circulation of false information at such a time and in such a place was sure to produce excitement which might lead to something more, and therefore I think Moscrip was justified in going to the pursuer and suggesting that the sale should cease.

The Court pronounced the following interlocutor:—

"Find that the pursuer has failed to prove that the defenders, or any of them, illegally interfered with the sale of the cards libelled, or impeded the ordinary business of the pursuer: Therefore sustain the appeal: Recal the judgment of the Sheriff: Affirm the judgment of the Sheriff-Substitute, and decern: Find the appellents entitled to expenses in this Court and the Inferior Court, and remit to the Auditor to tax and report."

Counsel for Pursuer (Respondent) — Rhind. Agent—R. Menzies, S.S.C.

Counsel for Defenders (Appellants)—Moncreiff. Agent—D. Hunter, S.S.C.

Saturday, March 7.

SECOND DIVISION.

[Sheriff of Roxburghshire.

WOODS *v.* PATON.

Landlord and Tenant — Damages by Rabbits — Relevancy.

An action of damages was brought by a tenant against his landlord for injury done by rabbits to a portion of the way-going crop on a farm. The lease allowed liberty to the tenant to destroy the rabbits, and some time previously he had objected to the employment of a trapper by the landlord—*held* that the facts set forth were not relevant to sustain the conclusions, there being no allegations as to the introduction of or as to means taken unduly to increase the stock of rabbits on the lands.

This case came up by appeal from the Sheriff of Roxburghshire, at the instance of Alexander Wood, Denholm, and others, sons of the late Alexander Wood, sometime tenant of the farm of Littletonlees, pursuers against John Paton of Crailing, Roxburghshire, for payment of £38, 6s. 3d. The sum sued for was stated to be the price or value of a crop of barley, which was portion of the way-going crop of 1872 on the farm belonging to the pursuers, and which, they averred, was destroyed by rabbits or other game or vermin on the lands of Crailing belonging to or under the control of the defender, during May, June, July, August and September 1872, after the term of Whitsunday of that year, at which term pursuers' occupation of the farm under lease expired, and after they had been served severally with a summons of removal at the defender's instance. The sum sued for was stated to have been fixed by arbiters in a submission for the valuation of the way-going crop; and the pursuers further averred that the rabbits or game, being known to the defender to be destructive to the crop, were culpably and negligently allowed by him to destroy and injure the same after the pursuers had left the farm, and when it was consequently out of their power to protect the same properly, or employ others to do so for them. In defence, it was maintained that there was a reservation under the lease to the landlord of the game, with the exception of the rabbits, which the tenant or his sons should have liberty to destroy, but not to allow poachers or unqualified persons to go upon the land; that the pursuers were not warned away from the land on which the way-going crop was growing until the separation of the crop from the ground; that it was the pursuers' duty to have protected and looked after their out-going crop; that about seven years previously they had objected to a person employed by the defender to kill the rabbits on his property killing the rabbits on their farm, and since then no person had been employed in this way. The damage done to the waygoing crop, if any such there existed, was not, the defender further said, caused by rabbits; also, he was not a party to the alleged award, and was not represented at the valuation of the way-going crop.

The defender pleaded in point of law—(1) That there was no obligation on him to protect the pursuers' way-going crop; (2) *separatim*, the pursuers having previously refused or objected to allow him to kill rabbits on their farm, the action ought to be dismissed; and (3) The pursuers not being warned away from the land under crop until the crop was separated from the ground, there was nothing to prevent them protecting the crop.

The Sheriff-Substitute (RUSSELL), on the 23rd October 1873, pronounced the following interlocutor:—

"*Jedburgh, 23d October* 1873.—Having considered the closed record, and heard parties' procurators, before further answer allows to the parties a proof of their respective statements, with conjunct probation: Grants diligence against witnesses and havers, and appoints a meeting with parties' procurators on the 27th instant, in order to fix a time for taking the proof.

"*Note.*—It was contended on the part of the defender that there are materials for the disposal of the case without further probation, but in this view the Sheriff-Substitute cannot concur. The phraseology in which the reservation of the game is expressed in the minute of agreement, under which the lands were let to the pursuer's father, is peculiar, and possibly admits of different interpretations; but being satisfied that a proof is necessary, the Sheriff-Substitute deems it better, at the present stage of the case, to avoid all expression of opinion as to the true import of the words employed."

On appeal, the Sheriff-Depute (PATTISON) recalled the interlocutor appealed against and found as follows:—

"*Edinburgh, 6th December* 1873.—The Sheriff, having resumed consideration of the cause, recalls the interlocutor appealed from: Finds that there are not in the summons and record facts set forth relevant to support the conclusions of the action: Therefore assoilzies the defender therefrom, and decerns: Finds the pursuers liable in expenses, of which allows an account to be lodged, and remits the same when lodged to the Auditor of Court to tax and to report.

"*Note.*—The pursuers allege that they succeeded to the farm of Littletonlees as tenant under a lease to their deceased father granted by the defender, dated 23d June 1853, which expired at Whitsunday 1872; and they conclude against the defender for

payment to them of £38, 6s. 3d. as the price or value of the barley, part of their way-going crop, said to have been destroyed by 'rabbits or other game or vermin on the lands of Crailing, belonging to the defender, during May, June, July, August, and September 1872.'

"As to game other than rabbits having destroyed the barley, there is no statement on the record as to any game other than rabbits, and the document called an award upon which they found speaks of rabbits alone as the destroying animals. The Sheriff therefore reads the action as truly one for destruction caused by rabbits. As to vermin there is no specification, and it is not explained what species of vermin destroyed the barley, or how the defender is liable for the depredation of animals falling under that designation. Indeed it is not stated what animals the pursuers mean by the word 'vermin.'

"Under the lease which is founded on by the pursuers, and has been produced, the defender reserved the game on the farm except 'rabbits, which the tenant or his sons shall have liberty to destroy, but not to allow poachers or unqualified persons to come upon the land.'

"This gave the tenant a right to destroy rabbits in any way, except that it was not to be used as a pretext for allowing poachers to come on the land. The pursuers therefore had ample power to destroy rabbits, and they might have done so either by themselves or by persons employed by them for that purpose. The defender came under no obligation by the lease to do so.

"It is said, indeed, that the lease terminated at Whitsunday 1872, and that although the pursuers had right to the way-going crop, this did not allow them to go on to the lands. But this is a mistake. They had a right to go on to the lands for all purposes necessary to and connected with the growth, preservation, and reaping of their away-going crop; and if it was necessary for its preservation to go on to the lands for the purpose of protecting it from the depredation of rabbits by using lawful means for their destruction, or by persons employed by them for that purpose.

"The fact alleged, that the pursuers sold their away-going crop to the incoming tenant, makes no difference so far as regards the defender.

"It is not alleged that he was a party to that transaction, and his obligations or liabilities cannot be affected by it. Besides, that did not prevent the pursuers, or their assignees, the incoming tenant, from destroying the rabbits on the farm, so far as necessary for the protection of the away-going crop, just as under their lease they could do.

"But it is not said that the barley referred to in the action was destroyed by rabbits on the farm of Littletonlees: on the contrary, it is said to have been destroyed by rabbits 'on the lands of Crailing, belonging to the defender,' which rabbits, it is said in the condescendence, came from a fox cover, and also from the policies and plantations of the defender outside the farm.

"The action is not laid on contract. It must therefore be founded on *fault* or *culpa* of the defender. What is the *culpa*? It is said to be the failure to kill the rabbits when requested to do so. But unless there was a legal obligation on the defender to kill the rabbits or vermin on his own lands, there could not be any *culpa* in his not doing so.

"Now it is nowhere laid down, and the Sheriff knows of no principle in law for holding, that a proprietor is bound to kill all the wild animals, such as rabbits wood pigeons, or the like, which breed naturally on his lands, under the sanction that if he fail to do so he is to be liable for all the food which they may consume on the neighbouring lands.

"What might be the case if a proprietor, after letting part of his estate to an agricultural tenant established in its immediate neighbourhood, on his own lands and for his own profit, a rabbit warren which did not exist before, or greatly increased by protection or other artificial means the quantity of rabbits usually existing on his estate, is unnecessary to consider. Nothing of that kind is alleged in this case.

"It is not said that the defender either introduced rabbits for the first time during the months of May, June, July, August, and September 1872, or that he then used any means to increase the previously existing stock of rabbits on the land. The statement in the summons and record comes to nothing more than this, that the defender did not kill the rabbits which bred on his lands so as to prevent them from going on to the neighbouring lands. The pursuers do not allege that by law an obligation to that effect lies upon him, and the Sheriff knows of no authority for such a proposition.

"The pursuers' contention, upon which the whole summons is based, comes to this, that every proprietor upon whose estate rabbits or other game or vermin breed is liable if he allows them to exist for all the food which they may consume on the lands of a neighbouring proprietor or farmer. If this were law, then the proprietor would be liable for the corn consumed by wood-pigeons, or for the poultry carried off by foxes whose holes were in his lands. In short, it is not easy to see a limit to the consequences of such a proposition. The Sheriff cannot adopt or affirm such a proposition, for which no authority is given, or exists, so far as he knows. And he therefore has no hesitation in in at once assoilzieing the defender from the action as irrelevant.

"The pursuers' liability for expenses necessarily follows."

The pursuers appealed to the Court of Session.

Authorities—*Gatherer* v. *Cumming's Exs.*, 6 Macph. 379, and Lord President there; *Inglis* v. *Moir's Curators*, 10 Macph. 274, and Lord Justice-Clerk there.

The Court unanimously affirmed the Sheriff's judgment.

Counsel for the Appellants (Pursuers)—Dean of Faculty (Clark), Q.C., and Moncreiff. Agents—J. H. Campbell & Lamond, C.S.

Counsel for the Respondent (Defender)—Watson and Darling. Agents—Mackenzie & Kermack, W.S.