consideration of all the rights which crofters may or may not have. At any rate they are not proprietors, and it would be difficult to hold they were, looking to the whole scheme as well as to the phraseology of the Crofters Act.

LORD ADAM—I concur. I think these crofters remain tenants, only they cannot be turned out at will. It would be most remarkable to say that the intention of the Crofters Act was to turn them into proprietors. I entirely agree with the judgment of the Sheriff-Substitute.

LORD M'LAREN—This action is instituted under the old Scots Statutes providing in terms for compensation to a proprietor who encloses his land, to the extent of half of the expense incurred, by giving a right to recover it from the adjacent proprietor, who also takes benefit from the erection of the fence.

In considering whether crofters are in a position to exercise the powers conferred by the Acts upon heritors, it is not necessary to consider whether or not they are heritors in the sense of having to contribute to the rates or of having the right to attend church meetings. Heritors in the sense of the Act 1661 are proprietors of heritable estate. They must show that they have a right of property in the subjects which they desire to fence. Now, we find in the Crofters Act a peculiar species of tenure which is said by the Sheriff to amount to a right of property, but I do not think that it has that character. Crofters before the passing of the Act were nothing but annual tenants, and we know that by custom many such families enjoyed the benefits of a tenancy perpetually renewed, and in few cases were they evicted if they paid their rents, although the custom was not enforceable in a Court of law. Now, by statute a crofter has a legal right to remain in possession, because the Act of Parliament provides that he shall not be removed if he complies with certain conditions. In giving this right the Legislature never intended, as is seen from the phraseology of the Act, that the tenure should be essentially different from what it had been, viz., annual tenancy. They are not tenants for a specific number of years, and if they fail to pay their rent, or become bankrupt, or fail to observe certain other conditions, crofters may still be removed, and the landlord may then put in motion the privileges of eviction which he possesses in the case of ordinary annual tenants. This is a very different right from that of property. These crofters have more than an ordinary common law right of tenancy, but they have not enough to give them the right to compel their landlord to join with them in erecting a march fence. I therefore agree with your Lordships.

LORD KINNEAR was absent.

The Court recalled the interlocutor of the Sheriff and dismissed the action.

Counsel for Pursuers and Respondents—G. Watt—Trotter. Agent—M. Graham Yooll, Solicitor.

Counsel for Defenders and Appellant—H. Johnston—C. N. Johnston. Agents—Dalgleish & Bell, W.S.

Thursday, June 7.

FIRST DIVISION.

[Lord Kyllachy, Ordinary.

ELIOTT'S TRUSTEES *v.* ELIOTT.

Landlord and Tenant—Contract—Lease—Reduction — Whether Stipulations in Lease Binding on Tenant.

A lease of shootings granted by trustees in possession of an estate was reduced as *ultra vires* of the trustees after the tenant had possessed under it for fourteen years.

Held that the lease having been the tenant's sole title of possession, he was responsible for the due performance o its stipulations, and might be sued for a breach of the same.

Landlord and Tenant—Right of Shooting—Whether Tenant Liable for Damage Caused by Excessive Stock of Game.

A shooting tenant was bound by his lease to relieve the landlord of all claims which might be made by any of the agricultural tenants on the estate on account of damage caused by game, including rabbits. The lease contained no other provision for the protection of the landlord against such damage.

The Court *dismissed* as *irrelevant* an action of damages by the landlord against the shooting tenant on account of damage caused by rabbits to the trees and grass parks on the estate, *holding* that the tenant was placed under no obligation to keep down the stock of game.

Landlord and Tenant—Shooting Tenant—Claim of Damage for Excessive Stock of Game—Mora.

A landlord brought an action against a tenant, who had been in possession of a right of shooting over his estate for a period of fourteen years, on account of damage alleged to have been caused during the whole period of the defender's tenancy, and in particular during the last five years, by the defender permitting an excessive stock of rabbits to exist on the estate. The pursuer averred that he had repeatedly remonstrated with the defender, and applied to him to reduce the stock of rabbits, but without avail.

Held that the pursuer having given no notice to the defender of his intention to claim damages, was barred by *mora* from insisting in the action.

In 1879 the trustees acting under the trust-disposition and settlement of Sir William

Francis Eliott of Stobs and Wells, who were duly infeft as proprietors of the estate of Wells, entered into a lease whereby they let to Sir William Francis Augustus Eliott, free of any rent, the mansion-house of Wells, with the garden and offices, and also the "exclusive right to the game of every kind, including hares and rabbits, and of shooting and killing the same on the estates" of Wells and Easter Fodderlie. The tenant was taken bound "to free and relieve the said trustees of all claims which may be made by any of the agricultural tenants upon the said estates of Wells and Easter Fodderlie against them for or on account of damage sustained by such tenants from the game, including hares and rabbits, upon the said estates, and to make good to the said trustees any loss which may arise to them in such claims."

In October 1892 the trustees brought an action against Sir William Francis Augustus Eliott for reduction of the deed, and on 31st October 1893 the First Division reduced the lease as *ultra vires* of the trustees (*vide supra*, p. 36.)

In June 1893 the trustees brought the present action against Sir William Francis Augustus Eliott for payment of £600 in name of damages.

The pursuers averred—"(Cond. 4) During his whole tenancy of Wells, and particularly since the year 1888, the defender has permitted an excessive and unreasonable stock of rabbits to remain upon the estate, whereby great injury and damage has been done to the estate. In particular, the rabbits have destroyed a very great number of trees upon the estate, and in addition to the loss thus occasioned the pursuers have been advised that it is useless to plant young trees so long as the present stock of rabbits is undiminished. A considerable amount of planting is at present, and has been for some time, necessary for the proper management of the estate. The trees in the neighbourhood of the mansion-house itself, and on the avenues approaching it, the 'Gilboa Wood,' the 'Heron Wood,' the wood at 'Dykes Burn,' and on many other parts of the estate, have suffered injury from the excessive stock of rabbits. The said excessive stock maintained on the estate has also had the effect of materially reducing the value for grazing purposes of certain grass parks which are annually let by the pursuers, and the rents obtained for them have in consequence fallen. The pursuers have repeatedly remonstrated with the defender, and have made application to him to remedy the present state of affairs and to reduce the number of rabbits upon the estate, but without avail."

The defender pleaded, *inter alia*—"(1) The action is irrelevant."

On 1st December 1893 the Lord Ordinary (KYLLACHY) sustained the first plea-in-law for the defender and dismissed the action.

"*Opinion.*—As this case was originally presented, I had not much doubt it was, as the defender maintained, irrelevant. But the pursuers obtained leave to amend, and they have made very considerable alterations upon their record. I have been willing to consider how far those alterations obviate the objections which were urged at the debate. The result is that I have come to the conclusion that they do not obviate those objections, and that I must dismiss the action.

"The pursuers are the trustees on the estate of Wells, and it appears that so far back as 1879 they professed to let to the defender—on what was in substance a life-rent lease, with a yearly break in the defender's favour—the mansion-house and shootings of the estate. The defender possessed under this lease until the other day, when in an action at the pursuers' instance the Court found that the lease in question was beyond the pursuers' powers, and therefore reduced it, and decerned the defender to remove. The pursuers now seek in the present action to recover damages from the defender to the extent of £600, in respect that since the date of the lease, and in particular since 1888, he permitted the stock of rabbits on the estate to increase beyond a reasonable stock, and also beyond the stock at the date of his entry.

"I am unable to discover any legal ground on which the pursuers can base this claim. It has long been settled that in an agricultural lease, where the landlord reserves the game, and the tenant—being bound for a term longer or shorter—has no means of protecting himself against damage to his crops, the landlord is held bound as under an implied condition of the lease to prevent an increase of game beyond a reasonable stock, or at all events beyond the stock at the date of the lease—*Wemyss* v. *Wilson*, 10 D. 194. It is probably also settled that it is an implied condition of a lease of game to a game tenant that the latter shall not allow the stock of game to be increased to an extravagant extent—*Kidd* v. *Byrne*, 3 R. 255. But the obligation in question always rests not upon delict, but upon contract, and where there is no contract between the parties, it is not easy to see how such an obligation can be implied. In the present case the result of the recent judgment is that the defender is and has all along been a precarious possessor, occupying the house and shootings by tolerance, and liable to be dispossessed at the pursuers' pleasure. It does not appear to me that there is room under such a tenure—if tenure it can be called—for implying any undertaking by the defender with respect to the rabbits on the estate. If the defender failed to keep them down, the pursuers had the remedy in their own hands. They might at any time have protected themselves, or, if necessary, have given the defender notice to quit.

"It may be suggested that the lease, although bad as a lease for a term of years, may be read as constituting a good yearly tenancy. I doubt whether this could be so without making in effect a new contract between the parties—a contract to which neither of them in fact consented. But even apart from that difficulty, I do not, I

confess, see how such a tenancy would help the pursuers' case. The pursuers had the opportunity at the end of each year of terminating the tenancy. Each year's increase must therefore have founded a separate claim of damage. That being so, and no such claim having been either enforced or reserved during the whole period of fourteen years, I do not, I confess, see how it can now be maintained.

"I therefore propose to pronounce an interlocutor sustaining the first plea-in-law for the defender and dismissing the action."

The pursuers reclaimed, and argued—The lease having been the defender's sole title of possession, he was responsible for a breach of its provisions, and he had disregarded these provisions by permitting the rabbits to increase to an excessive extent. A landlord was entitled to protect himself against loss resulting from an excessive stock of game—*Ewing* v. *Ewing, &c.*, October 26, 1881, 19 S.L.R. 20, and a tenant was bound not to allow the game to increase beyond a fair and reasonable stock—*Kidd* v. *Byrne*, December 16, 1875, 3 R. 255.

Argued for the defender—The lease had been reduced as *ultra vires* of the pursuers, and declared to have been void from the beginning. The Lord Ordinary was therefore right in holding that no contractual relation had existed between the parties which could form a basis for the present action. The pursuers had acted illegally in granting the lease, and they could not claim damages for what had followed from their own illegal act. Further, no obligation lay on a shooting tenant to keep down the stock of game. The landlord was bound to protect himself by stipulations in the lease, and could not sue on account of damage done by game, unless the lease entitled him to do so. The present lease contained a stipulation for the pursuers' protection, but it did not afford any support to the claim now made. *Kidd's* case was between a landlord and his agricultural tenants, and did not apply as between a landlord and his shooting tenant. Even assuming that the pursuers' claim would have been good if made timeously, they were barred by *mora* from now maintaining it.

At advising—

LORD ADAM—This is an action at the instance of the trustees of the estate of Wells, and it is brought under somewhat peculiar circumstances. The defender has been in possession of the mansion-house and shootings on that estate for the last fourteen years. His title to possession was a certain document, as it is now called in the third article of the condescendence, in the form of a lease, dated in September 1879, by which the pursuers the trustees let to him "All and whole the mansion-house of Wells, with the garden, office-houses, orchards, and policy thereto belonging," and "also the exclusive right of fishing in the river Rule and its tributaries," and "also the exclusive right to the game of every kind, including hares and rabbits, and of shooting and killing the same on the said estates. Then the record goes on to say that it was provided by the lease that "the said Sir William Francis Augustus Eliott, Bart., binds and obliges himself and his foresaids during his occupation of the subjects hereby let to free and relieve the said trustees and their foresaids of all claims which may be made by any of the agricultural tenants upon the said estate of Wells and Easter Fodderlie against them for or on account of damage sustained by such tenants from the game, including hares and rabbits upon the said estates, and to make good to the said trustees any loss which may arise to them in such claims."

That was the condition on which Sir William Eliott was in possession of this shooting. He paid no rent. He was the heir of entail under the trust, and the trustees were not entitled to give him possession of the shootings rent free. However, the trustees did let to him the shootings on the estate without exacting any rent in return. An action was raised in this Court in which that lease, under which Sir William Eliott was in possession of this estate, has been reduced, and he has been obliged, as I understand, to leave the mansion-house and shootings. It was during the dependence of that action that the present action was brought by the trustees. The ground of this action is that during his tenancy of the shootings the defender allowed the rabbits on the estate, which at the time of his entry were a reasonable stock, to increase to an excessive and unreasonable extent, whereby great injury and damage has been done to the estate. Then the pursuers go on to say, "In particular, the rabbits have destroyed a great number of trees upon the estate," and add that the grazing parks which are let annually have been reduced in value. It will be observed that it is not said anywhere on this record that any of the agricultural tenants have made claims for injury to them by this alleged excessive amount of game and rabbits, of which claims Sir William was bound to relieve them. The amount of damages asked is the sum of £600, and I beg further to call your Lordships' notice to the fact that this claim goes back to 1886, and that the damage is said to have occurred and accumulated from that year down to the present date. It is not said that any express intimation was made to Sir William that the trustees would hold him liable for any damage that might be done, or anything of that sort. All that is said upon that matter is—"The pursuers have repeatedly remonstrated with the defender, and have made application to him to remedy the present state of affairs, and to reduce the number of rabbits upon the estate, but without avail," and, as we have previously held, such a statement as that amounts to nothing more than a mere grumble. We have in cases of a tenant's claim against a landlord held that the tenant must make a distinct intimation and claim upon the landlord, and that he is not to allow such

claims to run up and then insist upon damages. If that be so in the case of a claim by a tenant upon a landlord, it appears to me that the same principle applies in the case of a claim by a landlord against his tenant.

The Lord Ordinary has assoilzied the defender, and apparently he has gone upon this ground, that the Court having reduced the document or lease under which Sir William possessed, the effect of that decision was to put Sir William into the position of having been a precarious possessor, that he was not bound by any of the conditions in the document under which he possessed, and that he is to be treated as being under no obligations or conditions at all. Now, I cannot altogether agree with the ground on which the Lord Ordinary has disposed of the case in that respect. There is no doubt at all that Sir William's title to the possession of the mansion-house and shootings was this document, and he beyond doubt did possess under it, and I do not think a tenant is entitled to dispute the document which is his only title to possession. I think myself that although this document was ultimately reduced as *ultra vires* of the trustees, it was upon the terms and conditions contained in it that Sir William was in possession of the estate and shootings, and that this case must be considered in that light.

But considering it in that light, I am still of opinion that the Lord Ordinary's judgment is right, and upon this ground. It will be observed that the right given to the defender is the exclusive right to game of every kind, including hares and rabbits, and of shooting and killing the same on the estates. Now, everybody knows that it is the interest of a shooting tenant to have as large a stock of game and rabbits as he can have upon the estate. The larger the stock the more sport he has. Accordingly, if landlords and tenants act in this view, we must consider Sir William in the position of a tenant and the trustees as his landlord. Landlords and tenants usually stipulate for mutual protection in that matter. A common course on the part of the landlord, if he is afraid that the tenant will injure his property by encouraging too many rabbits or hares, is to take the tenant bound to keep them down. That is a very common clause in sporting leases, with this further condition, that if the tenant does not keep them down, the landlord will be entitled to enter upon the estate and protect himself. Another very common provision is—and we find it in this lease—that the shooting tenant will relieve the landlord of all claims of damages by the agricultural tenants. These are the ways in which landlords and tenants of shooting leases protect themselves, and the point I am coming to is this, that the parties to this lease or to this document, as the pursuers call it, have contracted with each other as to the protection which the landlord was to have in regard to game, because there is a special clause dealing with that very matter to the effect that the tenant shall relieve the landlord of claims of damages by the agricultural tenants. If they have dealt upon that lease, and have provided a certain protection to the landlord, are we to imply—for it comes to implication—that the landlord is entitled to have additional protection to that which the parties have made a matter of contract? That is actually the pursuers' case. They say, no doubt, we have that stipulation for our protection, but we want another and implied condition. I do not know what is meant,—that the tenant shall keep only a fair and reasonable stock of game upon the estate. They want us to read into the lease a clause of that sort. In my opinion the parties have dealt with this matter, and having dealt with it specially, we are not entitled to imply further conditions.

That differentiates this case from the case we were referred to by the Lord Ordinary of *Kidd* v. *Byrne*, 3 R. 255. I cannot quite understand that case, because I do not quite understand what in the eyes of a shooting tenant is a fair and reasonable amount of game, but nevertheless it was decided in that case, there being no stipulation whatever, and the matter of game not being dealt with at all in the lease, that it was to be implied that the shooting tenant was not entitled to keep more than a fair amount of game, whatever that may be. But that case is different from this in the way I have pointed out, namely, that the amount of protection to be given to the landlord is dealt with in this case. Therefore I do not think that it is an authority to regulate this case.

Then the Lord Ordinary says—"But even apart from that difficulty I do not, I confess, see how such a tenancy would help the pursuers' case. The pursuers had the opportunity at the end of each year of terminating the tenancy. Each year's increase must therefore have founded a separate claim of damage. That being so, and no such claim having been either enforced or reserved during the whole period of fourteen years, I do not, I confess, see how it can now be maintained." I do not see either how after this long delay the pursuers' claim can now be insisted in. How can a tenant defend himself against a claim brought for the first time now as to the state of the trees in these woods seven or eight years ago? I suppose nobody living could say what the state of the trees was seven or eight years ago. Yet that is what the pursuers propose he should be bound to do. I agree with the Lord Ordinary on that point also, that this claim—if it was a good claim—is barred by *mora*.

LORD M'LAREN—This is one of the rare cases where it is possible to do justice so as to give perfect satisfaction to all the parties concerned, because—and I see Mr Dundas agrees—it was not the intention of these trustees to play the part of the wicked stepmother to the young gentleman under their charge, but they are really trustees for creditors, and as such feel under obliga-

tion to endeavour to collect every available asset that might possibly fall into their trust. I have no doubt it was very much against their own inclinations that this claim was put forward.

The question arises upon a lease of the mansion-house and shootings which was granted by the trustees of Sir William Eliott's father to him in the supposed exercise of powers conferred by his settlement. The lease has been reduced, and the Lord Ordinary has disposed of the case upon the principle that there never was any contractual relation between the trustees as proprietors and Sir William Eliott as tenant. That is no doubt quite true, but it hardly appears to me to exhaust the considerations that go to the solution of this case, because, as your Lordship has pointed out, although the actual relation of landlord and tenant did not exist, yet, as Sir William Eliott was allowed to be in possession under the lease for a term of years, and has received all the benefits which the lease conferred upon the tenant, and does not propose to pay anything for the possession which he has had, he cannot claim the benefit of a *bona fide* tenant without submitting to the obligations which would have rested upon him if the lease had been a valid one. There is an old principle that he who invokes equity must be prepared to do equity, and I can hardly see how any *bona fide* possessor could claim to have all the rights of possession and yet be relieved from these obligations which in the case of a tenant under a real lease he would have been bound to recognise.

But it is necessary to distinguish precisely what Sir William's position was in regard to the shootings, because although we speak popularly of a lease of shootings, yet if the privilege be nothing more than the right to kill game, it is so far different from an ordinary lease that there is really no subject of lease—nothing but a right for a certain term of years to the exercise of a personal privilege. In such a case it is difficult to affirm that the obligations which the law would imply from the relation of landlord and tenant in a heritable subject are necessarily binding as between the granter and the grantee of a purely personal privilege. In the case of *Kidd* v. *Byrne* Lord Moncreiff said, referring to the obligations contained in the game tenant's lease to keep up the game—"I do not think that the obligation upon the game tenant to maintain a fair stock of game and rabbits implies the obligation to keep down their number to a fair stock. The object of the clause is to maintain the stock and not to diminish it." That I should conceive to be a sound principle, but I am not so clear that the principle was well applied in the case of *Kidd* v. *Byrne*, because the Court proceeded upon a certain view of an implied obligation resulting independently of contract, and held that the game tenant was liable. If it were necessary to consider that question again, the inclination of my opinion would be that there can be no such liability unless it is either contained in the written contract or is to be plainly inferred from it.

But then there is another ground which I think is sufficient for the disposal of the present claim. I mean the one last referred to by your Lordship, founded upon the rule which has been very generally recognised in questions between landlord snd tenant, that where a claim of damage is founded upon a misuse of a subject or privilege let, there is a duty to give notice of the intention to make such a claim—notice that the one party considers that the other has failed in his obligation, and notice of the intention to claim indemnification against that breach of contract. It is admitted, or at least there is no allegation, that any claim of damage was made against Sir William Eliott during the currency of his possession, so as to reserve the present question, and in the absence of such a claim and notice, I think we are justified in dealing with this case on the principles that have been very widely applied in reference to agricultural leases.

There is perhaps a third ground. It may perhaps be classed with the one which I first considered. That is, that there is here an obligation to relieve the trustees and their foresaids of all claims made by the agricultural tenants for damage sustained from the game, including hares and rabbits. Now, as far as this question depends upon contract, that clause appears to me to contemplate that the game tenant is to be entitled to use his own discretion as to the preservation of the game on relieving the proprietors of all claims that may be made against them—that is, against the trustees. The clause seems to me to be inconsistent with the notion that the tenant was bound to keep down the game, because it contemplates that he is to be responsible as for an excess of game, the trustees protecting themselves against all liability in consequence of such excess. But it is not said that any claim has been made by the agricultural tenants. The only damage alleged is damage to fields let from year to year, and to property in the possession of the trustees, and which they hold in the meantime for the benefit of Sir William Eliott himself. I am therefore of opinion that the case for the trustees has failed, and that the defender is entitled to be assoilzied.

LORD KINNEAR—I am of the same opinion. I am unable to agree with the Lord Ordinary in thinking that Sir William Eliott has been relieved of all the obligations he may have undertaken in the contract of lease between him and the trustees, merely by reason of its having now been found that the contract was *ultra vires* of the trustees, and therefore that he was in fact possessing precariously during the fourteen years that elapsed after the date of the contract. The judgment of the Court that the contract was *ultra vires* does not establish that there was no contract between the parties in point of fact. If indeed both parties had known from the first that they had no power to contract in these terms, and if they had entered into a

formal contract of lease which they knew to be perfectly futile, from some indirect motive, then I could have understood its being held that there never had been any real agreement between them. But I do not understand it to be disputed that both the one party and the other were acting in perfect good faith, and I do not understand the view upon which it is held that because it is found after fourteen years that the contract is invalid as being beyond the power of the parties that entered into it, that therefore there has been no contract, although it has been acted upon during the whole period of fourteen years. I see no reason to doubt that from 1879 down to 1893 Sir William Eliott was in possession of the mansion-house of Wells, and of the privilege of shooting over the estate under a contract of lease between him and the trustees, although it has turned out that the contract was a bad one. That being so, I am unable further to hold that he is not responsible for the due performance of any of the stipulations of that contract by which his possession was regulated during the period that it lasted, and therefore it appears to me that the only question we have to consider is whether there is any relevant averment of breach of contract on the part of the defender? Now, I think there is none.

The lease gives Sir William Eliott the occupation and possession of the mansion-house, and it gives him the exclusive right of shooting game, including hares and rabbits, over the estate, and also the exclusive right of fishing in the water of Rule. Now, the parties chose to stipulate for the protection of the landlords' property against the excessive use of this right of shooting, and they did so by a perfectly clear stipulation that if the result of Sir William Eliott's exercise of his right should be to give rise to claims of damages against the landlords, the trustees, at the instance of agricultural tenants upon the estate, then he should be bound to relieve them of these claims of damages. That is a perfectly intelligible and eminently reasonable stipulation. It appears to me that that exhausts the rights for which the proprietors chose to stipulate, and when one bears that in view, it becomes perfectly clear that there is no relevant allegation of breach of contract on the part of Sir William Eliott at all. The pursuers do not say that any damage has been done to the agricultural part of the estate, and they do not say that any claim of damage has been brought against them by agricultural tenants. What they do say is, that a number of trees have been destroyed by rabbits, and also that the number of rabbits at present on the estate is so great that it is useless to plant young trees, although a considerable amount of planting is necessary for the proper management of the estate. The only additional averment of damage is that the stock of rabbits maintained upon the estate has reduced the value for grazing purposes of certain grass parks which are annually let by the pursuers. It is impossible to infer from any of these statements the existence of any claim of damage at the instance of the agricultural tenants. But then it is said that in addition to the express stipulation in the contract there is an implied stipulation not to keep more than a reasonable stock of game upon the estate. I can quite understand that even although the remedies to which a proprietor should be entitled in the event of any excessive use of his privileges by a shooting tenant are expressly stipulated in the lease, there might nevertheless be a claim against the tenant if it can be charged against him that he had done anything equivalent to dilapidation of the estate—that is to say, that he had brought great quantities of game upon the estate, and so increased the stock to an extravagant extent, causing an amount of injury which never could have been in the contemplation of the parties when the shooting lease was granted. It might very well be that such an excessive use of his privileges as that would be beyond the powers which the contract of lease contemplated, and therefore would be a wrong done to his landlord. But there is no suggestion of anything of that kind upon record, because all that is said is not that he did anything to increase the stock of game, but simply that he has not kept it down, and has permitted the rabbits to increase on the estate. Therefore the pursuers' case is, that there was an obligation on this gentleman to exercise the rights of shooting rabbits while living in the mansion-house, and not only so, but to exercise it so effectually as to prevent injury to trees and plantations, and injury to grass parks. I agree with your Lordships that it is impossible to read into this contract any stipulation of the kind.

I agree, also, that if there were any contractual obligation which the defender had broken, it is too late for the pursuers now to bring an action at this date, reverting back to damage which has continued for so long a period of time. I think that the principle upon which it is held that if a tenant is to claim damages from his landlord, he must give notice of the fact of such damage existing and of his claim at a reasonable time, is still more directly applicable to the case of a proprietor claiming damages from his shooting tenant, because the landlord is left in the uncontrolled administration of his estate for all purposes except those of sporting, and therefore he is upon the spot and must see that the damage is arising. It appears to me, therefore, that there is a very clear duty lying upon him if he means to maintain a claim of damage for what he thinks an excessive use of his tenant's privileges to give notice at once, so that the tenant may have an opportunity of exercising his right to kill game on the one hand, or of preserving evidence that the amount of game is not excessive. On these grounds I agree with your Lordships.

The LORD PRESIDENT was absent.

The Court adhered.

Counsel for the Pursuers — Dundas — Howden. Agents — Mackenzie & Black, W.S.

Counsel for the Defenders—George Watt —A. M. Anderson. Agent—J. L. Officer, W.S.

Friday, June 15.

SECOND DIVISION.

[Lord Kyllachy, Ordinary.

LIVESEY *v.* PURDOM & SON.

Agent — Custom — Custom Regulating Business Relationship between Two Solicitors in England not Applicable between One Solicitor in Scotland and One in England.

An alleged general custom having the force of law in England, by which one solicitor in England instructing another solicitor in England in a litigation on behalf of a client, becomes personally liable for costs incurred by the solicitor employed—*held* not to apply to the case of a solicitor in Scotland instructing a solicitor in England.

In August 1891 Thomas Purdom & Son, solicitors, Hawick, wrote to J. M'Keever & Son, solicitors, Carlisle, introducing their client J. A. Macdonald, contractor, Hawick, in order that an action at his instance against the Corporation of Workington might be raised and prosecuted by Messrs J. M'Keever & Son.

The action was brought but was unsuccessful. J. A. Macdonald was unable to pay the balance of the account incurred by Messrs M'Keever & Son for professional services rendered by them and their London agents in connection with the action.

During the progress of the action the firm of J. M'Keever & Son in March 1892 assigned their business to the firm of J. M'Keever, Son, & Livesey, and the latter firm in August 1892 assigned their business to Alfred John Livesey, solicitor, Carlisle. The latter became entitled under the assignations to all unpaid accounts due to his authors.

In January 1894 Mr Livesey raised an action against Messrs Thomas Purdom & Son for the sum of £604, 15s. 7d., being the amount of their account for services rendered in connection with Mr Macdonald's action.

The pursuers averred, *inter alia*—"(Cond. 5) By the law of England, a solicitor employing another solicitor in the conduct of an action for a client, as in the present case, is held to employ him as his own agent in the matter, and is personally responsible to him for all costs and charges incurred. The contract of employment between the defenders and the said John M'Keever, and J. M'Keever, Son, & Livesey, and the pursuer, is an English contract, and the rights and liabilities of parties thereunder fall to be determined by the law of England, according to which the defenders are liable in payment of the account sued on.

The defenders pleaded, *inter alia*—"(3) The defenders never having employed the pursuer or his alleged predecessors or their London agents, to perform the services and to make the payments charged for, should be assoilzied. 4. *Separatim*, assuming that the work charged for was done, and the outlays stated in the pursuer's account were made on the instructions of the defenders, they acted as agents for a disclosed principal, and are not themselves responsible to the pursuer or his alleged authors."

After hearing proof the Lord Ordinary (KYLLACHY) on 6th April pronounced the following interlocutor:—"Finds that the contract of employment, being to be performed in England, its construction and effect falls to be determined by the law of England: Finds that by the law of England an agent duly authorised, contracting on behalf of a disclosed principal, does not pledge his personal credit: Finds that by custom, judicially recognised, there is an exception to this rule in the case of contracts of employment between country solicitors in England and also between country solicitors in England and London solicitors, but that the pursuer has failed to prove that the said exception applies where, as in the present case, one of the parties to the employment is not a solicitor practising, or entitled to practise, in England: Finds, therefore, that the defenders are not personally liable to the pursuer for the balance of the account sued for: And assoilzies them from the conclusions of the action, and decerns."

"*Note.*— . . . The matter to be decided is whether the defenders, notwithstanding that they acted for a disclosed principal, are personally liable in respect of an alleged rule of the law of England to the effect, as stated by the pursuer, 'that a solicitor employing another solicitor in the conduct of an action for a client as in the present case is held to employ him as his own agent in the matter, and is personally responsible to him for all costs and charges incurred.' . . .

"It is not disputed that the contract being to be performed in England its construction and effect must be determined according to English law; and as to that law English counsel have been examined on both sides. There does not, however, appear to be any real controversy as to what the law of England is. It is, on the one hand, admitted that by the general law of England an agent contracting on behalf of a disclosed principal binds his principal and not himself. On the other hand, it is also admitted that to this rule there is in England an exception established by custom, and judicially recognised, to the effect that an English country solicitor employing a London solicitor on behalf of a client becomes personally liable for the latter's costs, and that the result is the same as between English country solicitors when they employ one another. The point to be decided is whether the present case falls within the rule or within the exception.

"It appears to me that the parties here