large extent, the loss amounting that year to £250, exclusive of loss by injury to turnip crop and pasture.

The defender averred:—"(5) The pursuer and his predecessors have totally changed the mode of culture and rotation prescribed by the lease, and instead of the farm being cropped and laboured under the rotation specially above mentioned, it has been cropped and laboured in contravention of the lease, by which great pecuniary advantages have been obtained by the tenants, who have been largely *lucrati* by the lease. An action of declarator is now in dependence in the Court of Session, at the defender's instance against the pursuer, in consequence of the change of culture and rotation prescribed by the lease. (7) Had the tenants adhered to the mode of cropping prescribed by the lease (even assuming that an excessive quantity of game had been preserved, but which is specially denied), the alleged damage could not have been sustained; in respect at least one-half of the farm would have been laid down in pasture, one portion in fallow, and the remainder in white crop; and the damage, if such has arisen, has been caused by the pursuer and his relatives' own illegal acts."

The Sheriff-substitute (ROBERTSON) found that the defender was only liable for damage done by increase of game since the date of the lease, and, before answer, allowed the pursuer a proof of the state of the game at that date and in 1866. The Sheriff (HERIOT) adhered. The pursuer advocated, and proposed this issue.

"It being admitted that, in 1866, the pursuer was the defender's tenant in the farm of Balmachie, under the lease No. 15 of process, and assignations thereof, Nos. 16, 17, and 18 of process, and had right to the crops grown on the said farm in the said year:—

"Whether, in 1866, the defender wrongously preserved, and had in excessive quantities upon the said farm, game of various kinds, whereby the crops of the said year, in the particular fields specified in the schedule hereunto annexed, or part of the said crops, were destroyed or injured, to the loss, injury, and damage of the pursuer?

"Damages £250."

(Here followed schedule.)

The respondent proposed these counter-issues:—

"1. Whether, in 1866, the pursuer cropped the said farm, or any part thereof, contrary to the provisions of the said lease?

"2. Whether, in the years 1863, 1864, 1865, and 1866, or in any and which of the said years, the pursuer cropped the said farm, or any part thereof, contrary to the provisions of the said lease; and whether, in respect of the said miscropping, the pursuer is indebted and restingowing to the defender, under the said lease, in the sum of £250, or any part thereof?"

The Lord Ordinary (KINLOCH) reported the case.

BALFOUR (CLARK with him) for respondent, objected to the relevancy of the action, in respect that there was no allegation of material increase of game since the commencement of the lease, and no allegation that the stock of game at that time was more than a fair average stock; and contended that the action was excluded, because the tenant had departed from the mode of cropping prescribed by the lease.

WATSON and ASHER, for advocator, were not called on.

LORD PRESIDENT—I don't think there is any difficulty in this case. The first objection taken by the defender is, that the averments of the pursuer are irrelevant, and his ground for that is, that they don't show a sufficient contrast between the condition of the farm at the time when the lease was entered into and the time when the damage was done. All I shall say is, that the third, fourth, and fifth averments are quite sufficient for that purpose. The third says [reads, *ut supra*]. Considering the date of the lease, the pursuer could not be expected to say more. All he can do is to show that at that time there was no such thing as damage done by game. He avers, in contrast to that time, that on the defender [*reads* cond. 4, &c]. Therefore, so far as that objection is concerned, there is no foundation for it.

It is said next that this claim is excluded by the admissions made by the pursuer in answer to the defender's statements five and seven, the admissions being represented as admissions of miscropping. I give no opinion as to the effect of proof of miscropping. It would be a very important question at the trial; but I think there are no such admissions as to exclude the pursuer's claim. The miscropping of the farm may be a most important element in the evidence of the defender at the trial; for if he can show that, by miscropping, crops have been introduced which have suffered the damage complained of, he will have a good ground for saying that the pursuer cannot recover damages. But it is not necessary to go into that now. It will be open to the defender at the trial, without any counter-issues at all. As to the second counter-issue, that is simply an attempt to bring an action of damages as counter to another action of damages.

As to the form of the pursuer's issues, I should be disposed to adopt the form settled in the recent case of *Syme* v. *Earl of Moray*.

The other judges concurred.

This issue was adjusted:—

"It being admitted that in 1866 the pursuer was the defender's tenant in the farm of Balmachie, under the lease, dated 16th February 1774, No. 15 of process, and assignations thereof, Nos. 16, 17, and 18 of process, and had right to the crops grown on the said farm in the said year:—

"Whether, in 1866, the defender had upon the said farm an unreasonable and excessive stock of game of various kinds, beyond what existed thereon at the date of the lease, whereby the crops in the fields mentioned in the schedule, or in one or more of them, were destroyed or injured, to the loss, injury, and damage of the pursuer?

"Damages, £250."

Here followed Schedule.

Agents for Pursuer—G. & J. Binny, W.S.

Agents for Defender—Gibson-Craig, Dalziel, & Brodies, W.S.

Wednesday, February 19.

YOULE *v.* COCHRANE AND OTHERS.

Ship—Freight—Charter-party—Agreement—Lien—Shipmaster. A chartered a ship for two years. He then "sub-chartered" it to B for carriage of a cargo to Rio at a stipulated freight, agreeing with B that one-third was to be paid on the sailing of the ship, and the rest at Rio. The cargo was loaded, and one-third of the freight paid by B to A. On arrival of the ship

at Rio, the consignee paid to the master the full freight. In an action by B, the shipper, against the owners for repetition of one-third of the freight paid by the consignee, paid, it was alleged, in ignorance of the previous payment to A,—*Held* that the owners were not bound to repeat, no more having been paid to them (or their master as representing them) than they were entitled to, they not being bound to deliver the cargo until payment of the full freight.

In November 1863 Kitto chartered from the defenders their ship "Marcellus" for a period of twelve months, with liberty to retain the ship for the extended period of twenty-four months. In February 1865 he entered into a sub-charter with Youle to convey a cargo of coals from Cardiff to Rio de Janeiro, freight at the rate of 27s. per ton, to be paid thus: "One-third in cash on sailing from Cardiff, remainder on right and true delivery of cargo, in cash at current rate of exchange, or by good and approved bills on London, at captain's option." The coals were put on board, and the master signed a bill of lading, which bore that the cargo was to be delivered at Rio to the consignee or his assignees, he or they paying freight for the same, and other conditions as per charter-party. Youle paid to Kitto £207, being one-third of the freight of the cargo, payable under the sub-charter-party, and there was endorsed on the bill of lading a receipt, signed by Kitto, in these terms:—"Received on account of freight the sum of Two hundred and seven pounds shillings and pence, which I agree to have deducted from the same on settlement hereof." The ship sailed from Cardiff and arrived at Rio, and the consignee paid to the master the full freight for the cargo.

The shipper, Youle, now brought an action against the owners for repetition of £207, alleging that the consignee, in settling the freight-account with the master at Rio, had overlooked the fact that one-third of the freight had already been paid at Cardiff, and had by mistake paid the full freight.

The defenders contended that, under the charter-party between them and Kitto, in respect of which a sum exceeding the freight above mentioned was due, they were entitled to retain the cargo from Cardiff to Rio until payment of the freight was received by the captain for them, and the freight having been paid and the cargo delivered, they were not bound in repetition of the freight; and that it was *ultra vires* of the shipper and Kitto, by any arrangement of the nature founded on, to defeat the owners' lien over the cargo.

Issues were proposed, but a joint minute of admissions was afterwards lodged, admitting, *inter alia*, that the master knew the terms of the sub-charter, and knew of the payment of £207 to Kitto at Cardiff when he received payment at Rio; and that the consignee settled the freight account in ignorance that the said sum had been paid to Kitto, and in the belief that no sum had been previously paid.

The case was argued on the record and documents and joint-minute.

A. Moncrieff and Gloag for pursuer.

Clark and Shand for defenders.

Lord President.—This action is raised for repetition of £207, which is one-third of the freight stipulated to be paid by the pursuer to the defender under a contract of affreightment for the carriage of goods from Cardiff to Rio de Janiero, and the ground of action is, that that was an overpayment, the freight being overpaid to the extent of one-third. I must take leave to say, that the facts on which this question depends are not satisfactorily before us, and but for the circumstance, that the sum is not a large one, I should have been very much disposed to have the facts brought before us in a more satisfactory form. But I think we have enough in the record, and minute of admissions, and contracts of affreightment, to enable us to decide the case.

The owners of this vessel contracted, through their master, to charter her to Mr Charles Kitto. That charter party is dated 18th November 1863. The vessel is chartered in what may be called the usual way, that is, the entire use of her is given to the charterer with the services of the master and crew. But there is no surrender of possession by the owners. They remain in possession through the master and crew, their own servants. The entire use of the vessel is given to the charterer for twelve months, and he is bound to employ it for that time, but he is at liberty to retain her for a period of, in all, twenty-four months beyond this time. The freight stipulated under this charter party is 18s. 6d. per registered ton for every calendar month, part of a month being remunerated in proportion. And then comes the usual clause with regard to bills of lading, which is expressed in these terms:—"The captain to sign bills of lading on any freight therein mentioned, without prejudice to this charter, the captain having a lien on the cargo for all freight, dead freight, and demurrage." Now, the meaning of all this is, that, notwithstanding the rate of freight in this charter-party, contracts of affreightment may be made by the captain, as representing the charterer, with parties whose goods are to be conveyed, at rates that may be got for the time. But that is without prejudice to this charter-party, and is not to interfere with the rate stipulated. The captain has a lien for all freight, dead freight, and demurrage. It matters little what is the precise meaning of these words, for the right of lien by possession of the vessel is as good at common law as by a special clause in the charter-party. The captain is to have a lien in both characters, as representing both the owners and the charterers. There is one other clause to which it may be right to refer. "The vessel to be consigned at all loading and discharging ports to charterers or their agents, free of all commission abroad." The object of that clause is to prevent the agent or consignee of the charterer abroad from having any charge they could deduct from the freight at the port of discharge, and so to enable the master to recover the whole freight as a condition of delivery of the goods. "But paying a consignment commission of 2½ per cent. in London on all freight carried under this charter for ship's benefit." All that is plain, and if the ordinary course had been followed, the present question could never have arisen. The ordinary course, when the charterer wishes to load the goods of another shipper, is to frame ordinary contracts by bills of lading between the master and the shipper. But there is interposed here between the charter-party and the bill of lading, a document called a "sub-charter," a name I never heard before. It is not a charter-party, for that can only be made between the owners, or the captain as representing them, and the charterer, but this is between the charterer and somebody else. It is a kind of copy of a sub-lease, but as the charterer is not in the position of a lessee, he cannot convey to a sub-lessee. This is an innominate agreement between the charterer and Youle, by which, for a certain voyage in the course of the time for which the

vessel is in the hands of the charterer, Youle was to have the exclusive use of the vessel. He was to fill the vessel as shipper. But that is not binding on the owners or master for neither of them are parties to it. And therefore, it is not properly a contract of affreightment at all, for no one is bound to carry the goods under this agreement. The vessel is not bound at all; the agreement might have stood for ever without any effect, had it not been for the subsequent bills of lading signed by the master. This agreement makes certain provisions that the rate shall be 27s. per ton, one-third to be paid in cash on sailing from Cardiff, and the remainder on delivery of the cargo. It appears to me, that if either the owners or the master had been asked to agree to that stipulation, they would have refused; for that is a plain interference, to the extent of one-third, with the right of lien belonging to the owners and the master. They could not have been called on to agree to such a stipulation. But then came the bill of lading, and it is said that, under it, this condition of the agreement between Kitto and the pursuer is adopted and made part of the contract of affreightment expressed in the bill of lading. The words relied on are, "that the goods are to be delivered at Rio to the consignee or his assigns, he or they paying freight for the same, and other conditions as per charter-party." It is said that means that the captain, in signing this bill of lading, assented to the condition of one-third of the freight being paid at the port of loading or sailing from Cardiff. I do not think that is the fair or true meaning of the words. I think the only reference made to the private agreement is for the rate of freight, and the other condition prestable or performable by the consignee or his assignees. No such general words, which are explained sufficiently by the meaning I have given, can be construed as importing into this contract of affreightment anything so entirely subversive of the right of the owner as would be imported if we gave effect to the contention of the pursuer.

That being the nature of the contract, the question is, what is the effect of what was done at Rio? That involves the question, what were the rights of the parties on the arrival of the vessel at Rio? It appears to me that the right of the master of the vessel, as representing the owners, was to hold the goods, and to refuse delivery until the full amount of freight stipulated by the bill of lading was paid. Certainly, the goods of the pursuer, under this contract of affreightment in the bill of lading, were not to be made liable in virtue of the owner's lien for anything but their own freight, but that is of no consequence in the case. The admission of the defender is that the consignee at Rio paid the whole amount of freight "in ignorance that the said sum of £207 had been paid to Kitto at Cardiff, on account of freight, payable under charter-party, No. 9 of Process, and in the belief that no sum had been previously paid." Now, if it were necessary to go into this, I think this ignorance and this belief were somewhat strange in the circumstances. The bill of lading, which we have before us, has on its margin a receipt at Cardiff for the £207. Whether that was on the bill of lading sent to the consignee was not stated. If it was, then the ignorance and belief of this consignee arose from his not reading this addition on the margin. If it was not on his copy of the bill of lading, he is at least in this position, that if he cannot from it ascertain what he must pay as freight, he must go elsewhere, and if he had asked how and where the rate was stipulated, he must have arrived at a knowledge of this sub-charter, in which is expressed not only the rate, but the way in which it is to be paid. So that this consignee, if really in ignorance, was in a position to have ascertained the facts with a very little trouble. But that is not of much importance, for the master was entitled to retain the cargo until the entire freight was paid. That was the right of his owners, and therefore his right; and, therefore, if the consignee had insisted on delivery of the cargo on payment of two-thirds of the freight, the master would have been entitled to resist that demand. It follows that the payment actually made was no more than the master was entitled to demand, and therefore this action cannot lie. Therefore I am for assoilzing the defenders.

Lord Curriehill—I have no difficulty in this case. By charter-party this vessel was chartered for a period of two years, on the conditions contained in the charter-party, and by one of these conditions the charterers are bound to pay the captain the sum there mentioned for freight. This vessel, in the course of the period to which this charter-party related, arrived at Rio, and, according to the terms of the charter-party, the charterer, Kitto, and those acting for him, were bound to pay the freight due at that time. The freight contained in the charter-party was then due and payable. The owners, besides having the personal obligation of Kitto, had a lien on the cargo carried to Rio, and they were entitled to retain until they got payment of the debt owing to them. That was their right under the only charter-party to which they were parties. They make a claim in terms of the charter-party, and the full amount is paid to them. The question is, is there any ground in law why they should repay that sum, or any portion of it? My opinion is, that if the consignee had declined to pay the freight at Rio, the owners would have been entitled to retain the cargo at Rio, and to sell it for payment of the whole sum. Nothing had occurred to discharge their personal claim on Kitto, or their lien in security of the freight. They got nothing but what was their own, and I see no ground in law on which it can be contended, with any chance of success, that they must make any repayment of the money they received. If the case had been raised at Rio, that would have been their right to get payment, and the case is *a fortiori* where they had actually got payment. With regard to the transaction between the charterer and Youle, the owners were no parties to it. Kitto seems to have stipulated that part of the freight should be advanced to him, the debtor of the owners. But was the captain bound to think that his owners would give up their claim on Kitto, or their lien? The captain, even supposing he knew of this private arrangement, was entitled to think that Kitto had made arrangements by which the whole freight would be paid at Rio. There was nothing to indicate that the owners' right of lien was to be affected. In no view is there any ground for Youle's claim of repetition from the defenders. The pursuer may have had a claim for repetition, but only as against Kitto.

Lord Deas concurred.

Lord Ardmillan—I am quite prepared to concur on the first ground mentioned by all your Lordships. That ground of judgment is probably all

that is necessary to take up. If, however, we go farther, and consider the question of *condictio indebiti*, I think the argument of Mr. Clark would be entitled to very great weight, that an error in fact, arising from mere ignorance, is not enough to sustain a plea of *condictio indebiti;* the ignorance must be excusable. The only admission in the joint-minute is of ignorance; it is not admitted that it was excusable. We are accordingly left to gather from the circumstances of the case whether the ignorance of the consignee was excusable or not, that is, whether he had within his reach the means of knowing that of which he was ignorant. Looking to the bill of lading with the receipt on the margin, I think there can be very little doubt on that point. Accordingly, I should have very great difficulty in supporting the action on the ground of *condictio indebiti*. But I do not rest my opinion on that ground, but on the other. The measure of the lien is in the first charter-party, and the document called a sub-charter-party is only an assignation of the right of the charterer to the pursuer, Mr Youle, for a limited purpose. That does not interfere in any way with the owners' existing lien for freight over the cargo.

Agents for Pursuer—Wilson, Burn, & Gloag, W.S.

Agent for Defenders—L. Macara, W.S.

Wednesday, February 19.

OUTER HOUSE.

(Before Lord Mure.)

MACKAY *v.* ALLAN AND OTHERS.

Husband and Wife—Exclusion of jus mariti—*Mandatory. Held* (per Lord Mure) that a wife is entitled to sue in her own name in regard to a subject from which there is an exclusion of the *jus mariti*, and that, if she is resident in Scotland, she is not bound, in the absence of her husband, to sist a mandatory.

In this action Mrs Mackay, suing with the concurrence of her husband, Captain Mackay, sues the judicial factor on her father's trust-estate for £1500, as arrears of an annuity provided to her by his trust-deed, and expressly excluded from the *jus mariti* of her husband. When the action was raised, Captain and Mrs Mackay were resident in London, and a motion was then made by the defenders that Mrs Mackay should be made to sist a mandatory. She answered this by coming herself to stay in Edinburgh, but after a short residence here she returned to London. The defenders thereupon renewed the motion, and contended that it could not be satisfied merely by Mrs Mackay's residence here, because, even admitting, as maintained by Mrs Mackay, that the exclusion of the *jus mariti* gave her a good title to sue in her own name, and thereby the concurrence of her husband was rendered unnecessary, that did not relieve her of the duty of providing some one who might be liable for the expenses of process, if she were unsuccessful, for she herself would not be personally liable. The Lord Ordinary refused the motion, but ordered the appointment of a curator *ad litem*. His Lordship added the following note:—"The Lord Ordinary understands it to have been settled by the decision in the case of *Graham*, March 4, 1821, that when, as here, a wife sues for recovery of a fund from which the *jus mariti* of her husband is excluded, she is *in titulo* to do in her own name and for her own interest. It seems also to have been settled, in the case of *Gale*, March 7, 1857, that when a wife has an interest to sue separate and distinct from her husband, and sues with his concurrence as her administrator, it is not necessary that a mandatory should be sisted for the husband. In the peculiar circumstances of this case the Lord Ordinary sees no reason for applying a different rule; but, having regard to the state of the husband's health, it may be proper that a curator *ad litem* should be appointed to the pursuer, as was done in the case of *Gale*."

Counsel for pursuer—Mr Keir. Agents—H. & A. Inglis, W.S.

Counsel for other defenders—Mr Shand. Agent, A. Morrison, S.S.C.

Counsel for judicial factor—Mr W. A. Brown. Agent—James C. Baxter, S.S.C.

Thursday, February 20.

JURY TRIAL.

SYME *v.* EARL OF MORAY.

(Before Lord Barcaple.)

Landlord and Tenant—Excessive Preservation of Game—Reparation. In an action of damages on account of injury by game, verdict for pursuer.

In this case, Mr George Syme, residing at Couston, in the parish of Aberdour and county of Fife, tenant of the lands of Meikle Couston and Muirton Park, in the parishes of Aberdour and Dalgety, as also of the lands of Chester and Kirk Park, Hattonhead Park, and Barns Farm, also in the said Parish of Dalgety, was the pursuer; and the Right Hon. Archibald George, now Earl of Moray, and the Hon. George Philip Stuart, brothers of the late John Stuart Earl of Moray, trustees and executors appointed by, and acting under the trust-disposition and deed of settlement of the said John Stuart, Earl of Moray were the defenders.

The following is the issue sent to the jury:—

"It being admitted that the defenders' author, the Right Hon. John Stuart Earl of Moray, now deceased, was during the year 1865 proprietor of the lands of Meikle Couston and Muirton Park, in the parishes of Aberdour and Dalgety, as also of the lands of Chesters and New Kirk Parks, 'The Barns' Farm, and Hattonhead Park, also in the said parish of Dalgety; and it being admitted that the pursuer was during the year 1865 tenant under the said Earl of Moray of—(1) The said lands of Meikle Couston and Muirton Park, under agreement dated 3d June 1853; (2) the said lands of Chester and New Kirk Parks, under agreement dated 12th and 13th February 1855; (3) the said 'Barns' Farm, under agreement entered into shortly before Martinmas 1859; and (4) the said lands of Hattonhead Park, under an agreement entered into shortly before Martinmas 1862:

"Whether, during the year 1865, the said John Stuart Earl of Moray had upon the said lands, or any part thereof, an unreasonable and excessive stock of game, beyond what existed thereon at the dates of entering into the said leases respectively, to the loss, injury, and damage of the pursuer?"

Damages were laid at £270.

Balfour opened for Pursuer.

Evidence was led.