COURT OF SESSION.

Tuesday, November 26.

SECOND DIVISION.

HUTCHISON & CO. *v.* HENRY & CORRIE.

Issue—Contract—Mercantile Amendment Act—Expenses. *Held* that the Mercantile Amendment Act does not apply to an executory contract which had no reference to a specific *corpus*, or specific quantity, and issue adjusted apart from the provisions of the statute. Pursuers, who succeeded in obtaining the issue in the terms which they first proposed, held entitled to expenses.

This was an action of damages, in which the pursuers were Robert Hutchison & Co., corn merchants in Kirkcaldy, and the defenders were Messrs Henry & Corrie, merchants in Leith. The issue proposed by the pursuers was as follows :—

"Whether, in March or April 1866, the defenders sold to the pursuers 3000 quarters or thereby of Petersburg oats for mealing purposes? And whether, in breach of said contract, the defenders failed to deliver to the pursuers 2000 quarters or thereby of oats fit for mealing purposes, to the loss, injury, and damage of the pursuers?"

Damages laid at £800.

The defenders objected to this issue, and contended that, having regard to the terms of the fifth section of the Mercantile Law Amendment Act, which assimilated our law on this subject to the law of England, the issue should be whether the defenders "expressly" sold the oats for mealing purposes. They also maintained that the pursuers were not entitled to schedule damages beyond the amount of the specific damage set forth in the condescendence, and amounting to £539; but this last matter was arranged in the course of the discussion by the schedule being restricted to £600.

The Lord Ordinary (BARCAPLE) reported the issue to the Court without expressing an opinion.

CLARK and LANCASTER in support of the issue.

YOUNG and SHAND in answer.

At advising—

Their Lordships held that the provision of the Mercantile Law Amendment Act did not apply to a case like the present, where there was no purchase of a specific *corpus*, or a definite part of a specific *corpus*. The Act only applied to such cases. Any other reading of it was inconsistent with what it provided as to the passage of the risk. Here the contract was an executory contract, which had no reference to any definite subject; and the question would have been precisely the same if it had arisen in an action for implement instead of an action for damages. The Court accordingly approved of the issue in the terms in which it had been approved by the pursuers.

LANCASTER, for the pursuers, moved for expenses, maintaining that they had been substantially successful, that they had got their issue, and that no discussion would have followed upon the issue but for the objection to it which the defenders had taken.

YOUNG, in answer, argued that the defenders were reasonably entitled to come to the Inner House in the circumstances to have the issue adjusted, and that the pursuers having succeeded upon a point that was suggested by the Court, for both parties had originally contemplated the application of the Mercantile Amendment Act, they should not get expenses.

The Court allowed expenses, and modified these to six guineas.

Agents for Pursuers—Mackenzie & Kermack, W.S.

Agents for Defenders—Murray, Beith, & Murray, W.S.

Wednesday, November 27.

FIRST DIVISION.

MORTON *v.* GRAHAM.

Lease—Game—Reparation. *Held* that a tenant had no claim against his landlord in respect of damage done to his crops by rabbits, the lease containing a clause reserving rabbits, &c., and barring any claim for compensation on the part of the tenant, and there being no proof by the tenant of an unreasonable excess of game. Opinions, from the clause in the contract, and the nature of the farm (a hill farm, with plantations and loch), that the parties to the lease contemplated an increase of game, and that redress would be had for an extravagant increase on the head of fraud.

Thomas Morton, farmer, Craigallian, in the parish of Strathblane, and county of Stirling, brought this action against his landlord, Mr Graham of Craigallian, seeking to recover the sum of £168 as compensation for damage done to the pursuer's crops by game and rabbits. It appeared that the pursuer became tenant of farms belonging to the defender at Martinmas 1856. The lease betwixt the landlord and the tenant contained this clause—"Reserving also to the first party and his foresaids all game, hares, rabbits, wood-pigeons, wild duck, and roebuck, with the exclusive liberty to him, and those having his authority, of hunting, shooting, sporting, and fishing on the premises, without being liable to compensate the tenant in respect of the reservation and liberty herein expressed." The tenant alleged that since his entry to the farm the stock of game and rabbits, especially the latter, had increased to an extent enormously exceeding a fair average stock, such as was on the farm at the commencement of the tack, to the great injury of the crops on the farm. It appeared further that the landlord had let the shootings on Craigallian to a game tenant for a period of years after Whitsunday 1866.

The defender contended that the pursuer had not stated a relevant case; that his claim of damages was excluded by the terms of the lease libelled; and farther, that the game and rabbits on the farm had never exceeded a fair average stock.

The Lord Ordinary ordered parties to lodge issues. The defender reclaimed. The Court recalled the interlocutor, and remitted to the Lord Ordinary to take a proof. The proof was taken and reported to the Inner-House.

The case was heard on the proof.

MACKENZIE and BLACK for pursuer.

YOUNG and HALL for defender.

The case of *Wemyss and others* v. *Wilson*, 2d December 1847, 10 D., 194, was relied on for the pursuer.

LORD PRESIDENT.—The question to be decided

here is very much a jury question. But at the same time there are some legal principles involved. What is the jury question we are to settle? I don't think this is at all the same question as in the case of *Wemyss* v. *Wilson*, or that the principle of that case is applicable. In that case there was no special provision as to game at all, and the whole matter was left to common law between the landlord and tenant; and the rule which, according to the suggestion of Lord Fullerton, was applied under these circumstances appears just and reasonable, and one which ought to be applied to all such cases. Lord Fullerton says, "It appears, then, that a tenant may have a claim of damage for the injury done by game; but that, in order to support such a claim, it is necessary to prove, not merely a certain visible damage arising from game, but a certain and visible increase of the game, and a consequent alteration of the circumstances contemplated in the contract, imputable to the act of the landlord. The true ground of damage seems to be, not that the game is abundant, but that its abundance has been materially increased since the date of the lease, in consequence either of the active measures of the landlord, or his failure to keep down the burden; which last circumstance must be held equivalent to his act, as the right so to keep it down is one expressly withheld from the tenant." I think the great principle involved in that rule is, that something has been done by the landlord not contemplated in the contract of lease, and against the faith of the contract. The parties making no particular stipulation on the subject, must be held to have looked at the land as it then stood, seeing it largely or sparcely stocked with game, and it was a not unreasonable supposition that there was to be no material alteration on the lands. But, in the circumstances of this case, it is seen that the parties, so far from contemplating that there should be no change in the amount of game, looked forward to the very reverse. Now, in the first place, what is this farm? It is a hill farm, the greatest part being pasture. There are 466 acres of pasture, 89 of arable land, and, what is extremely important, there are 200 acres of plantation, and a loch of 40 acres. Now, the woods at the time of the lease were unenclosed, and it was provided that the landlord should be entitled to enclose them. He intended and stipulated to enclose them, notwithstanding the right of the tenant in the meantime to graze them. The landlord also stipulated for power to resume more land for planting. Now, a farm of that nature is, on the face of it, a farm on which a great deal of game may be expected, if there is anything done in the way of preservation. Of course, if the game is neglected, or poachers are allowed to work undisturbed, there may be a scarcity of game; otherwise it is likely to be in considerable quantity. That must have been known to both tenant and landlord. Now, what is the game clause to which the tenant consents? It is one of the most stringent against the tenant I ever saw. [*Reads clause.*] All I shall say is, that so far from the parties to this lease having contemplated that the condition of the game is to be unchanged, I think they must both have contemplated a very considerable increase. That is my inference from the contract, and the nature of the subject let. I need say no more to show that the principle of *Wilson* is inapplicable. The question is entirely different. The question here is, Whether, under such a lease as this, where it is intended that the game shall be maintained as a separate right, and that right improved, and the game increased, it has been done to such an extent as nevertheless to admit a claim of damages on the part of the tenant? It appears that Mr Graham let the game to a sporting tenant in 1865. I only refer to that for the purpose of showing that it was just carrying out what was intended, and in the contemplation of parties—that there should be occupation of this land by a game tenant at the same time as by an agricultural tenant. It was plainly contemplated that the agricultural tenant should suffer damage, but for that he was to have no claim. I can understand that a case might be made out of such an extravagant increase in the game as would amount to a fraud on the agricultural tenant, and open to him such a remedy as he here seeks; but there is no case of that here. This is a very weak case for the agricultural tenant. It is the easiest thing in the world to get a number of witnesses to come and say that there are countless rabbits on the farm, while they don't know what a great number of rabbits is, or what an excess of game is; and it is just as easy to get other witnesses who will say that the farm is a miserable place to shoot over, and that there is no game to be had on it. I should not attach much importance to either kind of evidence. Taking the substance of the evidence here, I am satisfied that, while under the lease the tenant cannot claim damages, unless he makes out a strong case against his landlord, he has made out nothing approaching that here.

Lord Curriehill—I am of the same opinion.

Lord Deas—I have some difficulty in this case. My first difficulty relates to the clause of reservation. It reserves [*reads clause*]. I am disposed to think that the fair construction of that clause is, that although some animals are reserved which are not game, the reservation is for the purpose of sport. I think that clause cannot be read as a reservation for the purpose of profit. There is no doubt that here the rabbits have been made a source of profit as much as of sport. They are not interfered with at the breeding season, and they are trapped to a large extent in the autumn, and taken to market, and money realised, without any sport. My next difficulty is, what rule to apply to the number of animals that are to be kept on the farm. It is rather vague to speak of a fair stock of game. That may be made intelligible, but a fair stock of rabbits and wood-pigeons I don't understand. If the rabbits are to be trapped and sent to market that would depend on the extent of the market. Wood-pigeons seem more a matter of mere sport. It rather appears to me that the only test we can apply is the quantity of rabbits at the beginning of the lease. I have some hesitation in going along with your Lordship's view as to the prospective increase of hares and rabbits by enclosing the plantations and adding ground for planting. The lease was for nineteen years. It is a serious thing to say that the wood-pigeons were to be allowed to go on increasing without being kept down in any way. I am disposed to think that though the landlord had power to enclose the woods that only entailed an additional obligation on him to keep down vermin, else the tenant might have his crops eaten up in a short time. Notwithstanding that qualification of my opinion, I am not able to differ in the result—namely, that there is no proof of any material increase in the number of rabbits.

Lord Ardmillan—This is an action by a tenant

against a landlord for damages in respect of injury to crop and pasture by game and rabbits. The question has in argument been limited by the pursuer to the injury done by rabbits. The lease contains a clause, of which I need not repeat the terms as they have been already explained; and the difficulty of the case arises in applying that clause to the rights of parties, with reference to the general rules of law on the one hand, and to the proved facts of the case on the other. The point may not be one of very general application, because it depends on the terms of the clause and the facts instructed. Still the question is important, and I am anxious that my opinion shall not be misunderstood.

The tenant of a farm is, in the general case, entitled to be protected against injury to his crops by rabbits; and if the landlord does not keep them down the tenant may kill them himself. Apart from stipulation, the encouragement or preservation by the landlord of rabbits for sport or profit, leading to the necessary injury of the tenant, is not legitimate. It is a wrong to the tenant. If this clause were not in the lease, I am of opinion that the defender, Mr Graham, would not be entitled to keep for sport or profit what is called a stock of rabbits without giving compensation to the tenant for the injury done. The right of the tenant to be protected from injury done to his crops by rabbits is a higher right than the right of the landlord to keep rabbits, whether for sport or profit.

But the position of the parties, the provisions of the lease, and the nature of the farm must be kept in view; for we are not here in a case falling within the general law only. There is here a contract of lease, with a special clause of reservation of rabbits without liability to compensate, which we must construe and apply.

When a tenant takes a farm on a lease with such a clause in it, he is bound by that clause according to its fair meaning, and with reference to the state of the farm. Here the farm was only arable to a limited extent and there were above 200 acres of plantations. There were a good many rabbits, greater or less in number, then on the land, and the tenant must be viewed as contemplating some degree of injury from them. He did not expect the entire absence of rabbits, or of injury. Then, he agreed that the landlord should enclose the plantations, which was accordingly done; and this operation, keeping out cattle and letting the undergrowth get up, was obviously calculated to increase the cover, and stimulate the production of rabbits. He therefore must have expected an increase of rabbits, and a still further amount of injury to his crops.

In this state of matters, the tenant, knowing that there were some rabbits, and expecting that there would be more, signs a lease reserving to the landlord, not only game and hares, but "rabbits and wood-pigeons," &c.; and declaring, that the landlord shall not be "liable to compensate the tenant in respect of the reservation and liberty herein expressed." I cannot read this exemption from liability to compensate as applicable only to shooting, sporting, and fishing, and not to trapping rabbits for the market. I think it applies both to the reservation and the liberty; or, in other words, both to the reserved right to the rabbits, and to the reserved privilege or liberty of shooting and sporting. By this clause the right which the tenant had to kill the rabbits is surrendered. This is important in two ways. In the first place, it is inconsistent with the right to demand the extirpation of rabbits, and, as it precludes the tenant from insisting that there shall be no rabbits on his farm, it would, of course, be fatal to a demand for compensation of all the injury done by rabbits; but, in the second place, it is important in a point of view favourable to the pursuer if his evidence can support his averments. It renders the tenant altogether dependent on the landlord for such protection as justice demands against the destruction of his crops by the unfair and unreasonable multiplication of rabbits. The tenant is helpless. He cannot protect himself; and if the clause were to be so construed as to give to the landlord the absolute right, at his pleasure, to encourage and multiply rabbits to an unlimited extent, it would give him the power of destroying the crops and ruining the tenant without restraint and without redress.

This very startling construction of the clause was presented, but not, I think, very seriously maintained, by the counsel for the defender. I cannot so read the clause. It must be fairly and reasonably construed; and I do not think that it can be sustained as an absolute protection to the landlord against all liability whatever, even though he encourages the increase of game and rabbits to an unlimited extent.

Still the clause must have an important bearing on the pursuer's claim. It cannot be that his right to demand compensation is the same, or nearly the same, as it would have been in the absence of the clause. For the injury done by rabbits within the number estimated as on the farm at the commencement of this lease, the landlord is not, I think, responsible. It is clear that the clause so far protects him. For injury done by rabbits above the number at the commencement of the lease, but not beyond the increase reasonably to be expected from the enclosing of the plantations, I think the landlord is not responsible. That was a result which must be held to have been contemplated by the contract of lease. Here again, the clause, when read with reference to that contemplated result, affords protection to the landlord.

Now, the question which next arises, and on which, I think, the case turns, is one on which I have felt some difficulty. Is there evidence here of the excessive encouragement and increase of rabbits clearly and seriously beyond the number estimated as originally on the farm, augmented by the number fairly within the contemplated increase from the enclosure of the plantations? That is a question on the proof.

I cannot say that we have very satisfactory materials for this calculation. I have read the proof again and again; and from its conjectural and conflicting elements for comparison, I feel the greatest difficulty in reaching a conclusion satisfactory to my own mind. There is conflicting evidence and some exaggeration on both sides, as might naturally be expected. The testimony of the pursuer and his witnesses is to some extent exaggerated. I do not think that the excess can be held proved to an extent so great as they represent. On the other hand, I cannot agree with the defender's counsel in holding it proved that there has been very little damage done; and that there has been no increase, or no considerable increase, since 1857. The impression made on my mind by the whole proof is, that considerable damage has been done, and that there has been to some extent, and for the sport or profit

of the landlord, an increase of rabbits in excess of the number at the commencement of the lease, and perhaps even somewhat in excess of what was to be expected from the enclosure of plantations. But this last point is not free from doubt, and the tenant maintaining such a claim in the face of the clause must make out a clear case of serious and unreasonable excess, beyond what he must be held as having expected. In my view of the clause, a trifling excess, even if proved, would not support the tenant's claim, and any defect in proof is a defect in the tenant's case, for the burden of proving great and unreasonable excess rests on him. Now, the pursuer's view of his own case is thus stated by himself:—"If there was nothing more than ordinary stock in the farm there should be no appreciable damage. When the damage becomes appreciable, then I think the stock of game is more than the fair average amount." This means, that for all damage that is appreciable, the landlord is responsible notwithstanding the clause. This is out of the question; for the tenant is a party to the clause, and effect must be given to it.

Taking the most favourable and reasonable view of the pursuer's claim, I have carefully considered the proof.

I do not mean to enter on any analysis of the evidence, but I may refer to a few sentences to illustrate what I mean. [His Lordship here read passages from the pursuer's and defender's proof, and continued]—

The result is, according to the best opinion which I have been able to form, that the pursuer, being a party to this lease, and bound by this clause, has not instructed by proof facts sufficient to sustain his claim.

In the view which I take of the evidence, it is not necessary to dispose of the defender's separate plea, urged at the bar, but not stated on record, founded on the game lease by him to Mr Drummond. But I think it right to explain that I am of opinion that that plea is not well founded.

Agent for Pursuer—W. H. Muir, S.S.C.

Agent for Defender—Graham & Johnston, W.S.

Wednesday, November 27.

M'EWAN *v.* MALCOLM.

Master and Servant—Wages. A farm servant engaged for a year having sustained injuries when engaged at his work which disabled him from fulfilling his contract, *held* that, as the injuries had been caused by his own recklessness, he was not entitled to recover wages or board wages for the remainder of his term of service.

This was an advocation from the Sheriff-court of Perthshire.

The respondent was engaged by the advocator as a farm servant from December 1864 to Martinmas 1865, at a wage of £19, 10s. On 24th April 1865, when going home from field work, he sustained certain injuries, which he thus described in his own evidence:—"Towards the end of April I was working with the foreman at the harrows. We had finished the work of the day. We both loosed about one time. We had a rein at each of the horses' heads. When I unloosed the horses, I tied up the reins and put them across the backband, and put one of the horses in a cart to go home. The foreman did the same. I took my seat on the front of the cart, and led the other horse behind the cart. I had a single rein attached to the horse behind the cart. This was the same rein which I used when working on the farm, but used double reins when off the farm. The said rein was not sufficiently long to be made a double rein. The foreman was on the front of his cart just as I was. When near home, half-way, the horse in the cart started suddenly, and ran off—started all at once. I jumped off and tried to catch my horse by the head, and the cart drove me down. When sitting on the front, the rein was not sufficiently long to come back to the cart, and was tied to the hems." And in cross-examination he said—"I had no hold of the horse at the time, no rein in my hands. The ploughing reins were in the backband. It is not customary to put them in the horse heads when working on the farm. The reins made use of when the cart was away from the farm were the same plough lines. I was not in particular warned by defender to take care of that horse. Never told by him to use reins with that horse. He was occasionally troublesome, but not always fashious. The foreman, Walker, has told me to look after that horse, and to take care of him, as he ran away. He had ran away once before with me. Defender, when taking in the stack with no rein, or one rein, was at the head of the horse, and not seated on the cart. I could not say if the horse would have been restrained had I the plough lines in my hands."

After receiving the above injuries, the pursuer remained at the farm until 2d May, when he went home to his father's house at Dunfermline. On 5th June, having recovered, he went to the farm and offered to resume his work. The advocator had by that time engaged another man to fill the pursuer's place, and refused to take him back. The pursuer thereupon raised an action concluding for full wages for the whole term, and board wages from 24th April to Martinmas.

The claim was resisted by the defender on the ground, *inter alia*, that, as the pursuer had become unfit for work, in consequence of injuries sustained through his own rashness and imprudence, he was not entitled to recover any wages. But he tendered payment of the wages effeiring to the time for which the pursuer had actually served.

A proof having been led, the Sheriff-substitute (Barclay) found, "under the whole circumstances disclosed in the proofs, that the parties must be held mutually to have agreed to the termination of the contract of service when the pursuer, without objection on the defender's part, left Mill Earn on 2d May 1865, and that therefore the pursuer is only entitled to the wages actually earned and judicially offered by the defender." He therefore decerned for the sum tendered, and *quoad ultra* assoilzied the defender, with expenses.

The Sheriff (Gordon), on appeal, altered the interlocutor, and decerned for the full money wages sued for, and for £3 in name of board wages. He held that "the defence that the pursuer's rashness and negligence caused the injury sustained by the pursuer had not been established."

The defender advocated.

Burnet (with him Fraser) was heard for the advocator, and

Brand (with him Solicitor-General) for the pursuer.

At advising—

The Lord President—This action concludes for wages for the entire period from December 1864