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-

ber. On the 16th December decree was obtained in the small-debt action by Messrs Goodwin & Hogarth for the sum of £2, 5s. 6d., with £1, 18s. of expenses. This was immediately paid by the defender.

In the meantime, on 7th December, the day following the execution of all these arrestments, a petition was presented to the Sheriff of Ayr by the said John Purfield, the master, and also by George Purfield, the owner of the said vessel 'Speed,' craving to have the arrestments recalled as "obtained and used maliciously and oppressively, and without any grounds whatever." This petition was not, however, insisted in, as the arrestments came practically to an end upon implement of the decree pronounced in the small-debt action on 16th December. It was allowed, however, to remain in dependence till after the 22d December 1870, when the present action was raised.

The present action was brought also in the Sheriff-Court of Ayr, by Messrs Goodwin & Hogarth against the previous defender John Purfield, as master and as representing the owner of the said schooner 'Speed,' to recover the sum of £6, 1s. 8d., being the expenses incurred by them in executing the warrants of arrestment, &c., of the said ship and apparelling, &c., and also for the sum of 5s. per week for storage. The grounds on which this action was founded were (1) that arrestment *jusisdictionis fundandæ causa* had been already executed against the defender, and (2) that he was himself the pursuer in an action against the present pursuers to have the said arrestment and others loosed.

Several defences were stated for the defender, but he did not take the plea of want of jurisdiction. The Sheriff-Substitute (ROBISON), however, pronounced the following interlocutor:—

"*Ayr, 4th May* 1871.—The Sheriff-Substitute having heard parties' procurators and made avizandum of the process, finds that this Court has no jusisdiction to entertain this action, it being neither a maritime cause (M'Glashan, 4th edit., sects. 303-305) nor founded upon arrestment *jurisdictionis fundandæ causa* (*ibid.* sec. 390); while the defender is a foreigner, and was furth of Scotland when the action was raised, and has been cited edictally under letters of supplement, and not by personal service; therefore dismisses the action; finds no expenses due.

"*Note.*—The action is for recovery of the expenses of certain proceedings taken against a ship in the course of vindicating a debt claimed by the pursuers from the defender in a small-debt complaint lately depending in the Court at Ayr, and decided in favour of the pursuers. In defence, while liability for these expenses is denied, complaint is only made that this action ought likewise to have been raised in the Small Debt Court, instead of the Ordinary Court, there being no question made on the point of jurisdiction. In short, the Sheriff's jurisdiction is conceded. But to prorogate the jurisdiction of the Sheriff Court is not competent to a foreigner (M'Glashan, sec. 339).

"In these circumstances, expenses have not been allowed to the defender, and none could have been awarded to the pursuers."

The Sheriff (NEIL CAMPBELL) adhered on appeal, adding the following note:—"The pursuer's ingenious argument has not satisfied the Sheriff. In the first place, it is quite clear that but for arrestment *jurisdictionis fundandæ causa* or reconvention he Sheriff could have no jurisdiction in the case, the defender being a foreigner and absent from the country when the action was raised. In the second place, the arrestment *jurisdictionis fundandæ causa* founded on by the pursuer has reference, and is limited, as his application shows, to a particular specified debt, amounting to £2, 10s., which was sued for in the Small Debt Court, and for which decree was obtained and implemented by payment. The sum now sued for is a different debt of larger amount, and sued for in a different Court; in short, it is not the debt referred to in the petition for arrestment *jurisdictionis fundandæ causa.* In the third place, there is no reconvention. The petition for loosing the arrestments laid on in a depending action is not of the nature of a *lis* or action to which the principle of reconvention applies. It contains no claim or demand of a kind that could be compensated by a claim in any action at the instance of the respondent. The reasoning in the case of *Thomson* v. *Whitehead*, Jan. 25, 1862, 24 D. 331, which the pursuer quotes as in his favour, is wholly against the idea of reconvention being applied to such a case."

The pursuer reclaimed to the First Division of the Court of Session.

SCOTT and CAMPBELL SMITH, for them, insisted on the two pleas of arrestment and reconvention founded on in the summons, and also upon the additional pleas of prorogation and contract or *quasi* contract, as founding jurisdiction.

Appellant's authorities—On the competency of the appeal—*Buie* v. *Stiven*, Dec. 5, 1863 2 Macph. 208; *Caledonian Railway Co.* v. *Fleming*, Feb. 20, 1869, 7 Macph. 555. On the competency of the action—*Greig* v. *Christie*, Dec. 16, 1837, 16 S. 242; Smith's Maritime Law, pp. 57-8; *Longmuir* v. *Longmuir*, May 21, 1850, 12 D. 926; *Morison & Milne* v. *Massa*, Dec. 8, 1866, 5 Macph. 130; *Smith* v. *Ninian*, Nov. 16, 1826, 5 S. 8 (n. e. 7).

FRASER, for the respondents, contended that the appeal was incompetent, as the value of the action was below £25 (16 and 17 Vict. c. 88, sec. 24), and was not an action that should have been brought in the Sheriff's Ordinary Court at all, but in the Small Debt Court; that there had been no prorogation, and that there was no jurisdiction—*Burn* v. *Purvis*, Dec. 13, 1828, 7 S. 194. The exception as to Admiralty cases is created by 1 Will. IV. c. 69, §§ 21, 22; and 1 and 2 Vict. c. 119, § 21. Question, Whether it is a maritime cause? Smith's Maritime Law, p. 18, and Scots Act, 1681, c. 16; *Taylor*, Jan. 25, 1820, F.C.

At advising—

LORD PRESIDENT—The action in which this appeal is taken was brought in the Sheriff-Court of Ayr by Messrs Goodwin & Hogarth against John Purfield, the master of an Irish vessel, lately in the harbour of Troon (for it is not averred that she is now there). The sum charged against him in the conclusions of the summons, amounting to £6, 1s. 8d., was incurred in obtaining and executing warrant of arrestment against the said ship. And there is also charged a sum for certain expenses of storage. The action is founded, as the summons bears, upon arrestment *jurisdictionis fundandæ causa*, and also upon the fact that the defender is pursuer in an action presently depending before the Sheriff, or which was so at the date when this action was raised. The jurisdiction therefore is laid in the summons itself on two grounds, arrestment and reconvention. A certain third ground was mentioned in the argument, namely, that the action arose out of a state of circumstances which grew up within

the territory of the Sheriff, and which, as amounting to a contract, gave a ground of jurisdiction to the judge of the *locus contractus*. But there was nothing that can be called a contract here, and there was, further, no personal citation. A fourth ground was also stated, namely, that the defender had prorogated the jurisdiction. I see no ground whatever for this statement either. The two grounds, therefore, on which the pursuer's action really rests are the two I first mentioned, namely, arrestment and reconvention. Now, the arrestments were used, not with reference to this action, but to found jurisdiction in, and also on the dependence of, a previous action, out of which it is said that this action has grown. In that action the pursuers obtained decree, and the sum was paid by the defender on the day of the decree, so the action was then and there finally disposed of, and the arrestments at an end. These arrestments cannot therefore have any effect in sustaining the present action. It is a separate and independent proceeding, even though it may arise out of the same facts and circumstances as the previous one. It is by no means plain that this is a maritime cause, but even if it was, I should be equally of opinion that the former arrestments are no ground of jurisdiction in this action.

The plea of reconvention is founded upon quite different circumstances altogether. It is founded upon a proceeding taken by the defender on 7th Dec. 1870 to obtain recall of the arrestments. The small debt action was raised on the 6th December, and on that or the previous day the arrestments were laid on. It was on the following day therefore that the petition for recalling the whole arrestments, as groundless and oppressive, was presented. It was during the dependence of the small debt action that the petition was brought. That action, and that alone, made it competent. The petitioners could not have gone to any other than the Sheriff-Court of Ayr. The proceeding was therefore incidental to the small debt action. If the petitioners were to have the arrestments recalled at all—and on the face of it they seem to have had a perfectly good ground of complaint—then their only course was to go to the Court in which the original action was laid. This makes the petition for recall clearly incidental to the small debt action. The question therefore comes to be, Whether this petition can be looked upon as an *actio conventionis*, so as to found a plea of reconvention? It is quite true that the petition was still in dependence at the time this present action was brought, though it seems to have hung over rather as a matter of negligence than anything else. The question of law comes up therefore purely enough, Whether such a petition can be looked upon as an *actio conventionis*? I do not think it can. I do not think that the petition was an action in any proper sense of the term at all. I do not think that it was an action in which the petitioners, the defenders in the present action, submitted themselves voluntarily to the jurisdiction of the Sheriff of Ayr. They had been brought into Court before him; proceedings had been taken against them which they considered unjustifiable; and they had no resource but to go before him for redress. This is in no sense of the term an *actio conventionis*, and therefore I think the Sheriff-Substitute and the Sheriff did right in dismissing this action.

The other Judges concurred.

Agents for the Appellants—Fyfe. Millar, & Fyfe, S.S.C.

Agents for the Respondent—Millar, Allardice, & Robson, W.S.

Friday, December 8.

THOMAS JACKSON *v.* MRS MARGARET KEDDIE OR SMITH AND HUSBAND.

Heir-Apparent — Title-Deeds, Custody of. Held (*diss.* Lord Kinloch) that an apparent heir was not entitled, as matter of absolute right, to recover possession of her ancestor's title-deeds, even where the holder asserted no particular right to retain them.

But, under the circumstances, the prayer of the petitioning heir-apparent *granted*, reserving extract until a general service should be produced.

The action in which this appeal was taken was a petition at the instance of Margaret Keddie or Smith, only child and heir-at-law of the late James Keddie, farm-servant at Kinglassie, against Thomas Jackson, writer in Kirkcaldy. The object was to recover the title-deeds of certain property in the village of Kinglassie which had belonged to the petitioner's father, and which title-deeds it was asserted the respondent wrongously and unwarrantably withheld and refused to deliver up, "notwithstanding he has no hypothec or right of retention of any sort over the same. The petitioner was not served heir to her said father.

The respondent pleaded, *inter alia*, no title to sue, in respect of want of service as heir.

The Sheriff-Substitute (A. BEATSON BELL) pronounced the following interlocutor:—

"*Cupar, 17th February* 1871.—The Sheriff-Substitute having heard parties' procurators on the closed record and proof, finds, in point of fact—(1) That the female petitioner is the only child of the late James Keddie, formerly residing in Kinglassie; (2) that shortly before his death, which occurred about twenty-one years ago, the said James Keddie placed in the hands of the respondent the title-deeds of a property in Kinglassie belonging to him; (3) that the respondent still retains said title-deeds, and has not placed on record any plea claiming to retain the same in virtue of any hypothec or right of retention: Finds, in point of law, that the respondent is bound forthwith to restore the said title-deeds; therefore decerns and ordains him instantly to do so in terms of the prayer of the petition.

"*Note.*—It appears that the title-deeds were deposited with the respondent in security of a loan of £5; but as no statement is made by him on record that said loan is still unpaid, it must be held that no right of retention on that ground exists. The respondent did not lead any proof, and the evidence led by the petitioner is thus quite conclusive that the deeds are actually in the respondent's hands."

The Sheriff (CRICHTON) adhered on appeal.

The respondent appealed to the First Division of the Court of Session.

BRAND, for him, contended that as this was not an action of exhibition, but a mere petition for recovery of title-deeds, the petitioner had no title to sue without serving heir—Ersk. iii, 8, 57; Stair,