awarded under this application as interim aliment: Finds that the petitioner's father, the cadger, for some time took the petitioner and her children into his family, but he now refuses to aliment her any longer, has turned her out of his house, and she is now utterly destitute: Finds, in these circumstances, that the petitioner is entitled to parochial relief in respect of her infant children and the desertion of her by her husband, whatever claim of relief the parish may have against the husband: Therefore alters the interlocutor complained of, finds the petitioner entitled to relief for herself and her children, and ordains the defender to give her suitable relief accordingly."

The inspector of poor advocated.

MACKENZIE for advocator.

BALFOUR for respondent.

Before answer a remit was made to Dr Littlejohn to examine the petitioner's husband, and report as to his mental and bodily state.

The Court to-day held that the petitioner was not a proper object of parochial relief, her husband being able-bodied and not in desertion. Sheriff Alison's interlocutor was therefore altered.

Agents for Advocator—Mackenzie & Kermack, W.S.

Agents for Respondent—Maclachlan, Ivory, & Rodger, W.S.

Wednesday, March 20.

SECOND DIVISION.

PLUMMER *v.* MACKNIGHT.

Teinds—Decree of Valuation. Circumstances in which held that certain lands were included in a decree of valuation.

This is a question between the common agent in the locality of Selkirk, and Mr Charles Scott Plummer of Middlestead. In making up a rectified state of teinds the common agent held, (1) that the teinds of certain lands of Blackmiddings, held by Mr Plummer along with the lands of Middlestead, were not included in a valuation of "the lands of Middlestead," dated 25th July 1636. (2) That Mr Plummer's share in the commonty of Selkirk, which had been divided by Act of Parliament in 1681, was unvalued. To this state Mr Plummer objected. He alleged, (1) that Blackmiddings was valued along with and included under the name of Middlestead in 1636, the lands being separately mentioned in the titles from 1628 downwards. On the other hand, no separate teind had been paid to the titular for Blackmiddings. It is now distinguishable as a separate subject; and in a valuation roll dated 1643, the deduction from Middlestead for feu-duty (no mention being made of Blackmiddings) is £30, 6s. 8d., being exactly the amount of the feu-duty which appears from the Crown titles to have been payable for both of the lands—viz., £24 for Middlestead and £6, 6s. 8d. for Blackmiddings. (2) That the lands of Sunderland, Sunderlandhall, and Yair were also valued by the same valuation of 1636. In 1676, there was a settlement of the boundaries of the commonty of Selkirk between the burgh and the heritors, afterwards ratified by Act of Parliament, by which parts of the commonty were allotted to the said lands now belonging to the objector. There was no subsequent addition to the titles.

The Lord Ordinary (Barcaple) found (1) that the objector had sufficiently established that the teinds of the lands of Blackmiddings mentioned in his titles are included in the valuation of the teinds of the lands of Middlestead in the decree of valuation dated 25th July 1636 founded on by him, and are included in the tack of the teinds of the said lands of Middlestead, contained in a deed of tack between the Duke of Roxburghe and Wiliam Plummer of Middlestead, dated 26th August 1709, also founded on by the objector; (2) that the objector had sufficiently established that the teinds of the portion of ground which was by decreet-arbitral dated 7th October 1676, and ratified by Act of Parliament in 1681, decerned to belong to William Kerr of Sunderlandhall, as part and portion of the common of Selkirk, and which now belong to the objector, are included in the valuation of the teinds of the objector's lands of Sunderland and Sunderlandhall, contained in the said decree of valuation, and are included in the tack of the teinds of the said lands of Sunderland and Sunderlandhall contained in the said deed of tack.

His Lordship's judgment was rested as to the first point mainly on the inference to be drawn from the valuation roll of 1643, by which he held that the *onus* on the heritor had been discharged; and, on the second point, he held that the proceeding of 1676 was rather a settlement of boundaries than a proper division of commonty.

The common agent reclaimed.

COOK and HALL for him.

SOLICITOR-GENERAL and WEBSTER for the objector.

The Court adhered to the judgment of the Lord Ordinary on the first point; and on the second, as raising an important question in teind law, ordered written argument.

Agent for Common Agent—James Macknight, W.S.

Agents for Objector—Hughes & Mylne, W.S.

CUNINGHAME *v.* WEBSTER AND ROYSTON.

Lease—Agricultural Tenant—Tenant of Game—Plantation—Right of Pasturage. Circumstances in which held that an agricultural tenant who had a right to pasture in the plantations adjoining his farm, was entitled as a pertinent of his right to trap or kill rabbits there as well as in other parts of the farm.

This is an advocation from the Steward Court of Kirkcudbright, and raises an important question as to a tenant's right in regard to game. It arises out of the following circumstances:—The advocator, who is tenant of the shootings on the estate of Kells, presented a petition to the Steward against the respondents, Robert Webster, who is tenant of the farm of Airds, and Thomas Royston, a rabbit-catcher there, craving to have them interdicted from trapping or killing game or rabbits in the Airds plantation, and from hunting or trapping game on the farm of Airds. The respondents denied that they had ever trapped or killed game on any part of the ground libelled, and to that extent objected to the interdict as groundless and unwarrantable. So far as it was directed against killing or trapping of rabbits, they maintained that the tenant of a farm had right to kill these to the extent of preserving his crops. Some correspondence had taken place between the parties, the general import of which was that the agricultural tenant was willing not to interfere with the rabbits if the game tenant kept them down within reasonable bounds; but he complained that that had not been done. The agricultural tenant had a right to pasture within the

plantations, and it was proved in the proof led in the inferior court that he had been in the habit of killing rabbits there without objection. The Steward-Substitute, overruling an objection to the petitioner's title to sue, held that the petitioner, as tenant of the shootings, was bound under his lease to keep down the number of rabbits, so far as to protect the agricultural tenant; that he failed to do so; that the number of rabbits was excessive; and that, accordingly, the agricultural tenant was entitled at his own hands to destroy rabbits on the lands let to him to the effect of protecting his crops. The Steward-Substitute found that the tenant was only entitled to exercise his right upon the ground let to him, and not in the plantations. He also granted interdict, so far as directed against killing or hunting game. The Steward-Depute (Hector) altered this interlocutor, in so far as it did not sustain the tenant's right to destroy rabbits, not only on his own lands, but in the plantations also.

The petitioner advocated.

YOUNG and FRASER, for him, argued. The advocator seeks two things—1st, To interdict the respondent, Webster, from entering any of the woods on the farm of Airds, for the purpose of setting traps for taking or killing game or rabbits therein; and 2d, From entering or being within six acres of wood on the said farm, lying between the railway and the river Dee, for the purpose of taking or killing game or rabbits. The game was reserved to the proprietor in the respondent's lease of the farm of Airds, but there was no reservation to the landlord of the woods on the farm. That being so, the woods must, at common law, be held to be reserved to the landlord, and the tenant had no right to enter them for any purpose without his consent. The rights of the landlord, as regards the game, having been transferred to the advocator, he had a right and interest to protect his game, and exclude the respondent from entering the woods and placing traps there to injure the game. It was proved that during the end of 1864 the game was much mutilated by traps and snares set by the respondent's rabbit-catcher, Royston, and that he was in the habit of taking hares and pheasants in his traps. It would be argued by the respondents that they had a right to pasture cattle in the woods in question, but this right was limited merely to the hay on any open spaces interspersed through the woods. The evidence of the factor, Mr Mure, who let the farm, was clear on this point. He said, "he did not intend to let the enclosed woods on the estate of Airds along with the farm of Airds, but the tenant had a right to cut the meadow hay on any open spaces interspersed through the woods." This evidently showed that the tenant was not to have any right to the woods. The reasoning of the Steward-Substitute is conclusive on this point. He has found that the tenant had no right to enter the woods on any ground whatever, and that his doing so for the purpose of trapping rabbits was a trespass. Further, by special agreements entered into in 1861 and 1864, between the advocator and respondent, the latter bound himself to give up trapping rabbits in the woods and farm. The respondent violated this agreement down to the date of the interdict.

The advocator admitted that the respondent had a right to kill rabbits on his farm for the protection of his crops; but he had no right to do so in the woods, or in any manner calculated to injure the game. In the case of Moncrieff *v.* Arnott, 13th February 1828, 6 S. 530, it was decided that a landlord was entitled to interdict his tenant from trapping and snaring rabbits in such a way as to do injury to the game. In the present case injury to the game was not only apprehended but proved to have taken place. The case of Wemyss *v.* Gulland, 3d Dec. 1847, 10 D. 204, was to the same effect. The advocator was therefore entitled to the remedy sought, and the interlocutor of the Steward-Depute should be recalled.

MARSHALL and M'KIE, for the respondents, answered--The case divided itself into two branches—(1) the rights of the respondent as the agricultural tenant of the farm of Airds; (2) the rights of the advocator as tenant of the game. As to the rights of the agricultural tenant, it was proved that the respondent and his father had possessed the farm of Airds for nearly forty years, and had, during that time, exercised the right of pasturing catttle, cutting hay, and trapping rabbits in the woods upon the farm. It was proved that the woods were the great breeding places of the rabbits, and trapping was the only effectual way of keeping them down. The respondent, in trapping the rabbits, was most solicitous to protect the game, and showed the utmost anxiety to prevent it being injured. So much was this the case, that it was proved that his rabbit-catcher, Royston, covered his traps so as to prevent game getting into them, and only four pheasants were proved to have been caught in the traps during four years. The proof showed that the game was not destroyed or injured by the traps. But it was maintained that the respondent had no right to enter the woods on his farm, and that in doing so he committed a trespass. The Steward-Substitute has held it to be settled law that, when the lease is silent as to woods, they are held to be reserved to the landlord. The authorities cited in support of this principle are—Erskine, 2, 6, 22; Hunter on Landlord and Tenant, 2, 197 and 198, and stat. 1698, c. 16. The Steward-Substitute has misinterpreted these authorities. The tenant is entitled to the whole surface of the ground for which he pays rent. He may, unless specially reserved to the landlord, occupy the ground on which the timber grows, but must not consume or injure the timber. The Act 1698 assumes that the tenant can enter the woods on his farm for all lawful purposes; in fact, that he must do so, in order to protect the trees. Professor Bell (Prin. s. 1226) thus defines the rights of the tenant—"Woods are also reserved to the landlord, the tenant being entitled to the yearly fruits, thinnings for repairs, willow twigs while young for basket-wood," &c., and he refers to the case of Bogue, Mor. *voce* "Planting," App. 2. The respondent's entering the woods was not a legal trespass; the proprietor could not have prevented him. If he had right to enter the woods, he had a right to carry on all lawful operations there for the protection of his crops. Trapping rabbits is a lawful operation and was in the circumstances absolutely necessary—Moncrieff *v.* Arnott and Wemyss *v.* Gulland, *ut supra*. The application for interdict in those cases was not at the instance of a game-tenant, but of the landlord; and in both cases the tenant showed a total disregard of the interests of the proprietor in the game; quite different from the care and anxiety of the respondent to protect the game in the present case. But whatever may be the common-law rights of the respondent, it is proved that the respondent and his father pastured their cattle in

the woods, cut hay in them, and killed and trapped rabbits there for nearly forty years, without having their right so to do questioned by the proprietor. It was clear, therefore, that the respondent's rights extended over the whole surface of his farm, including the woods. (2) As to the rights of the game-tenant, the lease was a verbal one, and the only evidence in support of it was the receipt for rent paid, and the evidence of the landlord's factor, who referred to a letter, written to the advocator by his agent, embodying the terms of the lease. From that letter it appeared that the lease was to endure for three years, and that the game-tenant was to be bound "to keep down the rabbits." This lease was ineffectual, and did not constitute a sufficient title to sue. A verbal lease, for more than a year, is ineffectual even for a year (Bell's Prin. s. 1188); and it cannot be proved by the oath of party (Bell on Leases, vol. ii., p. 281, and note). Farther, a lease of game is not a real right, but only a personal privilege, and not good against a singular successor or purchaser of the land (Pollock, Gilmour & Co. *v.* Harvey, 6 S. 913). It may be a good title to sue to protect game, but is not sufficient to entitle the advocator to interdict the respondent from killing rabbits, which are not game, on his farm, or from entering the woods for that purpose. The proprietor ought to have concurred, which he has not done. But, if the advocator has a title to sue, he has no title to prevail on the merits, or to exclude the respondent from the woods on his farm for any lawful purpose, because the woods are a part of his farm, and the tenant has a right to destroy the rabbits for protection of his crops. It is proved that trapping was the only effectual means of destroying them; that the traps were set with great care, and that no injury was done or intended to the game. As to the right of the advocator to the six acres of wood between the railway and the river Dee, he had established no title to it. The respondent did not claim any right to possess and occupy that wood, and no attempt to trap rabbits there had been proved. Then as to the special agreements of 1861 and 1864, founded on by the advocator, there was no evidence that they were ever concluded agreements.

To-day the Court adhered to the judgment of the Steward-Depute.

The LORD JUSTICE-CLERK rested his judgment mainly on the right of pasture which the agricultural tenant had in the plantations, which he held to involve his right to kill rabbits there as a pertinent, and on the exercise which he had had without objection.

Lord COWAN concurred, expressing his dissatisfaction that there had been so much and persistent litigation on such a subject.

Lord BENHOLME was of the same opinion. He would only add, that where there was a conflicting interest between the agricultural and the game tenant, great forbearance was needed to prevent collision; for while the agricultural tenant used traps, as he was entitled to do, he must use such traps as would not destroy game. That was to a great extent possible; and on the other hand, the game tenant must take care not to injure the stock on the farm. It was plain that for many years there had been a good deal of that forbearance here, until something or other had happened, in consequence of which the game tenant had become unreasonable, and had begun a litigation which latterly had become merely a matter of expenses, his interest as game tenant having ceased before the record was closed in the inferior court.

Lord NEAVES concurred.

Agent for Advocator—W. S. Stuart, S.S.C.

Agents for Respondents—Scott, Bruce & Glover, W.S.

OUTER HOUSE.

(Before Lord Mure.)

PET.—MRS MACKAY.

Agent's Hypothec—Trust—Beneficiary—Judicial Factor—Rental Book. Held (per Lord Mure, and acquiesced in) that a law agent for a beneficiary under a trust-deed was not entitled to plead his right of hypothec in regard to the rental book of the estate, against a judicial factor, the latter being the natural custodier of such vouchers.

A question affecting the principle of a law agent's right of hypothec arises in this case. In 1821, John Russell, Esq., of Moreless and Balmaad, died, leaving a trust-deed, by which he conveyed his property to trustees. The trustees failed, and his daughter, Mrs Mackay, wife of Captain Mackay, of the 50th Regiment, with, it is said, in these proceedings, the consent of the trustees, served heir in general to her father, and assumed the management of the estate. The trust-deed provided that, in the event of Captain Mackay predeceasing his wife, the trustees were, a twelvemonth after that event, to divest themselves of the capital of the estate and make it over to Mrs Mackay, who was to be taken bound, by a deed sufficient for the purpose, that the capital and interest should be preserved for behoof of her children, and at her death divided equally among them. Mrs Mackay having served to her father, executed a disposition of the property to herself in liferent and her children in fee, and she continued along with her husband in management of the estate until 1840, when a judicial factor was appointed on an application made by Mrs Ewing, a daughter of Mrs Mackay. The estate has since then been in the hands of successive judicial factors, and is now under charge of Mr John Allan, solicitor, Banff, who was appointed in 1866. In these circumstances, Mrs Mackay brought a petition last year, praying for an annuity out of the estate. This being opposed by Mrs Ewing, the judicial factor was called upon by the Lord Ordinary to supply certain information to the Court, and in particular to instruct the alleged indebtedness by Mrs Mackay of considerable sums to the trust-estate, which were set up as a reason why no annuity should be granted. To enable him to do this, the judicial factor served a specification of writs for recovery of the rental book of the estate while that was under the management of Captain and Mrs Mackay. That specification was served on Messrs H. & H. Tod, W.S., who put in answers to the petition on behalf of the executor of the late Mr Pyper, writer in Edinburgh, who was the executor of the late Mr Dougal Grant, solicitor in Edinburgh, sole partner of the firm of Messrs Macmillan & Grant. Macmillan & Grant had done a good deal of law business for Captain and Mrs Mackay for the period between 1839 and 1856, in connection with the estate, and with their rights under it as beneficiaries. In particular they had acted as agents for Mrs Mackay in a petition for recal of one of the factors, and the appointment of another. For the account so incurred, Messrs H. & H. Tod,