tent of his influence on the other jurymen was we cannot say, but I agree that it is essential to the justice of the case that there should be a new trial.

LORD FRASER and LORD KINNEAR concurred.

LORD SHAND and LORD MURE were absent from illness.

The Court granted a new trial.

Counsel for the Pursuer — Rhind — Gunn. Agent—C. B. Hogg, L.A.

Counsel for the Defenders—Young—Clyde. Agents—Drummond & Reid, W.S.

Friday, March 2.

FIRST DIVISION.

[Lord Fraser, Ordinary.

CAMERON *v.* DRUMMOND.

Lease—Fence—Removal of Wire Netting by Landlord—Damage by Ground Game—Reparation.

Under the lease of a farm the landlord was taken bound to repair the fences where necessary, and it was declared that on this being done the tenant accepted of the fences on the farm as in sufficient tenantable condition and repair, and bound himself to uphold them in tenantable condition during the currency of the lease, and to leave them in the like condition at the expiry thereof. When the tenant entered upon the farm there was a wire fence lined with wire netting, which bounded the farm on one side from a plantation belonging to the landlord. The wire netting, which was intended to prevent inroads of ground game from the plantation, was, after the tenant's entry, removed by the landlord. The tenant then raised an action to have the landlord ordained to restore the wire netting, and for damages for the injury done to his crops by the ground game. *Held* that as the wire netting was delivered to and accepted by the tenant as part of the lease, and served a purpose useful to him, the landlord was bound to restore it, and was liable for the damages caused by its removal.

This was an action at the instance of Alexander Cameron, tenant of the farm of Hutcheson, on the estate of Cromlix, Dunblane, against the Honourable Arthur Drummond, proprietor of Cromlix.

The conclusions of the summons were that the defender should be ordained "to bring back and restore to its original position the wire netting removed by the defender from the wire fence which runs from the north end of the farm of Hutcheson, on the estate of Cromlix, in the parish of Dunblane and county of Perth, tenanted by the pursuer, in a south-westerly direction, and forms the march-fence between a plantation belonging to the defender and the said farm, thereafter for a short distance in a north-westerly direction, and which forms a part of said march fence, and then south-west to the farm of Crofts on said estate, partly through the hill pasture on said farm of Hutcheson, and which lies on the west thereof, and partly separating the said hill pasture from the remainder of said farm of Hutcheson, which wire netting lined the said wire fence and formed a portion thereof, or otherwise to line the said wire fence with new wire netting of the same height, quality, and dimensions," and to pay £150 damages.

By the conditions of let of the farm of Hutcheson it was stated that "the farm extends per Ordnance Survey to about 233 imperial acres, of which about 183 acres are arable and 50 pasture, all as delineated on the plan or sketch thereof shown herewith, and presently possessed by Mr Malcolm Macfarlane."

By the lease the defender let to the pursuer for fifteen years from Martinmas 1885—"All and whole the farm of Hutcheson as presently possessed by Malcolm Macfarlane." The proprietor was taken bound to "repair the fences where necessary, and sub-divide the 40 acre field with one fence; on these things being done the said Alexander Cameron hereby accepts of the buildings, fences, hedges, gates, roads, drains, ditches, and water-courses on the said farm as in sufficient tenantable condition and repair, and binds and obliges himself and his foresaids to uphold them in tenantable condition during the currency of this lease, and to leave them in the like condition at the expiry thereof, . . . and the tenant shall also be at half the expense of upholding plantation and march-fences."

The pursuer averred that previous to making an offer for the farm he had examined the fences on it, "and observed that on the west side the farm was bounded by a plantation belonging to the defender, which was closely preserved for game, but that the farm was effectually protected from inroads of ground game by a wire fence lined with wire netting, which ran from the north end of said farm tenanted by the pursuer, in a south-westerly direction, and formed the march-fence between the plantation and the farm, thereafter for a short distance in a north-westerly direction, and which formed a part of the march-fence, and then south-west to the farm of Crofts, also belonging to the defender, partly through the hill pasture of the farm of Hutcheson, which lay on the west thereof, and partly separating the hill pasture from the remainder of the farm tenanted by the pursuer. The wire fence so lined with wire netting extended to about 1000 yards. . . . The wire netting lined the wire fenee not only when the farm was examined by the pursuer with a view to becoming an offerer therefor, but when he entered into possession. As the plantation on the west side of the farm was full of ground game, it was thus the most important part of the fence, and its existence formed an important consideration affecting his becoming an offerer. On or about 9th September 1886 the defender removed the wire netting. The wire netting was about 3 feet high, and the mesh thereof about two inches wide, and formed an effectual protection against hares and rabbits getting access to the farm from the plantation." The pursuer further averred that his crops and grass had, since the removal of the wire netting, suffered seriously from hares and

rabbits which had come from the plantation.

The defender stated that the netting belonged to the defender, and was put on the fence by him in a temporary manner and for a temporary purpose, and that the defender was perfectly entitled to remove it at his pleasure. "The netting formed in no sense a part of the fence, which had been erected years before, and was an ordinary plantation fence. . . . In virtue of the provisions of the Ground Game Act 1880, the pursuer was and is entitled to protect his crops by taking and killing hares and rabbits as therein provided. If his crops have been damaged as here mentioned (which is denied), he is himself to blame for not efficiently protecting them, either by destroying the hares and rabbits or putting up wire netting at his own expense. Explained further that the landlord is not bound by the lease to fence the farm to the exclusion of ground game, and that the amount of ground game existing in the said plantation has not increased since the pursuer became tenant of the farm, and is not in excess of an average and usual stock."

The pursuer pleaded—"(1) The defender having unwarrantably, illegally, and wrongously removed the wire netting in question, ought to be ordained to restore the same. (2) In any view, the removal thereof constitutes a breach of the lease by the defender, and he ought to be ordained to restore it. (3) The pursuer having sustained loss and damage in consequence thereof, the defender is liable in reparation therefor."

The defender pleaded—"(2) The defender should be assoilzied in respect that he was perfectly entitled to remove the said wire netting, and is under no obligation to restore or replace it. (3) The pursuer having suffered no loss or damage for which the defender is responsible, the defender should be assoilzied with expenses. (4) Any loss or damage which the pursuer may have suffered having been caused by his own neglect to take measures for the protection of his crops, the defender should be assoilzied with expenses.

The Lord Ordinary (Fraser) on 18th January 1888 pronounced the following interlocutor:—"Decerns and ordains the defender within fourteen days to bring back and restore to its original position the wire-netting removed by him from the wire fence which runs, &c. . . . which wire netting lined the said wire fence and formed a portion thereof; or to line the said wire fence with new wire netting of the same height, quality, and dimensions: Further, in regard to the claim of damage made by the pursuer, allows to both parties a proof of their averments and to the pursuer a conjunct probation; appoints said proof to be taken before the Lord Ordinary, &c.

"*Opinion.*—The defender leased to the pursuer for a period of fifteen years from Martinmas 1885, 'All and whole the farm of Hutcheson, as presently possessed by Malcolm Macfarlane.' By the lease the proprietor was taken bound to 'repair the fences where necessary and subdivide the 40 acre field with one fence; on these things being done the said Alexander Cameron hereby accepts of the buildings, fences, hedges, gates, roads, drains, ditches, and water-courses on the said farm as in sufficient tenantable condition and repair, and binds and obliges himself and his foresaids to uphold them in tenantable condition during the currency of this lease, and to leave them in the like condition at the expiry thereof, . . . and the tenant shall also be at half the expense of upholding plantation and march fences.' Now at the time when the pursuer entered upon his farm there was on the west side of it a wire fence lined with wire netting which bounded the farm on that side from a plantation belonging to the defender. This wire fence and wire-netting were there when the farm was in the possession of Macfarlane. It was intended as a barrier against the inroads of game from the plantation. Now this was a material and important safeguard for the pursuer's crops, and he was entitled to rely upon the wire fence and netting being allowed to remain during his lease. He got the farm as it was possessed by the former tenant, and if the wire netting be taken away he does not get all that that tenant possessed. But the defender in the month of September 1886 did remove a considerable portion of it, and the result, as stated by the pursuer, is that the ground game have come in large numbers upon his farm and committed damage. The defender justifies his action by saying that the wire netting was his property, and consequently he was entitled to remove it at his pleasure. Now let us see how this view of the relation of the parties would answer. Ordinary fences or palings are intended to keep out the encroachments of cattle or horses. These palings are the property of the landlord, but he dare not touch them, far less carry them away, if the farm was let with these palings upon it. They are a fence against cattle; and so is wire netting a fence against ground game, and if he cannot remove the one fence he cannot remove the other; and the very stringent obligations laid upon the tenant in this case to uphold the fences imply an obligation on the part of the landlord to let these fences alone. The Lord Ordinary therefore has no hesitation in ordering the defender to replace the fences in the condition they were in when he took them away in September 1886, or if he cannot replace the identical netting, then he must give sufficient new netting.

"As regards the claim for damage, it is said to be irrelevant, because it is not stated that there is an increase in the ground game beyond the number that were upon the farm when the lease was entered into. What is stated is, that whereas the wire netting kept the ground game entirely off the farm, the removal of it has allowed rabbits to come in great numbers where there were none before. This is a perfectly relevant ground of damage. It is also argued that the claim cannot be insisted in, seeing that the tenant could have protected himself by erecting wire netting on his farm at the junction between it and the plantation. But why should he go to this expense if he has a right to insist upon the wire netting being left as it was when he took possession? Nor is the defence available in such a case as this that the pursuer is entitled under the Ground Game Act to kill all the ground game. The rabbits here are bred in a plantation to which the tenant has no access—the law as to such a case being 'that a landlord cannot both reserve covers for game preservation within or around the land which he has let for agricultural purposes, and at the same time answer such demands as this in regard to depredations by rabbits by the plea that the ten-

ant had the remedy in his own hand.'—Per Lord Justice-Clerk in *Inglis* v. *Moir's Tutors*, December 7, 1871, 10 Macph. 204. The only proper mode of extirpating them is by attacking them in the cover which shelters them, and in such circumstances the tenant's claim will lie, though he has the power of killing them if he finds them in the open."

The defender reclaimed, and argued—There was nothing in the contract to oblige the defender to allow the wire netting to remain. The words "as presently possessed" were open to reasonable construction, and were not to be applied to details—Rankine on Leases, p. 188; *Webster* v. *Lyell*, July 13, 1860, 22 D. 1423; *Critchley* v. *Campbell*, February 1, 1884, 11 R. 475. There was no obligation *ex contractu* to maintain the netting, and therefore there was no relevant averment of damage. The tenant must allege undue increase of ground game—*Wemyss and Others* v. *Wilson*, December 2, 1847, 10 D. 194, *per* Lord Fullerton p. 202. The Ground Game Act 1880 (43 and 44 Vict. c. 47) had cut off all claims of damage at the instance of tenants except in very special circumstances. The Act gave all the tenant could claim—[Lord President—I do not think the Act has much to do with this case]. But whether under the Act or at common law, if the defender used his ground fairly, and it was not averred here that there was an excessive quantity of ground game, no claim of damages could be made—*Inglis* v. *Moir's Tutors*, December 7, 1871, 10 Macph. 204.

Argued for the respondent—This wire netting was a part of the fence, and was part of the subject let to the pursuer. He was entitled to the subjects "as presently possessed by Malcolm Macfarlane." The case of *Critchley*, *supra cit.*, only decided that where there were clear words specifying the subject let, the words "as previously possessed" would not control them—*Galloway* v. *Cowden*, January 30, 1885, 12 R. 578. Even assuming that the landlord was entitled to remove the netting, he had by doing so laid the farm open to the incursions of ground game, which was not the case when the farm was let.

At advising—

Lord President—In this case the pursuer entered as tenant of the farm of Hutcheson at Martinmas 1885, and the subjects let are described in the conditions of let as extending "per Ordnance Survey to about 233 imperial acres, of which about 183 acres are arable and 50 pasture." The matter of fences is provided for in the lease, in which the proprietor is taken bound to "repair the fences where necessary, and subdivide the 40 acre field with one fence; on these things being done the said Alexander Cameron hereby accepts of the buildings, fences, hedges, gates, roads, drains, ditches, and water-courses on the said farm as in sufficient tenantable condition and repair, and binds and obliges himself and his foresaids to uphold them in tenantable condition during the currency of this lease, and to leave them in the like condition at the expiry thereof, . . . and the tenant shall also be at half the expense of upholding plantation and march fences." Now, it is admitted by both that when the pursuer examined the farm with a view to taking it, and also at the time when he entered into possession of it, there was attached to the fence dividing the farm from a certain plantation, and also on that part of the same fence between the arable land and the hill pasture, a wire netting three feet high. That fence has since been removed by the landlord, and the pursuer complains that injury has been done and a breach of contract committed. The Lord Ordinary has found in the affirmative and I am of opinion that he is right. I do not attach much importance to the description of the farm as possessed by the former tenant. I think that such words in leases, and in this lease in particular, refer more to the extent than to such a question as that of fences.

The question depends on the clause dealing with fences, and this is precise. They are first of all to be transferred from the landlord to the tenant in good condition; they are to be accepted by the tenant as they stand, and he is to maintain them, those within the farm entirely, and the march fences to the extent of one half. It appears to me that if the netting on the fence was useful to the tenant for any purpose, and was there at the time, and delivered and accepted by him as part of the lease, the landlord had no right to interfere with it. There can be no doubt that the netting was beneficial to the tenant. It is admitted that the estate carries a considerable quantity of ground game, and this netting was sufficient to prevent the ground game from encroaching on the farm. No one can doubt that this was beneficial to the tenant, and if this netting was delivered to the tenant, and if it was important and useful to him, that settles the question, because it was understood that the landlord was bound not to interfere with it. The defender says in one of his answers that it was only put by him on the fence for a temporary purpose and in a temporary manner. He does not say what that purpose was, and it is difficult to see what purpose it could serve unless to keep in the ground game. If it was put up by the defender for this purpose, and handed over to the pursuer as tenant and found useful by him, that is enough to decide the question. The landlord cannot say that he is entitled to remove it at pleasure. He says that the tenant is to blame for not keeping down the game, or that he might put up a net at his own expense. In the first place, this contemplates that the netting, if it had not been there at all, might have been put up by the tenant as a useful thing for himself. In the second place, the tenant saw it there when he took the farm, and saw its utility. Therefore I am of opinion with the Lord Ordinary that the netting must be restored, or an equivalent given, and that the pursuer is entitled to compensation for the damage he has sustained.

Lord Adam and Lord Kinnear concurred.

Lord Mure and Lord Shand were absent from illness.

The Court adhered.

Counsel for the Reclaimer—Sir C. Pearson—Dundas. Agents—Dundas & Wilson, C.S.

Counsel for the Respondent — Darling — Forsyth. Agent—James Forsyth, S.S.C.