of Cluny and others opening to an heir who shall at the time be proprietor or heir of entail in possession of my said lands and others in virtue of the said deed of entail to be executed by my trustees, &c., the right of such heir is to lapse. I think that that clause with the others has plainly come into operation. I think the succession has opened to him in the sense of this deed; and unless he were to say that he declines to take advantage of that succession which is open to him—unless he were to say that now, I am humbly of opinion that he cannot claim this annual allowance. So that in every view of it I concur in the result arrived at by your Lordship.

Lord Ardmillan—Mr James Stewart Robertson succeeded, on the death of Mrs Hepburn in April 1874, to the entailed estate of Cluny, and is now in possession of that estate. The settlement and the codicil of Mr John Stewart Hepburn of Colquhalzie must be read together.

It is the distinctly declared will—the *eniza voluntas*—of Mr Hepburn, that "the estate of Colquhalzie shall be held by a series of heirs different from those succeeding to the estate of Cluny," and the accomplishment of this purpose is secured by clauses, the distinctness and effect of which are not doubted, if Mr Stewart Robertson is within the scope and meaning of the declaration that the succession to the two estates shall be different.

I am of the opinion now expressed by your Lordships. I am disposed to think that Mr James Stewart Robertson is a conditional institute under this destination, and would, unless otherwise excluded, take as such, on failure of the heirs whomsoever of the body of the maker of the deed. That is the most favourable view for the first party; and I understand that is the view which, on the strength of the authorities mentioned, has been maintained for him. It is said he is institute and not heir. But if he is not heir, he cannot claim under the eighth clause. Assuming that he is institute under the destination, and assuming also that, in a question in regard to the imposition of the fetters of an entail, the institute is distinguished from the heirs, and cannot be fettered by implication, or excluded inferentially in clauses applicable to heirs alone, I am still of opinion that under this deed and codicil he cannot succeed to both estates, and is not "the heir who would be entitled to succeed under the destination," being actually the heir in possession of Cluny, and as such specially excluded.

The words by force of which the separation of the two estates is secured, and the heir succeeding to Cluny is excluded from Colquhalzie, are, I think, too clear to admit of doubt.

In this view the provisions of the 8th clause or purpose of the trust-disposition do not confer the benefits claimed on Mr James Stewart Robertson, since he is not the heir entitled to succeed under the destination. Therefore I think that the first question should be answered in the negative, and the second in the affirmative.

Lord Mure—I am of the same opinion, and I go upon the words that your Lordship has referred to in the 8th purpose of the trust, that the party who is to get these additional allowances is the heir who would then be entitled to succeed to the particular estate. Now, the provision in the codicil puts the elder Mr Stewart Robertson on the footing of an heir who, at the death of the wife of the truster would not be entitled to succeed to the estate; and on that ground I am of opinion with your Lordship that the first question should be answered in the negative.

The Court answered the first question in the negative, and the second question in the affirmative.

Counsel for First Party—Dean of Faculty (Watson)—Kinnear. Agents—Adam, Kirk, & Robertson, W.S.

Counsel for Second Party—Balfour—Asher. Agents—Pearson, Robertson, & Finlay, W.S.

Counsel for Third Parties—Mackay. Agents—Lindsay, Howe, Tytler, & Co., W.S.

Friday, December 17.

SECOND DIVISION.

[Lord Craighill.

BYRNE *v.* JOHNSON.

Landlord and Tenant—Reparation—Game—Relief.

A let the exclusive right of shooting and sporting and killing game and rabbits over his estate to B, who was bound to maintain during the currency of the lease a fair stock of game and rabbits, and to exercise the shooting in a sportsman-like manner. In consequence of a great increase in the number of rabbits, much damage was done to the agricultural tenants, who were bound by their leases to preserve the game and rabbits, and had been interdicted from shooting the rabbits. Two of these tenants raised actions of damages against A, their landlord, who in his turn brought actions of relief against B, as game tenant.—*Held* that A was answerable to the agricultural tenants for the damage done, but that he was entitled to relief from B, who, in permitting the estate to be so overstocked with rabbits had not made a fair and reasonable use of the subject let to him.

John William Byrne of Elshieshields, in the county of Dumfries, let in 1871, upon a lease of seven years, the Holm Farm of Elshieshields to Gilbert Gillespie. The farm of Chapelcroft, upon the same estate, had been let to Mr William Kidd in 1864 upon a fifteen years' lease. Both Gillespie and Kidd were taken bound by their leases to preserve the game (rabbits and hares included) upon their farms. In November 1872 Mr Byrne let to Mr Robert Johnson, for the period of five years, the mansion-house, grounds, &c.. of Elshieshields, together with the exclusive right "of hunting and shooting, sporting, killing game and rabbits, &c." Johnson bound himself to maintain a fair stock of game and rabbits, and to exercise his right of shooting in a sportsman-like manner.

During the years 1873-4, complaints were made to Mr Byrne by the agricultural tenants of the damage done to their crops in consequence of the excessive stock of rabbits which they alleged

was maintained upon the estate of Elshieshields. On 10th December 1874 both Kidd and Gillespie brought actions against Byrne, the one concluding for £200, and the other for £124, in name of damages. To these actions defences were lodged by the landlord, who, *inter alia*, pleaded that they should be conjoined with actions of relief at his instance against the game tenant Johnson. Two actions of relief were brought by Byrne against Johnson in February 1875.

Proof in the four actions was led before Lord Craighill. It appeared from the proof that there had been a great increase in the number of rabbits upon the farms, and that much damage had been done. The game-tenant had interdicted the agricultural tenants from shooting the rabbits. Upon 25th June 1875 his Lordship issued interlocutors finding for the tenants in their actions against Byrne, and awarding to Kidd £110 and to Gillespie £65, as compensation for the injury done to their crops, while in the actions of relief, at the instance of Byrne against Johnson, he gave decree against the latter for the sums awarded to the agricultural tenants, and for the expenses of the whole four actions.

The following are the findings in law and the note of the Lord Ordinary in the actions of relief:—

"*Edinburgh 25th June* 1875.—The Lord Ordinary having heard parties' procurators on the closed record, proof adduced, and productions, and considered the debate and whole process, in the first place, finds, as matter of law, that the defender, as game tenant on Elshieshields, under the lease set forth in the record, is not entitled to keep on Elshieshields, or on any of the farms of that estate, more than a fair average stock of rabbits; and, on the contrary, that it is an implied condition of the said lease that should the defender keep more than a fair average stock of rabbits on the said estate, or on any of the farms thereof, and the pursuer in consequence be subjected in damages for injury caused to the crops of his tenants or others by this excess, the defender is bound to relieve the pursuer of these damages.

"*Note.*—The defender is game tenant of Elshieshields, and is now sued by his landlord for relief of the damages claimed from the latter by Kidd and Gillespie, two of his agricultural tenants. The question is, whether the present defender is answerable for the consequences of the alleged injuries to the tenants' crops, even on the assumption that damages must be rendered by the landlord? The answer, as the Lord Ordinary thinks, depends, in the first place, on the view to be taken of the defender's rights as game tenant—Can he increase or preserve rabbits to any extent, whatever may be the consequences to the landlord? Or is his right, so far as it can be exercised without responsibility to the landlord for the consequences, subject to an implicit condition that the stock, one year or one period with another, shall not exceed a fair average stock? The latter is the view which the Lord Ordinary has adopted, and upon which the finding as to the law of the case in the foregoing interlocutor has been pronounced. The answer to the cardinal question depends, secondly, on whether the stock of rabbits on Chapelcroft, as well as on the Holm farm of Elshieshields (Gillespie), the tenant of which is also suing his landlord for damages, was only a fair average stock, and not an excessive stock in 1873 and in 1874? As to this a long proof has been led. Kidd and Gillespie, the pursuers of the actions for damages, the present pursuer, who is defender in these actions, and the present defender, were all present and took part, and the conclusion to which the Lord Ordinary has been brought is, that the stock was far in excess of that which was a fair average stock. There may be cases in which it is necessary to guage what is a fair average stock as between a landlord and his agricultural tenants as compared with that which is a fair average stock as between that same landlord and his game tenant. But the present, as the Lord Ordinary thinks, is not one in which such a necessity exists, because in his opinion the stock of rabbits exceeded such a fair average stock as either landlord or game tenant was entitled to maintain without answering for the consequences. Probably it is not necessary, but nevertheless it may be right, for the Lord Ordinary to explain that his attention was called, and has been directed, to the cases that have been decided, and especially to the decision in *Inglis* v. *Moir and Gunnis*, 7th December 1871, 10 Macph. 204. The Lord Ordinary thinks that his view of the law, as set forth in the first finding of his interlocutor, is neither contradicted nor foreclosed by anything which was said or done in the case just mentioned, or in any other decision. Had he thought otherwise, the judgment he has given would not have been pronounced."

Byrne reclaimed against the interlocutors in the two first actions, and Johnson against those in the two latter.

Argued for the landlord—Where one tenant injures another, no claim arose against the landlord. The injury to the agricultural tenants had arisen from a violation by the game tenant of the obligations of his lease. There was an implied obligation upon him not to allow the rabbits to exceed a certain number. It was against him, therefore, that the tenants should go for redress, or otherwise he was bound to relieve the landlord of their claims.

Argued for the game tenant—There was no violation of the conditions of his lease; and he was under no obligation to relieve the landlord of claims made by tenants for damage by game or rabbits.

Argued for agricultural tenants—The landlord was the proper party against whom to bring their actions, there being no contract between them and the game tenant.

Auhorities—Hunter's Land. and Ten. i. 521; *Henderson and Thomson* v. *Stewart*, June 23, 1818, Hume 522; *Caledonian Railway Co.* v. *Greenock Sacking Co. and Clyde Sugar Refining Co.*, May 13, 1875, 12 Scot. Law Rep. 443; *Drysdale* v. *Jameson*, Nov. 30, 1832, 11 Sh. 147; *Wemyss and Others* v. *Wilson*, Dec. 2, 1847, 10 D. 194; *Broadwood* v. *Hunter*, July 19, 1855, 17 D. 1139; *Morton* v. *Graham*, Nov. 30, 1867, 6 Macph. 71; *Inglis* v. *Moir's Tutors*, Dec. 7, 1871, 10 Macph. 204.

At advising—

Lord Justice-Clerk—In regard to the actions by the agricultural tenants against the landlord, I think that as long as the landlord or his game tenant kept no more than a fair stock of rabbits, the agricultural tanents were not entitled to com-

plain of excess. But I am perfectly satisfied that in the latter part of 1873 and in 1874 the stock of rabbits was unreasonable. It was not a sporting stock. It had to be kept down by trapping and netting (which are not sport), done by the orders of Mr Johnson, who says that they came n upon him like a flood. It is impossible to say that such a stock was not largely in excess of anything in contemplation of the parties. It has been argued for the landlord that the right of the agricultural tenant to redress is against the game tenant, in respect that he has gone beyond the term of his lease. No plea to this effect is stated on record, and I think the argument is unsound. It is enough to say that the liability of the game tenant must arise *ex contractu*, and that he has no contract with the agricultural tenant. The principle which applies to cases of delict committed by one in the exercise of powers derived from another has no application. Accordingly, I think that in the question between the landlord and the agricultural tenants, the Lord Ordinary's judgment is right. There might remain some question as to the amount of damage, but I think we must regard the Lord Ordinary's judgment as to the amount as the verdict of a jury, not to be disturbed unless manifestly wrong.

The question of relief between the landlord and the game tenant is very important. The question is between the landlord, who let the subject as a sporting subject, and the game tenant who took the lease. I adhere entirely to the views which I expressed in the case of *Inglis* v. *Moir's Trustees*. When the game tenant does not come in contact with the agricultural tenant, he has nothing to do with the relations between the agricultural tenant and the landlord. He is not supposed to know the terms of the agricultural tenant's lease.

This case is remarkably different in its circumstances from that of *Inglis* v. *Moir*. In that case the agricultural tenant had right to kill rabbits over his farm. The real mischief was caused by rabbits coming from plantations outside the farm. The game tenant pleaded that he was no more bound to protect the agricultural tenant from rabbits than the agricultural tenant was bound to protect him. We find that he had not prevented the agricultural tenant from killing rabbits, and we held that the mere fact of his being in possession of the shootings was not sufficient to make him liable.

Here the circumstances are very different. Mr Johnson acquired the right of excluding the agricultural tenants from killing rabbits, and exercised that right by getting them interdicted. Having done that, he allowed the rabbits to increase to an enormous extent. Now, his liability must be judged of upon terms of his own lease. If he was making a fair and reasonable use of the subject let to him, that is enough to protect him. If his use of the subject was beyond any reason, it is clear that he is not entitled to embroil the landlord with his agricultural tenants, or to subject him in a claim of damages at their instance, beyond the contemplation of parties. At the same time, I think it right to make two observations. I am unable to accept Mr Fraser's arguments, that where a landlord grants an agricultural lease, and afterwards a game lease of the same subject, he takes the game tenant bound by all the stipulations in the agricultural lease. That would lead to the most extravagant results Where there is no contract between the agricultural tenant and the game tenant, it is as impossible to import the terms of the prior agricultural lease into the game lease as it would be to import the terms of the game lease into the agricultural lease if the game lease were the first in date. In the next place, I do not think that the obligation imposed on the game tenant to maintain a fair stock of game and rabbits implies an obligation to keep down their number to a fair stock. The object of the clause was plainly to keep up a stock for sporting purposes. It is impossible to say that if the game tenant chose to take his risk of having to relieve the landlord of a claim of damages by the agricultural tenant, the landlord could under this clause prevent him from increasing the stock of game and rabbits. It is plain that, so far as regards this clause, the game tenant is entitled to a large margin. Still I think this throws some light upon the question. The landlord is bound to protect the sporting tenant to the extent of a fair sporting stock. He undertakes that up to the extent of a fair sporting stock he will be liable. The obligation on the game tenant to maintain a fair stock necessarily implies this. But will the landlord be liable for anything beyond this? I should be disposed to say that in going at all beyond this the game tenant proceeds at his own risk. Certainly where the stock has been increased to such an extravagant extent as in the present case, far beyond anything required for sporting purposes, there is no difficulty in holding that this was not in the use of the game lease contemplated, and that the maxim applies *culpa tenet suos auctores*.

I believe that this increase of rabbits was more of an accident than anything else. Mr Johnson seems to have been afraid of having too few rabbits instead of too many, and he was not alive to the danger of their increase. Still he must bear the consequences. The landlord repeatedly warned him of the claim he was incurring. I think that the right of relief has been made out. The injuries suffered by the agricultural tenants have plainly been great, and with every desire to protect the reasonable rights even of sporting tenants, it is impossible to justify what was done by Mr Johnson.

Lords Ormidale and Gifford concurred.

Lord Neaves was absent.

The Court pronounced the following interlocutor:—

> "The Lords having heard counsel on the reclaiming note for John W. Byrne against Lord Craighill's interlocutor of 25th June 1875, Refuse said note, and adhere to the interlocutor complained of, with additional expenses, and remit to the Auditor to tax the same and to report, and decern."

Counsel for Agricultural Tenants—Pattison—Rhind. Agent—R. P. Stevenson, S.S.C.

Counsel for Landlord—Fraser—Scott. Agent—W. S. Stuart, W.S.

Counsel for Game Tenant—Dean of Faculty (Watson)—Keir. Agent—George Andrew, S.S.C.