suer's appeal, Finds that one of the grounds of action set forth in the summons is, that the pursuer was dismissed from the defender's service 'illegally, wrongously, and without justifiable cause;' and it was stated for said pursuer at the debate that it was only *per incuriam* that the said averment was not repeated in the condescendence, and she craved to have the record opened up, with the view of enabling her to supply the omission. In these circumstances, recals the interlocutor appealed against, opens up the record accordingly, and remits to the Sheriff-substitute to allow the said addition to be made to the condescendence, and to be met in the defences; but this only provided the pursuer pays to the defender, within six days from this date, the sum of 15s. of interim expenses; and thereafter to close the record of new, and proceed with the cause as to the Sheriff-substitute seems just, with certification, that if the above sum be not paid, the Sheriff-substitute, after again closing the record, has full liberty to repeat, if so advised, the interlocutor now appealed against." The pursuer did not avail herself of the opportunity given to her to amend her condescendence, and the record having been again closed by the Sheriff-substitute, his Lordship of new closed the record, and repeated his interlocutor of 30th April 1867. The Sheriff, on appeal, altered his interlocutor, and allowed the pursuer a proof of her whole averments. The case was then advocated by the pursuer, with a view to jury trial in terms of the Act 6 Geo. IV., c. 120, sect. 40. The following issue was proposed:—

"Whether, on or about the 18th day of January 1867, the defender addressed and delivered, or caused to be delivered, to Peter M'Callum, junior, Helensburgh, a letter in the terms set forth in the schedule annexed hereto, or in similar terms? and whether, in the said letter, the defender falsely and calumniously stated to the said Peter M'Callum that the pursuer was far from honest, and quite an adept in all the usual modes of theft common among servants; or did, falsely and calumniously, make use of words and expressions of and concerning the pursuer of the like tenor and import, to the loss, injury, and damage of the pursuer?

Damages laid at £100 sterling."

Parties having failed to adjust before the Lord Ordinary (KINLOCH), his Lordship reported the issue.

CLARK and BLACK for advocator.

THOMSON, for respondent, contended that there was no issuable matter, and that no issue should be allowed. The fact that the ground of action was stated in the formal part of the summons, and withdrawn from the Condescendence, must be held to imply that the advocator intended to abandon it. The ground of action must be clear on the pursuer's own statement, and she was not entitled to spell out a relevant case by looking to the statements of the defender.

The Court unanimously sustained the issue, holding that there was sufficient averment; LORD NEAVES observing that the fair interpretation to be put upon the statement that a letter was written, is that it was despatched.

Agent for Advocator—W. H. Muir, S.S.C.

Agent for Respondent—A. Morrison, S.S.C.

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*Tuesday, Februarg* 18.

## FIRST DIVISION.

### MILNE *v.* EARL OF DALHOUSIE.

*Reparation—Game—Landlord and Tenant—Issue.* Issue adjusted to try claim of damage to crops by excess of game. Counter issues founded (1) on miscropping, refused as unnecessary; and (2) on alleged counter claim of damages for miscropping, refused as incompetent.

Alexander Anderson Milne, tenant of the farm of Balmachie, on the estate of Panmure, brought an action in the Sheriff-court of Forfar against the defender, heir of entail in possession of the said estate, for damages on account of injury done to the pursuer's grain and grass crops on the said farm during the year 1866, by reason of the defender having wrongously preserved and had in excessive quantities upon the said farm game of various kinds. The pursuer's lease was dated in 1774. The pursuer obtained right to it by assignation in 1862. The lease reserved to the proprietor the sole and exclusive right and privilege of fishing, fowling, and killing game on the farm. The pursuer alleged:—

"(3) At the time the said lease was entered into, and up to a recent period, there was little or no damage by game. The defender succeeded to the estates of Panmure on the death of his father in 1852. At that time there was very little game on the lands; pheasants were unknown; there was only one gamewatcher for that portion of the estate lying between Arbroath and Dundee, and the farmers were allowed to destroy the hares at pleasure."

"(4) On the defender succeeding to the estates, he immediately put on ten or a dozen keepers over the district on which the pursuer's farm is situated; he imported and bred pheasants and also rabbits to a great extent, and turned them loose on the pursuer's lands, and in the woods adjoining, and he abstained from shooting during the first two or three years after 1852."

"(5) By these means the game on the pursuer's farm and on some of the neighbouring farms has been enormously increased, and is yearly augmenting. Besides what he has used himself and distributed among his friends, the defender has sold immense quantities of game, killed almost exclusively on the pursuer's farm and one or two farms in the immediate neighbourhood. The defender is called upon to state the quantity and value of game sold by him for each of the last five years, with the names of the purchasers. In the summer of 1858, the defender was called upon by William Anderson, then tenant of the farm of Mains of Panmure, which adjoins the farm of Balmachie, to pay for game-damage, estimated at £160 or £170, and after an inspection and valuation the damage was settled extrajudicially by the defender paying Mr Anderson £100. Mr Anderson left Mains in 1860, and the farm has since been let to two different tenants, both of whom have thrown it up in consequence of the destruction to their crops by game. For the last three or four years it has been out of lease, and has been used by the defender as a game-preserve. Mains is only separated from Balmachie by a narrow strip of plantation, and the game fostered by the defender on the former farm have therefore easy access to the pursuer's crops on the latter."

The pursuer averred that in consequence of these proceedings on the part of the defender, the game had destroyed the crops of the pursuer to a very

large extent, the loss amounting that year to £250, exclusive of loss by injury to turnip crop and pasture.

The defender averred:—"(5) The pursuer and his predecessors have totally changed the mode of culture and rotation prescribed by the lease, and instead of the farm being cropped and laboured under the rotation specially above mentioned, it has been cropped and laboured in contravention of the lease, by which great pecuniary advantages have been obtained by the tenants, who have been largely *lucrati* by the lease. An action of declarator is now in dependence in the Court of Session, at the defender's instance against the pursuer, in consequence of the change of culture and rotation prescribed by the lease. (7) Had the tenants adhered to the mode of cropping prescribed by the lease (even assuming that an excessive quantity of game had been preserved, but which is specially denied), the alleged damage could not have been sustained; in respect at least one-half of the farm would have been laid down in pasture, one portion in fallow, and the remainder in white crop; and the damage, if such has arisen, has been caused by the pursuer and his relatives' own illegal acts."

The Sheriff-substitute (ROBERTSON) found that the defender was only liable for damage done by increase of game since the date of the lease, and, before answer, allowed the pursuer a proof of the state of the game at that date and in 1866. The Sheriff (HERIOT) adhered. The pursuer advocated, and proposed this issue.

"It being admitted that, in 1866, the pursuer was the defender's tenant in the farm of Balmachie, under the lease No. 15 of process, and assignations thereof, Nos. 16, 17, and 18 of process, and had right to the crops grown on the said farm in the said year:—

"Whether, in 1866, the defender wrongously preserved, and had in excessive quantities upon the said farm, game of various kinds, whereby the crops of the said year, in the particular fields specified in the schedule hereunto annexed, or part of the said crops, were destroyed or injured, to the loss, injury, and damage of the pursuer?

"Damages £250."

(Here followed schedule.)

The respondent proposed these counter-issues:—

"1. Whether, in 1866, the pursuer cropped the said farm, or any part thereof, contrary to the provisions of the said lease?

"2. Whether, in the years 1863, 1864, 1865, and 1866, or in any and which of the said years, the pursuer cropped the said farm, or any part thereof, contrary to the provisions of the said lease; and whether, in respect of the said miscropping, the pursuer is indebted and restingowing to the defender, under the said lease, in the sum of £250, or any part thereof?"

The Lord Ordinary (KINLOCH) reported the case.

BALFOUR (CLARK with him) for respondent, objected to the relevancy of the action, in respect that there was no allegation of material increase of game since the commencement of the lease, and no allegation that the stock of game at that time was more than a fair average stock; and contended that the action was excluded, because the tenant had departed from the mode of cropping prescribed by the lease.

WATSON and ASHER, for advocator, were not called on.

LORD PRESIDENT—I don't think there is any difficulty in this case. The first objection taken by the defender is, that the averments of the pursuer are irrelevant, and his ground for that is, that they don't show a sufficient contrast between the condition of the farm at the time when the lease was entered into and the time when the damage was done. All I shall say is, that the third, fourth, and fifth averments are quite sufficient for that purpose. The third says [reads, *ut supra*]. Considering the date of the lease, the pursuer could not be expected to say more. All he can do is to show that at that time there was no such thing as damage done by game. He avers, in contrast to that time, that on the defender [*reads* cond. 4, &c]. Therefore, so far as that objection is concerned, there is no foundation for it.

It is said next that this claim is excluded by the admissions made by the pursuer in answer to the defender's statements five and seven, the admissions being represented as admissions of miscropping. I give no opinion as to the effect of proof of miscropping. It would be a very important question at the trial; but I think there are no such admissions as to exclude the pursuer's claim. The miscropping of the farm may be a most important element in the evidence of the defender at the trial; for if he can show that, by miscropping, crops have been introduced which have suffered the damage complained of, he will have a good ground for saying that the pursuer cannot recover damages. But it is not necessary to go into that now. It will be open to the defender at the trial, without any counter-issues at all. As to the second counter-issue, that is simply an attempt to bring an action of damages as counter to another action of damages.

As to the form of the pursuer's issues, I should be disposed to adopt the form settled in the recent case of *Syme* v. *Earl of Moray*.

The other judges concurred.

This issue was adjusted:—

"It being admitted that in 1866 the pursuer was the defender's tenant in the farm of Balmachie, under the lease, dated 16th February 1774, No. 15 of process, and assignations thereof, Nos. 16, 17, and 18 of process, and had right to the crops grown on the said farm in the said year:—

"Whether, in 1866, the defender had upon the said farm an unreasonable and excessive stock of game of various kinds, beyond what existed thereon at the date of the lease, whereby the crops in the fields mentioned in the schedule, or in one or more of them, were destroyed or injured, to the loss, injury, and damage of the pursuer?

"Damages, £250."

Here followed Schedule.

Agents for Pursuer—G. & J. Binny, W.S.

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

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## *Wednesday, February* 19.

### YOULE *v.* COCHRANE AND OTHERS.

*Ship—Freight—Charter-party—Agreement—Lien—Shipmaster.* A chartered a ship for two years. He then "sub-chartered" it to B for carriage of a cargo to Rio at a stipulated freight, agreeing with B that one-third was to be paid on the sailing of the ship, and the rest at Rio. The cargo was loaded, and one-third of the freight paid by B to A. On arrival of the ship