any necessity to inquire as to the effect of the indorsation of such instruments, which has given rise to numerous questions. Questions might arise as to the purpose of a party taking such receipts in the name of another; but here the purpose and object could only be to carry out by means of them an intention to gift, and, that being so, there is no ground in law upon which, so far as I can see, effect should be denied to what the deceased did when he was in a state of mind which made him capable of doing it.

The other Judges concurred.

An interlocutor was pronounced finding that the defender was entitled to uplift the sums contained in both deposit-receipts.

Agents for Executors—Tods, Murray, & Jamieson, W.S.

Agent for Defender—D. J. Macbrair, S.S.C.

Saturday, February 1.

FIRST DIVISION.

SYME *v.* EARL OF MORAY'S EXECUTORS.

Reparation—Game—Landlord and Tenant—Issue. Form of issue approved of by the Court in action of damages by a tenant against his landlord for injury to crops by game.

This was an action of damages at the instance of George Syme, tenant of certain farms in the parishes of Aberdour and Dalgety, and county of Fife, originally directed against the Right Hon. John Stuart Earl of Moray, heritable proprietor of the said lands; the ground of action being alleged injury to the pursuer's crops on the said lands, in the year 1865, by the unreasonable and excessive stock of game kept thereon, wrongfully and by the fault of the defender.

It appeared that the pursuer's brother, Robert Syme, had become tenant of Meikle Couston and Muirton Park under minutes of agreement dated in June 1853, and tenant of Chesters and New Kirk Parks under minutes of agreement dated February 1855; and that, on Robert Syme's death in 1858, the pursuer had entered on possession of the lands as tenant, acknowledged by the defender. The pursuer had become tenant of the Barns Farm and of Hattonhead Park under verbal agreements of lease dated in 1859 and 1862 respectively. The pursuer alleged:—

"Cond. 8. When the said deceased Robert Syme became tenant of the lands mentioned in articles 1 and 2 hereof, as also when the pursuer succeeded him as tenant of these lands, the stock of game and rabbits thereupon did not exceed a fair average stock; nor was there above a fair average stock of game and rabbits upon the lands mentioned in article 5 hereof when the pursuer became tenant of these lands. The said Robert Syme and the pursuer entered into the said leases, and agreed to pay the rents thereby stipulated, on the faith and in reliance that the said stock of game and rabbits would not be increased, or at least not materially increased, and, in particular, that it would not be increased to an excessive and destructive extent.

"Cond. 9. At the dates when the first-mentioned leases were entered into, and thereafter down to about the years 1860 or 1861, the game was kept for the sport of the landlord and his friends, and no unusual means were taken to increase its amount. But within the last few years the defender has not lived at Donibristle, and the game has since been bred and dealt with exclusively as a marketable commodity. Its amount has, by careful preserving and unusual means employed by the defender, or those for whom he is responsible, been wrongfully increased to a very great extent beyond a fair average stock, and the defender has annually realised large sums by selling it. The defender has of late years regularly fed the pheasants until the pursuer's crops were sown and ready to afford them food. In particular, the game, especially hares and pheasants, has within the past three years increased enormously beyond the stock which existed on the said lands at the dates when the said Robert Syme and the pursuer respectively entered into and took up the leases above mentioned, and agreed to pay the rents thereby stipulated, and which rents have since regularly been paid. The rabbits have also increased to some extent."

The pursuer proposed the following issue:—

"It being admitted that the defender was during the year 1865, and still is, proprietor of the lands of Meikle Couston and Muirton Park, in the parishes of Aberdour and Dalgety, as also of the lands of Chesters and Kirk Park, Hattonhead Park, and Barns Farm, also in the parish of Dalgety; and that the pursuer was during the year 1865, and still is, tenant of the said lands under the pursuer:

"Whether, during the year 1865, or any portion thereof, the defender wrongfully kept upon the said lands, or any part thereof, an unreasonable and excessive stock of game and rabbits, to the loss, injury, and damage of the pursuer?

"Damages laid at £270."

The Lord Ordinary (Barcaple) reported the case, with the following note:—

"The defender does not dispute that an action may lie at the instance of an agricultural tenant against his landlord for damage done by undue increase of game, but he maintains that the pursuer's averments in the present case are not sufficient to entitle him to an issue. He contends that it is necessary for the pursuer in such a case to aver that there has been a material change in regard to the mode in which game has been dealt with on the lands, and that the increase complained of has been brought about by artificial means. The Lord Ordinary doubts whether either of these contentions can be maintained consistently with the judgments in previous cases; and, at all events, he is of opinion that articles 8 and 9 of the Condescendence contain sufficient averments on these points. The parties were not at one as to the precise ground on which such a claim is to be sustained—whether upon contract or on the ground of a wrong done to the tenant as possessor of the farm. The former view seems to be countenanced by the authorities, and the claim to be put upon the ground of implied obligation by the landlord to warrant the tenant in the beneficial possession of the land. If this is the true view of the relative position of landlord and tenant in this matter, it may possibly support the claim, even where there has been been no preserving, or other means used to increase the game, and where all ordinary means have been used to keep it down, if it has nevertheless increased owing to strict preserving on a neighbouring estate, or any other cause, which cannot be attributed as a wrong to the landlord. On this point the Lord Ordinary expresses no opinion. The defender maintains that, if there is to be an issue, the damages should

be scheduled with reference to each separate possession. The Lord Ordinary understands that the pursuer does not now insist on including the alleged increase of rabbits in his issue. The only averment in regard to them is, that they have increased 'to some extent.'"

The defender having died, the action was transferred against his executors.

YOUNG and BALFOUR for pursuer.

CLARK and SHAND for defenders.

After discussion, the following issue was approved of by the Court:—

"It being admitted that the defenders' author, the Right Honourable John Stuart Earl of Moray, now deceased, was during the year 1865 proprietor of the lands of Meikle Couston and Muirton Park, in the parishes of Aberdour and Dalgety, as also of the lands of Chesters and New Kirk Parks, 'The Barns' Farm, and Hattonhead Park, also in the said parish of Dalgety; and it being admitted that the pursuer was, during the year 1865, tenant, under the said Earl of Moray, of—

"1. The said lands of Meikle Couston and Muirton Park, under agreement dated 3d June 1853;

"2. The said lands of Chesters and New Kirk Parks, under agreement dated 12th and 13th February 1855;

"3. The said 'Barns' Farm, under an agreement entered into shortly before Martinmas 1859; and

"4. The said lands of Hattonhead Park, under an agreement entered into shortly before Martinmas 1862:

"Whether, during the year 1865, the said John Stuart, Earl of Moray, had upon the said lands, or any part thereof, an unreasonable and excessive stock of game, beyond what existed thereon at the dates of entering into the said leases respectively, to the loss, injury, and damage of the pursuer?

"Damages laid at £270."

Agents for Pursuer—Gibson-Craig, Dalziel, & Brodies, W.S.

Agents for Defenders—Melville & Lindsay, W.S.

Saturday, February 1.

RATTRAY *v.* TAYPORT PATENT SLIP CO.

(5 Macph., 944.)

Servitude—Rights of servitude holder and proprietor of the ground. Motion by servitude holder to have the proprietor of the ground over which the servitude extended ordained (1) to remove an embankment, retaining wall, and paling erected by him; and (2) to have him interdicted from making any erection on or otherwise occupying the said ground, *refused.* Observed (1) that the erections complained of were a legitimate exercise of the proprietor's right of property in the ground; and (2) that such a claim was incompetent by a servitude holder against the proprietor.

These were conjoined actions of (1) suspension and interdict and (2) declarator and damages, at the instance of Susannah Rattray, proprietrix of certain subjects in Tayport, against The Tayport Patent Slip Company (Limited), and their contractor. After various procedure, the Court, on 26th June 1867 pronounced an interlocutor, finding and declaring, *inter alia*, in respect of minutes for the parties, and reports by Mr Wylie, C.E., that the footpath described in the said reports was a public way, and ordaining the defenders to lay it out at sight of Mr Wylie, and thereafter to maintain it; applying the verdict of the jury, and finding and declaring that the pursuer had a servitude of bleaching and drying clothes on so much of the ground marked K K K K K on the plan, No. 100 of process, as was not occupied by the Patent Slip and the Shipbuilding shed in connection therewith, erected and occupied by the defenders; decerning and ordaining the defenders to lay out the said ground in the manner suggested by Mr Wylie; and finding that the pursuer was barred by the terms of the compromise and arrangement entered into between the parties, respecting the road above mentioned, from insisting on the removal of the defenders' slip and shed, or for restoration of the ground of the said servitude beyond what was above found and declared.

The pursuer now moved the Court, "in order to exhaust the conclusions of the actions, to decern and ordain the defenders to restore, as far as now practicable, to the state in which it was before the defenders' operations, the ground over which the pursuer's right of servitude has been found to extend, viz., so much of the ground marked K K K K K on the plan, No. 100 of process, as is not occupied by the patent slip and the shipbuilding shed, erected and occupied by the defenders, by removing—(1) The embankment made by them thereon; (2) A retaining wall on the west side, and making part of said embankment; and (3) A paling extending across the said ground, all erected by the defenders; and further, to interdict, prohibit, and discharge the said defenders from interfering with or making any erection on or otherwise occupying the said ground, over which the pursuer's right of servitude has been found to extend, in all time coming."

CLARK and GIFFORD for pursuer.

DEAN OF FACULTY (MONCREIFF), and N. C. CAMPBELL for defenders.

The LORD PRESIDENT held, on the first branch of the motion, that the operations complained of were a quite fair exercise of the defenders' right of property in the ground over which the pursuer's right of servitude extended; and held, on the second branch, that such a claim for interdict was quite inconsistent with the right of a servitude holder, which did not confer on him any title to sue an action of that kind.

LORD CURRIEHILL—I am inclined to put the right of a servitude holder a slight shade lower than your Lordship has done. The rule of our law is, that a servitude holder must exercise his right *civiliter;* so that when there is more than one way in which effect can be given to it, it must be exercised in the way least burdensome to the servient tenement.

LORD DEAS—There is no doubt that a right of servitude does not give the party who holds it a right to prevent all use being made, by the proprietor, of the ground over which the servitude extends. The proprietor may make every use of the ground he pleases, if such use is not inconsistent with the servitude. So much is this the case, that a servitude may be restricted to a particular portion of the ground if that can fairly be held sufficient for the proper exercise of the servitude. That restriction is very reasonably applicable to the servitude of bleaching.