to consider the relevancy of the action, and the title of the pursuer with reference to the record as it now stands.

The pursuer avers that he is the great grandson of James Fulton, farmer in High Warwickhill, in the parish of Dreghorn, and that he has been served heir of line in general to the said James Fulton. We may assume that that is so. Then he proceeds to state that by a Crown charter of resignation "in favour of Archbald Eleventh Earl of Eglinton, dated 23d February 1778, written to the Seal, and registered 8th May 1778, the lands, lordship and barony of Eaglesham and Eastwood, and others, were granted and conveyed to the said Archbald, Eleventh Earl of Eglinton, and the heirs-male of his body, whom failing, to the deceased James Fulton or Fultoune, farmer in High Warwickhill, and the heirs-male of his body." That charter, he says, was produced in certain proceedings in 1786, was borrowed by the Earl of Eglinton of the time, and is now in the possession of the defender. The form of the prayer in which he asks for exhibition of this charter, is this—"that the Court should ordain the defender to produce and exhibit to the pursuer, in the hands of the Clerk of Court, the Crown charter of resignation of the lands, lordship and barony of Eaglesham and Eastwood, and others, in favour of Archbald Lord Montgomerie, Eleventh Earl of Eglintoune, and the other heirs therein mentioned, dated on or about 23d February, and sealed on or about 8th May 1778." The description of the charter given there is not the same as that given in the statement of facts, and the respondent denies that any such charter as that described in the statement of facts is in existence, but there may very well be a charter corresponding to the more general description given in the prayer. The Earl of Eglinton does not dispute that there is a charter of the same dates in favour of Archbald Earl of Eglinton, and the heirs of his body, whom failing, to the heirs called by the previous settlement of the estate. Now, if we were to grant the prayer of the petition, the petitioner would be entitled to obtain exhibition of this charter, which the defender admits he possesses.

The first question therefore is—Is the petitioner entitled to demand production of the charter which the Earl of Eglinton possesses? He has not shown and cannot show that he has any interest in it. That charter contains at all events no destination in favour of James Fulton or any one with whom the petitioner says he can connect himself. There stills remains the question, Whether the petitioner is entitled to recover the charter, which may be in existence, containing the destination described by him in his condescendence? It would be, to say the least of it, a very strange thing that there should be two charters in existence of the same date, one containing a destination to the Earl of Eglinton and the heirs male of his body, whom failing to James Fulton and the heirs male of his body and the others a destination to the Earl of Eglinton and the heirs of his body whom failing to the heirs of the former investitures.

But the question is—Has the petitioner made out his right to demand exhibition of such a charter? He says that he requires to have inspection of that charter in order that he may deliberate and be advised whether or not he should enter as heir-male of the body to the deceased James Fulton. Now, we have it stated that James Fulton predeceased Archbald Eleventh Earl of Eglinton by ten years. The succession to these estates therefore never opened to him; he never was in possession of the estate; he never had any right or title to it; he never even was in apparency; he predeceased the time when he could have had a right of any kind to the estate.

Plainly, therefore, the petitioner's service as heir-male of the body of James Fulton will not advance him one step towards his object, for there was nothing in his *hæreditas* to take up. If he can make out that he is heir of provision to the eleventh Earl of Eglinton, that will be a very different matter, and in the course of that proceeding he may have to show his relationship to James Fulton in order to connect himself with the Earl of Eglinton. But the proceeding in aid of which this petition is brought being a useless one, the petition itself ought, I think, to be refused.

I am therefore of opinion that the petitioner has no title to see this charter, and that we should adhere to the Sheriff's judgment.

Lord Deas — The defender's counsel made what I thought a very fair offer, viz., to produce the charter of 1778 in the hands of the Clerk for inspection by the Court. I confess I do not see what harm there could be in that. There is no doubt, however, that it is a serious thing to ask a party to open his charter-chest and produce his old charters, and the party who asks that must show that he has an interest to do so. He must make out a very consistent and clear case to warrant exhibition even in the hands of the Clerk of Court. I am not satisfied that the petitioner has done that so far as to justify me in dissenting from your Lordship.

Lord Mure and Lord Shand concurred with the Lord President.

The Court adhered.

Counsel for Pursuer (Appellant) — Hunter. Agent—Neil M. Campbell, S.S.C.

Counsel for Defender (Respondent) — Blair. Agents—Hunter, Blair, & Cowan, W.S,

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Saturday, March 9.

SECOND DIVISION.

[Exchequer Cause.

GOSLING *v.* WILLIAM BROWN.
GOSLING *v.* WALTER BROWN.

Revenue—Gun Licence Act 1870 (33 *and* 34 *Vict. c.* 57), *sec.* 7, *sub-sec.* 4 — *Son of Tenant-Farmer shooting Vermin under Instructions of latter, who alone had a Licence.*

A tenant-farmer holding a gun licence under the Gun Licence Act 1870 instructed his sons, who held no licence, to carry his gun to scare birds and shoot vermin on the

farm. They each shot a rabbit, and on being charged with an offence under the Act for carrying a gun without a licence—*held* (*diss.* Lord Ormidale) that there was no offence, in respect that the accused were persons carrying guns for the purpose only of scaring birds or of killing vermin on the lands by order of the occupier thereof, who had in force a licence under the Act, all in terms of the 4th sub-section of the 7th section of the Act.

Game—Are Rabbits Vermin?—Gun Licence Act 1870 (33 *and* 34 *Vict. c.* 57), *sec.* 7, *sub-sec.* 4.

Held (*diss.* Lord Ormidale) that in relation to the crops of a farm, under the abovementioned Act, rabbits are vermin, and that they have no protection from the law as regards a tenant-farmer, although in other circumstances and places they may be property, and require a game licence to kill them.

These were cases stated for the opinion and judgment of the Court of Exchequer by the Quarter Sessions of Dumfriesshire, in terms of the 84th section of the Act 7 and 8 Geo. IV. cap. 53. An information was laid under "The Gun Licence Act 1870" (33 and 34 Vict. c. 57) charging each of William and Walter Brown with an offence under that Act, in so far as on 31st August 1877, at the farm of Hillhead, in the parish of Kirkpatrick-Fleming, they each carried a gun without having a licence in force under the abovementioned Act.

The 7th section of the Act provides—"Every person who shall use or carry a gun elsewhere than in a dwelling-house or the curtilage thereof without having in force a licence duly granted to him under this Act, shall forfeit the sum of ten pounds: Provided always that the said penalty shall not be incurred by the following persons, namely— . . . . . .

"(4) By the occupier of any lands using or carrying a gun for the purpose only of scaring birds or of killing vermin on such lands, or by any person using or carrying a gun for the purpose only of scaring birds or of killing vermin on any lands by order of the occupier thereof who shall have in force a licence or certificate to kill game or a licence under this Act."

The information was tried before two Justices of the Peace at Annan on 19th November 1877. The accused pleaded not guilty, and the Justices, in respect of the evidence adduced, assoilzied them, whereupon the Excise officer, Nathaniel Gosling, gave notice of appeal to Quarter Sessions.

The facts of the case as stated by the Justices were as follows:—The accused are sons of Robert Brown, tenant and occupier of the farm of Hillhead, and reside with him there. Robert Brown holds a licence under the Act, and instructed his sons (who hold no licence under the Act) to carry his gun to scare birds and shoot vermin on the said farm. On 31st August 1877 William Brown shot a rabbit upon the farm of Hillhead, and Walter fired at one and missed it, but thereafter fired at and killed another rabbit.

The Justices in Quarter Sessions upon these facts dismissed the appeal, holding that the penalty was not incurred, in respect that the accused was a person carrying a gun for the purpose only of scaring birds or of killing vermin on the lands by order of the occupier thereof, who had in force a licence under the Act, all in terms of the 4th sub-section of the 7th section of the Act.

It was argued for the appellant (whom the Court called upon, though no appearance was made for the respondent) that rabbits were not vermin in the sense of the Act, but that vermin might be described as "any small noxious wild animals," whereas rabbits were used largely as food.

At advising—

Lord Justice-Clerk—Your Lordships have two cases stated by the Quarter Sessions of Dumfriesshire in prosecutions at the instance of an officer of Excise under the Gun Licence Act of 1870. There was no appearance for the parties accused, but looking to the nature of the questions raised we have thought it right to hear it *ex parte*. There is no difference substantially between the two cases, and I shall give my opinion in reference to the charge against William Brown.

The charge against the accused was that of carrying a gun without having a licence in terms of that statute, and the statutory penalty of £10 was concluded for.

The facts of the case are thus stated by the Quarter Sessions—[*reads ut supra*]. On this state of fact the Justices assoilzied the accused, and on appeal to the Quarter Sessions they, as stated in the case, dismissed the appeal, "holding that the said penalty was not incurred, in respect that the accused was a person carrying a gun for the purpose only of scaring birds or of killing vermin on the said lands by order of the occupier thereof, who had in force a licence under the said Act, all in terms of the 4th subsection of the 7th section of the said Act."

It is maintained on the part of the Excise—first, that rabbits are not vermin in the sense of the Act; and secondly, that the facts thus found prove that the accused was not carrying a gun for the purpose only of scaring birds or of killing vermin.

The clause under which the Quarter Sessions proceeded is the following—[*reads ut supra*].

Taking the last of these pleas first, I assume, from the finding of the Quarter Sessions, that on the evidence before them they did not find any ground for holding that the purpose for which the gun was ostensibly carried was not the true purpose, and did not draw any contrary inference from the fact that a rabbit was shot by the accused. The Quarter Sessions, however, have not explained whether this conclusion in point of fact was arrived at from holding that rabbits are vermin, or from holding that there was no evidence to show that the purpose of carrying the gun was other than that authorised by the statute, even although rabbits should be held not to be included in that category.

Although the ground is narrow, I am not disposed to disturb the judgment of the Court below on this question, which seems one solely within their province. They are the judges of the purpose with which the gun was carried; and although they arrive at their conclusion by an inference, that inference is one of fact, of which they were the appropriate, and indeed the exclusive, judges.

I am, however, quite prepared to deal with the

case on the broader ground were that necessary. I am of opinion that in the true construction of the clause in question rabbits are nothing else but vermin—that is, noxious and destructive wild animals; and that the accused in using the gun for the purpose of killing them was entirely within his right.

I must advert in the outset to the position in which the tenant of the farm in question stood, and the rights which he possessed in the protection of his crop, and to the true question which the Excise have raised here. On one hand, the tenant was himself entitled to kill the rabbits on the farm, precisely as he was entitled to kill any other noxious animal which injured the fruits of the earth and was not under special statutory protection. He was entitled to do this by himself or any person authorised by him. He could not indeed destroy them by shooting without having a gun licence; but if he had one, he was entitled to use the privilege of his gun by anyone he chose to appoint for the purpose of protecting his crops from the depredations of birds and destructive wild animals or vermin. Such at least I gather to be the policy of this exception in the Gun Licence Act. But the Excise maintain that he may not delegate his gun to anyone for the purpose of protecting his crops from one species of destructive wild animal, namely, rabbits; and that consequently the tenant must take out a fresh gun licence for every servant whom he may for the time authorise to shoot rabbits. I think this would be a very oppressive, as I think it is an entirely erroneous, construction of the statute.

The term "vermin" used in this clause has no generic signification but that of a destructive wild animal. It has a popular signification, varying, however, with the subject to which it is applied. It must be read according to the subject-matter in connection with which it is used; and as the clause in question has relation to the tenant's right to protect his crops, the word must receive the signification necessary to that end. A rabbit no doubt may be preserved—it may be kept in a warren or in a hutch, when it may be property, or in a cover, when it may even require a game licence to kill it. But in relation to the crops of a farm it is vermin, and nothing else. It has no favour or protection from the law as regards the tenant-farmer, and he is entitled to kill it, simply in its character of vermin, unless he has contracted to the contrary.

A rabbit is certainly not game, as has been repeatedly found ever since the case of *Moncreiff and Arnott*, February 13, 1828, 6 S. 530. We took occasion in the recent case of *Inglis* v. *Moir's Tutors*, December 7, 1871, 10 Macph. 204, to reassert the doctrine, and it is clearly recognised in the Game Certificates Act of 1860 (23 and 24 Vict. cap. 90).

Doubtless animals which are in their nature vermin in relation to the fruits of the earth may yet be protected by the law. Some are sought after for their flesh, some for their skins, some merely for sport, but when not protected they continue to be vermin. A fox is eminently vermin. Yet a game-tenant in Leicestershire who undertook to keep down the vermin would hardly be bound to shoot and trap the foxes. The term, as I have said, must be read in its reasonable sense in relation to the matter in hand. In the case of *Inglis* I said that a tenant was entitled to kill rabbits just as he might kill rats, and I think both animals are precisely in the same category as regards the tenant's crops. I know of no animal that can infest a farm to which the term vermin can be more appropriately applied than a rabbit, which in that respect is probably the most destructive of the class to which I think it belongs.

LORD ORMIDALE—I regret that in cases of this description I feel myself unable to concur with your Lordship. Although no appearance has been made in support of the deliverance of the Justices in this case of *The Excise* v. *Walter Brown*, which I may take first, it was thought right to hear the appellants. Accordingly the prosecutor was heard by counsel, and the Court has now to give judgment.

It was contended on the part of the prosecutor that the deliverance appealed against is erroneous, and ought to be reversed, in respect that on the facts stated it appeared that the accused had on the occasion in question carried and used a gun without the requisite licence in terms of the Act. On the other hand, it may be said that the deliverance of the Justices is right, in respect, as stated by them, "that the accused was a person carrying a gun for the purpose only of scaring birds or of killing vermin on the said lands by order of the occupier thereof, who had in force a licence under the said Act, all in terms of the 4th sub-section of the 7th section of the said Act."

There are thus disclosed two grounds upon which the deliverance of the Justices is or may be said to be maintainable—1st, that rabbits are vermin, and therefore that the killing of one rabbit and shooting at another by the accused did not require a licence; and 2dly, that the accused was on the occasion in question carrying a gun for the purpose only of scaring birds or vermin by order of the occupier of the lands, who had in force a gun licence.

Now, I must own that I can entertain very little doubt that rabbits or conies are not vermin, by which I understand noxious and worthless animals. Rabbits or conies are valuable animals, and fetch considerable prices in the market, and have always had a certain measure of protection. Accordingly although they are not classed with game any more than snipe or woodcock or deer in the existing Game Act (the 23 and 24 Vict. cap. 90), they, along with snipe woodcock and deer, are mentioned in section 2 of that Act as birds and animals which, except in the exempted cases referred to in section 4, require that a person must have a certificate in terms of the Act to entitle him to kill or shoot them. I cannot, therefore, hold that rabbits or conies, any more than snipe or woodcock or deer, can be dealt with under the Gun Licence Act as vermin merely because they are not classed as game under the Game Act, and I am not aware that they have ever been so considered or dealt with in any Act, although they are mentioned and referred to in many. On the contrary, rabbits or conies, besides falling under the Game Certificate Act, although not classed as game, are also expressly mentioned and dealt with along with game under the Poaching Acts, 9 Geo. IV. cap. 69, and 7 and 8 Vict. cap. 29. And what is perhaps still more important, it is by the 40 and 41 Vict. cap.

28, passed in the last session of Parliament, entitled "An Act to amend the Game Laws of Scotland," declared by section 3 that "the word game" (in that Act) "shall include all the animals enumerated in the Game Acts or any of them;" and by section 4 it is accordingly enacted that where the lessor of lands "shall reserve or retain the sole right of hunting, killing, or taking of rabbits, hares, or other game, or any of them, the lessee shall be entitled to compensation."

I have therefore to repeat that I cannot consider and deal with rabbits under the Gun Licence Act as vermin, although undoubtedly they are very destructive to crops, just as hares and pheasants are, although in a less degree.

But then it is said, taking the case as it is stated on record, that the accused must be treated as a person who on the occasion in question was carrying a gun "for the purpose only of scaring birds or killing vermin," notwithstanding that he did in point of fact kill one rabbit and fire at another, and therefore that the Justices were right in their deliverance. For myself I have found it impossible to adopt this conclusion, and when the case before the Court is closely examined I am unable to see how it can be supported. The Justices first state the facts, as they were bound to do, and then proceed to draw their conclusion from "these facts." Now, the only fact stated that can give any support to their conclusion is that the accused's father, who holds a licence under the Act, instructed his son, who holds no licence under the said Act, to carry his gun to scare birds and shoot vermin on the said farm, but how this, the mere instruction of the father, should exculpate the son, who disobeyed his father's instruction, and shot one rabbit and tried to shoot another, I fail to see. If it had been stated as matter of fact that in his endeavours to scare birds and kill vermin the accused had accidentally or unintentionally shot a rabbit, the case might have been different, but I am unable to hold, with the Justices, that because the accused had been instructed by his father "to carry his gun to scare birds and kill vermin" he is not liable in the penalty charged, for it must be kept in view that it is not the father, but the son, who is charged with having incurred the penalty. And it ought also to be borne in mind that the *onus* is by section 7 of the Act laid upon the accused to show that he did not commit the offence imputed to him.

In these circumstances, and for the reasons I have stated, I am of opinion that the deliverance of the Justices ought to be reversed, both in this and the other case against William Brown. At the same time, I should regret very much if such a judgment were to prejudice farmers in the protection of their crops, but I cannot think it would do so, as I believe that it is not by shooting, but by trapping and other means, that rabbits are usually kept down. But I am not without fear that to sustain the deliverance of the Justices might lead to a not unfrequent evasion of the Gun Licence Act, a Fiscal Act of some importance.

Lord Gifford—In this case I have experienced considerable difficulty, and I regard the point as one of some nicety, and of some width in its effect. After all I have come to the same conclusion on both points as your Lordship in the chair. [*His Lordship read the clause in the Gun Licence Act*]. The accused here say they were instructed by their father, who holds a licence, and that they were carrying the gun only for the purpose of scaring birds. Now, that is the question of fact for the Justices—Were William and Walter Brown on the occasion here specified carrying that gun for the statutory purpose or not? That was the question the Justices were called upon to answer, and they have answered it in the affirmative. The question of fact is answered, and it is one of fact pure and simple, though the case as presented to us may not be very artistically drawn. The purpose with which the accused went has to be sought, and has been found. I am inclined to read these special cases very strictly (indeed this is a quasi-criminal matter), and applying to this case the first principles of construction, I think that in the finding of the Justices we have sufficient for the purposes of decision.

But, in the next place, even supposing we hold that the Justices here meant that the accused were out for the purpose of killing rabbits, then in that case also I agree with my Lord Justice-Clerk, that rabbits are in the sense of this Act and of this clause of this Act vermin. Vermin are described as destructive and noxious wild animals, either to sportsmen or to farmers, as the case may be, for what is vermin to the one may be quite the reverse to the other. Thus, a weasel to a sportsman is certainly vermin, but to the farmer it scarcely would be so. Here the exception in the Act is, as I read it, an exception in favour of the farmer, who under it has conferred upon him the power to shoot what is regarded as vermin from his point of view.

The Court dismissed the appeal, and sustained the decision of the Justices in Quarter Sessions.

Counsel for Appellant—Rutherfurd. Agent—Solicitor of Inland Revenue.
For the Respondents—No appearance.

Tuesday, March 12.

SECOND DIVISION.

[Lord Adam, Ordinary.

M'LEAN AND OTHERS *v.* SCHOOL BOARD OF KILBRANDON AND KILCHATTAN.

School—Sufficient Accommodation—Education (Scotland) Act 1872, *secs.* 27 *and* 28—*Powers of Education Board—Review.*

The decision of a School Board as to the amount of school accommodation in a parish having caused dissatisfaction, on application by the Board the Education Department sent one of their members to inspect the locality and inquire. The result was that the Education Board approved the decision of the School Board, and subsequently refused to alter it or recall their sanction when petitioned to do so by some of the ratepayers. —*Held* that the Board of Education having complied with the statutory regulations, and applied their minds to the question, were the sole and exclusive judges, and that their resolution could not competently be reviewed.