everything necessary for his jurisdiction. I am for dismissing the appeal.

Agent for Suspender—Lindsay Mackersy, W.S.
Agent for Respondent—John Richardson, W.S.

COURT OF SESSION.

Thursday, December 7.

SECOND DIVISION.

INGLIS *v.* MOIR'S TUTORS AND GUNNIS.

Landlord and Tenant—Game—Destruction to Crops—Game Tenant. A landed proprietor in the lease of one of his farms reserved the power to himself of resuming possession of any part of the land and enclosing it as plantation, and also reserved the game upon the estate. In an action of damages at the instance of the tenant against his landlord, and also against the game tenant of the lands for damages done by the rabbits bred in these plantations,—*held* that the landlord was liable in damages for the injury done by the excessive breeding of rabbits in these plantations, but that the game tenant was not, in respect that he had not contracted to keep down the rabbits, and had not been to blame for their increase.

This action was brought by Mr John Inglis, farmer, Spittalton, against the tutors of his landlord, A. E. Graham Moir of Leckie, and Mr George Ponton Gunnis, tenant of the Leckie shootings, concluding for damages done to his (the pursuer's) crops during the years from 1866 to 1869, by an undue increase of the stock of rabbits on his farm during those years, as compared with the stock on the lands at the commencement of his lease; and the action was maintained against the defenders respectively on the following grounds:—

In the first place, as against the landlord, it was urged—(1) That the landlord was bound at common law to keep down any excess in the stock of rabbits upon his lands, and was not relieved of that obligation by the fact that the tenant had himself the right of killing rabbits for his own protection; (2) that in any view the landlord was liable in the present case, because the tenant's lease contained a reservation to the landlord of the covers and plantations on the farm, which were the chief nurseries of the rabbits; and as the tenant could not enter these, he could not effectually protect himself, and was in truth in the same position as if the right of killing rabbits had been reserved to the landlord.

In the next place, as regards the game tenant, it was pleaded that he was liable on two grounds—(1) Because he had, by preserving the rabbits and destroying vermin, unreasonably multiplied the stock of rabbits on the pursuer's farm, and had thus used his right of occupancy in violation of the maxim *Sic utere tuo ut alieno non lædas;* (2) because he had further disputed the pursuer's right to kill the rabbits, and had prevented him from keeping them down, which otherwise he might to a certain extent have done.

The Sheriff-Substitute (SCONCE) found both the landlord and the game tenant liable.

The Sheriff (BLACKBURN) assoilzied both, holding that the tenant had the remedy in his own hands, and was not entitled to damages if he had omitted to use it.

The tenant appealed.

The DEAN OF FACULTY for him.

SHAND and MACKAY for the landlord, and MACLAREN for the game tenant, in answer.

At advising—

LORD JUSTICE-CLERK—Some very important questions have been argued in this case—important to the parties, and to the law on the relations of landlord and tenant; and the Judges in the Court below differed.

Inglis became tenant of a farm under a lease from the late Mr Moir in 1850. The parts of that lease which are material to the present question are two reservations—the first, a reservation to the landlord of power to resume possession of such parts of the lands let as he might require for planting or enclosing, and also of the existing plantations, and the second was a reservation of the game and fish on the farm, and the liberty of hunting, shooting, and fishing. There is no reservation of rabbits, and no mention of them. The pursuer entered on possession of the farm, and during the course of the lease 30 acres were resumed by the landlord under the former reservation. It is alleged that prior to 1865 considerable damage was done by rabbits, and that an extrajudicial arrangement was made between the landlord and tenant on that head. In 1864 Mr Moir died, and the shootings were let to Mr Bruce, who was killed in the same year, and in 1865 the tutors of the present owner let the shootings on a game lease to the defender Mr Gunnis. It is admitted that in 1865-66, 1866-67, and 1867-38 considerable damage was done to the crops of the agricultural tenant by rabbits. The game lease contained a clause in these terms, "the whole cost of keeping and preserving the game, including gamekeeper, under keeper's wages to be paid for by the second party (*i.e.* the game tenant). The stock of game to be fairly used and kept up, and so as not to injure the tenants or give ground for action at law.

In these circumstances Inglis, the agricultural tenant, brings an action against the landlord stating the injury he has suffered by rabbits, and claiming damages for these three years. Defences were lodged, and a similar action was brought by Turnbull, a tenant of an adjoining farm under the same landlord. In the Sheriff-Substitute's note to an interlocutor in the latter case, which is referred to in the note to his interlocutor in this case of October 15, 1869, he says—"The Sheriff-Substitute would hazard this other remark, that before incurring further expense in this cause, the pursuer should deliberately consider whether he is suing the proper party, or is right in bringing the defenders only into the field." On that hint the pursuer acted, and brought a supplementary summons against Mr Gunnis, the game tenant. The actions were then conjoined, and, after proof, the Sheriff-Substitute decerned against both defenders, and, on appeal, the Sheriff assoilzied both.

In regard to the claim against Mr Gunnis, to whom the shootings were let, I am of opinion that the Sheriff's judgment is right, and that the case against him has failed. There are two grounds of action alleged by the pursuer against him—the first, which is stated in the 7th article of the condescendence, to the effect "that by exterminating the vermin and preserving the rabbits he increased the stock during these three seasons to an enormous extent from the amount on the farm when it was taken by the pursuer." That is the first ground. The second, as stated in article 8th of

the condescendence, is that Mr Gunnis prevented the pursuer from destroying the rabbits by shooting them, and in that way has made himself responsible for the damage which they have done.

The first of these grounds must be founded on contract or *quasi* contract. It assumes an obligation on the part of Mr Gunnis, undertaken to the agricultural tenant to destroy the rabbits or not to destroy the vermin on the farm. But Mr Gunnis never undertook any such obligation. The lease of the shootings which Mr Gunnis held merely communicated to him the proprietor's personal privilege of destroying wild animals on the farm, and traversing the lands for that purpose. The lessee obtained by this lease no right either in the lands or in the fruits of the lands. Although the soil might be let to a tenant for the purposes of cultivation, no contract relation was constituted between the lessee of the lands and the assignee of the shooting privilege. If not prohibited by the lease, the agricultural tenant was entitled to kill the rabbits on his farm whether the shootings were let or unlet. If the tenant of the shootings did any personal act to the injury of the agricultural tenant, such as treading down his corn or breaking down his fences, he would be responsible. And so, if the agricultural tenant were to encourage his dogs or his hinds to scour the covers to the injury of the game, he might be responsible to the assignee of the shooting privilege. But the latter is under no obligation to kill rabbits for the benefit of the crops of the former, nor is the former bound, although of course he is entitled, to kill the owls, or weasels, or polecats which may damage the game. There is no mutual obligation between them. Neither the omission to kill rabbits, nor the destruction of vermin, which are matters entirely within the power of the game tenant to do or to omit, can give the agricultural tenant any just cause of action. His claim lies against his own landlord, under the contract with him, which is neither enlarged nor restricted by the rights given to the tenant of the shootings.

There may no doubt be an ulterior question underlying all this, springing out of the general principle that no man can so use his property as to injure his neighbour. It may be maintained that no one is entitled to keep on his property an unreasonable amount of destructive animals if the lands in the vicinity are thereby injured. I desire to give no opinion as to whether cases may exist between adjacent proprietors which may fall under this principle. But before the question could arise it would be necessary to allege and prove a deliberate and excessive harbouring of wild animals with a view to their multiplication. But no such case can arise here. The proof shows that whatever stock Mr Gunnis found on the farm, he did nothing to increase, and in the latter years much to diminish it.

But it is said, in the second place, that Mr Gunnis prevented the pursuer from shooting the rabbits on the farm, and that he has, consequently, made himself liable for the damage done by them. Now, it is not necessary to say that if there had been, on the part of the tenant, a persistent attempt to shoot the rabbits, and a persistent obstruction on the part of Mr Gunnis, there might not have arisen a claim of damage. But the facts do not disclose any such state of matters. There never was a persistent attempt by the pursuer to shoot, and there never was any persistent refusal by Mr Gunnis to permit shooting. If the pursuer had intended to make this a separate ground of action, he should have taken care to insist on his right, and to have done so with the intention of bringing it to a distinct solution. He never did so, and I do not believe that he ever meant to do so; and Mr Gunnis says that if he had been applied to the leave would have been granted.

Lastly, as regards the case against the game tenant, I am of opinion that the clause in his lease relative to not giving rise to claims by tenants is one with which the pursuer has no concern; and on the whole, I am of opinion that Mr Gunnis must be assoilzied.

This leaves the question as it was originally raised in the summons against the landlord; and I have now to consider how far any case is established against him and his tutors.

In regard to this claim, it is necessary to keep in mind the legal principles which apply to it. In the first place, rabbits are not game. That was quite clearly decided in the case of *Moncrieff* v. *Arnot* in 1828, and has been held as law ever since. It was suggested at the bar that the case of *North* in 1864 threw some doubt on this doctrine; but in reality that decision in no degree affects the question. The question raised in that case was one solely between the proprietor and the tenant of the shootings. The proprietor had reserved in his own hands the rabbits in his agricultural leases, and had let to Mr North the whole shootings of every description. He subsequently gave to his agricultural tenants privileges in regard to the rabbits, and the lessee of the shootings maintained that this was inconsistent with the grant to him. And so the Court found. But there was nothing in that decision inconsistent with the general proposition that rabbits are not game. That they are not so is rendered certain both by the Revenue Statutes and the Night Poaching Act. In the second place, it necessarily follows that if the tenant is put under no restriction by the terms of his lease, he is entitled to destroy rabbits as an ordinary agricultural operation necessary to the cultivation of the farm; and if so, that he is not entitled either to require the landlord to destroy the rabbits or to claim damages for the injury done by them. But, thirdly, I am very clearly of opinion that a landlord cannot both reserve covers for game preservation within or around the land which he has let for agricultural purposes, and at the same time answer such demands as this, in regard to depredations by rabbits, by the plea that the tenant had the remedy in his own hand. If there be one fact which is clearly proved in the course of the evidence in this case, it is that the covers sheltered the rabbits, and that the rabbits multiplied in the covers. It may perhaps be said to be more assumed than proved in the evidence; but every witness who is examined speaks to what it really required little testimony to establish. I am of opinion, therefore, that in the present case the reservation of the covers on the farm rendered the landlord as much responsible for an unreasonable stock of rabbits as if he had reserved them along with the game in the lease; and the only question which remains is, Whether, during the years libelled, that stock was unreasonable?

I am very clearly of opinion that during the years 1865–66 it was entirely unreasonable, and that the landlord, consequently, is liable for damages for that year and part of the next. It is said, indeed, that if the tenant had been allowed to shoot, the rabbits might have been kept down

without trapping in the plantations. But although Mr Turnbull, one of the tenants, in his anxiety to make Mr Gunnis liable, says he would have kept down the rabbits if he had been allowed to shoot, the inadequacy of this remedy is quite clearly proved by all the witnesses of skill. If there had been more substance in the plea of the proprietor, it is greatly weakened by the fact that he had tied his own hands by letting the game to a tenant. I attach little importance to the statement that the landlord's agent told the pursuer, when he complained, to shoot the rabbits. They were bound to have prevented their game tenant from interfering in this matter; but they always avoided taking any responsibility or aiding the tenant in such a remedy, even if it would have been available.

I am therefore of opinion that, to the extent to which the stock of rabbits was excessive, the landlord is liable in this case, on the principle which has ruled the decisions from the case of *Moncrieff* downwards; and that practically it is impossible, as regards rabbits, for a landlord both to reserve for purposes of sport, and still more of profit, the covers where rabbits are bred, and yet to exact, without compensation, full rents from the tenant on whose crops they are maintained in life. The case is, of course, all the stronger when the rabbits, which eat the corn and destroy the turnips, yield a second rent to the proprietor from the hands of a third party.

But, on the other hand, the tenant has some things in his power in regard to this matter. I have no idea that he is entitled to act upon the advice which I see the pursuer received in this case, when he was told that if he killed the rabbits he would have no claim for damages, but that he would if he refrained. Wherever a tenant is entitled to go on his farm, then he is entitled to kill rabbits as he is entitled to kill rats, unless he be prohibited by the lease; and he is not entitled to omit reasonable exertion on the one hand, and claim compensation for the injury done to his crops on the other. On reading this proof I am satisfied that for the season 1865–66, and for the next half-year, there was an unreasonable accumulation of rabbits on this farm, for which I think the landlord is responsible. For the remainder of the time I think the stock was considerably reduced; and not being satisfied that the tenant has proved the existence of an unreasonable amount during this period, I am not prepared to alter the Sheriff's judgment in regard to it. I think we should allow the pursuer £30 in all in name of damages.

Lord Cowan—As to the position of the game tenant, called as defender in the supplementary action, I concur in the views of your Lordship so entirely as to make it unnecessary for me to say anything.

The real question relates to the alleged liability of the landlord to the pursuer for the damages claimed in the summons; and I do not think the principles on which this question falls to be decided doubtful.

It must be held to be quite fixed that, where there is no stipulation to the contrary, and no obligation, express or implied, to the effect that the landlord has reserved to himself the rabbits on a farm,—the agricultural tenant is entitled, at common law, to kill them, and so to protect himself against damages to the crops. This was authoritatively decided in the case of *Arnott* v. *Moncrieff*, and has been recognised in subsequent cases. But the consequence of this right in the tenant is to exclude him from claiming damages from his landlord on account of damage suffered from the ravages of rabbits—it being his own fault that he has not kept down the stock of rabbits on the farm. So much on the one hand.

But, on the other hand, when, under his lease, the tenant is debarred from destroying rabbits, the landlord will be responsible to him for the damage caused by them when they have been allowed to increase to an unusual and excessive amount.

Taking these principles as fixed, I would have been inclined to affirm the judgment of the Sheriff under review, were it not for the specialties which exist in this case. By the lease between the landlord and his agricultural tenant there is reserved to the pursuer "the whole woods and plantations on the foresaid farm and land," and there is also reserved power and liberty to him, during the currency of the tack, "to resume possession of such part or parts of the farm and lands hereby let as he or they may require for planting and enclosing." Under this reserved power about six acres of ground were resumed in 1853 or 1854, and planted by the landlord. And subsequently an additional quantity of land was resumed, to the extent of upwards of 20 acres. There was thus a considerable extent of land retained in possession of the landlord as plantation, from which the right of the tenant under his lease was excluded. The landlord alone, or those authorised by him, could enter into these enclosures. But these were the very best cover for rabbits on the lands, and the tenant having no power to enter them, was virtually debarred from killing them on that part of his farm. The landlord alone could keep down the stock so as to be within reasonable bounds, having regard to the size of the farm. And it is for inquiry whether, on the proof, it is established that during the three years set forth in the summons there was damage truly suffered by the tenant through a superabundant stock of rabbits, and whether the increase may not be traced to the existence of these protected enclosures. In that case it seems to me consistent with the principles stated, that damage therefrom suffered should be made good to the tenant by the landlord.

On the proof, I think it is sufficiently established that during the years 1866 and 1867, but more especially in 1866, being the first year for which damage is claimed, there was an excessive number of rabbits on the farm. The game tenant employed a man (Connell) to keep down the stock of rabbits. He says that it was in October 1866 that he began operations, remaining till the beginning of April following; and his statement is—"The stock was too heavy for the estate when I first went to it, and required to be reduced, but they were pretty well down when I left the first year." And he proceeds to explain the state of matters in the two following years, till, as he says, at the close of his engagement the stock of rabbits was reasonably reduced. These statements appear to me to be substantially consistent with the rest of the evidence. For the damage done in 1865 payment had been made to the tenant by the landlord; and as for the years 1866 and 1867 there was no effective measures resorted to by the landlord to reduce the excess of stock on the farm, I think there is room so far for the claim advanced in this action.

For the other year, 1868, it appears to me that the game tenant had effectually kept the stock of rabbits within reasonable bounds. As stated by the same witness, the decrease had gone on steadily from the time he went, so that at "last there was a very small stock indeed; the stock was taken down rapidly."

There is, no doubt, difficulty in ascertaining how far the excessive stock in the year 1866 and 1867 arose from the cover afforded by the plantations, and there is room for doubting whether the whole amount of damage claimed by the tenant should be allowed him, seeing that the tenant abstained from killing rabbits on his farm, as he was entitled to do. This must be equitably and reasonably judged of from the whole proof, as in a jury question; and, on the whole, I concur in the judgment which your Lordship proposes.

Lord Benholme concurred.

Lord Neaves—I concur. In the argument an important general question was raised, which we should notice, although it is not necessary for the decision of the case. It was contended that, apart from contract, a proprietor of land is responsible for any wrongful act in connection with his land. It requires a strong case to make a man liable for the use of his own property. But if he erects a dam on a stream, and the construction is so defective that the water overflows and injures his neighbour, he will be answerable for the injury which arises. If, again, he were to keep noxious animals, such as wolves, and they attacked a neighbour's flock, he would be bound to make good the damage. In the case even of tame animals the proprietor would be responsible. Where the property has been put to an unnatural use the owner is answerable. But I cannot say that, if a proprietor has ground which in its natural uses may be occupied by rabbits or wood pigeons, he is in every case to be responsible for damage arising from those animals. Laying out of view the fact of the possession of the game tenant, I do not see how he can be held responsible. He was under no contract to keep down the rabbits. It is not said that he did anything to make him answerable. His fault is rather said to consist in *faciendo*, and to make him liable he would require to have entered into some contract. But I think he seems to have done what he could to keep down the rabbits. It is said that he prevented the tenant from destroying the rabbits, but I do not think there was any such persistent attempt to prevent the tenant shooting as would give him right to claim damages. The tenant was merely told by Mr Gunnis' gamekeeper that he had no right to shoot, and this amounted to no more than an advice as to what his rights were. He followed the advice given by the gamekeepers, contrary to his own view of his rights, and that will not give him a claim against the game tenant. Therefore I concur in thinking that Mr Gunnis is not answerable.

As to the landlord I also concur. This is not a case between strangers, but between parties who have entered into a contract of location of land, in which *bona fide* is implied on both sides. If the landlord failed in doing what is necessary for the tenant's proper enjoyment of his right, he commits a fault which entitles the tenant to reparation. I should be sorry to say anything which would discourage planting, but if the consequence of the landlord exercising this right is that the rabbits so increase as to become a plague to the tenant, I think he is bound to exercise the right reasonably, so as to keep faith with the tenant whose crops they live on. This is only equitable, especially when the landlord gets rent from the game tenant partly for the rabbits. There is enough to show a remissness on the part of the landlord in carrying out the planting—not taking care that the rabbits should not be allowed to increase. It is fair that the rabbits should be kept down. As far as the tenant has right to destroy the rabbits, so far he cannot claim damages for their improper increase. If his right is not taken away, he has the remedy in his own hands, and if he does not use it, he can have no claim for damages. He may be exceedingly glad to have the rabbit damage as an excuse for not paying his rent, but if he refrains from using his right he will not have a claim for the damage.

The result is, that the game tenant should be assoilzied, and the agricultural tenant held entitled to the damage from the landlord.

Agent for Appellants—A. J. Davidson, S.S.C.
Agents for the Landlord—Dundas & Wilson, C.S.
Agents for the Game Tenant—Millar, Allardice, & Robson, W.S.

Friday, December 8.

FIRST DIVISION.

GOODWIN & HOGARTH *v.* PURFIELD.

*Process—Jurisdiction—Arrestment—*Jurisdictionis fundandæ causa—*Reconvention. Held* that arrestments laid on to found jurisdiction, and also on the dependence in a previous action in which decree had been given and implemented, did not avail to found jurisdiction in a new action between the same parties for recovery of the expenses incurred in executing, &c., the previous arrestments.

Held farther, that a petition presented by the defenders during the dependence of the previous action, to have all the arrestments recalled as groundless and oppressive, was a proceeding incidental to the previous action, and was in no sense itself an *actio conventionis*, so as to found a plea *reconventionis* against the petitioners in a new action at the instance of the respondents, the pursuers in the previous action.

The appellants in this action, Messrs Goodwin & Hogarth, who were ship chandlers in Ardrossan, had, on 5th December 1870, obtained warrant from the Sheriff of Ayr to arrest the schooner 'Speed,' of Balbriggan, in Ireland, in order to found jurisdiction against the master thereof, John Purfield, for himself and as representing the owner. This arrestment was executed on 6th December. Also on the 5th day of December a small-debt summons was taken out at the instance of Messrs Goodwin & Hogarth against the said John Purfield, founding on the above-mentioned warrant, to arrest *jurisdictionis fundandæ causa*, and arrestment on the dependence of this action was executed on the following day. At the same time a petition for dismantling, &c., the ship was presented, and warrant granted, and execution of arrestment and dismantling was expede on the same 6th day of Decem-