of the landlord, an increase of rabbits in excess of the number at the commencement of the lease, and perhaps even somewhat in excess of what was to be expected from the enclosure of plantations. But this last point is not free from doubt, and the tenant maintaining such a claim in the face of the clause must make out a clear case of serious and unreasonable excess, beyond what he must be held as having expected. In my view of the clause, a trifling excess, even if proved, would not support the tenant's claim, and any defect in proof is a defect in the tenant's case, for the burden of proving great and unreasonable excess rests on him. Now, the pursuer's view of his own case is thus stated by himself:—"If there was nothing more than ordinary stock in the farm there should be no appreciable damage. When the damage becomes appreciable, then I think the stock of game is more than the fair average amount." This means, that for all damage that is appreciable, the landlord is responsible notwithstanding the clause. This is out of the question; for the tenant is a party to the clause, and effect must be given to it.

Taking the most favourable and reasonable view of the pursuer's claim, I have carefully considered the proof.

I do not mean to enter on any analysis of the evidence, but I may refer to a few sentences to illustrate what I mean. [His Lordship here read passages from the pursuer's and defender's proof, and continued]—

The result is, according to the best opinion which I have been able to form, that the pursuer, being a party to this lease, and bound by this clause, has not instructed by proof facts sufficient to sustain his claim.

In the view which I take of the evidence, it is not necessary to dispose of the defender's separate plea, urged at the bar, but not stated on record, founded on the game lease by him to Mr Drummond. But I think it right to explain that I am of opinion that that plea is not well founded.

Agent for Pursuer—W. H. Muir, S.S.C.

Agent for Defender—Graham & Johnston, W.S.

Wednesday, November 27.

M'EWAN *v.* MALCOLM.

Master and Servant—Wages. A farm servant engaged for a year having sustained injuries when engaged at his work which disabled him from fulfilling his contract, *held* that, as the injuries had been caused by his own recklessness, he was not entitled to recover wages or board wages for the remainder of his term of service.

This was an advocation from the Sheriff-court of Perthshire.

The respondent was engaged by the advocator as a farm servant from December 1864 to Martinmas 1865, at a wage of £19, 10s. On 24th April 1865, when going home from field work, he sustained certain injuries, which he thus described in his own evidence:—"Towards the end of April I was working with the foreman at the harrows. We had finished the work of the day. We both loosed about one time. We had a rein at each of the horses' heads. When I unloosed the horses, I tied up the reins and put them across the backband, and put one of the horses in a cart to go home. The foreman did the same. I took my seat on the front of the cart, and led the other horse behind the cart. I had a single rein attached to the horse behind the cart. This was the same rein which I used when working on the farm, but used double reins when off the farm. The said rein was not sufficiently long to be made a double rein. The foreman was on the front of his cart just as I was. When near home, half-way, the horse in the cart started suddenly, and ran off—started all at once. I jumped off and tried to catch my horse by the head, and the cart drove me down. When sitting on the front, the rein was not sufficiently long to come back to the cart, and was tied to the hems." And in cross-examination he said—"I had no hold of the horse at the time, no rein in my hands. The ploughing reins were in the backband. It is not customary to put them in the horse heads when working on the farm. The reins made use of when the cart was away from the farm were the same plough lines. I was not in particular warned by defender to take care of that horse. Never told by him to use reins with that horse. He was occasionally troublesome, but not always fashious. The foreman, Walker, has told me to look after that horse, and to take care of him, as he ran away. He had ran away once before with me. Defender, when taking in the stack with no rein, or one rein, was at the head of the horse, and not seated on the cart. I could not say if the horse would have been restrained had I the plough lines in my hands."

After receiving the above injuries, the pursuer remained at the farm until 2d May, when he went home to his father's house at Dunfermline. On 5th June, having recovered, he went to the farm and offered to resume his work. The advocator had by that time engaged another man to fill the pursuer's place, and refused to take him back. The pursuer thereupon raised an action concluding for full wages for the whole term, and board wages from 24th April to Martinmas.

The claim was resisted by the defender on the ground, *inter alia*, that, as the pursuer had become unfit for work, in consequence of injuries sustained through his own rashness and imprudence, he was not entitled to recover any wages. But he tendered payment of the wages effeiring to the time for which the pursuer had actually served.

A proof having been led, the Sheriff-substitute (Barclay) found, "under the whole circumstances disclosed in the proofs, that the parties must be held mutually to have agreed to the termination of the contract of service when the pursuer, without objection on the defender's part, left Mill Earn on 2d May 1865, and that therefore the pursuer is only entitled to the wages actually earned and judicially offered by the defender." He therefore decerned for the sum tendered, and *quoad ultra* assoilzied the defender, with expenses.

The Sheriff (Gordon), on appeal, altered the interlocutor, and decerned for the full money wages sued for, and for £3 in name of board wages. He held that "the defence that the pursuer's rashness and negligence caused the injury sustained by the pursuer had not been established."

The defender advocated.

BURNET (with him FRASER) was heard for the advocator, and

BRAND (with him SOLICITOR-GENERAL) for the pursuer.

At advising—

The LORD PRESIDENT—This action concludes for wages for the entire period from December 1864

to Martinmas 1865, and also for board wages up to that term. There is no doubt that from 24th April 1865 till Martinmas the pursuer was not serving the defender. The defender tenders wages up to 24th April, but denies liability otherwise, because he has received for the subsequent period no corresponding service from the pursuer. The Sheriff-substitute assoilzied the defender, proceeding on a ground which was not pleaded by him. The Sheriff recalled this interlocutor, and sustained the pursuer's claim. I cannot agree with his Lordship. I think the pursuer has no case, and in forming that opinion I proceed entirely on the pursuer's own evidence, beyond which I don't think it necessary to go. The pursuer was disabled in consequence of an injury. The manner in which he sustained it is thus described by himself. [*Reads as above.*] From this evidence I gather these facts: The horse was a dangerous horse—not unfit for use—but troublesome. Of the two horses under the pursuer's charge he selected that one to put into the cart. He used no reins. He had reins there which he might have used. And he sat in front of his cart without any rein in his hand. In these circumstances, I think the injury he sustained was imputable entirely to his own recklessness. The injury made him unable to fulfil his contract of service; and, having been so disabled by his own fault exclusively, he is not entitled to recover more than the wages tendered.

The other Judges concurred.

Agent for advocator—John Thomson, S.S.C.

Agent for respondent—Alexander Morison, S.S.C.

Thursday, November 28.

MORRIS *v.* MORRIS' TRUSTEES AND ANOTHER.

Heir—Ancestor—Apparency—Passive Title—1695, *c.* 24—*Discussion. Held* that an heir subjected to a passive title under 1695, c. 24, has not the benefit of discussion as in a question between him and the representatives of the debtor. Opinions as to the meaning of Erskine and Bell.

This was an action by the widow of the late James Morris, of Albany House, Dunfermline, against her husband's trustees and Andrew Beveridge, a nephew of her husband, conjunctly and severally, for payment of an annuity secured to her by marriage-contract. It appeared that James Morris and his brother William were joint *pro indiviso* proprietors of certain heritable subjects in virtue of a feu-disposition on which an infeftment followed in favour of neither of them. William Morris died in 1841, and James thereafter, until his own death in 1864, possessed his deceased brother's *pro indiviso* share of the property as heir-apparent of his brother, without making up any title. James Morris left a trust-disposition and settlement conveying his whole heritable and moveable estate to trustees for the purposes mentioned in the deed. Andrew Beveridge made up a title to the *pro indiviso* half of the property by serving as heir-of-line in general, and also of conquest, to William, his maternal uncle, passing by James, who had been more than three years in possession on apparency, and to whom Beveridge was apparent heir. The trustees made up a title to the other half. The trustees alleging that they were unable from the proceeds of James Morris' estate to pay the annuity provided to the widow, the widow brought this action against the trustees and Andrew Beveridge, to have a conjunct and several liability established against the defenders for payment of her annuity, founding, as against Beveridge, on the statute 1695, c. 24. The plea principally insisted in by Beveridge was that the pursuer was not entitled to decree against him until she had discussed her husband's trustees and representatives. He maintained that the heir who is by the statute subjected to a passive title has the benefit of discussion, so that the creditors of the interjected person must discuss all the debtor's representatives before the heir can be condemned, referring to the authority of Bell's Com., i., 666-7.

The Lord Ordinary repelled the plea, adding this note to his interlocutor:—

"*Note.*—The defender does not dispute that, to the extent of the value of the estate, to which he has made up a title passing over the pursuer's husband, he is liable under the Act 1695 for payment of her annuity. But he maintains that his liability is subsidiary to that of her husband's trustees and proper representatives, and that he is entitled to have them discussed before he can be called upon to pay. In support of this contention he refers to the *dictum* of Mr Erskine, iii., 8, 94, that the heir who is by the statute subjected to a passive title 'has the benefit of discussion, so that the creditors of the interjected person must discuss all the debtor's representatives before the heir can be condemned;' and to Mr Bell, i. Com., 666-7, and the case of *Vint* v. *Dalhousie*, M. 3562.

"The Lord Ordinary thinks that the defender misapprehends the import of these authorities. The case of *Vint*, which is referred to both by Mr Erskine and Mr Bell, was a discussion as between heirs—the heir-male and the heir of line—and if Mr Erskine's words, which are not unambiguous, are to be taken as importing that the privilege goes beyond the ordinary right of discussion as between heirs, his doctrine is not warranted by the authority on which he grounds it. Mr Bell says, that 'the personal responsibility of the entered heir, if not heir-at-law and representative of the deceased, is of the nature of a subsidiary obligation after the heirs of the deceased have been discussed,' and he also refers to the case of *Vint* as the authority for the rule. He could not mean that the entered heir would be liable at all, even as a subsidiary obligant, if he was not an heir of the interjected person. The statute only enacts that he shall be liable for the debts and deeds of the person interjected, 'to whom he was apparent heir.' The Lord Ordinary understands Mr Bell as merely expressing the doctrine fixed by the case of *Vint* to which he refers—that if the heir entering to a remoter ancestor is not heir-at-law, and, in that sense, representative of the interjected person, but only his heir-male, or other heir of a limited kind, he is entitled to the benefit of discussion common to all heirs. This seems to be the import of all the authorities; but any further limitation or postponement of the heir's liability would seem to be unwarranted by the terms of the statute, and contrary to its intention.

"The defender is not an heir of a more limited character asking to have the heir-general discussed. He is himself the heir-general of line and of conquest, though unentered, and only liable under the statute. He seeks to have the trustees discussed, on the ground that they are disponees and exe-