of the undisputed fact that a certain animal had won. Here the basis of the action was a *pactum illicitum*, and therefore the rule applies *melior est conditio possidentis.*"

The pursuer appealed, and argued — The Sheriff-Substitute was wrong. The statute of 42 Geo. III. cap. 119, sec. 2, did not apply to Scotland, and even if it did the Court would entertain such an action as the present, where the defender admitted that the ticket No. 160 was the winning number in the lottery (*vide Graham* v. *Pollok*, Feb. 5, 1848, 10 D. 646; *Calder* v. *Stevens*, July 20, 1871, 9 Macph. 1074). The Court was only called on to stop a dishonest course of action (*vide M'Allister* v. *Douglas*, March 20, 1878, 5 R. 30).

The defender argued—The Sheriff-Substitute was right in dismissing the action. It was a rule of common law, quite apart from statute, that the Court should not be diverted from serious and important business by entertaining such cases—*Foulds* v. *Thomson*, June 10, 1857, 19 D. 803.

At advising--

LORD YOUNG—I am of opinion that the Sheriff-Substitute's judgment is right here, and I think it proper to state that I do not accept the suggestion made that the defender is acting dishonestly in this case, which, in any other point of view than a legal one, a man would be who exposed an article to be competed for, and then after getting the money for the entries refused to give it up, because he explains to us on record that he has no objection to give up the pony to the holder of the winning ticket as soon as the parties settle amongst each other who that person is, though at the same time he suggests that this is not a suitable tribunal for trying the dispute, because the Queen's courts do not exist for settling disputes as to who is the drawer of the ticket and entitled to the prize. I call this a suggestion for the Court, because I should have stated it myself as a reason why such a dispute should not come up for trial here. I am of opinion that neither the Sheriff nor this Court has been in the habit of entertaining, or will entertain, an action of this kind. I do not entertain any opinion on the question whether a lottery for pictures or a pony is illegal in the sense of punishable, or that it is competent to put a stop to such by interdict as *contra bonos mores*, although, as your Lordship has said, it is familiar to those who are concerned with the administration of the Crown law of this country that the Sheriffs and procurators-fiscal are instructed to protect the public by putting a stop to such lotteries. I know that there are various opinions on this question, and therefore in giving my opinion here against this lottery I merely give it to this extent, that an action founded on it as *medium concludendi* cannot be sustained here or in the Sheriff Court.

LORD ADAM concurred.

LORD JUSTICE-CLERK—I am not sure that it is merely a question as to whether this is a case which can be competently heard in this Court. But I am clearly of opinion that it is a contract not only not lawful, but also one which this Court will not entertain, and there is plenty of authority on the point.

The Court therefore sustained the judgment and dismissed the appeal.

Counsel for Appellant—Rhind. Agent—James Andrews, L.A.

Counsel for Respondent — Campbell Smith. Agent—David Forsyth, S.S.C.

Wednesday, October 26.

FIRST DIVISION.

[Lord Curriehill, Ordinary.

EWING *v.* EWING AND OTHERS.

Fee and Liferent—Right of Fiar to Plant Trees on the Estate, and Preserve them from Damage by Game and Rabbits during Liferenter's Possession, or to cause Liferenter so to Preserve them.

Form of conclusions of summons in an action of declarator and damages by a fiar against a liferenter in possession for the protection from injury by game and rabbits of young trees planted by him on the estate during the liferenter's possession, and averments which were in support thereof admitted to proof before answer.

Humphrey E. Crum Ewing, proprietor in fee of the estates of Strathleven and Dumbarton Moor, raised this action of declarator and damages against Mrs Jane Tucker Crawford or Ewing, widow of the late James Ewing of Strathleven, and liferentrix under his trust-disposition and settlement of the said estates, and against her game tenants thereon for their interest in the premises. The conclusions of the summons were as follows:—"Therefore it ought and should be found and declared, by decree of the Lords of our Council and Session—(1) That the pursuer is entitled, by himself or others in his employment, for the protection of the trees planted by or belonging to him on the said estate, to kill hares and rabbits or otherwise, and at least rabbits, within the plantations on said lands and estate, and that by shooting, snaring, and all other lawful means, within the said plantations, and in the fences surrounding the same; (2) that the defender, the said Mrs Jane Tucker Crawford or Ewing, is not entitled to cause or allow to exist and breed within the said plantations, or on the said lands and estate, a stock of rabbits or hares incompatible with the life and growth of the trees in said plantations, or with the fair and ordinary enjoyment by the pursuer of his proprietory rights in the said plantations; (3) that otherwise, and in any view, the said defender is not entitled to cause or allow to exist and breed on said lands or estate or otherwise, and at least within and around the said plantations, a stock of rabbits or hares in excess of what is usual and ordinary and reasonably sufficient for the purpose of sport; and further, it ought and should be found and declared by decree foresaid that the said defender has acted wrongfully, and to the pursuer's loss, injury, and damage — (1) In forcibly, and by herself and her game tenants with her authority, preventing the pursuer and

his servants and others employed by him from killing hares and rabbits, or at least rabbits, in said plantations; (2) in at the same time causing or allowing to exist and breed on said lands and estate, and within and around the said plantations, a stock of rabbits and hares incompatible with the life and growth of the trees in the said plantations; and (3) in causing or allowing to exist and breed in said lands and estate, and within and around the said plantations, an unusual and extraordinary stock of hares and rabbits, and a stock in excess of what is reasonably sufficient for purposes of sport; and the said defender ought and should be decerned and ordained by decree foresaid to make payment to the pursuer of the sum of £1000 sterling in name of damages."

The pursuer made the following averments on record—"(Cond. 3) At the date of Mr Ewing's death there were a number of plantations in said estate, for the most part consisting of narrow beltings necessary for the purposes of shelter and amenity. A considerable portion of the wood in question still remains, and is carefully superintended by the pursuer as fiar of the estate. But considerable portions of the said wood have been from time to time uprooted by storms, and trees ripe for cutting have been cut down for estate purposes and otherwise, and some of these have been replanted by the pursuer with the tacit approval of the liferentrix. There are thus on the estate at present, besides various portions of old plantations, a number of young plantations which have been replanted by the pursuer, and which are managed and cultivated at his expense, and these young plantations are all of them necessary for shelter and the preservation of the amenity of the estate." "(Cond. 4) The game on the estate is let by the liferentrix to Messrs White and Ewing, the defenders called for their interest; and for some time past the game, and in particular the ground game, has been very strictly preserved, and the stock of game, and in particular of hares and rabbits, allowed very largely to increase. In point of fact, there is at present, and has been for some years upon the estate, a stock of hares and rabbits very largely in excess of what is usual and ordinary or necessary for any legitimate purposes of sport. The said increase has been due to the actings and mode of management pursued by the defender or by her said game tenants with her authority." "(Cond. 5) The result of the presence on the estate, and in particular within and around the said plantations, of so large a stock of hares and rabbits, and in particular of rabbits, has been entirely to destroy great parts of the said plantations, and to make it impossible for the pursuer to keep up the same or to replant with the possibility of success. The hares and rabbits (and more especially the latter as being more numerous) have for several years past regularly eaten up the young trees or otherwise injured or destroyed them, and great numbers of trees have in this way, year after year, been totally destroyed. The damage which the pursuer has thereby sustained is not less than the sum of £1000." "(Cond. 6) The pursuer, when the effects of the said excess in the stock of hares and rabbits became apparent, made repeated complaints to the defender and her game tenants, and urged them to keep down the said stock at their own hands. The pursuer's complaints, however, did not have the desired effect, and the result was that he was obliged to direct his foresters and other servants to destroy rabbits in the plantations where the ravages were most serious. This was done chiefly by digging up rabbit-burrows and setting traps and snares in burrows and rabbit runs. So soon, however, as the pursuer adopted these measures of protection the defender and her game tenants and their servants began systematically to spring the pursuer's traps and destroy his snares. The pursuer's servants thereupon employed ferrets and guns, but latterly, and particularly towards the end of November last, the servants of the game tenants, or one or other of them, came in considerable force and forcibly interfered with the pursuer's servants; and the defender and her game tenants have intimated that they will continue to prevent any killing of hares and rabbits, or even of rabbits, within the said plantations. Openings have been repeatedly made in the fences surrounding the said plantations, whereby the hares and rabbits readily get in and out." "(Cond. 7) The pursuer has no means of protecting his trees and plantations against the ravages of the animals in question except by killing them down. No fencing which he could erect would be of any avail for that purpose. He has made repeated proposals to the defender for an amicable adjustment of the matter, and latterly he has offered to take the whole game on the estate into his own hands on lease, paying the liferentrix a rent equal to the total rent which she at present receives from her game tenants. But the defender declines to make any terms, and the present action has thus become necessary."

The pursuer pleaded—"(1) The pursuer, as the occupier of the said plantations, or at least having the rights of a fiar in the same, is entitled at common law to kill down the rabbits within the said plantations for the protection of the trees planted by or belonging to him. (2) *Separatim*, The pursuer has the said right as regards both hares and rabbits under the Ground Game Act 1880. (3) In any view, the defender is not entitled by herself or her tenants to maintain an excessive stock of hares and rabbits on said estate, and in particular in and around the said plantations, and having wrongfully done so, to the pursuer's loss, injury, and damage, the pursuer is entitled to reparation as concluded for."

The defenders pleaded—"(1) The pursuer's averments are not relevant or sufficient to support the conclusions of the summons. (2) The pursuer having only the rights of fiar in the estate in question, subject to the free liferent use and enjoyment of the same by Mrs Ewing, he has no title to insist on the conclusions of the action."

The Lord Ordinary (CURRIEHILL) allowed a proof before answer.

The defenders reclaimed, and argued—That the pursuer having no title to sue, and his averments being irrelevant, the action should be dismissed. He argued that trees, once planted by whomsoever, were *partes soli*, and belonged to the fiar, but the fiar had no right to interfere with the ordinary enjoyment of the liferenter in her estate. The pursuer's demand would come to

this, that the liferenter could keep no game or rabbits at all in the neighbourhood of any plantations on the estate. The form of the summons was unprecedented, and decree could not go out under it as it stood.

The pursuer answered—The only question at this stage was whether his averments were so irrelevant as to render proof undesirable. The case could not be satisfactorily settled except on a full view of the facts.

Authorities—Ersk. Inst., ii., 9, 56; Bell's Prin., sec. 1062; *Gray* v. *Seton*, 1789, M. 8250; *Dickson* v. *Dickson*, Jan. 24, 1823, 2 S. 152; *M'Alister's Trustees* v. *M'Alister*, June 27, 1851, 13 D. 1239.

At advising—

Lord President—This is undoubtedly a very peculiar case, and involves some questions on which there is confessedly no authority. The first set of conclusions of the summons appeared to me from the first time I read them over to raise a grave question as to the title of the pursuer to maintain such an action. I listened with great attention to the arguments on both sides, and I still entertain great doubts whether, under any circumstances that could be disclosed upon the evidence to be led, the pursuer could succeed under these conclusions. But the Lord Ordinary having thought fit to send the case to proof, reserving all the questions of law in the case under the words "before answer," I am not disposed to press the necessity of separating the case into parts; for as to the other conclusions I think it is clearly right to have a proof before they are decided. I am therefore for adhering to the Lord Ordinary's interlocutor.

Lord Deas—This case if it goes on will involve some novel and very difficult questions of law, on some of which there seem to have been no decisions at all. I have a distinct impression about some of these, and not about others, but I think in any view it would be desirable to get at the distinct state of the facts.

Lord Shand concurred.

The Lords adhered, reserving all questions of expenses, and remitted to the Lord Ordinary to proceed with the proof.

Counsel for Pursuer (Respondent)—Lord Advocate (Balfour, Q.C)—Mackintosh. Agents—J. & A. Peddie and Ivory, W.S.

Counsel for Defenders (Reclaimers)—Solicitor-General (Asher)—Jameson. Agent—F. J. Martin, W.S.

Wednesday, October 26.

FIRST DIVISION.

[Lord Adam, Ordinary.

SCROGGIE *v.* SCROGGIE.

Husband and Wife—Process—Expenses—Divorce—Interim Award of Expenses to Wife.

John Scroggie, tobacco pipe manufacturer, Glasgow, brought an action of divorce against his wife. The Lord Ordinary (Adam), after proof led, assoilzied the wife, and Scroggie reclaimed against this judgment. A short time before the proof the Lord Ordinary had made an interim award of £10 to the wife towards expenses of process. Before the reclaiming note came on for hearing she presented a note to the Inner House asking a further award. It was stated for her that she had still an untaxed amount of Outer House expenses, amounting to about £40, and her counsel now asked an award of £50, or at least that the said expenses should be taxed and decree for the amount thereof awarded. Counsel for Scroggie submitted that as he had had to aliment his wife since the Lord Ordinary's judgment, and was in poor circumstances, and had a family dependent on him, £10 would be enough.

The Lords made an interim award to the wife of £15.

Counsel for Pursuer (Reclaimer)—M'Kechnie. Agent—Thomas Carmichael, S.S.C.

Counsel for Defender (Respondent)—Rhind. Agent—Wm. Officer, S.S.C.

Wednesday, October 26.

FIRST DIVISION.

[Jury Trial—Lord Shand.

M'EWEN *v.* LOWDEN.

Reparation — Damages — Culpa—*Liability of a Proprietor for Accident occurring on his Premises.*

A man having sustained injuries by falling through a defective paving stone into a cellar in front of a shop, sued the proprietor of the shop for damages. The jury, upon the facts proved, found for the defender, and the Court on a motion for new trial *refused* to disturb the verdict.

Thomas M'Ewen, tobacco merchant, Glasgow, sought to recover £2000 in name of damages from Matthew Lowden, a retired merchant, and proprietor of a house at the corner of Gordon Street and West Nile Street, Glasgow. The ground floor of the said house consisted of a shop, occupied by a fruiterer as the defender's tenant, with cellars underneath which extended for some feet under the pavement in front of the shop, that space being covered partly with glass, and partly with stone. As the pursuer in passing along the street stepped over the said cellar a slab of stone gave way under him, and he partially fell into the cellar below, and sustained some injuries to his person, for which he now sought damages.

The pursuer pleaded—"(1) It being pursuer's duty to provide a safe and sufficient covering for the foresaid cellars so as to protect the public walking over the same from harm, and having failed to perform that duty, he is liable in damages as concluded for. (2) The pursuer having sustained the injuries foresaid through the insufficiency of the foresaid pavement for the purpose for which it was intended, owing to the fault of the defender, or those for whom he is responsible, decree ought to be pronounced against him, as libelled, with expenses."