the irritant clause. See *Mackintosh*, 18 D. 249; *Kintore*, 23 D. 1105, 4 M'Q., H. of L. 520; *Gilmour*, 15 D. 587."

The pursuer reclaimed.

Authorities—*Lang* v. *Lang*, M'Lean & Robertson, 871; *Scott* v. *Scott*, 18 D. 168; *Rollo* v. *Rollo*, 3 Macph. 78; *Preston* v. *Heirs of Valleyfield*, 1 D. 332.

At advising—LORDS BENHOLME and NEAVES having delivered opinions for the defender in favour of the validity of the entail,—the LORD JUSTICE-CLERK said—I concur. The principle deducible from the case of *Overton* is often imperfectly or inaccurately stated. It is just this, that if a word of flexible meaning is used in a restrictive sense in one part of a deed of entail it must be read in the same sense in subsequent parts of the deed. But the case of *Overton* established no such principle. It only decided that the same construction must be applied to the term when used along with connecting words relative to the collocation in which it was formerly used. The case of *Overton* was a strict but quite logical or rather grammatical application of this rule. But where generic words are used without any qualification they must receive their generic effect; nor does it signify that in a previous part of the deed the same words have been used along with qualifying and restricting expressions. The cases of *Gilmour* and *Drummond* are clear authorities for this proposition. This case, therefore, having no such relative words, must be construed on its own terms; and the question is whether the words "all deeds done in the contrary hereof" are used in a generic or restrictive sense. The argument has been ingeniously stated, but I fail to see any reasonable meaning but one of which the words are susceptible. The clause irritates *all* deeds which may be done in the contrary hereof, that is of the entail of the prohibitions of the entail. I cannot doubt that an alteration of the order of succession is a deed done in the contrary of the prohibitions of the entail. The universality of the expression *all* deeds entirely dissociates the term from the sense in which it was previously used, and leaves the general terms to have their legitimate effect.

Their Lordships adhered to the Lord Ordinary's interlocutor.

Counsel for Pursuer—Marshall and Duncan. Agents—Mackenzie & Black, W.S.

Counsel for Defenders—Solicitor-General (Clark). Agents—Gibson-Craig, Dalziel, & Brodies. W.S.

Friday, February 6.

SECOND DIVISION.

[Sheriff of Lanarkshire.

WATERSTON *v.* CITY OF GLASGOW BANK.

Cheque to Bearer—Recall—Presentation—Non-Payment.

In an action against a bank for payment, by holder of cheque payable to bearer, but which had been recalled by the granter, the bank having refused to pay—*Held* that the bank was entitled to refuse payment, a cheque being an order by a customer which may be countermanded before payment.

This was an appeal from the Sheriff of Lanarkshire. From the summons in the Sheriff-court it appeared that the pursuer, Waterston, horse dealer in Beith, had sold a horse to William Anderson, farmer, Gillespie, Glenluce, who gave in payment a cheque for £34, dated 28th June 1872, drawn upon the branch of the City of Glasgow Bank at Stranraer, and payable to bearer.

This cheque the pursuer endorsed and delivered for value to the Union Bank of Scotland, who presented it for payment to the branch of the City of Glasgow Bank at Stranraer on 1st July. The agent of the said bank at Stranraer, however, refused payment of the cheque, although there was in the bank at the time funds belonging to the drawer sufficient for that purpose.

In consequence of this refusal of payment by the defenders' bank at Stranraer, the pursuer was compelled to retire the cheque in the hands of the Union Bank, and he now brought this action against the City of Glasgow Bank for the value of the cheque, and the commission charged by the Union Bank for presenting the said cheque for payment.

The City of Glasgow Bank defended the action, and stated their defence "to be a denial of restingowing or liability for the sums sued for, or any part thereof. The said William Anderson, the granter of the draft or cheque libelled, having stopped payment thereof before it was presented to the defenders for payment as libelled, and instructed them not to pay the same. The defenders are entitled to absolvitor, with costs."

Anderson, the drawer of the cheque, not having been called as a party, the Sheriff-Substitute (DICKSON) ordered the process to be intimated to him, and pronounced the following interlocutor:—

"*Glasgow, 24th May* 1873.—Having resumed consideration of the case, parties' procurators dispensing with further debate, and no appearance being made for William Anderson referred to in the last preceding interlocutor, notwithstanding intimation of the process to him—Finds that on 28th June 1872 the said William Anderson granted and delivered to the pursuer, for value received, a bank-cheque in the following terms:—'*Stranraer, 28th June* 1872. To the Agent of the City of Glasgow Bank. Pay Mr John Waterston, or bearer, thirty-four pounds stg. Signed WM. ANDERSON—£34 stg.:' Finds that the pursuer received the said cheque from Anderson for value received, but that the cheque did not set that forth, and it is not proved that the defenders were aware of the fact till this action was raised: Finds that the pursuers having endorsed and delivered the cheque to the Union Bank at its branch at Beith, the same was presented at the defenders' branch at Stranraer for payment on or about 1st and 4th July 1872, but payment thereof was refused on both occasions, and in consequence the pursuer had to retire the cheque from the Union Bank by repaying it the amount thereof, with 1s. 8d. of bank charges: Finds that at the time of the said refusal the said William Anderson had in the defenders' branch at Stranraer funds sufficient for payment of the cheque, and that the non-payment was occasioned by his having countermanded payment before it was presented: Finds, in point of law, that the said countermand was a sufficient reason for the said refusal: Therefore, and for the reasons stated in the note, sustains the defences, and assoilzies the defenders: Finds

the pursuer liable in expenses; allows an account thereof to be given in, and remits the same when lodged to the Auditor of Court to tax and report, and decerns.

"*Note.*—There is no dispute now as to the facts in this case. 'The question of law which it raises is important, namely, whether the onerous payee and holder of a bank cheque has a good ground of action against the bank on which it is drawn, and which, having funds of the drawer sufficient to honour it, has refused to do so on presentment, on account of the drawer having countermanded it. There is no direct precedent or authority upon this question, which must therefore be decided upon principle.

"The pursuer's case (which was argued most elaborately) is laid on the grounds—(1) that the cheque being a mandate *in rem suam* of the pursuer as grantee, was irrevocable by the granter, and (2) that being analogous in this respect to a bill of exchange, it operated on presentment as a transfer of the amount in the hands of the defenders, being the drawees.

"A number of authorities were adduced to show (what is undoubted) that an assignation is in origin, form, and principle a mandate of the granter, and that it is irrevocable in consequence of being *in rem suam* of the grantee.

"A cheque (it was contended) is the same in form and substance, and should receive the same effect.

"That view receives some support from the following cases cited for the pursuer. In *Carter* v. *M'Intosh*, 1862, 24 D. B. M. 925, where a bill at three months for value received having been presented to, but not accepted by, the drawee, was held to operate as an assignation, and to be sufficiently intimated by being produced in a multiplepoinding for distributing the drawer's funds in the hands of the drawee. The Lord Justice-Clerk (INGLIS) observed:—'Not being accepted, what is its effect? In the first place, it subsisted unrecalled, because, as a mandate or precept given for value it was not a document that the granter had power to recal except with consent of the payee.' . . . 'It had this further effect, that being unrecalled and irrevocable, it was a standing and subsisting order on the drawees to pay the amount out of the money in their hands belonging to the drawer.' . . . 'An order to pay, or a precept to pay, is one of the best known forms of assignation in the law of Scotland. It imports an authority to the one party to pay, and to the other to receive the money.'

"Again, in the case of *Muir* v. *Ross*, 1866, 4 Macph. 820, where a deceased payee in a deposit-receipt from a bank left it blank endorsed in the hands of another, it was held after a proof that that other was entitled to the contents as a donation, the Court considering that delivery of the document operated as a mandate to the holder *in rem suam*, which did not fall by the death of the mandant. Lord Curriehill, in speaking of the analogy between an endorsation and an assignation, observed, 'What is an assignation? It is nothing else than a mandate *in rem suam*.'

"In *Bryce* v. *Young's Trustees*, 1866, 4 Macph. 312, where a bank cheque had been given to the payee by the granter on deathbed, but had not been presented till after the drawer's death, in a competition between the holder and the deceased's executor, the former was preferred, his possession having been proved to be partly in payment of a debt and partly as a donation.

"The last two decisions are thought to have little, if any, bearing on the present question, for they were in cases of competition, where the real question was, What were the deceased's intentions in making the document payable to the holder?—not, as here, What was the exact legal effect of the document as against the party holding the fund? In *Paul and Thain* v. *The Royal Bank*, 1869, 7 Macph. 361, where the bank were held not entitled to retention of money in their hands belonging to the drawer of a cheque, the question also arose in a competition, and was decided upon the rules as to retention as against the drawer of the cheque or any one holding it.

"In the case of *Carter* v. *M'Intosh*, also, the question arose in a multiplepoinding, the party preferred being the holder of a bill in which value and onerosity were not only presumed, but were expressed, and which was therefore presumed to be, and was held by the payee, *in rem suam*.

"But no such presumption exists in regard to bank cheques, for, as was observed by Lord President (INGLIS) and Lord Deas in *Bryce* v. *Young's Trustees*, above cited, they are often used for getting money from the bank for the drawer's own purposes.

"Indeed, it is the constant daily practice of persons keeping bank accounts to draw money therefrom for their own use on cheques in the name of their employees or members of their family; and there are many people who never draw cheques in any other way, or for any other purpose. The terms of such cheques, and of those for the use of the payee, are precisely the same.

"Undoubtedly the drawer may countermand payment of one of the former, and after he has done so the banker would pay it at his peril. But according to the pursuer's contention he must pay the latter at once, notwithstanding a countermand, although he has no knowledge and no means of ascertaining to which class the cheque belongs; and if he does not see that he can do so with safety, he must incur the trouble, cost, and perils of a litigation, the result of which will depend on a proof perhaps conflicting and dubious.

"It is thought that the legal character and effect as regards third parties of an important class of documents in constant and general use must depend on their terms, not on the result of inquiries, judicial or extrajudicial, as to the latent purpose for which they have been made.

"That is the law in the case of bills, which the drawee, relying on the presumption of onerosity in the holder, may safely pay out of the drawer's funds in his hands, leaving the drawer and payee to fight out the question as to their latent arrangements.

It is the drawee's own fault if, by refusing to accept and pay any bill on account of a countermand by the drawer, he exposes himself to an action by the payee. As he incurs no risk in paying, he is bound in law to pay.

"It is quite otherwise in regard to bank cheques, which the drawee could not pay after countermand without risk of a claim from the drawer.

"Farther, the main as well as the most usual purpose of bills is to enable the seller of commodities to draw on the buyer for the price, where not payable in cash, owing to distance between the parties, or to credit being allowed; while that of bank cheques is to enable the drawer to get his

own money at once out of the bank (usually close at hand), in which he has temporarily deposited it. This distinction is seen in the form of the document, the one being to the payee '*or order*,' the other usually (like the one sued on) to the payee '*or bearer*,' the one bearing, while the other does not, a term of payment, and usually 'value received,' and the drawee's acceptance being required for completion of the one, not of the other; and it pervades the common and statute law regarding them—as in the presumption already noticed, the necessity for protest and all the rules as to recourse, the procedure for recovery, and the different amounts of stamps required for bills compared with cheques. Material distinctions between the two classes of documents also appear in the sexennial prescription applying only to bills, and the protection of bankers paying on forged indorsations only to cheques.

"The pursuer's argument—founded on a cheque being like a bill—a request of the drawer to pay money to the holder—ignores these important differences, which are thought to be fatal to the analogy between them as regards the present question.

"The dicta on which he relied, where cheques are said to be similar to bills (cases of *Carter* v. *M'Intosh* and *Muir* v. *Ross* above cited, Thomson, Bills, 224) were not expressed with reference to the present question, and it would be straining their meaning to regard them as authorities upon it.

"On the other hand, it is more consistent with the character, object, and general use of bank cheques that the granter should have power to stop payment of them than the reverse.

"Further, supposing the pursuer's arguments were right, that the cheque in question was equivalent to an assignation, he must fail, for it was not followed by intimation or anything corresponding to that, until this action was raised—mere presentation for payment not being sufficient even on the analogy of bills (see the case of *Carter* v. *M'Intosh* above cited).

"The raising of the present action would have sufficed for the purpose. But the pursuer only avers that the defenders held funds of the drawer when the cheque was presented, not when the action was raised, which would have been necessary for that line of argument.

"There is nothing on record, or on the proof, to show that Anderson did not withdraw all his funds from the bank between these dates; and the Sheriff-Substitute could not therefore find, in point of fact, that the defenders had funds in their hands when the action was raised.

"The view of the law thus explained is supported by the fact, that no authority has been found recognising a direct right of action in the payee of a cheque against the banker, except where the latter had marked it, or otherwise indicating his undertaking to pay (see Byles on Bills, 10th ed., pp. 18, 21, also Shaw's Treatise on Bankers, p. 71).

"The Sheriff-Substitute is not moved by the argument that mercantile expediency is in the pursuer's favour. If true, it would be a consideration rather for the Legislature than for a Court of Law. But at least as good a case of expediency might be pleaded on the other side, for the pursuer's argument would deprive the customer of a bank of legitimate control over cheques he had placed in the hands of a fraudulent employee, and cheques which had been lost or stolen; while the onerous holder of a cheque has himself to blame if he accepted it in payment of a debt, seeing it was not a legal tender. Payment of it would have been rightly refused if the granter had withdrawn all the money at his credit before it was presented, and the holder's position is not materially altered by the granter having prevented payment by a countermand instead of such withdrawal.

"Before closing, the Sheriff-Substitute must notice the terms of the pursuer's intimation, No. 13 of Process, in which he protests that he holds the interlocutor which he was ordered to intimate 'incompetent,' and 'that he will object to Mr William Anderson appearing in the case should that be attempted, and will oppose any motion that may be made by him, or on his behalf, and also any attempt to state pleas other than or in addition to those stated in the record, and to any other course being adopted by the Sheriff-Substitute, or the Sheriff, except their disposing at once of the case stated in the record, as between the present pursuer and defender.'

"It is irregular and unbecoming in a litigant to comment thus on the interlocutor which he is ordered to intimate, and to make the intimation in terms calculated (although perhaps not intended) to defeat the object for which it was ordered. The Sheriff-Substitute has considerable doubt whether he should not order the paper to be withdrawn from process, and the intimation to be made anew."

The pursuers appealed to the Sheriff-Principal (BELL), who affirmed his Substitute's judgment.

The pursuer then appealed to this Court and argued—This was a cheque for value received by the drawer; it was a mandate *in rem suam*, and operated as a transfer of so much of the drawer's funds in the bank as he was necessary to meet it; it was, further, of the nature of an intimated assignation, and irrevocable.

The defenders argued—A cheque does not in all cases operate as a transfer of funds; it is merely a mandate to the bank as holder of the drawer's funds at his order, which mandate may be recalled or countermanded. The bank is bound to obey the latest order of their customer, and has nothing to do with questions between the holder of the cheque and the drawer.

At advising—

LORD JUSTICE-CLERK—It is important to observe the terms of the demand made here, and the ground upon which judgment is asked for the pursuer in the summons. The facts of the case are these—Waterston, the pursuer, had contracted to sell a horse to Anderson for £34, and received payment from him by a cheque for that sum upon the defender's bank at Stranraer, dated the 28th of June. Before, however, the cheque had been presented for payment at the defender's bank, Anderson says he discovered the horse was not conform to contract; he therefore repudiated the sale, and wrote to the bank stopping payment of the cheque. Accordingly, when the cheque was presented payment was refused. The pursuer now brings this action against the bank, on the ground that the bank had no right to refuse payment of the cheque. Indeed, so strongly does he maintain that the bank is alone responsible to him that he refused to call the granter of the cheque, Anderson, and when the Sheriff ordered intimation of the process to be made to him, the pursuer took the unusual course

of protesting against the competency of the interlocutor—there is therefore no doubt as to the position that the pursuer takes up, that the issue raised is between himself and the bank alone. The question comes then to be this—Can a cheque for value, payable to bearer, be countermanded by the granter so as to entitle the bank to refuse payment to the holder? The cheque is printed at p. 18 of the record—"Pay Mr John Waterston or bearer thirty-four pounds sterling."—Wm. Anderson." It is said that, this being an order for payment by the drawer in favour of the holder, constituted a mandate *in rem suam*, and operated a valid transfer of so much of the drawer's funds to the pursuer as was necessary to meet the cheque; that it had the effect of an intimated assignation in favour of the holder, and in this respect was equal to an inland bill of exchange, so that having been once given it could not be recalled.

Even if the pursuer had made out these points, I do not think that he could have succeeded, since the relation between the drawer and his creditor, the holder of the cheque, gives rise to claims which are by no means necessarily valid as between the holder of the cheque and the bank.

That a cheque has some of the characteristics of a bill of exchange is true—it is negotiable by passing from hand to hand—but it differs in some very important particulars. It does not imply value received, nor is the holder on the face of it an onerous assignee of the drawer.

On this point let me refer your Lordships to the case of *Macdonald* v. *Union Bank*, 2 Macph. 962. In that case a person made a draft upon his own account in one bank which was cashed by another. The draft when presented at the bank in which it was drawn was dishonoured for want of funds. The pursuer of the action had put his name to the draft as endorsee, and the bank that had paid the sum in the cheque held him liable. The action was brought for reduction of the obligation, on the ground that the pursuer had not endorsed the cheque *animo endorsandi*, and that he had received no value for it. The Court allowed a proof of the averments as to the endorsation—a manifest indication that if a cheque is like a bill of exchange in some features it yet differs from it in others, since the endorsation was not held without proof to imply value received. Lord Benholme in that case said "I think that a draft differs from a bill of exchange in this, that though both are negotiable documents, the one may be impeached upon such grounds as the pursuer here relies on. He says that he endorsed the draft *non animo endorsandi*. I think that would not be a good or relevant objection to a bill of exchange. But a draft stands in a different position. It is not ordinarily negotiable by passing from hand to hand, and it is competent to prove that a party's name was put upon a draft without a purpose of endorsation. My reason for thinking so is founded upon the English law, of which a correct exposition appears to me to be given by Chief-Justice Erle in the case of *Keene* v. *Beard*. Endorsation is the ordinary character of a bill, and an endorsement shuts the endorser's mouth. But a draft is different, for while it may be made the subject of an obligation by endorsation, the party may competently challenge the legal import of his endorsement." These observations of Lord Benholme bring out, I think, the difference between a draft and a bill in these points. And, therefore, although a cheque may be tranfered from hand to hand, it has not necessarily the effect of an assignation such as a bill of exchange bears, nor does it raise a presumption of onerosity in a question with the banker.

The position of the banker is this: he makes, on the opening of an account, a contract with the customer, by which he undertakes to pay sums from that account either to the customer or to his messenger, the holder of the cheque. But how the messenger holds the bank is not bound to enquire. The document on the face of it does not impute value, and although the bank on presentation is bound to pay if there are funds belonging to the drawer, but it is not bound to accept it as a bill of exchange.

But then the bearer is only entitled to get the money on the authority of the customer, and therefore if the cheque has been countermanded the authority is withdrawn from it, and the bank is no longer bound by it. There may be circumstances in which the duty of the bank may be to hold the money until the question of the assignation be determined, but it is not bound to pay at the risk of incurring liability.

Whether a cheque may be held equal to an assignation intimated does not arise here.

On the whole matter, I think the able and careful judgment of the Sheriff should be adhered to.

Lord Benholme—The question here is, was the bank entitled or not to refuse payment, the fact being that the draft had been countermanded? That is a more simple and easy issue than if the question had been whether or not the bank might have been entitled to hold their hand. I take a view totally exclusive of the issue whether the bank did or did not know that the cheque was for value received. This is not the issue between the pursuer and the defender. The conduct of the pursuer shows that he knew the true issue was between himself and the bank, and therefore when the Sheriff proposed to call Anderson he strenuously objected. He says—You, the bank, are bound to make payment to me without enquiry on my presenting the cheque, even though your customer had countermanded it. This is the only question raised.

Now, bills of exchange are well understood to have certain privileges as to endorsation and presumption of value, but this is not the case with drafts. A draft is a mere mandate; the banker says to customers, I will obey your instructions in writing, and I shall be bound by your latest instructions. If therefore a cheque is countermanded the countermand is the latest instruction. Every man being entitled to change his mind unless something has occured to interfere with that right, if therefore the bank should pay after recall it will do so contrary to the instructions of the customer.

I think both Sheriffs state the issue correctly, and have decided in the only way in which they could.

Lord Neaves—I concur. It is important to see what is the relation between the customer and the bank. It is a peculiar but well known relation; the bank holds the money for the use of the customer, with an obligation to make it forthcoming when required. I think a verbal instruction might be enough, though the bank might demand to have it in writing.

The cheque is the usual form in which instruc-

tions are given, but it may be recalled by contrary instructions. A cheque does not raise up any onerous relation between the holder and the bank, and therefore may be recalled. In this a cheque differs from a bill of exchange, which by law constitutes a onerous relation between the holder and the drawee. Neither is a cheque itself a proof that it is a mandate *in rem suam* of the holder, it may be an assignation in certain circumstances, but that is not the question here.

The Court dismissed the appeal, and adhered to the Sheriff's interlocutor.

Counsel for Pursuer—Solicitor-General (Clark), and Keir. Agents—Thomson, Dickson, & Shaw, W.S.

Counsel for Defenders—Watson and Mackintosh. Agents—H. & A. Inglis, W.S.

Wednesday, February 11.

SECOND DIVISION.

[Lord Shand, Ordinary.

WELWOOD *v.* HUSBAND.

Lease for 999 *years—Right to kill Game.*

Held that the right of killing game is an incident of landed property, inherent in the landlord in respect of his ownership of land, and is not conveyed to a tenant by an agricultural lease for 999 years.

The pursuer in this case was A. A. M. Welwood of Meadowbank and Garvock, who raised a summons against Robert Husband, tenant of Easter Gellet and others, in the parish of Dunfermline and county of Fife, to have it found and declared that the pursuer, as heritable proprietor of the said lands of Easter Gellet and others, has the sole and exclusive right to the game of every description which is or may be at any time in or upon or flying about the said lands, and that the pursuer has the sole and exclusive right and privilege of coursing, hunting, shooting, and killing the foresaid game; and further, that the defender has no right or title to the said game, and ought to be interdicted, &c., from killing the said game in all time coming. It appeared that there were two leases of different parcels of land, one for 999 years, and the other for 99 years. The pursuer eventually only insisted in the conclusions of his summons in regard to the lands held under the 999 years' lease.

In his condescendence the pursuer set forth that "the defender is agricultural tenant of the lands described in the first place in the summons, under a tack dated 16th June 1808, and recorded in the books of Council and Session on 23d May 1812, entered into between Robert Welwood, Esq., institute under the foresaid entail, as proprietor of said lands, and in exercise of an alleged power to that effect in the entail, on the one part, and Thomas Purves, Esq. of Lochend, as tenant, on the other part, whereby the said Robert Welwood let to the said Thomas Purves, his heirs and subtenants, the farm and lands described in the first place in the summons, and that for the space of 999 years from and after the term of Martinmas 1806; and the said Thomas Purves thereby obliged himself, his heirs, executors, and successors, to make payment to the said Robert Welwood, his heirs, executors, or assignees, of a free yearly rent amounting to 455 bolls 2 firlots 1 peck 2½ lippies of oatmeal, being equivalent to 3 bolls of oatmeal at 8 stones weight per boll for each acre, and proportionally for part of an acre; and the said Thomas Purves also obliged himself and his foresaids skilfully and properly to labour and manure the lands thereby let, and to keep them in good tid and quirod, and not to run out or destroy the same, and to leave the inclosures upon the lands in a tenantable and fencible condition at the expiry of the lease; and it was by the lease further provided and declared that if one whole year's tack-duty should remain unpaid at the end of three months after the same should have become due, the tack should be void and null, provided the proprietor should within three months thereafter signify his intention of resuming possession of the said lands by a writing under his hand, without any declarator or other process of law; and it was declared that it should not be lawful for the said Thomas Purves or his foresaids to purge the irritancy at the bar; and the said Thomas Purves obliged himself and his foresaids to remove from the land at the expiration of the tack, and to leave the same void and redd, to the effect that the proprietor might enter thereto immediately, and that without any previous warning or process of removing, as the said tack in itself more fully bears.

"The defender is tenant of the lands described in the summons in the second place, under a tack entered into between the said Robert Welwood last mentioned and Alexander Young, tailor in Limekilns, dated 9th December 1800, whereby the said Robert Welwood let to the said Alexander Young and his heirs and assignees the said piece of ground described in the summons in the second place, and that for the space of 99 years from the term of Martinmas 1800, subject to payment of the tack-duty and other conditions therein specified.

"The defender, the said Robert Husband, acquired right to the foresaid two tacks by disposition and assignation dated 29th and 30th May 1843, granted in his favour by Alexander Purves, Esq., and others, the trustees of the said Thomas Purves, who had right thereto.

"Notwithstanding that the said Robert Husband, who is simply agricultural tenant of the lands under the foresaid tacks, has no right to the said game, or to hunt, course, shoot, or kill the same, he, in disregard of complaints repeatedly made to him by the pursuer and by others on his behalf, has shot and otherwise killed and destroyed the said game illegally, and to the loss and damage of the pursuer; or at least the defender has threatened to interfere with and molest, and has interfered with and molested, those authorised by the pursuer to exercise the right of killing game."

The defender stated that the persons possessing the lands under the titles mentioned in second, third, and fourth articles of the condescendence, have always exercised the sole and exclusive right of killing the game on the lands described in the summons, and that he claimed the right to kill game on the said lands, and disputed the right of any other person to do so.

He further set forth—The lands occupied by the defender are entered in the valuation roll at a sum considerably above what is paid annually by the defender to the pursuer, and the whole public burdens on the lands are assessed according to the value of the lands as so entered. The defender some years ago claimed from the pursuer repayment