cases of uncertainty and hardship may possibly arise for want of such a record, still we are not entitled to extend to the superior a protection which is not given by the Act.

Lord Mure—The practice formerly was to allow the superior's agent who prepared the charter to record it in the chartulary of the superior, and to charge all the expense of recording it against the vassal. Now, the superior's agent has nothing to do with preparing the conveyance from one vassal to another, and we cannot therefore allow him to make a charge for recording it.

The Court answered the question submitted to them in the negative.

Counsel for First Parties—M'Laren. Agent—William White Millar, S.S.C.

Counsel for Second Parties—Begg. Agents—Morton, Neilson, & Smart, W.S.

Thursday, May 19.

FIRST DIVISION.

[Lord Shand, Ordinary.

CADZOW *v.* LOCKHART.

(See *ante*, vol. xii. p. 624.)

Landlord and Tenant—Reparation—Damages—Game—Rabbits.

By the lease of a farm under which the game was reserved to the landlord it was "expressly declared and agreed that the tenant shall have no claim whatever for any damage he may sustain from game, hares, or rabbits during the lease, this being held to have been calculated upon and allowed for by him in offering for the farm." In an action of reparation for damage by rabbits—*held* (1) that the claim of the tenant was not absolutely barred, nor the landlord entirely protected by the clause in the lease; but (2) that considering the terms of the lease the increase in the number of rabbits was not here proved to be so great as to warrant a claim of reparation.

William Cadzow, the pursuer of this action, which concluded for £600 of damages, was tenant of two farms on the estate of Lee, of which the defender Sir Simon Macdonald Lockhart was proprietor, having succeeded to his brother Sir Norman in May 1870. The pursuer became tenant of one of the farms, viz., East Nemphlar, at Martinmas 1857 as to arable land, and at Whitsunday 1858 as to the houses and grass. The term of the lease was nineteen years, and the rent £155. In the lease, dated 9th and 15th May 1858, there was the following reservation:—"Reserving also to the proprietor and his foresaids the sole right to the whole game and fish of every kind within the lands hereby let, with full power to himself and to those having his permission to hunt, shoot, or fish and sport on the farm without liability in damages; and the tenant shall be bound to preserve the game of all kinds to the utmost of his power, to interrupt poachers and unqualified persons, and to give information of them to the proprietor and his foresaids, or those acting for him or them; and it is hereby expressly declared and agreed that the tenant shall have no claim whatever for any damage he may sustain from game, hares, or rabbits during the lease, this being held to have been calculated upon and allowed for by him in offering for the farm."

The pursuer became tenant of the other farm, viz., West Nemphlar, at Martinmas 1862 as to the land under crop, and at Whitsunday 1863 as to the houses and grass. The lease was for seventeen years, and the rent was £54. In this lease the game clause was as follows:—"Reserving also to the proprietor and his foresaids the sole right to the whole game, including hares and rabbits of every kind, and to all the fish in the rivers and burns within the lands hereby let, with full power to himself and to those having his permission to hunt, shoot, or fish and sport on the farm, without liability in damages; and the tenant shall be bound to preserve the game of all kinds, including hares and rabbits, to the utmost of his power, and to interrupt poachers and unqualified persons, and to give information of them to the proprietor and his foresaids, or those acting for him or them; and it is hereby expressly declared and agreed that the tenant shall have no claim whatever for any damage he may sustain from game, hares, and rabbits during the lease, this being held to have been calculated upon and allowed for by him in offering for the farm."

The two farms adjoined one another and extended along the Clyde, a strip of ground belonging to the defender, and covered with copse and brushwood, being interposed between them and the river.

The pursuer averred, *inter alia*—"At the dates of the leases foresaid there were few or no rabbits on the said farms or in the said strip of ground mentioned in the last article. For a number of years back, however, and in particular since the succession of the present defender in the year 1870, the said strip of ground has been turned into a rabbit preserve; and in consequence the pursuer's farm has been so infested with rabbits as to make the profitable occupation of his land impossible. The stock of rabbits in said strip of ground and in the pursuer's farms has been unduly and unreasonably increased year by year by the defender's predecessor and by the defender; and the said increase has been permitted and fostered for purposes of profit, the proprietor having for many years derived, and still deriving, a large annual revenue from the rabbits on his estate, and in particular from the rabbits on and adjacent to the pursuer's farms. From the date of the defender's succession to the present time the pursuer has suffered loss, injury, and damage from the foresaid undue increase of rabbits on his said farms to the extent of not less than £120 per annum, or in all £600, as concluded for in the summons. From the year 1871 inclusive the pursuer has had said damage carefully ascertained and estimated every year." It was alleged by the pursuer that "he had not ceased to complain to the defender, or those representing him, of the injury sustained," and that he had intimated to his landlord the claims of damage which he was now seeking to enforce. In consequence of the loss thereby sustained, the pursuer's rents from Whitsunday 1870 had not

been paid in full, and a large balance was due to the defender.

The defender denied that he had allowed the rabbits to increase for the purpose of profit, and alleged that he had trapped them on the pursuer's farm to prevent damage, and that they were not more numerous than at the pursuer's entry. He further denied that the pursuer had made any complaints of injury.

A proof of these averments was allowed, the purport of which, so far as material to the case, sufficiently appears from the opinions delivered by the Judges.

The Lord Ordinary thereafter pronounced the following interlocutor:—

"Having considered the cause, finds that by the leases under which the pursuer holds his farms there was reserved to the proprietor the sole right to the whole game, including hares and rabbits, within the lands thereby let, with full power to himself, and those having his permission, to hunt, shoot, and sport on the farms 'without liability in damages,' and the pursuer became bound to preserve the game of all kinds, including hares and rabbits, to the utmost of his power, and that it was thereby 'expressly declared and agreed that the tenant shall have no claim whatever for any damage he may sustain through game, hares, and rabbits during the lease, this being held to have been calculated upon and allowed for by him in offering for the farm.' Finds it proved that during the years from 1870 to 1874, both inclusive, there was a great increase of rabbits on the pursuer's farms beyond the number which had formerly existed, or might reasonably have been expected, assuming that ordinary measures for keeping down the rabbits had been adopted: Finds that this increase arose in consequence of the failure of the defender the landlord by shooting, trapping, or otherwise, to keep down the number, and that the pursuer's crops suffered considerable damage in consequence; but finds that the pursuer is not entitled to payment of the sum claimed, or any part thereof, on account of damage so caused, in respect of the stipulations contained in his leases above set forth, and especially of the stipulation that he should have no claim whatever for any damage he might sustain from rabbits during the lease. Assoilzies the defender from the conclusions of the action, and decerns: Finds him entitled to expenses, and remits the account thereof, when lodged, to the Auditor to tax and to report.

"*Note.*—[*After narrating the facts.*]—At the debate at the close of the proof the defender renewed the discussion which had taken place in the Procedure Roll when a proof was ordered, founded on his second plea, to the effect that all claims of damages for injury done by rabbits to the pursuer's crops are excluded by the terms of the leases; and with the facts now fully disclosed in the evidence I have come to the conclusion that this plea is well founded. When the argument was originally maintained, before any proof had been allowed, it appeared to me that the legal question involved could not be satisfactorily disposed of on the pursuer's averments as contained in the record. The terms of article 6th of the condescendence seemed to make it necessary that evidence should be allowed; for the statement there made is that the defender from 1870 onwards had made use of a strip of property belonging to him, adjoining the pursuer's farms, and which did not appear to be connected with them, in a manner which the pursuer could not have anticipated when he entered into his leases, by having turned this ground into a rabbit-preserve, in which he had gradually increased the stock of rabbits by carefully fostering them, for purposes of profit. If this averment were proved, it appeared to me a special case might be established to which the clause excluding claims of damage would not, or at least might not, apply. I do not think, however, that a case of this special character has been established.

"Without going in detail into the evidence which has been adduced at considerable length, I may shortly state what appears to me to be its result.

"1. It has not been established that a rabbit preserve or warren was created by the defender on his property adjoining the pursuer's farms, nor that during the period for which damages are claimed rabbits were designedly preserved and fostered by the defender on the pursuer's farms, or the plantations within them, or which formed the boundaries, with the view of making profit.

"2. On the other hand, I think it is equally clear that, owing either to neglect on the part of the defender's servants, viz., his gamekeepers and trappers, or from the insufficient number of these servants at times when trapping was required, there was during at least the four years from 1870 to 1874, both inclusive, a great increase of rabbits, and that a serious amount of damage consequently resulted to the pursuer's crops. The plan of the farms produced, which is admittedly correct, shews that the boundary, which extends to a considerable distance along the side of the river Clyde, consists of plantations, which are all of considerable age, varying from a strip comparatively narrow to one of considerable breadth; and in addition to these several plantations of some extent run into the farm, and particularly into the parks called Orchard Park, Hakespie-hill, Level Park, and Waterside Park. The increase of rabbits was allowed to take place in the cover thus afforded, and the extent of the increase and consequent injury to the pursuer's crops has been proved to have been, in my opinion, much beyond what the pursuer could reasonably have contemplated when he entered on the farms; and indeed the injury has been so great during several years as to render it impossible for the pursuer to pay the stipulated rent from the produce of the farms. If I were of opinion that the pursuer was entitled under his leases to damages for the injury to his crops arising from an excessive increase of the stock of rabbits beyond the stock on the farms when he entered into possession, and the number which might naturally be expected to arise from the plantations or the farms—assuming that fair and ordinary measures were taken to keep them down—I should hold that the pursuer had made out a claim for the years from 1870 to 1873 inclusive, and would have estimated the damage for each of these years at from £50 to £60, which it will be observed is about a-fourth of each year's rent. By the year 1874 such measures had been taken to reduce the numbers that I am not prepared to say there was then an excessive stock in the sense now explained. The evidence of the pursuer as

to the large increase of rabbits, and the consequent injury to his crops, has been corroborated by neighbouring farmers and others, who also support his estimate of the damage sustained, by some of the gamekeepers and trappers examined, and particularly by the witness Fair, and by the returns of rabbits killed on the estate. This last evidence, which the pursuer could scarcely have anticipated he would be able to adduce, shows how little was done in keeping down the rabbits during the years following 1869, and until the end of 1873, when the evil was to a large extent removed, and materially corroborates the pursuer's other proof. The evidence in defence does not, in my opinion, to any material extent destroy the weight to be given to the proof adduced by the pursuer. The amount of damage, as estimated by the pursuer and his witnesses, is excessive in any view, because it has been stated on the principle of including the whole damage, without allowing for any stock of rabbits on the ground. But allowing for such a number as might naturally be expected—assuming ordinary measures to have been used to keep them down—deducting from the estimates of the witnesses a certain amount for exaggeration, and disallowing the greater part of the damage claimed on account of injury to pasture as not being satisfactorily proved, there remains the sum of between £50 and £60 per annum already mentioned, to which, if the pursuer were right in his view of the law, I should hold he was entitled for four years. There is a conflict of evidence as to the complaints and notice of claims given by the tenant to Mr Maclean, the defender's factor, and the proof is certainly not so satisfactory on this subject as could be desired. At the same time, I think as a whole it shews that several complaints were made, in writing as well as verbally, from time to time, accompanied by claims for abatement of rent; and although Mr Maclean does not now remember of these, or of the request by the gamekeeper Fair for assistance to keep down the rabbits, which was refused, I think this must be because, unfortunately, he did not attach sufficient importance to these matters at the time.

"I am, however, of opinion that all claims of damage at the pursuer's instance, on account of injury which might be caused to his crops from any increase of rabbits arising from the defender's failure to keep down the stock on the lands and adjoining plantations, were excluded by the terms of the leases. In no case which has hitherto occurred for decision have claims of damage been the subject of a clause so stringent in its nature against the tenant as the present. In the case of *Morton* v. *Graham*, 30th November 1867, 6 Macph. 71, the lease reserved to the landord all game and rabbits, with the exclusive liberty of shooting and sporting, 'without being liable to compensate the tenant in respect of the reservation and liberty herein expressed.' And it was remarked by the Court that the clause was one of the most stringent against the tenant that had occurred. In the present case the clause is fuller in expression, and contains stipulations more clearly excluding claims than were found in the case of *Morton*. It is in the following terms:—'Reserving also to the proprietor and his foresaids the sole right to the whole game, including hares and rabbits of every kind, and to all the fish in the rivers and burns, within the lands hereby let, with full power to himself and to those having his permission to hunt, shoot, or fish, and sport on the farm without liability in damages, and the tenant shall be bound to preserve the game of all kinds, including hares and rabbits, to the utmost of his power, to interrupt poachers and unqualified persons, and to give information of them to the proprietor and his foresaids, or those acting for him or them; and it is hereby expressly declared and agreed that the tenant shall have no claim whatever for any damage he may sustain from game, hares, and rabbits during the lease, this being held to have been calculated upon and allowed for by him in offering for the farm.'

"There is thus (1) a reservation to the landlord of the rabbits, with power to himself and those having his permission to shoot and sport on the farm without liability in damages. (2) An obligation on the tenant to preserve rabbits to the utmost of his power, and to prevent poaching on the lands. (3) There is nothing in the clause which can be read as imposing on the landlord, either expressly or by implication, an obligation to keep down the rabbits, so as to prevent an excessive increase in their numbers; and lastly, it is agreed 'that the tenant shall have no claim whatever for any damage he may sustain from rabbits during the lease, this being held to have been calculated upon and allowed for by him in offering for the farm.' The question for decision is one of construction of this clause, and it appears to me that, giving to the language used the ordinary effect which it must receive, the result is that the tenant agrees to leave himself entirely in the hands of the landlord so far as regards the keeping down of hares and rabbits. The damage which might result from game or rabbits was plainly in the view of the parties, and was the subject of a careful and distinct provision. The tenant agreed that he should have no claim whatever for such damage. He now asks that this provision should be read as if it were of a limited kind, excluding claims of damage generally, but not such clauses as might arise from an excessive stock of game or rabbits being allowed to grow up, either from active measures on the part of the landlord or the landlord's failure to keep down the burden. I see no room for this construction in the language which the parties have used. If such a limitation had been intended, it would have been expressed by some words controlling the effect of the general terms employed. In the absence of such words it is not for the Court, in construing the clause, to add a limitation which the parties have not themselves made. Both parties found on the concluding words of the clause—'this being held to have been calculated and allowed for by him in offering for the farm,' as being in favour of their respective views. Taking the clause as a whole, I think the relative 'this,' with which this part of the clause begins, must be read as referring to any damage which the tenant might sustain, and that such damage, whatever might be its amount, was a matter on which he calculated, and for which he allowed in offering for the farm; at least he agrees that this shall be accepted as the footing on which he entered into the lease, however far this may be from the fact, for it appears that the farms were

let at their full value as agricultural subjects. It was maintained on his behalf that this expression must be taken to refer to a calculation and allowance for damage from a certain quantity of game and rabbits, roughly estimated with reference to the stock on the lands at the time of entry, and to what could fairly be expected to arise from the plantations on the farms—assuming that ordinary measures had been used to keep the stock down—and that claims of damage by game and rabbits in excess of this were left open. I cannot, however, adopt this view; the words 'calculated upon and allowed for' appear to me to refer to damage not from a certain limited quantity of game and rabbits so roughly estimated, but to any damage which might occur,—the effect of the clause practically being that the tenant took his risk of the landlord keeping down the game and rabbits within reasonable bounds, and calculated on the damage he might suffer running that risk, which he may have thought very small.

"The pursuer strongly argued that it could not be readily supposed that a tenant would enter into a lease which left him so much at the mercy of the landlord, and that the Court should control or construe the expressions in the lease, so as to give to them the effect only of excluding claims of damage other than those arising for an excessive stock of game. It appears to me, however, that the terms used do not admit of this construction, and I come to that conclusion although I think at the same time that the clause gives expression to an arrangement which I should characterise as extremely improvident on the part of the tenant. It may be assumed that the pursuer thought he might trust that the landlord would not exact his full rent, and at the same time, either of design or from neglect, keep up such a stock of rabbits as would so seriously injure the crops as to render it impossible that the rent could be paid from the produce of the farms; but that being the agreement, the pursuer is left with an appeal to his landlord only. The Court has no power to modify the terms of the agreement, and the pursuer cannot maintain a right to damages of a kind for which his lease provides he shall have no claim whatever. The case in its general aspect is not unlike that of *Buchanan and Henderson and Dimmack* v. *Andrew*, decided in the House of Lords on 10th March 1873, Law Reports, volume ii. Scotch Appeals, p. 286, in which the respondent in the appeal, on the ground that his house would be thrown down by the operations of the mineral owner and his tenants, endeavoured to stop their operations. His feu-contract contained an obligation to erect and maintain a house of some value and of a specified character, but at the same time authorised the mineral owner to work out the minerals, "and that free of all or any damage which may be thereby occasioned to the feuar." The House of Lords, reversing the decision of this Court, held that the operations could not be prevented even though they should result in the house being brought down, and the opinions distinctly affirmed that the feuar had no claim of damages for injury which might arise from the removal of the minerals. All of the Judges expressed the view that the agreement to which the pursuer had been a party was improvident, but the question being one of construction, they were of opinion that the general words used gave the power which the mineral owner asserted, and that all claims of damage were renounced by the feuar. So in this case I think the lease gave the power of preserving game and rabbits, which the landlord asserted and used, and that the tenant renounced all claims of damage which might arise to him from the exercise of this right. I regret the result, for I think the tenant's position now is one of extreme hardship. This is, however, the result of the agreement into which he entered. If he had not meant to leave himself entirely on his landlord's hands he should have stipulated either that the reservation of claims of damage should be limited in its terms, or that the lease should contain an obligation on the landlord to keep down the stock of rabbits, so that it should not become excessive, to the serious injury of the crops."

The pursuer reclaimed, and argued—The clause in the lease meant that a calculation had been made of damage according to the then existing stock of rabbits. The landlord could not impose an obligation on him to preserve, and abstain himself from keeping down rabbits. There was the same case here as if the landlord had made a warren.

Authorities—*Moncreiff* v. *Arnott*, Feb. 13, 1828, 6 S. 530; *Wemyss* v. *Wilson*, Dec. 2, 1847, 10 D. 194; *Drysdale* v. *Jameson*, Nov. 30, 1832, 11 S. 147; *Wemyss* v. *Gulland*, Dec. 2, 1847, 10 D. 204; *Morton* v. *Graham*, Nov. 30, 1867, 6 Macph. 74; *Syme* v. *Lord Moray*, Jan. 14, 1868, 6 Macph. 217; *Byrne* v. *Johnstone*, Dec. 17, 1875, 13 Scot. Law Rep. 170, 3 R. 255.

The defender argued—By the clause of the lease all claims of damage were excluded unless fraud on the part of the landlord were proved. But apart from that, there was no excessive increase of rabbits, and the landlord had kept them down as far as could reasonably be required.

At advising—

Lord President—Before we come to consider the facts of this case, it is desirable to have a distinct understanding of the clause in the leases upon which the defender relies. It is substantially the same in the two leases, but I quote from that which applies to West Nemphlar. In the first place, there is a reservation "to the proprietor and his foresaids of the sole right to the whole game, including hares and rabbits of every kind, . . . with full power to himself and to those having his permission to hunt, shoot, &c., without liability in damages." In the second place, there is an obligation on the tenant "to preserve the game of all kinds, including hares and rabbits, to the utmost of his power." And in the third place, there is this express declaration and agreement, "that the tenant shall have no claim whatever for any damage he may sustain from game, hares, and rabbits, during the lease, this being held to have been calculated upon and allowed for by him in offering for the farm."

The reservation to the proprietor is of the entire game of every description, including rabbits, and it is made on the face of it for the purpose of sport. In the second place, the obli-

gation on the tenant to preserve is strongly expressed, and I need hardly say that that necessarily implies that the landlord is to co-operate with the tenant in promoting the strict preservation of the game during the currency of the lease. And then follows the clause which is specially important here, and which is undoubtedly a very stringent, and not a very usual one. The game is to be so preserved that it is perfectly obvious that damage to some extent will ensue. It was impossible that the game should be preserved as contemplated without some damage resulting to the crops, and so the question comes to be, whether it was within the contract of parties that there should be no claim for reparation however great the injury.

It was argued that the clause in the leases seemed to show that a calculation had been made as between the landlord and tenant as to what the damage was to be, and so, in so far as the damage had not been calculated on, it was claimed here. That was an ingenious suggestion, but it is not within the terms of this clause. According to these, the tenant is to have no claim for any damage, and they are quite unqualified. The words which follow are not restrictive of the first part, but are only superadded to show how completely the stipulation was carried out. That was not by making a calculation by pounds, shillings, and pence, of how much damage was to be suffered, but it simply meant this, that the damage had been taken into consideration, and had been given effect to when the lease was entered into. Now, it would be very difficult, in the face of a clause of this kind, for the tenant of this farm to maintain a claim under anything like ordinary circumstances. If there were an increase of rabbits beyond the quantity on the farm at the commencement of the lease that would not be sufficient ground for getting the better of this clause, the tenant having obviously calculated upon the damage in such a case.

But, on the other hand, I can quite understand that damage may have been sustained by the tenant to such an extent that a claim for reparation would not be barred. If, for instance, the landlord had deliberately proceeded to convert the farm, or a part of it, into a rabbit-warren, so as to make the land barren altogether, and to leave no green thing remaining, I cannot have any doubt that the tenant would have then had a remedy. I go further than that, because I think that if the landlord systematically, and not by mere oversight and partial neglect, had omitted the ordinary precaution necessary for keeping down vermin, it would be difficult to say that a tenant, after warning him of it and bringing it under his notice, would not have a claim against him. Mere inaction in the case of rabbits is a most dangerous principle on which to proceed; they are a class of animals, as everybody knows, of a very fecund nature, and in the absence of repressive measures increase at a most rapid rate. If a case of that kind were to occur, where the landlord had permitted the rabbits to multiply without check, the claim of the tenant would not be barred, nor would the landlord be protected by such a clause as this.

What is the case before us? As it stands on record it might have got the better of the clause in the lease. If the averments made in the 6th article of the pursuer's condescendence (quoted *supra*) had been established, I should have given judgment in favour of the pursuer, but when I come to look at the evidence I cannot find that the facts amount to anything like the allegations there made. The case made out upon the proof is in effect this, that in the course of the years of the lease which have already run there has been an increase in the number of rabbits, the amount of which has varied considerably—in some years it has been more, in others less. The landlord has employed trappers to keep them down, and in some years they have been more successful in doing so than in others. In such a case as that, it being clear that the amount of the rabbits had been materially increased, I should have been of opinion that, but for the clause founded on, there was a case for reparation upon the ordinary rule of law. But I do not think that a mere increase beyond the amount existing at the time the lease was entered into, although harm resulted to the tenant, would be sufficient to warrant a claim of reparation. There must be more than that.

From the proof I find that the exertions of the landlord and the keepers have not been always and uniformly the same. For instance, there had not been the same keeper, and one keeper will do more than another in trapping and killing vermin, and one season is more favourable than another for that purpose. The way in which that is managed is by killing the rabbits during the time when they are not breeding, and at a time when the invasion of the covers for that purpose is not prejudicial to other game. I cannot see that measures were not taken to keep down the rabbits. I cannot impute that to the landlord as a fault or as a failing of his undertaking under the lease. There has been an honest intention on his part to keep them down, and if the keepers have not seconded him it has not been the purpose of the landlord to fail in taking measures for their suppression.

In these circumstances, I concur with the result at which the Lord Ordinary has arrived, but not with his view of the evidence. He represents that as more favourable to the pursuer than I think it is. The case which he has found in point of fact is one that does not to my mind appear from the evidence. I do not think "there was a great increase of rabbits on the pursuer's farms beyond the number which had formerly existed, or might reasonably have been expected, assuming that ordinary measures for keeping down the rabbits had been adopted." Neither do I think that the "increase arose in consequence of the failure of the landlord . . . to keep down the number." I understand that by failure there it is meant to impute a want of duty, and if that were established I should have thought it more difficult for the landlord to avoid this claim. I think there is an increase of rabbits, but not a very large increase, and by the clause in the lease the tenant has renounced his claim for damage for such a cause.

Lord Deas—I do not concur with the Lord Ordinary in the construction he puts upon this lease. His Lordship construes it as an undertaking by the tenant not to claim damage from the landlord whatever increase there might be in the quantity of rabbits during the currency of the lease, and this construction his Lordship

repeats again and again in the note appended to his interlocutor in the strongest possible terms. He further refers to the case of *Buchanan, &c.* v. *Dimmach* (H. of L.), March 10, 1873, L. R. 2 Sc. Apps. 286, as being not unlike the present case. I think that case was a very different one; there the damage necessarily occurred in spite of the landlord, and nothing he could have done would have prevented it. The workings were perfectly regular, and the landlord could not have prevented the house from coming down, which was the result in that case. Here the landlord can prevent the result by keeping down the rabbits, and I cannot consider this lease an absolute undertaking by the tenant that in no case was he to be entitled to damages.

It is quite plain that if the landlord merely by not keeping down the rabbits were to bring about the result that every green thing upon the farm was eaten up, the tenant would not be deprived under this lease of his right to have damages. It is as impossible that he would have no claim for damage although the injury were short of absolute destruction. The leading object for which the rabbits were to be preserved certainly was that of sport, and it is not said that it was for the market or to enable the landlord to make the largest possible profit. The damage, according to the clause in the lease, is said to have been "calculated upon . . . in offering for the farm." The Lord Ordinary says that means under all circumstances, nor is it clear that he makes any exception whatever. If the landlord is absent from the country, and has made no provision for keeping down the rabbits while he is from home, the Lord Ordinary holds that there is no implication that the landlord is to keep the rabbits down, but that is, I think, implied by the fact that the tenant is not to keep them down. They are vermin apart from this lease, and there is no implication that the landlord is not to do something to keep down vermin. If the lease is to be construed according to the Lord Ordinary's view, I doubt whether it could be legally enforced; it would seem to me very like a contract *contra bonos mores*. But there is no need to go into that, because the landlord is, in my opinion, bound to keep the rabbits from being so excessive in number as to be intolerable.

While I differ as to the construction of the clause in the lease from the Lord Ordinary, I also differ from him in the view I take of the facts of the case. If the facts were what he holds them to be, and the damage done for each of three years amounted to £60, I think that, in the face of remonstrance on the part of the tenant, the claim of the latter against the landlord would be good. This clause must receive a fair construction, although it is a stronger one than has yet been under the notice of the Court. While in ordinary clauses it has been held that the landlord is not entitled to increase the amount of rabbits beyond what is reasonable, a wider meaning is to be put upon this one, and there might here be an increase which in ordinary cases would afford ground for damages, but not here. The question is, whether in point of fact there has been here an unreasonable increase such as to entitle the tenant to damages. The utmost amount of damage which the Lord Ordinary has allowed is £60. I doubt whether that estimate of loss would be entirely without remedy. It is peculiarly incumbent on the tenant to make intimation to the landlord seriously, and to urge strong remonstrances upon him against a state of things in which the rabbits are permitted so to increase. It is not proved here that the tenant made the remonstrances which were necessary under this lease.

I am quite of opinion that, looking to the terms of this lease, there has been no such excessive damage proved, in the face of remonstrances by the tenant, as to entitle him to compensation.

Lord Ardmillan—I concur generally in the result of the decision of the Lord Ordinary, and also in the result of the opinion of your Lordship now given. I would not add anything were it not that, while concurring, and, I may say, compelled to concur, in the result, my view of the case is slightly different. In an action by a tenant against the landlord for damages in respect of injury to the crop on the farm caused by rabbits, it is of the utmost importance to consider the terms of the lease. The action is substantially for breach of contract. As your Lordship in the chair explained in the case of *Morton* v. *Graham*, the claim of the tenant rests on this principle—that nothing should be done contrary to the faith of the contract; the breach of contract by the landlord is a wrong, and for that wrong, when instructed, the law recognises the tenant's right to redress in the form of damages. The lease is a mutual contract, and the rights and obligations of the parties must be ascertained by reference to the terms of the contract. Construction may be necessary, and construction of dubious or obscure language must be conducted with due regard to the principles of equity applicable to mutual contract. But, with the exception of stipulations contrary to law or *contra bonos mores*, whatever is clearly expressed in the contract must receive effect. This Court cannot make for the parties a contract different from what they have made for themselves, and cannot exclude or ignore a clearly expressed stipulation if it be not illegal or immoral.

Let us first look at this case apart from the special and peculiar clause in the lease to which your Lordship has adverted, and which forms the foundation of the legal defence pleaded by the landlord.

The injury of which the tenant complains was caused by rabbits. It is of great importance to see what were under this contract the relative positions of the landlord and the tenant in regard to rabbits on this farm. The tenant was not permitted to kill rabbits. Nay, he was taken bound to preserve them. If he could have killed them he might have protected himself. Rabbits are marvellously prolific. They multiply so rapidly that, unless kept down by steady killing, they must soon become excessive, and most injurious. Now, when the tenant is not permitted to kill, but is taken bound to preserve rabbits, and when the landlord reserves to himself the sole power to kill, then the landlord, having deprived the tenant of the power to protect himself, must either keep down the rabbits or be liable in damages for injury arising from their

material excess. Unless there be a special clause in the lease protecting the landlord from liability, the law in this respect is, in my opinion, well and conclusively settled. There are several decisions. I take the law to be as it is laid down by Lord Fullerton in the case of *Wemyss* v. *Wilson*, 2d December 1847, and by your Lordship in the chair in the case of *Morton* v. *Graham*, 30th November 1867.

If, therefore, there has in point of fact been an unreasonable and excessive increase of rabbits on this farm, that must be attributable to the landlord, because he has prohibited the tenant from protecting himself, and he has even bound him to preserve the rabbits.

On the question of increase, in point of fact, I cannot say that I have any doubt. On the one hand, I agree with your Lordship that the statements in the sixth article of the pursuer's condescendence, to the effect that the landlord turned part of the ground into a rabbit preserve or warren for purposes of profit, have not been instructed by proof. I think that statement is unfounded. On the other hand, I am quite satisfied that the rabbits have not been kept down as vigorously as they ought to have been, but that there has been a considerable and unreasonable increase of rabbits, and consequently a considerable injury to the pursuer's crop. Though this has not been effected designedly by the formation of a rabbit warren for profit, still it has been caused by the landlord's act or neglect, by his failure to keep down sufficiently the rabbits on a farm where preservation of rabbits was his purpose, and where he had deprived the tenant of the power of protecting himself.

The rent of the farm is, I think, £3 an acre, a rent by no means low, certainly not so low as might fairly have been expected if the rabbits were to be preserved by the tenant and left to be insufficiently kept down by the landlord.

Accordingly I am of opinion that, but for the clause in the lease to which I shall now advert, the tenant would have had a claim for damages in respect of injury caused by unreasonable increase of the rabbits on his farm. The law, if this clause were absent, would recognise his right. The law would in that case afford him protection. If the landlord deprives the tenant of the power to protect himself, then the landlord must be responsible, and liable in damages for injury caused by excess or unreasonable increase in the stock of rabbits. I adhere to what I stated in the case of *Morton* v. *Graham*. Apart from the special stipulation, the increase of rabbits on a farm by the act or by the failure of the landlord, where the tenant cannot protect himself, is a wrong to the tenant for which the law affords redress in the form of damages. Such increase has, I think, been here proved.

I come now to the clause in the lease. But for that clause the claim of the tenant could not, in my opinion, be altogether resisted. The facts support it to some extent, and the law recognises it to the extent instructed.

But the defender declines to make compensation, in respect of this clause, on the ground that "all claims of damages are excluded by the lease." These are the words of his statement and of his plea in law.

The clause is in the following terms:—"It is hereby expressly declared and agreed that the tenant shall have no claim whatever for any damage he may sustain from game—hares and rabbits—during the lease, this being held to have been calculated upon and allowed for by him in offering for the farm." This clause follows upon a reservation to the landlord of the exclusive right to kill all kinds of game and rabbits, and follows an obligation laid on the tenant to preserve the rabbits; and is indeed the most stringent clause for protecting the landlord from liability which I have seen. It was, as I see from the principal lease, prepared by the landlord or his agent, and it is founded on by the landlord in this action to its full extent, as in point of fact applicable to all claims of damages for injury from rabbits, and as in point of law operating to the entire exclusion of all such claims.

Now, this clause, so prepared and proposed, was accepted by the tenant. It was intended to exclude, and is pleaded as excluding, all such claims, and the words are wide enough and strong enough to have that effect. The lease has been very dexterously and carefully prepared to secure preservation of rabbits and immunity from damages, and I cannot doubt that it was intended by the landlord to meet such a case as this. The words at the end of the clause have in argument been founded on by the tenant, but they are not introduced in favour of the tenant, and do not derogate from the force and the generality of the preceding words. On the contrary, they seem to suggest a reason for the stringency and comprehensiveness of the clause. I rather think that the clause is strengthened by the added words. The word "this" in the closing sentence means, in my view, this exclusion of the claim for damage, such exclusion, or in other words, such risk to the tenant, being held to have been calculated upon and allowed for by him in offering for the farm. It means that the tenant in making his offer is held as having taken into his calculation the fact that the rabbits were to be preserved, and that his claim for damages was excluded, and the tenant is held as having offered for the farm on the footing and in the view of that exclusion. Whether, in point of fact, that was so calculated on or not, the lease bears that it was "held" as done.

So reading the clause, I come to the conclusion that it was framed to shut out this claim, and that it must be held as accepted by the tenant on the same footing. As I have already explained, I think that the tenant would be entitled to damages to a considerable amount, though not to the full amount concluded for, were it not for this clause. He has, in my opinion, certainly been to that extent wronged, and for the wrong, and to the extent of the wrong, the law would have afforded him redress had he not accepted the peculiar provisions of this lease, and particularly this clause. But he has signed the lease with this clause in it. He has accepted the clause. He has surrendered his claim. He has contracted himself out of the right which the law recognises, out of the protection which the law affords, and out of the remedy which the law provides. Either in most exuberant and confiding trust, or in most egregious folly, this tenant has by his own deed cast from him the protection

by which the law surrounded him, and placed himself as regards this matter at the mercy of his landlord. To that effect the landlord has pleaded this clause. On this record the plea for the landlord is that "all claims," not some claims, but "all claims of damages are excluded by the lease."

The Lord Ordinary's reading of the clause is severe on the tenant's claim. The landlord's own reading and pleading of the clause is precisely to the same effect. The Lord Ordinary has read it just as the landlord reads it, and just as the landlord has pleaded it.

On the whole case I feel that I have no alternative but to reject this claim of damages. The contract of lease, and this clause in the contract of lease, is clear in its import, and in its effect is conclusive, and in the face of the lease, with that clause in it, this action cannot be sustained.

Lord Mure—I have little to add. I agree with Lord Ardmillan in the opinion that this is the most stringent and strictly-worded clause which has ever come before the Court, but my opinion is that it does not necessarily bar the tenant in all cases. When the case was before us with regard to the mode of proof, I thought that if the averments in the 6th article of the condescendence were proved, the clause in the lease would not have protected the landlord. If he were to take no steps to keep them in check, to abstain from shooting or from employing keepers, and to inundate the district with more rabbits than would permit the crops to grow, I think that would be treatment such as would entitle the tenant to compensation. The law holds, in the absence of a protecting clause of the description found here, and without the necessity of proving that the increase arose from designing acts on the part of the landlord, that wherever there is a material increase the tenant is entitled to claim damages. Where a clause of this kind has been inserted, that has been done for the purpose of avoiding such a claim if in some year there has been an increase. It is well known that rabbits will breed more or less according to the seasonableness of the year, and that one set of trappers may do better than another. It is to meet the sudden rise in one year over another. For instance, in 1871 they increased more than in other years, but we see from the evidence of the keepers and ground overseer that the rabbits were kept down under the instructions of the landlord. It is proved by the gamekeeper Fair, who is a witness for the pursuer, that the rabbits were trapped and kept down both in summer and winter, and it is further proved that that is never done in summer unless with that intention. Fair was keeper from 1870 to 1873, and it appears that at first there was an increase in the number of the rabbits, but I agree with your Lordship that that increase was not such as that the landlord was not protected from its effect by the terms of this clause.

The following interlocutor was pronounced:—

"The Lords having heard counsel on the reclaiming-note for William Cadzow against Lord Shand's interlocutor of 24th November 1875, Recal the said interlocutor: Find that, having regard to the clauses of the leases libelled, excluding all claims of damages by the tenant for injury done by game or rabbits, the pursuer has not proved such an increase in the amount of game and rabbits on the farms during the years libelled as to entitle him to any decree in terms of the conclusions of the action: Therefore assoilzie the defender from the conclusions of the action, and decern: Find the defender entitled to expenses, and remit to the Auditor to tax the account thereof and report."

Counsel for Pursuer (Reclaimer)—Fraser—Balfour—Mackintosh. Agents—J. & R. D. Ross, W.S.

Counsel for Defender (Respondent)—Adam—Mackay. Agent—Hector F. M'Lean, W.S.

Saturday, May 20.

SECOND DIVISION.

[Lord Craighill, Ordinary.

COWAN *v.* SLOANE AND OTHERS.

Succession—Period of Vesting—Liferent—Postponement.

A testator provided that the residue of his estate should upon the death of his wife, or upon the death of the longest liver of two annuitants, "whichever of these events shall last happen, but not earlier, be divided equally, share and share alike, among the children of my said two sisters, and if any child or children shall have died, either before the date of these presents or before the said period of division, then their issue shall equally among them succeed to their parent's share." It was further declared that "in the case of females, whether children or the issue of children, the provision in their favour shall be exclusive of the *jus mariti*" of their husbands; and in the case both of males and females "their provision shall be either paid to themselves upon their own receipt, or secured for their behoof by my said trustees" in such way as they shall think fit.—*Held* that the residue vested at the death of the longest liver of the wife and the two annuitants, and not *a morte testatoris*.

This was an action of multiplepoinding raised by John Cameron Craig, C.A., judicial factor on the trust-estate of John Craig, clothier in Edinburgh, who died on 20th July 1857, leaving a trust-disposition and settlement, of date 24th September 1855, the 5th clause of which was in the following terms:—"The free residue and remainder of my said subjects, means, and estate shall upon the death of my said spouse, or upon the death of the longest liver of the said two annuitants, whichever of these events shall last happen, but not earlier, be divided equally, share and share alike, among the children of my said two sisters, and if any child or children shall have died either before the date of these presents or before the said period of division, then their issue shall equally among them succeed to their parent's share. Declaring that in the case of females, whether children or the issue of children, the