COURT OF SESSION.

Tuesday, November 26.

SECOND DIVISION.

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

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

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

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

Damages laid at £800.

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

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

Clark and Lancaster in support of the issue.

Young and Shand in answer.

At advising—

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

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

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

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

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

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

Wednesday, November 27.

FIRST DIVISION.

MORTON *v.* GRAHAM.

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

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

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

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

The case was heard on the proof.

Mackenzie and Black for pursuer.

Young and Hall for defender.

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

Lord President.—The question to be decided