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,

as representing the interest of Macmillan & Grant, claimed a right of hypothec over the rental book of the estate and other writings which had come into their possession on the employment of Captain and Mrs Mackay. The Lord Ordinary remitted to a commissioner to take proof under the specification, when Mr Tod appeared, and declined both to produce the book and to say where it was. The commissioner having reported the matter to the Court, a discussion followed as to the validity of the alleged right of hypothec. In the course of the discussion it was admitted that the rental book was in the possession of the Messrs Tod, but they maintained their right to retain it until payment of their account, or at any rate of that part of their account which was incurred in the recal and appointment of a new judicial factor, because that was both beneficial to the estate and a direct charge against it. The Lord Ordinary pronounced the following interlocutor, which has been acquiesced in :—

"28*th February* 1867.—The Lord Ordinary, having heard counsel on the report of the commissioner, No. 40 of process, relative to the objection raised by the haver, under the call made upon him to produce in terms of articles 1st and 2d of the specification No. 37 of process, Finds that the haver is bound to answer the question whether he has the rental book and other writs called for in his possession, and if so, to produce the said rental book; and ordains him to produce the same by Monday first, under reservation of any claim he may have to payment out of the estate in the hands of the judicial factor of such of the accounts in respect of which the claim of hypothec is asserted, as he can instruct are properly chargeable against that estate, and have not already been paid, and reserving *hoc statu* the questions raised as to production of the decree-dative and inventory: Finds the haver liable in the expenses of this discussion, which modifies to five guineas, and decerns. DAVID MURE."

"*Note.*—The rental book called for ought, in the opinion of the Lord Ordinary, to have been handed over to the predecessor of the present judicial factor by the agent whose representative now claims right to retain it, when the trust estate was taken out of the charge of his client, Mrs Mackay, and placed under judicial management in 1840, and this would probably have been done had that judicial factor properly discharged the duties devolved on him by the Court. In these circumstances, it appears to the Lord Ordinary that the representative of the agent who so omitted to hand over the rental book to the judicial factor is not entitled, in respect of any of the rules which have hitherto been applied in regard to an agent's hypothec, to refuse to deliver up that book to the officer of Court under whose charge the estate now is, because of accounts incurred on the employment of one of the beneficiaries interested in the estate after it had been placed under a judicial factor. When the question was discussed before the Lord Ordinary, the claim to retain was accordingly not insisted on, in regard to several of the accounts in the appendix to the answers for the executor, on whose behalf the claim was set up; and, in particular, in regard to Nos. 2 and 5, and, as the Lord Ordinary understood, No. 7 of that abstract, and the Lord Ordinary does not very well see upon what ground, *ex facie* of the other accounts, a claim to retain can be maintained in respect of them as against the present judicial factor, unless it can be shown that the business was incurred upon the employment of his predecessor in the office or in proceedings necessary to be taken against that predecessor for the protection of the estate; and which, in the peculiar circumstances of the case it may have been necessary to do. While, therefore, the Lord Ordinary has appointed the rental book to be produced, he has inserted a reservation which will keep open any claim the haver can instruct to be properly chargeable against the trust-estate, which is sufficient to meet any such demand; and he has also reserved *hoc statu* the question as to ordering production of the decree dative and inventory. "D. M."

Counsel for Haver—Mr G. H. Pattison. Agents—H. & H. Tod, W.S.

Counsel for Judicial Factor—Mr W. A. Brown. Agent—J. C. Baxter, S.S.C.

HOUSE OF LORDS.

Monday—Thursday, March 18—21.

OSWALD'S TRUSTEES *v.* OSWALD AND OTHERS.

(In Court of Session 2 Macp. 249.)

Entail—Contravention—Prohibitions against Alienation and Altering the Order of Succession—Mortis Causa Deed. An heir of entail in possession executed a *mortis causa* trust-deed, conveying the entailed lands to trustees, who maintained that the conveyance was within the granter's power, because the prohibition against alienation was ineffectual, being erased *in substantialibus*. *Held* (aff. C. of S.), that the deed was not an alienation, but an alteration of the order of succession, which was prohibited by a clause not said to be ineffectual, and that therefore it was a contravention of the entail.

This was an appeal from a judgment of the Second Division of the Court of Session, in an action of declarator at the instance of the trustees and beneficiaries named in the trust-deed of the late Richard Alexander Oswald, Esq., of Auchencruive, dated 19th October 1838. Mr Oswald died on 19th June 1841.

The pursuers concluded for declarator that they had right under the trust-deed to the whole heritable and moveable property of the late Mr Oswald, and especially to certain specified lands which Mr Oswald held under a deed of entail, dated 22d January 1790. The deed of entail contained a prohibition against alienating the lands, and another against altering the order of succession. But, in the prohibition against alienation, the word "irredeemably" was written on an erasure, which, it was maintained, rendered that prohibition ineffectual and entitled Mr Oswald to convey the lands to the pursuers.

The defender, Mr Alexander Oswald, pleaded that the trust-deed was not a deed of alienation in the sense of the statute 1685, c. 22, but a deed altering the order of succession, and that, although the clause prohibiting alienation might be ineffectual because of the erasure *in substantialibus*, the clause prohibiting the alteration of the order of succession was not in that position; and that therefore the late Mr Oswald had no power to grant the trust-deed in so far as it affected the subjects of the entail.

The Lord Ordinary (Jerviswoode) assoilzied the defenders, and on a reclaiming note the Second