of the harbour so far as it was occupied by sea or extended below low-water mark. Therefore I think it is finally decided by authorities which cannot be called in question that harbours as such are lands and heritages assessable for poor-rates, and if that be so, the objection to allowing the expenses of dredging the harbour below low-water mark as a deduction from the assessor's valuation necessarily falls. A harbour is a complex heritable subject, and the attempt to analyse it so as to distinguish between its corporeal and incorporeal elements seems to me a logical exercise which for the present purpose is not very profitable. It is a heritable subject known to the law. It is the property, the complainers aver and the respondent does not deny, of the Burghead Harbour Company, and therefore they are owners and occupiers of this complex heritable subject described as Burghead Har-

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."