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Thursday, December 21.

SECOND DIVISION.

[Sheriff of Aberdeen.

FRASER *v.* LAWSON.

Lease—Landlord and Tenant—Act 43 *and* 44 *Vict. c.* 47 (*The Ground Game Act* 1880), *sec.* 6—"*Ground Game*"—*Hares and Rabbits.*

Section 6 of the Ground Game Act 1880 enacts, *inter alia*—"No person having a right of killing ground game under this Act or otherwise shall, for the purpose of killing ground game, employ spring-traps except in rabbit-holes." Section 8 defines ground game to mean "hares and rabbits."

Held (*diss.* Lord Rutherfurd Clark) that section 6 applied to an agricultural tenant who had entered into his lease prior to the passing of the Act, and who had therefore no right to kill hares, but merely a common law right to kill rabbits.

Ground Game Act 1880, *sec.* 6—"*Except in Rabbit-holes*"—*Scrapings below a Wire Fence—Interdict.*

A tenant who had placed a fence of wire-netting in one of his fields to protect his crops, laid down traps in the "runs" which rabbits scraped below the fence in order to pass from one side of it to the other. The Court (*diss.* Lord Young) *interdicted* the tenant from placing such traps, being of opinion that such "scrapings" or "runs" were not "rabbit-holes" in the sense of the Act.

The Ground Game Act 1880, on the preamble, that it "is expedient in the interests of good husbandry, and for the better security for the capital and labour invested by the occupiers of land in the cultivation of the soil, that further provision should be made to enable such occupiers to protect their crops from injury and loss by ground game," . . . enacts (section 1)—"Every occupier of land shall have as incident to and inseparable from his occupation of the land the right to kill and take ground game thereon, concurrently with any other person who may be entitled to kill and take ground game on the same land—Provided that the right conferred on the occupier by this section shall be subject" to certain limitations.

Section 2—"Where the occupier of land is entitled, otherwise than in pursuance of this Act, to kill and take ground game thereon, if he shall give to any other person a title to kill and take such ground game, he shall nevertheless retain and have as incident to and inseparable from such occupation the same right to kill and take ground game as is declared by section 1 of this Act. Save as aforesaid, but subject as in section 6, the occupier may exercise any other or more extensive right which he may possess in respect of ground game or the other game, in the same manner and to the same extent as if this Act had not been passed."

Section 5. . . . "In Scotland when" at the date of the passing of this Act "the right to kill and take ground game is vested by operation of law or otherwise in some person other than the occupier, the occupier shall not be entitled by virtue of this Act to kill or take ground game during the currency of any lease or contract of tenancy under which he holds at the passing of this Act, or during the currency of any contract made *bona fide* for valuable consideration before the passing of this Act whereby any other person is entitled to take and kill ground game on the land." . . .

Section 6—"No person having a right of killing ground game under this Act or otherwise shall use any firearms for the purpose of killing ground game between the expiration of the first hour after sunset and the commencement of the last hour before sunrise; and no such person shall for the purpose of killing ground game employ spring-traps except in rabbit-holes, nor employ poison; and any person acting in contravention of this section shall on summary conviction be liable to a penalty not exceeding two pounds."

Section 8—"For the purposes of this Act the words 'ground game' mean hares and rabbits."

Colonel Frederick Mackenzie Fraser of Castle Fraser, Aberdeen, presented this petition in the Sheriff Court of Aberdeen, Kincardine, and Banff, at Aberdeen, against John Lawson, his tenant in the farm of Backhill of Glack, Cluny, for interdict against his setting on the farm, elsewhere than in rabbit-holes, spring-traps calculated to take and kill game or rabbits. The defender's lease was for nineteen years from Whitsunday 1874.

The petitioner averred that since the passing of the Ground Game Act, 1880, the defender had persistently set traps for the purpose of killing rabbits otherwise than in rabbit-holes, and in particular that he had set traps on the top of the end rigs of the fields on his farm in which the game ran, with the result of capturing hares, and also pheasants, partridges, and other winged game. He founded on section 6 of the Ground Game Act above quoted, and pleaded that the defender in killing rabbits by spring-traps was entitled to do so by setting his traps in rabbit-holes only.

The defender denied the pursuer's averments as to his manner of placing traps, and pleaded—"The defender having acted only in accordance with the rights competent to him in terms of his lease and the Act of 1880, this action was unnecessary and uncalled for."

A proof was led, from which it appeared that there was on the defender's farm a wire fence stretching along the side of a cover, and upon the top of a drill. The fence had so small a mesh that game could not get through it. Beneath this fence were various holes or scrapes which rabbits had scraped away to let them into the field from the cover. These were not burrows, but only runs for the rabbits. The scrapes were not such as hares would be likely to go through, unless they were artificially widened. The defender set his traps in them. He admitted that occasionally, though rarely, he had caught winged game in them. There was no reservation of rabbits by the landlord in the lease, and the defender had thus a common law right to kill them. After the

passing of the Ground Game Act 1880 he had been offered its privileges, but had declined them.

The Sheriff-Substitute (DOVE WILSON) found "in fact that the defender was the tenant of the farm of Blackhill of Glack, leased from the pursuer for nineteen years from Whitsunday 1874; that the lease neither conferred upon the tenant right to kill game, nor took away from him right to destroy rabbits; that after the passing of the Ground Game Act of 1880 the defender was offered its benefit but declined it; found in law that the defender was entitled, if so advised, to refuse the benefit of the Act, and that (not being a person entitled to kill hares) he was not (within the meaning of the 6th section of the Act) a person having a right of killing ground game under that Act or otherwise, and therefore was not liable to the restrictions or penalties imposed by it; therefore assoilzied the defender from the conclusions of the action."

On appeal the Sheriff-Principal (GUTHRIE SMITH) found it proved that the defender had, contrary to the provisions of section 6 of the Statute 43 and 44 Vict. cap. 47, sec. 80, set rabbit-traps elsewhere than in rabbit-holes, and claimed the right so to do, and granted interdict in terms of the prayer of the petition.

"*Note.*—The defender does not dispute that his traps have been set, not in rabbit-burrows, but in holes which have been scooped by rabbits under some wire netting by which they pass from one side to the other. These are certainly not 'rabbit-holes' in the sense of the Act. The proprietor himself could not lawfully kill rabbits in this way. A lessee of the game could not lawfully do so. A tenant whose lease is subsequent to the Act would be equally prohibited. But the defender says he has nothing to do with the Act; it conferred no benefit on him, and he does not wish to take anything by it. He is quite content that his right to kill rabbits should remain as it stood before the Act came into operation. In the Sheriff's opinion this is a view of the Act which cannot be maintained. Having first declared who shall be entitled to kill game, it proceeds in section 6 to regulate the manner in which this right shall be exercised, by prohibiting night shooting, spring-traps, and poison. It applies to all persons whatsoever, whether their right arises under and by virtue of the Act, 'or otherwise.' If, therefore, the defender's lease gave him power to kill both rabbits and hares, he would plainly be within the section; and it never could have been intended that when the party's right was more limited, being confined to rabbits only, he should be exempt from its provisions, and thereby be in a much better position than even the proprietor. To avoid these anomalous results we must resort to a well-known rule of construction —of frequent application in the interpretation of statutes as well as wills—that a conjunction may be read in a disjunctive as well as a copulative sense, and that 'ground game,' as used in section 6, includes 'hares *and* rabbits,' or either."

The defender appealed, and argued—The 6th section of the Act did not apply to him, inasmuch as he had not within its meaning a right to kill ground game, which meant hares *and* rabbits. His lease was dated prior to the Act, and unexpired at the date of the action. Under it the right to kill hares was expressly reserved to the landlord, the sole right possessed by the tenant being the common law right of killing rabbits. The Act conferred no benefit on him, and its prohibitions were not to be enforced against him to the effect of depriving him of rights which he before undoubtedly possessed. By the 5th clause of the Act it is provided that he is not to have the benefit of the Act where the right to kill ground game is vested in some other person other than himself. On the other hand, he is said to be under the disabilities of the Act because he has a right to kill ground game. The same words are thus used in the one case as excluding him from the operation of the Act, and in the other as bringing him within it. This would involve a contradiction. His operations were fairly within his common law rights. At common law he might destroy rabbits in any way he pleased, so long as he did no unnecessary injury to his neighbours. (2) But even if the Act was held to apply to him, he had been guilty of no contravention, inasmuch as he had not set his traps anywhere else than in "rabbit-holes," as the word was used in the statute—the common-sense and perfectly intelligible test of the meaning of the word as applicable to the present case was simply this, that the rabbits here made their way, in search of the food which was fenced off from them, by "holes" underneath the fence.

The respondent replied—(1) The appellant's contention would render nugatory the provisions of the Act. The words must be used disjunctively as well as copulatively, and therefore "ground game" as used in the 6th section thus included hares *and* rabbits, or either, It would be absurd to argue that the offence of using firearms for the purpose of killing game at hours not specified in section 6 was not to have been held to have been committed if hares only were shot during these forbidden hours, although no rabbits were shot. The same criticism applied to the other restrictions in the section, viz., (2) against spring-traps for killing ground game, although no one ever set traps to kill hares in rabbit-holes, and (3) against laying down poison, although it may be laid down where no hare was ever likely to be. "Ground game" then includes separately hares *and* rabbits. Both by themselves are described as ground game, and either hares *or* rabbits fall under the restrictive enactments. The Act therefore applied to the appellant. (2) But he had contravened the Act, inasmuch as he had set his trap in what were certainly not "rabbit-holes" in the sense of the Act. The traps were not set in what is ordinarily understood as rabbit-holes, or in any part of them. They were neither set in the rabbit-burrows themselves nor in the entrances to them. They were simply set in what may be called "scrapes" or "runs." The case of *Brown* v. *Thomson*, July 20, 1882, 19 Scot. Law Rep. 838, settled this point.

After hearing counsel, the Court called in the assistance of a Judge of the Outer House, and ordered that the cause should be argued again before the Court as thus constituted by one counsel on either side.

At advising—

LORD CRAIGHILL—There is brought up from the Sheriff Court of Aberdeenshire by the present appeal an action at the instance of Col. Fraser of Castle Fraser against John Lawson, Backhill of Glack, of which farm the defender is ten-

ant and occupier. The petition prays that the defender should be interdicted from setting on his farm, elsewhere than in rabbit-holes, spring-traps calculated to take and kill game or rabbits, this claim to interdict being rested on the provisions of the Ground Game Act of 1880.

A proof was allowed and led, on a consideration of which the Sheriff-Substitute assoilzied the defender. On appeal to the Sheriff he recalled this interlocutor, repelled the defences, and granted interdict in terms of the prayer of the petition. Hence the appeal by the defender to this Court.

The ground of action, as already mentioned, is the Ground Game Act of 1880, by section 6 of which it is *inter alia* enacted that "No person having a right of killing ground game under this Act or otherwise shall employ spring-traps except in rabbit-holes." Two defences have been maintained—the first, that the defender is not a person having a right of killing ground game either under the Ground Game Act of 1880 "or otherwise" in the sense of that statute; and the second, that the place where the spring-traps complained of were set were rabbit-holes within the meaning of the Act. These are the two questions which now await our decision.

The first defence is rested on two grounds, of which one is that the Act does not apply to the defender, because his right to kill ground game, such as it is, was acquired before the Ground Game Act of 1880 passed; and the other, that as his right is to kill rabbits only, it is not a right to kill ground game within the meaning of those words as used in section 6, being the clause on which the action is laid. The facts are as assumed in these propositions. The defender acquired his lease before the passing of the Act, and as no right was given to kill game, and as the exclusive right to kill rabbits was not reserved to the landlord, the defender may not kill hares, but he may kill rabbits. This is the common law result upon the terms of the lease. These being the circumstances, what of the application of the Act to the case?

On the first point, my opinion is that the Act applies to an occupier whose right to kill ground game was acquired prior to the passing of the Ground Game Act of 1880. There is no limitation or qualification of the words "or otherwise" in section 6. Whatever the date when the right was acquired, if it is a right to kill ground game within the meaning of the Act, the person possessing it is subject to the operation of the Act. The source as well as the date of the title is immaterial. Landlords, game tenants, and agricultural tenants occupy the same position in this question. It could not reasonably be said that a landlord, because his right was acquired prior to the passing of the Act, was not subject to the enactment in section 6. To say the opposite would be simply to say that for an indefinite period the Act is not to apply to the greater number of landlords in Scotland. In the same way, there may be leases which practically are rights in perpetuity. In the case of the Ormiston leases, well-known in our Law Reports, for example, the tenants could never have come under the operation of the Act on the defender's construction; and it seems to me that there is just as little reason for suggesting, out of consideration either for the words of the enactment in question, or of that which is said to be the policy of the statute, that a tenant under a nineteen years' lease, or under a lease for any other term, contracted before the passing of the Act, is for the unexpired period to be free from the enactments of the statute. His landlord is subject—why should he be exempted from its operation? There is nothing in the statute by which the cases are distinguished. The Sheriff-Substitute in the note to his interlocutor assumes that a tenant who had rights before the Act may elect to come within or remain outside the Act as he may prefer. But there is nothing in the Act which countenances such a pretension. All that is urged in support of such a claim is that it would be hard to apply restrictions when there is not a benefit to be got in compensation. But supposed hardships in the result cannot be a warrant for departing from the plain interpretation. Our function is to construe, not to amend; and the words of the statute are not to be limited in their natural operation that a result which some may think rigorous, or if you will, inconsistent with the supposed policy of the statute, may be obviated. The truth is, that if there be a hardship, the tenant is not the only sufferer. For an owner and occupier who acquired his title prior to the passing of the Act the same plea might be urged; and the same interpretation of the rights of both must be adopted. The consequence, therefore, of the defender's construction of the words "or otherwise" would be a postponement for an indefinite period of the general application of the Act. But, in my opinion, that, for the reason explained, is not the true construction.

The next question raises for decision the meaning of the words of the Ground Game Act 1880 in that part of section 6 which forbids the use of spring-traps for the purpose of killing ground game except in rabbit-holes. Must the person on whom this restriction is imposed have a right to kill hares and rabbits? or will the right to kill either bring him within the operation of the prohibition? Ground game, the interpretation clause tells us, means hares and rabbits. The defender says this couples the two. The pursuer, on the other hand, says "and" has the power only of "or." The Sheriff-Substitute has taken the former view, the Sheriff the latter, and I agree with the Sheriff. Reading section 6 throughout there appears to me to be no escape from the conclusion that ground game as there used must mean hares or rabbits, unless we are of opinion that in the one part of the section, ground game means "hares and rabbits," and in another means "hares or rabbits." Try the matter thus:—The first clause of the section enacts that no person having a right of killing ground game under this Act or otherwise shall use any firearms for the purpose of killing ground game between the expiration of the first hour after sunset and the commencement of the first hour before sunrise. Plain it is that both hares and rabbits were intended to be and are under the protection of this enactment. The idea that the shooting of hares only, or of rabbits only, within the forbidden time, is not a contravention, would be as unreasonable a reading as could well be imagined; and if as used the second time in the section the "and" is not copulative, no more can it be so when used the first time, there being nothing in

the nature of the enactment which even suggests that ground game means one thing in one part and another thing in another part of the enactment. But this is not all. Observe what the effect of the defender's contention would be if it were sustained. Having right only to kill rabbits, may he divest himself of that right? He may, if in the statute ground game means hares and rabbits, and does not cover either when separated from the other. And yet section 2 enacts that where the occupier of land is entitled otherwise than in pursuance of this Act to kill and take ground game, if he should give to any other person a title to kill and take such ground game, he shall "nevertheless retain and have, as incident to and inseparable from such occupation, the same right to kill and take ground game as is declared by section 1 of this Act. Save as aforesaid, but subject"— [*reads from sec.* 2, *ut supra*]. Thus section 2 and section 6 may be said to be in combination, and ground game as used in the one affords a key to the interpretation of the same words as used in the other. This provision against alienation has always been thought to be one of the characteristics of the statute — the thing for which, next to giving the right to kill ground game where not already possessed, it was passed. And yet as regards occupiers who were tenants under leases existing at the date of the Act without right to kill hares as well as rabbits, it must be absolutely inoperative, as there would upon the defender's construction be in their case no provision against alienation. The purpose of other sections, particularly the fifth, would be similarly frustrated. Such results cannot reasonably be held to be within any sound construction of the statute; and therefore my opinion is that the reading contended for by the defender is not a sound interpretation.

The second defence is, that assuming the Act to apply to the defender, the spring-traps which he set were set in rabbit-holes, in which case there would be no contravention. The situation of the traps complained of is described in the note annexed to the Sheriff-Substitute's interlocutor. He says—"They were not set in what are ordinarily understood as rabbit-holes, or in any part of them. They were set neither in the rabbit-burrows themselves, nor in the entrances to them. The defender placed for his protection a fence of wire netting in one of his fields, and the traps were set in the holes which the rabbits scraped below it in order to pass from the one side of it to the other. Now, Acts of Parliament must be interpreted according to the ordinary use of language, and nobody would describe such scrapes or runs as rabbit-holes, which are the holes which the animals make in the ground for their habitation or shelter."

This being the situation of the spring-traps, I agree with the Sheriff-Substitute and the Sheriff, who take the same view of this matter, that such a place is not within the meaning of the Act a rabbit-hole. The place, indeed, is not a hole in any sense. It is a mere scraping, all but entirely roofless, the only part which may be supposed to have a covering being that almost infinitesimal part above which hangs a portion of the iron network by which the field is surrounded.

Apart from authority this would be my opinion; but the authority referred to at the debate namely, *Brown* v. *Thomson*, July 20, 1882, 19 Scot. Law Rep. 838, is a decision by which the contention of the defender may fairly be said to be as good as everruled. Undoubtedly that case was not a decision to the precise effect required to be a precedent, but the bearing of the decision and the opinions of the Judges, particularly that of the Lord President, appear to me to be hostile to the present defender's contention.

Upon this part of the case a plea of hardship has also been put forward. It is said that prior to the passing of the Ground Game Act of 1880 rabbits were but vermin, and that as vermin they ought to be considered in the case of an occupier whose right to kill rabbits is not dependent on the Act; but the answer is the Act does not deal with rabbits as vermin. On the contrary, it deals with them as ground game, conferring rights in them, and making regulations for the exercise of such rights. The Legislature may have been right, or may have been wrong, though presumably they were right, in enacting that occupiers having a right to kill rabbits at the date of the Act were to be subject to its operation. But once it has been determined that they are subject, there is no relevancy in the consideration that prior to the Act, and independently of the Act, the rabbits might have been killed in the situation and by the means which are complained of in this action.

On the whole matter, I am of opinion that the interlocutor of the Sheriff being in accordance with the right of the pursuer in the premises, the defender's appeal ought to be dismissed.

Lord Young—Clause 6 of the Ground Game Act applies only to persons "having a right of killing ground game," leaving persons acting without right to the law irrespective of the Act. But if a person has the right it is immaterial whether it is "under this Act or otherwise." The first question here is, Has the appellant the right? It is admitted, on the one hand, that he has a right to kill rabbits, not under the Act, but "otherwise," and, on the other, that he has no right to kill hares. I am of opinion that a right of killing rabbits is "a right of killing ground game," inasmuch as rabbits are ground game. Hares are so too, no doubt, and other animals may hereafter be included in the term, but I cannot assent to the proposition that a man has not a right of killing ground game unless his right extends to every species and description of ground game, any more than to the proposition that he does not kill ground game unless he kills every species and description of it. Nor is it material, in my opinion, that the reason of his right is the protection of his crops. It is a very good reason for the right to rest on, and is, as it happens, the reason of the right under the Ground Game Act wherever it exists, though I must think the reason or policy of the right where it certainly exists is immaterial. The purpose of section 6 is to limit the means or contrivances which may be lawfully used in the exercise of it, and has no concern whatever with the policy of the law, whether statute or common law, in conferring or recognising the right. A person having a right to kill rabbits, no matter on what it rests, may not in the exercise of it use firearms during night, or employ spring-traps except in rabbit-holes, or employ poison.

On the question whether the appellant's spring-

traps are employed in "rabbit-holes," I must state my opinion with much diffidence, as it differs from that of all of your Lordships. It is formally a question of fact, but only formally—the facts not being doubtful, and the controversy being really on the legal question—whether perforations under a fence erected to protect ground under crop, made and used by rabbits for their passage to the crop, are "rabbit-holes" in the sense of section 6 of the Ground Game Act. I call this a question of law, inasmuch as it is a question on the construction or meaning of a statute. It is said that the expression "rabbit-holes" means only rabbit-burrows—and that it comprehends rabbit-burrows I do not doubt—being fitted according to the common meaning of the words to do so. But I think the words in their common meaning are also fitly used to express and signify perforations or openings made by rabbits, and used by them for their passage through any solid obstruction in order to reach their food, according to their instincts and habits, and I know of no statute or rule of the common law which entitles me to limit the title to one description of rabbit-holes. If the question were asked how rabbits reached the appellant's crops, being protected by a wire fence impervious to rabbits, the answer that they did so by means of holes which they made underneath the fence would, I think, be intelligible and accurate.

I think it not improper to add that in construing a penal enactment which is urged against the appellant in limitation and to the detriment of his undoubted legal right allowed him for the protection of his crops, I should think it allowable to put as large and comprehensive a meaning on the exception from the enactment as the words employed reasonably admit of. Traps set in rabbit-holes are excepted from the penal enactment.

Lord Rutherfurd Clark—The question is, whether the pursuer is entitled to enforce against the defender the 6th section of the Ground Game Act? The pursuer does not allege that the defender is acting beyond his right at common law, or in violation of his lease, and in my opinion such an allegation, if it had been made, would have entirely failed. The case of the pursuer is laid under the statute alone, and it necessarily fails if the Act does not apply to the defender.

The plea of the defender is that he does not come within the scope of the Act, inasmuch as he has not, within the meaning of the 6th section, a right to kill ground game, or, in other words, to kill hares *and* rabbits. He contends that the section does not apply to any person who has not a right to kill both.

It is certain that the defender is not entitled to kill hares. By the lease these are reserved to the pursuer. Nor, indeed, has he an absolute right to kill rabbits. The lease contains no reservation with respect to rabbits, but, on the other hand, it confers no right on him. The consequence is that he has a right to kill rabbits for the protection of his crops, but to no other extent. His sole right is to protect his crops.

The theory of our law is that the land is let to the tenant for agricultural purposes only, and therefore that he acquires under his lease no other rights than those which are necessary for the due enjoyment of the land as an agricultural subject. Hence there is no necessity for any reservation in favour of the landlord. Everything is reserved to him *ex lege*. This rule was well illustrated in the case of *Maxwell*, 7 Macph, 142, H. of L. 9 Macph. 1, in which it was held in this Court, on the principle to which I have referred, that a tenant has not the right of fishing in the streams which pass through his farm. In the House of Lords two of the noble Lords abstained from giving an opinion on the general point, but the view taken in this Court was confirmed by Lord Westbury and Lord Colonsay.

The question then comes to be, whether the defender, who has a right to kill rabbits for the protection of his crops, but no other or further right, is, in the sense of the 6th section of the Act, a person having a right of killing ground game? It is plain that inasmuch as his lease was prior to the Act he obtains no benefit under it, and he not unnaturally objects that its prohibitions should be enforced against him. For if they be he will be deprived of rights which undoubtedly he had before.

The purpose of the Act is declared to be that "further provision should be made to enable occupiers of land to protect their crops from injury and loss by ground game." To this end it is enacted that every occupier of land shall have as an incident to his occupation the right to kill and take ground game thereon, or, in other words, hares and rabbits. But the defender has not the right to kill and take ground game because of the enactment in the 5th section—"In Scotland when the right to kill and take ground game is vested by operation of law or otherwise in some person other than the occupier, the occupier shall not be entitled by virtue of this Act to kill or take ground game." It is proper to note that the tenant's right to the benefit of the Act is excluded by the very same words which are said to bring him within the scope of the 6th section. The defender has not the benefit of the Act because the right to kill ground game is vested in some person other than himself, or, in other words, is not vested in him. But he is said to be under the liabilities of the Act because he has a right to kill ground game. This seems to me to involve a contradiction, or a use of the same words, in the one case as excluding the defender from the operation of the Act, and in the other as bringing him within it.

It has been conceded in argument that the defender has not the benefit of the Act, and that by reason of the provision of the 5th section which I have just quoted. If this be so—and I take it to be the true construction of the Act—it means that the defender has not the right to kill ground game because that right is vested in some other person. His right to kill rabbits for the protection of his crops does not exclude him from the operation of the 5th section, because it is not a right to kill ground game within the meaning of that section, or, in other words, because he has not a right to kill both hares and rabbits.

Again, if we turn to the 2d section, it is provided that "When the occupier of land is entitled, otherwise than in pursuance of this Act, to kill or take ground game thereon, if he shall give to any other person a title to kill and take such ground game, he shall nevertheless retain and have, as incident to and inseparable from

such occupation, the same right to kill and take ground game as is declared by section 1 of this Act." I am unable to read this clause as applicable to any other case than that where the right to kill both hares and rabbits exists. For it is expressly declared that in the event contemplated the occupier is to retain the right declared by section 1, or, in other words, the right to kill both hares and rabbits. Hence I find in two sections of the statute the words which we are required to construe in the 6th, and in these sections I cannot construe them otherwise than as meaning a right not to kill rabbits or hares, but to kill both. I cannot see that I should adopt another construction in the 6th section in order to bring within its prohibitions an occupier of land who is not entitled to the privileges of the Act.

The purpose of the statute I take to be to attach to the occupation of land a right to kill hares and rabbits, and to regulate the exercise of that right wherever it exists. I am aware that the words "ground game" as they occur in one part of the sixth section must be read as meaning hares or rabbits. I refer to the phrase "for the purpose of killing ground game." But I am not moved by this apparent contrariety of construction. The statutory offence may of course be committed by killing either rabbits or hares. But it does not follow that it is enough that the right to kill shall extend to either. I have said that I am disposed to adopt a construction which does not bring within the prohibition of the Act a tenant who is excluded from the benefit of it.

I have only to add, that if the statute is held to apply, I do not think that the traps have been set in rabbit-holes.

Lord Adam—The first question in the case is, whether the appellant, who has a right to shoot rabbits otherwise than in respect of the Ground Game Act 1880, is under the restrictions and limitations as to the mode of killing ground game specified in section 6 of the statute? I am of opinion that these restrictions are meant to be of universal application, and to apply to everyone who has a right to kill either hares or rabbits or both.

The interpretation clause of the Act tells us what in the sense of the Act ground game is; it says that "ground game" means hares and rabbits. At all events, as I read the clause, hares are ground game in the sense of the Act, and so are rabbits. Accordingly, when we come to consider what the sixth section of the Act—which is the one more immediately in question—provides, we find that it is this—"No person having a right of killing ground game under this Act or otherwise shall employ spring-traps except in rabbit-holes, nor employ poison." That is what it comes to. Now, it humbly appears to me that a person having a right to kill hares has, in the sense of the Act, a right to kill ground game; and as the appellant here is a person having a right of killing rabbits, he is, in the sense of the Act, in the position of being entitled to kill ground game also. If that be the true reading of the clause, I think that is conclusive of the case.

It appears to me, further, that putting any other interpretation on these words would lead to very odd results. Just take this case:—A person has a right to shoot hares only; according to the interpretation proposed by the appellant, the restrictions do not apply to him, so that such a person can use a gun or firearms during the night—that is, an hour after dusk to an hour before sunrise—for the purpose of shooting hares. Thus the appellant, on his own confession, having a right of shooting rabbits only, can in like manner go out and use a gun in the night to kill rabbits; but when the two rights happen to concur in the same person, the same person has a right to shoot hares and rabbits—the result is that he is brought within the restrictions of the Act; so that when a man happens to have one right the restrictions do not apply, when he has both they do.

It seems to me that where there is a general enactment of this kind—for it is obvious that these restrictions were imposed to meet a general evil—it would be against the public policy of the thing to make such exceptions. And I must here say that I concur in what was said in regard to these restrictions—the restrictions on the use of firearms for example—in the case of *Brown* v. *Thomson* in the First Division of the Court—namely, that they are meant to be of general application. It was introduced because it was not considered a right thing that people should be allowed to go out at night armed with weapons for the destruction of those animals. The restriction against the use of poisons is also of a general nature. It was introduced for the very same reason, that it is a dangerous use to make of poison, and not a right way to kill game. Dogs and other animals run risks from poison so used, it being generally very deadly poisons that are put down for such purposes. That is the reason of the prohibition. And thus, though not perhaps to the same degree, was the restriction imposed with which we are more immediately concerned—the prohibition against setting spring-traps. As far as the general public are concerned, it is not perhaps of so much importance; but it is forbidden in the case of those who are in the possession or right of the land, the reason being that if you put traps there other game will run into them. And that being the nature of the restrictions, is there anything in the nature of a reason why it should not be applicable to the occupier as well as to the owner of the soil. There is no dispute that the landlord, who has a right to kill both hares and rabbits under the same Act, is subject to the limitation; and I can see no reason why the tenant, who like him has a right to kill rabbits, should be free, for instance, to use a gun at all hours of the night, or why he should be entitled to kill rabbits by means of poison, when his landlord, who has an equal right with him, is prohibited. I do not think that is giving to landlord and tenant a concurrent right at all. It is putting the one on a different footing from the other, and I do not suppose the Legislature intended to bring about such a result. It cannot in fairness be said that the one should benefit by the Act more than the other. The tenant in this case takes no benefit by the Act; that may be true; but neither does the landlord. Therefore I cannot understand why those restrictions which appear to me to be in their nature of general application should be restricted to the case where a person has a right to kill both hares and rabbits.

The construction contended for by the defender—if I rightly understood Lord Rutherfurd Clark—seems to be, that where the expression first occurs it is to be read conjunctively, and where it next oc-

curs separately. But that, I need hardly say, is not the ordinary manner of interpreting such clauses, and I see no reason in the nature of things why it should be so.

It is said there are other clauses in the Act which bear upon this matter; and I think the second section does. It says—"When the occupier of land is entitled otherwise than in pursuance of this Act to kill or take ground game thereon, if he shall give to any other person a title to kill and take such ground game, he shall nevertheless retain and have, as incident to and inseparable from such occupation, the same right to kill and take ground game as is declared by section 1 of this Act." Now, the purpose of that enactment is to prevent an occupier who is entitled to shoot ground game otherwise than under the Act, from divesting himself wholly and altogether of the right of killing such ground game—that is to say, he cannot give back to his landlord the right which he himself has to take and kill them. That is the object of the Act, even although the person whom it prevents divesting himself takes no benefit from it.

Now, if the tenant is under this clause of the Act, I think that also is conclusive of this case. And why he should not be under it I am unable to see. It is admitted that if the occupier, not being under the Act, and he not having the right to kill ground game under the Act, has the right to kill hares and rabbits, the section will apply, and in that case the tenant could not, as I have explained, divest himself wholly of his right to kill ground game. But if he happens not to have both—that is to say, if he has only, as in this case, the right to kill rabbits—he is entitled to divest himself wholly and entirely of his right to kill such rabbits—that is to say, he may give the right to kill rabbits back to his landlord, who may preserve them to any extent for the purposes of shooting. That, however, according to my view, is against the policy of the Act, which intended and meant that occupiers should be protected against themselves in regard to the giving away of that right. The Legislature intended to say "You shall not give away that right to any extent." And, as I have already said, I see nothing in the case to indicate that the restrictions in the section should be limited to the case where the occupier has the right to kill both hares and rabbits.

But that is not all, for the section goes on to point out what the person having that right shall be entitled to do. It says—"Save as aforesaid"—that is to say, he shall not wholly divest himself of his right—"but subject as in section 6—that is to say, he shall be subject to the restrictions and limitations we have been referring to. That seems to me to be conclusive, because in effect this provision amounts to this—"You may have more extensive rights as a tenant in the mode and manner of killing game, but you shall exercise them under the restrictions contained in section 2 and in section 6." So that I take a different view of that clause from the view urged upon us by Lord Rutherfurd Clark, thinking, as I do, that it conclusively shows that the phrase "ground game" was intended to apply to a person in the position of the appellant, who has a right only to shoot and take rabbits.

Then the fifth section was referred to as throwing light on the subject—"In Scotland when the right to kill and take ground game is vested by operation of law or otherwise in some person other than the occupier, the occupier shall not be entitled by virtue of this Act to kill or take ground game." It seems to me that the purpose of that provision is to save existing interests. If it shall happen that the landlord has the right to kill game, nothing shall empower the tenant to interfere with that right. But, on the other hand, if the landlord has not the sole right of killing game—if, as in this case, the tenant has the right, then no more is that right to be interfered with. In the case we are dealing with, the right to kill and take ground game is vested by operation of law in Colonel Fraser, the respondent. Therefore all that is provided for by that section is that the tenant shall have no right given him by which Colonel Fraser's right would be diminished or infringed upon. On the other hand, there is nothing in this clause of the Act which says that the tenant's right shall be at all affected so far as his existing interest is concerned; he is entitled, in short, as before, to kill and take rabbits.

Upon that part of the case, therefore, I agree with Lord Young and Lord Craighill, and on the grounds I have endeavoured to explain.

But another question remains—whether or not these places where the traps are put are places struck at by the Act—in other words, whether these traps are put in rabbit-holes? Upon that matter I have very little to say, because I concur entirely in the definition or description of rabbit-holes given unanimously by the Judges of the First Division in the case of *Brown* v. *Thomson*. I am certainly of opinion that that case is *a fortiori* of the present, and that unless we are to reverse that decision we must accept it. Speaking from one's knowledge of such matters, it never could have occurred to me to have called this a rabbit-hole at all. In ordinary country language this would be called, as it really is, a rabbit-run; it is a rabbit-run just as we have a hare's run. Every scrape in the ground that a rabbit may make, however shallow, is not a rabbit-hole in the sense of the Act. A hole is in the ground and under the ground. And that in my opinion is what the Act means. I am not going to the Act to interpret what it says; the rubric of the case expresses exactly what is meant by the Act itself—"Held that the occupier is only entitled to set spring-traps within the roof of the rabbit-hole, and is not entitled to set them in the scrape formed by the rabbit before going below ground." Now, in one sense, no spring-traps are set above ground, because there is always a little earth over them, for you cannot spread out your trap before the rabbits' eyes. The Act does not mean that they shall in that sense be under the ground, but that you shall not set the traps above ground, in this sense, that other animals, such as hares and dogs, and even pheasants, may go in and be caught. That is what it means. They are to be set under ground in a hole with a roof over it. It is not, of course, an absolute prohibition or restriction on the tenant killing rabbits in such a place as we have under consideration, for everyone knows that such are just the places where other means of killing rabbits is adopted, snaring, for instance. And, upon the whole, I do not see that this restriction against the use is a very serious interfer-

ence with the power of the occupier to kill game. They are dangerous things set in the open; and my reading of this Act is that they ought to be set in holes in the ground. In this matter, therefore, I agree with Lord Rutherfurd Clark and Lord Craighill; and on the whole matter I am of opinion that the appeal ought to be dismissed.

Lord Justice-Clerk—The question has been very fully discussed by your Lordships, but it is one of some general interest, and the opinions that have been delivered are to a considerable extent conflicting; and therefore I shall express my own opinion, the result of which is that I concur in the judgment of the Sheriff, and in the opinions of Lords Craighill and Adam.

I agree in all that has been said as to the hardship of this case on the appellant. He takes no benefit by the Act. He has no access to the rabbit burrows, which are chiefly in the covers, which he may not enter, and I think it sufficiently appears that the traps which are the subject of this dispute are intended and calculated only to protect his crops. Travelling out of the subject before us, my impression is that the landlord might have done well if he had simply left these traps, which seem to do him no harm whatever, where they are. But the words of the statute founded on seem to me too clear and unambiguous to admit of serious question.

It is quite true that this statute is remedial—intended to remedy a very great evil; and its empowering clauses ought to receive a favourable and liberal construction in the direction of the object set out in the preamble, that object being to secure that the cultivating occupier shall have the power of protecting his crops from the depredations of hares and rabbits. But the occupier's right so conferred is given by the Act under regulation as to how and when and by whom it is to be used; and these regulations must be construed, like the rest of the Act, to effect the end which they were intended to accomplish.

The sixth clause of the statute is wholly prohibitory and restrictive. It relates entirely to three different ways of killing ground game—that is, hares and rabbits. The first is shooting, the second trapping, and the third poisoning. As to the first, it prohibits the use of firearms for this purpose earlier than an hour before sunrise, or later than an hour after sunset. It prohibits placing spring traps anywhere but in the rabbit-holes; and it prohibits the use of poison altogether.

The policy of these prohibitions is obvious enough, whatever may be thought of their importance. The restriction of the hours during which firearms may be used to kill ground game is so obviously reasonable that it requires no explanation. The prohibition of the use of poison is equally so. And the limitation of the place in which spring traps may be placed to rabbit-holes plainly proceeds on the footing that these implements would interfere with the concurrent rights of the landlord and the game tenant, and be dangerous to winged game and dogs.

These restrictions are not confined to persons taking benefit by the Act, but comprehend all persons who by virtue of its provisions or otherwise are entitled to kill ground game. In other words, the prohibitions are absolute and universal.

The words "ground game," as used in the statute, are defined to mean "hares and rabbits."

The appellant is a tenant under an unexpired lease dated prior to the statute, and the empowering clauses of the Act do not apply to him. According to our common law, rabbits are not ground game, and the appellant has the right, which he has exercised, of protecting his crops by killing them. Lord Rutherfurd Clark in the course of his opinion made an observation to which there is a certain degree of weight attached—namely, that the tenant's right under the common law is not a right abstractly or generally to kill rabbits, but a right to protect his crops, and to kill rabbits so far as that may be necessary for the protection of his crops. I do not think that that makes any difference in the present case, or that it can be said that in respect of that the tenant here is not a person entitled to kill rabbits otherwise than by virtue of the statute.

Be that as it may, in the course of killing rabbits he has placed spring-traps for rabbits in holes or scrapes made by the animals under a wire fence which the tenant for his own protection, and with the landlord's consent, erected between his arable land and the cover. And hence the complaint.

There are thus only two questions for us to decide—First, Is the appellant a person entitled to kill ground game otherwise than by virtue of the Act? and secondly, Are these spring-traps placed in rabbit-holes?

On the first, it is said that under the glossary given in the statute "ground game" means "hares and rabbits," not "or either of them;" and that as the appellant has no right to kill hares he is not entitled to kill ground game otherwise than by virtue of the Act.

I cannot so read the Act, and to adopt this view would render its provisions nugatory. It seems to me that when it is said "The words ground game mean hares and rabbits," the statute in effect says these words mean hares, they also mean rabbits, and they mean nothing else. It must needs be so on the very clause we have before us. Firearms are not to be used to kill "ground game" save at specified hours, and that under a penalty. The offence would clearly be committed if hares were shot during the forbidden hours, although no rabbits were shot, and that because ground game means hares; so in regard to spring-traps for the killing of "ground game," although no one can set a trap to kill hares in a rabbit-hole; and the offence of using poison is in like manner committed although laid down where no hare ever was or was likely to be. All the clauses seem to negative this ingenious subtlety; and indeed Lord Rutherfurd Clark, who takes a strong view of this matter, conceded that in the sixth section "ground game" must be subject to the interpretation I have alluded to. In short, the term "ground game" includes separately hares and rabbits. Both by themselves are described as ground game; and of course either hares or rabbits fall under the restrictive or prohibitory enactments. If I may venture to say so, I rather think the interpretation clause is not quite so clear, and indeed creates some difficulty, for if the words "hares and rabbits" had been inserted in each clause of the statute, in all probability no doubt would have been felt as to the meaning.

The other question is, whether, if the appellant be within the descriptions of persons to whom the clause applies, the offence in question has been committed—were these traps placed in situations "other than rabbit-holes?" I do not doubt that they were. I understood a rabbit-hole to signify a burrow such as the rabbit uses for habitation, and not to include casual scrapings made by the animal, not under ground, but open and exposed, for the purpose of avoiding or getting under a physical obstacle. No other meaning would make the provision intelligible. The spring-traps are to be placed in these positions, because there, and there only, they do not endanger other animals, such as winged game and dogs. If the places usually known as rabbit scrapes or rabbit-runs are included in the term "rabbit-holes," I can imagine no object which the provision was intended to effect.

I substantially agree with the view expressed by the Lord President in the recent case of *Brown* v. *Thomson*, in the First Division, as to the policy which this clause was intended to promote. The case was much stronger than the present, for there the traps were within sixteen inches of the mouth of the rabbit-burrow; but it was held that they were not in the rabbit-hole, that is, under its roof, but outside, in the rabbit-scrape. Here there was nothing but a gangway perforated under the wire of the fence, to enable the animal to pass under it; and if such a position were legal, the spring-traps might as well be set in the open. One matter referred to in that case was this, how far these traps would or would not be legal in the open at common law. I do not think it necessary to say anything upon that matter. Those are my views, and on the whole case I concur in the views of Lord Craighill and Lord Adam.

The Court found that the defender, in the exercise of his right of killing rabbits, had set traps in places which were not rabbit-holes, and in so doing had acted contrary to sec. 6 of the Ground Game Act; therefore dismissed the appeal and affirmed the judgment of the Sheriff.

Counsel for Appellant—R. Johnstone—Rhind. Agent—John Macpherson, W.S.

Counsel for Respondent—J. P. B. Robertson—Graham Murray. Agents—Mackenzie & Black, W.S.

Friday, December 22.

FIRST DIVISION.

[Sheriff of Lanarkshire.

THE WILLIAMS RAILWAY PATENTS COMPANY (LIMITED) AND THOMSON *v.* PATERSON AND ALLEY & MACLELLAN.

Property—Implied Contract—Conterminous Proprietors—Mutuality.

A, the proprietor of building land lying between the Aitkenhead and Polmadie Roads, near Glasgow, disponed one lot to B, and another to C, in consideration of ground annuals, these lots being described as bounded on the north by the centre line of a "proposed new street to be called Steven Street," which if formed would connect the above two roads. Both contracts contained a clause providing that the proposed new street should remain open and unbuilt upon to a certain width, and that the disponees should pay to A the expense of forming and maintaining one-half of the street opposite their lots.

A subsequently disponed, also in consideration of a ground annual, another and adjoining lot to D, whose contract contained a clause by which he agreed to A forming or dispensing with forming the proposed street, but was taken bound to relieve A of all expense in connection with it.

In all these contracts there was a clause by which A was declared entitled at any time at his own discretion to discharge or modify in favour of the disponee all or any of the conditions or obligations contained in the contract, without consent of any other disponees from him, the contract being only intended to regulate the terms of the agreement between himself and the other party to it.

In an action at the instance of B and C against A and D, to have them ordained to form Steven Street, or to obtain a warrant to make the street at their expense, *held* that by the terms of the contracts there was no obligation on A or D to make the street.

In February 1877 a contract of ground annual was entered into between John Paterson, brickmaker, Glasgow, of the first part, and John Whyte, engineer, Glasgow, of the second part, by which the first party disponed to the second party a plot of ground lying between the Aitkenhead and Polmadie Roads, in the neighbourhood of Glasgow, extending to about 4876 square yards, "bounded on the north by east by the centre line of a proposed street to measure 60 feet in width from building line to building line, along which it extends 243 feet or thereby; on the east by south by unfeued ground belonging to the said John Paterson, along which it extends 209 feet or thereby; on the south by west by the centre line of a proposed street to measure 60 feet in width from building line to building line, along which it extends 177 feet or thereby, and on the west by north by the present east side of the said road leading from Glasgow to Aitkenhead, which is to be widened to 60 feet in width, from building line to building line, along which it extends 219 feet 6 inches or thereby."

It was stipulated in the contract in the *sixth* place that "the said two proposed streets and the said Aitkenhead Road to its increased width, when respectively formed, shall remain open and unbuilt upon of the width of 60 feet each in all time coming, for the use of the parties hereto, and the other disponees and assignees of the first party, and also the feuars anddis ponees" of the Misses Elizabeth Steven and Grace Steven of Bellahouston and their successors, from whom Paterson had feued the ground. Then followed certain stipulations as to the burden of making and keeping up the street, which were precisely similar to these quoted *infra* in the opinion of the Lord President, and contained in the contract with Paterson immediately to be mentioned.

There was also an obligation on the second party to relieve the first party of the expense of making and keeping up the said two proposed streets and Aitkenhead Road.