gether, and taking the one as explanatory of the other, I prefer to construe the phrase as equivalent to "imposed, or in the course of being levied," rather than to adopt the very strained construction of the appellant.

There is, however, another construction, but one equally fatal to the appellant. "Imposed" must, I think, be referred to the date of imposition. "Levied" may mean after the assessment has been levied and when the rate has ceased to exist. But in that case the statute contemplates two events, in both of which the sum is exigible —that is to say, during the existence of the special rate or after its termination — so that in all cases when a drain leading from premises such as are described in the Act is connected with a sewer a reasonable sum may be exacted by the Commissioners.

But we are confronted with the argument that the payment is for the use of the sewer, that this means for the future use of it, and therefore that the appellant becomes liable in a double payment for the same thing. I have to consider what is the meaning of the words "for the use of sewers" as occurring in this clause. The case contemplated by the statute is that a new benefit is obtained by lands not previously assessed, or by premises built on, enlarged, or altered. That benefit arises from the drains of such lands and premises being connected with the sewer. It is on the occurrence of this benefit that the sum becomes exigible. This was not disputed by the appellant. His point was that the connection must be subsequent to the termination of the special rate, which I have already disposed of.

But the payment is for the use of the sewer. I cannot read these words as meaning in lieu of the special rate, for there is nothing in the Act to permit of a commutation of the rate, nor to exempt any lands from an existing rate. Nor does the appellant so contend. He admits that he is liable to the special rate, and uses the words to which I am referring as aiding him in his construction of the 190th section, to the effect that nothing is due under it during the currency of the special rate, and his use of them is this—that we must adopt his construction of the words "imposed or levied," or force him to pay twice for the same thing. Yet he is not very consistent even in this argument, for in the case which he admits to fall under the section, viz., where the connection is made after the expiration of the special rate, there would be an obligation to pay for the use of sewers which had already been paid for, and to contribute a proportion of the expense of maintenance over and above the general rate.

But I think that I give consistency to the section by reading the words in question as meaning on taking the use or getting the use of sewers. The lands on which the burden is imposed are conceived of as not using the sewers, either from not being within burgh at the time when the sewers are made or from not having any or sufficient buildings to require such a use. But when the use is taken I think that there may be perfect fairness in requiring the owner to pay a reasonable sum though he is liable for the special rate as well. He takes the benefit of a sewer to the making of which he has contributed nothing or little. He has to pay the special rate in the future; but that may not fairly represent the benefit which he derives. Accordingly I think that the Legislature meant to empower the Commissioners to exact a reasonable sum as an equalising rate or payment on his taking that use. They, as charged with the interests of the burgh, and all and each of its inhabitants, are the judges of the amount, not necessarily without control, but unless their power were capriciously or oppressively exercised, it would be difficult to set aside their judgment.

LORD JUSTICE-CLERK—That is the opinion of the Court.

The Court pronounced this judgment:—

"The Lords having heard counsel for the parties on the appeal, Sustain the same: Recal the judgment of the Sheriff-Substitute and Sheriff appealed against: Assoilzie the defender John Renwick from the conclusions of the action: Find him entitled to expenses," &c.

Counsel for the Appellant—Asher, Q.C.—Sym. Agent—David Turnbull, W.S.

Counsel for the Respondent—Guthrie—Younger. Agents—Morton, Smart, & Macdonald, W.S.

Friday, June 27.

SECOND DIVISION.

[Sheriff of Dumfries.

M'COWAN *v.* RODDAN.

Landlord and Tenant—Lease—Arbitration Clause—Construction.

An agricultural lease provided, "There shall be no claim by the tenant for damages done by the rabbits on the farm in any one year unless the actual damage to his white and green crops exceeds ten pounds, but when it does exceed this sum, then the question of damage shall be referred to arbitration as after specified."

In an action by the tenant against the landlord for damage to his crop from rabbits, *held* (*diss.* Lord Rutherfurd Clark) (1) that this clause did not confine arbitration to damage done to white and green crop, and (2) that the tenant was entitled to the full amount awarded by the arbiter without a deduction of £10.

By lease dated 24th and 25th February 1875 Peter Smith, of Newtonairds, Dumfriesshire, let to John Roddan, farmer, the farm of Steilston. Mr Smith died, and was succeeded by Mrs Agnes Eason or M'Cowan as

proprietrix in liferent. The lease, *inter alia*, provided—"But saving and reserving to the proprietor from this let the exclusive right to the game, hares and rabbits on the lands hereby let, with full power to himself and those having his permission to hunt, shoot, and kill the same on the said lands, and in any turnip or potato crops thereon, without being liable in damages; . . . and it is agreed that there shall be no claim by the tenant for damages done by the rabbits on the farm in any one year unless the actual damage to his green and white crops exceeds ten pounds, but when it does exceed this sum, then the question of damages shall be referred to arbitration as after specified; . . . in all cases where in this lease matters are to be fixed by or referred to arbitration, it is understood and hereby agreed to betwixt the parties that it shall mean arbitration to two men mutually chosen, with power to them to name an oversman in the event of their differing in opinion, whose decision shall be final."

In September 1888 Roddan in the Sheriff Court at Dumfries sued Mrs M'Cowan and her husband for £71, 13s. as damages for injury done to his crops by rabbits.

The pursuer pleaded—"(1) The pursuer being tenant under the defenders, and having had his crops injured by the game, hares, and rabbits on said farm of Steilston, in regard to which the defenders reserved the sole right of hunting, killing, or taking the same, he is entitled to compensation as craved. (2) The defenders having allowed the game, hares, and rabbits to increase to an undue extent on said farm of Steilston, and said game, hares, and rabbits being reserved to them in pursuer's lease, and pursuer having been interdicted from killing the rabbits on the said farm, and having been thus debarred from protecting his crops from injury thereby, he is entitled to reparation from defenders, and decree should be pronounced as craved, with expenses. (4) The defenders having all along been unwilling to submit the damage done on the farm of Steilston by rabbits to arbitration, in terms of the clause of reference in pursuer's lease, and the pursuer having sustained the damage condescended on, the present action has been rendered necessary, and decree should be pronounced as craved, with expenses."

The defenders pleaded—"(1) The pursuer being bound by his lease to refer to arbitration the question of damage by rabbits in any one year when the same exceeds £10, this action, at least so far as regards the question of damage to the green and white crops, is excluded, and to that extent should be dismissed, with expenses. (2) The pursuer not having sustained damage to his green and white crops by rabbits to the extent of more than £10, the defenders are not liable to him in any sum therefor. (3) In any case, the defenders are not liable to the pursuer for any damage caused by rabbits to his grass lands."

Upon 17th October 1888 the Sheriff-Substitute (HOPE) found in law "(1) that by the terms of said lease the extent of damage done on the farm falls to be fixed by arbitration; (2) that therefore this action is incompetent; therefore sustains the first plea-in-law for the defenders, dismisses the action, and decerns: Finds the pursuer liable in expenses," &c.

On appeal the Sheriff (MACPHERSON), on the authority of *Ramsay* v. *Strain*, February 6, 1884, 11 R. 527, recalled these findings, and found that "if it be proved that during the year preceding Whitsunday 1888 damage was done to the white and green crops on the pursuer's farm to the extent of upwards of £10 from excessive increase of rabbits, the pursuer will be entitled to damages for all the injury done to the farm by the said cause, and the amount of the said damage will fall, in terms of the lease, to be referred to arbiters mutually chosen;" and remitted to the Sheriff, Substitute for further procedure.

Upon 2nd April 1889 the Sheriff-Substitute, after proof, found that damage was done to the green and white crops on the farm of Steilston by the rabbits to a value exceeding £10, and refused the prayer of the petition, leaving the parties to resort to arbitration.

After some further procedure the Sheriff, on appeal, in respect that it had been ascertained "that damage had been done to the green and white crops on the farm of Steilston during the year from Whitsunday 1887 to Whitsunday 1888 to a value exceeding £10 sterling, Finds that the parties are bound to refer to arbitration the amount of the pursuer's claim for damage done by the rabbits on the said farm during the said year, &c.

"*Note.*—The pursuer's claim for damage will include the damage done by the rabbits on the said farm as well as to the white and green crops."

Arbiters were ultimately appointed, and the Sheriff named an oversman, who issued this decree-arbitral upon 3rd January 1890, *inter alia*—"I find that damage was done by rabbits on the farm of Steilston during the year from Whitsunday 1887 to Whitsunday 1888 to the following amounts—(1st) To the turnip crop to the amount of £14, 10s.; (2nd) to the rye-grass crop to the amount of £1, 4s.; and (3rd) to the grass lands to the amount of £16, amounting *in cumulo* to the sum of £31, 14s. sterling."

Upon 13th February 1890 the Sheriff pronounced this interlocutor:—"Interpones authority to the decreet-arbitral; and in respect thereof, finds the defenders liable to the pursuer in the sum of £31, 14s.: Therefore decerns against the defenders for payment to the pursuer of the said sum, with the legal interest accrued since 15th September 1888: Finds the pursuer entitled to expenses, &c.

"*Note.*—Practically the only question argued was whether decree should go out for the whole sum of damages ascertained by the decreet-arbitral to have been done to the farm by rabbits, or whether decree should be limited to that sum less £10. I have seen no reason to change the view I expressed in the interlocutor of 24th December 1888, that in the event of the damage done to certain crops on the pursuer's farm

exceeding £10 the defenders would be bound to pay, in the words of the lease, for the 'damages done by the rabbits on the farm,' not merely for the excess of damage above £10. Not only is the lease antecedent in date to the Ground Game Act of 1877, but that Act specially limits its effect to leases of later date. The parties made a special bargain, and without some such clause as we have here the tenant would have been entirely at the mercy of the landlord, who had not only reserved the exclusive right of killing rabbits, but had also interdicted him."

The defenders appealed, and argued—1. They were not liable for any damage done to the grass lands by rabbits. There was a question as to whether rye-grass could be considered a white or green crop, but as the value was very small the matter was not pressed. 2. If the tenant had suffered damage to the extent of over £10 to his white and green crops the only amount he could recover was the excess over £10. The £10 was the amount of damage which he contracted to suffer to his white and green crops without compensation, and therefore it must be deducted in any claim for damages.

The respondent argued — The Sheriff rightly sent this case to the arbiters after it had been proved that the damage amounted to more than £10, although no arbiters were named—*Ramsay* v. *Strain*, February 6, 1884, 11 R. 527; *Waddell* v. *Governors of Stewart's Hospital*, *ante*, p. 815, June 21, 1890. Even if there was a reservation of the game on the farm in favour of the landlord or the game tenant the agricultural tenant was entitled to damages for the injuries to his crop if the stock of game on the farm was excessive—*Kidd* v. *Byrne*, December 16, 1875, 3 R. 255. Under the clause in the lease the damage that was to be valued was the damage done to the whole farm. The £10 mentioned there was merely a test to see if the amount of damage was serious enough to make the parties undergo the expense of an arbitration. If under £10 it was to be settled by meetings between the landlord and tenant.

At advising—

Lord Lee—This action is laid upon a lease in which there is a clause reserving to the landlord the exclusive right to the game, hares, and rabbits, with full power to himself to hunt, shoot, and kill the same, in the usual terms, and containing also an agreement in the following words—"It is agreed that there shall be no claim by the tenant for damages done by the rabbits on the farm in any one year unless the actual damage to his white and green crops exceeds ten pounds, but when it does exceed this sum, then the question of damage shall be referred to arbitration as after specified." That clause raises two questions. In the first place, whether there is to be any arbitration at all except with reference to the amount of damage done by rabbits to the green and white crops, alone excluding the grass lands? In the second place, if it should be found that the damage to the green and white crops should exceed the sum of £10, whether the tenant is entitled to get the full amount of damage as estimated by the arbiter, or whether he has first to submit to a deduction of £10.

What happened then before the Sheriffs. In the first place, the Sheriff-Substitute was of opinion that under this clause of arbitration the whole action was incompetent. That interlocutor was in my opinion very properly recalled by the Sheriff, and a proof allowed to see if the damage to the farm amounted to £10 in value. After proof, both Sheriffs decided that as the damage amounted to more than £10, recourse must be had to arbitration. At this point I think the Sheriff-Substitute made another mistake, because upon the ground that the whole question of damage had been referred to the arbiter he dismissed the action. I do not think that that was the usual or proper course to take when the subject-matter has been remitted to an arbiter. He should have sisted the action until the arbiter had issued his award. Ultimately however the parties arranged matters and named an arbiter who finally issued an award of the damage done by the rabbits, in these terms—(1st) to the turnip crop to the amount of £14; (2nd) to the rye-grass crop to the amount of £1, 4s.; and (3rd) to the grass lands to the amount of £16, amounting *in cumulo* to the sum of £31, 14s. sterling.

The first question is, whether the clause in the lease limits the pursuer to damages to his white and green crops. The reference to green and white crops shows that the clause has regard to a state of affairs in which there shall be a claim for damages by the tenant for injuries done to his farm by the rabbits. If then the test is fulfilled and the question of what is the damage done to the farm as a whole is the matter to be remitted to the arbiter, I do not think that there is anything in this clause to prevent him giving his judgment upon a claim for damage done to the grass lands. In the first place, the amount of damage to the green and white crop has to be ascertained, and if the parties are not satisfied with their own actings, then the question of damages is to be referred to the arbiter. I think that the Sheriff rightly left it to the arbiter to decide what was the amount of damage, considering the question in the view that it was the damage to the whole farm generally that was to be estimated, and not merely the injury done to the green and white crops. In that view I think the arbiter did right in considering that if damage had been done to the grass lands he was entitled to put a value upon it.

I may notice in passing that a question was raised at the debate whether damage to ryegrass could be held as being damage to white and green crop. As the value was very small—only £1, 4s. I think—the appellant did quite right in not pressing his objection, which might have raised very difficult questions.

The other question that was raised was

whether £10 was to be deducted from the sum which the arbiter has found to be due to the tenant as the amount of damage he sustained from the rabbits because of the condition in the clause "there shall be no claim by the tenant for damages done by the rabbits on the farm in any one year, unless the actual damage to his green and white crops exceeds £10." The landlord says that the meaning of that clause is that the tenant agrees to submit to damage to the extent of £10 yearly, and that if any sum is found due to him for damage done by rabbits, he can only receive the amount which is in excess of £10 for the damage done. Now, that is quite an intelligible reading of the words in the clause, but is it the meaning of the contract. In my opinion, when the condition has been purified—the damage to the green and white crops found to be above £10, and the arbiter had judged of the damage done to the farm as a whole, and found that a certain sum of money is due in respect of that damage, it would be inconsistent to say that before it could be paid, £10 must be deducted. I think that the more natural reading of that part of the clause is to take the £10 as the test of what amount of damage must have been caused by the rabbits before the question of what is the actual amount of damage can be sent to the arbiter to be ascertained. The result, therefore, is that I think the Sheriffs' final judgment is right and ought to be affirmed, so that this unfortunate result happens that this case in which there has been a great deal of what I think is unnecessary procedure comes to an end, and the defender is saddled with the expenses, a great part of which he had no part in incurring. It is unfortunate, but I see no other alternative.

Lord Rutherfurd Clark—I confess I cannot agree with the opinion expressed by Lord Lee. It appears to me that the only legitimate construction that can be put upon the words of this clause excludes the idea that damages can be claimed by the tenant from the landlord for injury to anything else than the green and white crops, and that the tenant has no claim to have the question submitted to arbitration, unless the amount of damage exceeds £10. I am therefore disposed to hold that the landlord is right in his contentions, that the arbiter was not entitled to take into consideration the damage done to the grass lands, and that the tenant is entitled to decree for the sum found due to him only after £10 has been deducted from the total amount.

Lord Justice-Clerk—I think that this is a very bad form of an arbitration clause. In my opinion the words which relate to the extent to which the damages are to be considered as being spread over the whole farm or confined to damage to the green and white crops may be read in either of the ways your Lordships have suggested. For these circumstances it is necessary to consider what is the more natural way to read them, and although I have had considerable difficulty in the matter, I have come to the conclusion that the more natural way is to read them in the way Lord Lee has indicated, and to hold that when the clause relating to damage by rabbits comes into operation the tenant is entitled to ask damages not merely for the injury done to his green and white crops, but for the injury done to his whole farm. I think that Lord Lee's view was the right one when he considered that the sum of £10 was only fixed upon by the parties as a test whether the claim for damages to be fixed by the arbiter had arisen or not. I think that the words of the clause, if read fairly, imply that the damage to be assessed is damage done not merely to the green and white crops, but to the whole farm. The words are these, "There shall be no claim by the tenant for damages done by the rabbits in any one year," and if the words "done by the rabbits on the farm in any one year" be read into the clause before the reference to arbitration, it is plain that payment is to be made for damage to the whole farm, and not merely to the green and white crops.

As regards the other question raised, I think the logical sequence from what I have said is that the damages to be paid are for injuries done to the whole farm.

The Court pronounced the following interlocutor:—

> "Find that damages to an amount exceeding £10 was done to the green and white crops on the farm of Steilston during the year ending at Whitsunday 1888: Find that under the agreement of lease mentioned in the record the amount of damage done by rabbits on the farm was a question for arbitration as therein provided: Find that the said question has been decided by the decree-arbitral: Therefore dismiss the appeal, affirm the interlocutor of the Sheriff of 13th February 1890; of new ordain the defender to make payment to the pursuer of the sum of thirty-one pounds fourteen shillings sterling," &c.

Counsel for the Appellant—Jameson—C. N. Johnstone. Agents—Somerville & Watson, S.S.C.

Counsel for the Respondent—Rhind—Baxter. Agent—William Officer, S.S.C.