suer's case, in my opinion, to show that the foreman neglected to have the opening under charge of a special watchman, or at least of a watchman with special instructions.

I think that the accident occurred by reason of a defect in the condition of the deck which the pursuer had to traverse, which defect arose from or had not been remedied owing to the negligence of the foreman entrusted with the duty of seeing that the byelaw was observed, or other sufficient precautions taken.

The Court pronounced the following interlocutor:—

"The Lords . . . Find in fact (1) that on the occasion libelled, the pursuer, then a workman in the employment of the defenders, was injured by falling into a hole in the deck of the steamship 'Pretoria,' which the defenders were filling with new engines and boilers; (2) that the defenders appointed sufficient watching and lighting for the protection of those having to traverse the deck of said vessel; (3) that at the time of the accident the watchman on duty had gone away from his post unnecessarily, and that it was in consequence of his failure in the duty entrusted to him that the accident to the pursuer happened: Find in law that the defenders are not liable for the consequences of the failure of the watchman to fulfil the duty entrusted to him: Therefore dismiss the appeal, and affirm the judgment of the Sheriff-Substitute appealed against, and decern."

Counsel for the Pursuer—Rhind—A. S. D. Thomson. Agent—Wm. Officer, S.S.C.

Counsel for the Defenders—Dickson—Aitken. Agents—Drummond & Reid, W.S.

Saturday, November 30.

SECOND DIVISION.

[Lord Kyllachy, Ordinary.

WALLACE *v.* ANDERSON.

Landlord and Tenant—Trust-Deed—Occupier of Farm—Ground Game Act 1880 (43 *and* 44 *Vict. c.* 47)—*Interdict.*

A tenant farmer at Whitsunday 1889 conveyed to a trustee his whole estate, including his rights under his lease, and granted at the same time to the landlord a deed of renunciation of his lease as at the following Martinmas. He continued by agreement to reside on and manage the farm. On 10th October 1889 the landlord sought to interdict the farmer from killing the ground game, alleging that he had no authority therefor either from himself or the trustee, who was occupier of the farm. The farmer opposed the application, alleging that he was occupier of the farm, and desired to protect his crops for behoof of his creditors.

Held (*diss.* Lord Young) that as the pleadings disclosed a question for trial between the parties, and as caution had been found, the note was properly passed.

Hugh Robert Wallace, proprietor of the farm of Barneil, Ayrshire, raised this note of suspension to interdict William Anderson from killing ground game thereon.

The respondent became tenant of the farm of Barneil for nineteen years after Martinmas 1882. The lease included the following provisions—"Reserving all game of every description on the said lands, so far as not inconsistent with the Ground Game (Scotland) Act 1880, . . . with the exclusive privilege of . . . shooting . . . on the same by the proprietor or others having his authority, free of all damages and expenses: . . . It being hereby declared that the tenant shall have no claim on the landlord for any injury or damage done to the crops by game in any manner of way: . . . If the tenant shall at any time during the currency of this lease become bankrupt, . . . or if he shall voluntarily divest himself of his property by trust-disposition or otherwise for behoof of his creditors, . . . then, and in any of these events, it shall be in the power of the proprietor to put an end to this lease, and to resume possession of the subjects hereby let without any declarator or process of law for that effect."

On 2nd April 1889 the respondent executed a trust-deed for behoof of his creditors in favour of James Findlay, the landlord's factor, by which he assigned and conveyed his entire estate and effects, including his rights under the foresaid lease. At the same time he executed a deed of renunciation of the lease to take effect at Martinmas 1889. Findlay accepted the office of trustee under the foresaid trust-deed, and entered upon possession of the farm.

The complainer averred—"The respondent continues to reside on and manage the farm under the said James Findlay. Taking advantage of his residence there, he is regularly in the habit of killing the ground game on the said farm, although he holds no authority to that effect from the said James Findlay. He has been frequently warned by the complainer that he has no longer any right to kill the ground game, but he still continues the practice. The complainer is consequently forced to apply to your Lordships for interdict as craved."

The respondent averred that for some time past his crops had suffered from over-preserving of game. "As the complainer declined to keep the ground game within reasonable limits, and as he refused to pay compensation for the partial destruction of the respondent's crops, the respondent had no other alternative but to exercise his right under the Ground Game Act in order to protect his crops from total destruction. The respondent during this year has suffered loss by partial destruction of his crops by the excessive stock of ground game by over-preserving to the extent of £60, as estimated by the complainer's factor, who is the respondent's trustee. Said trustee and creditors have made frequent complaints to the

respondent for not keeping down the ground game so as to prevent destruction to his crops, and accordingly he has as far as possible attempted to comply with their request by killing said game."

The complainer pleaded—"The respondent having no authority either from the proprietor or from the occupier of the said lands to kill the ground game, interdict ought to be granted as craved."

The respondent pleaded—"(1) The respondent as occupant of said farm, being entitled under the Ground Game Act 1880 to kill the ground game on said farm, interdict should be refused, with expenses. (2) The respondent by permission, or at the request of his trustee, is entitled under said Act of Parliament to kill the ground game, and interdict should be refused."

On 26th October 1889 the Lord Ordinary on the Bills (KYLLACHY), on caution, passed the note, and granted interim interdict.

The respondent reclaimed, and argued—He had admittedly granted a trust-deed, but that was for behoof of his creditors. He was tenant of the farm till Martinmas, and as such was the only occupier in the sense of the Act, and it was not necessary that the tenant should obtain written authority from the trustee for keeping down the rabbits. He was acting for the benefit of his creditors by saving his crops—*Inglis* v. *Moir's Trustees*, December 7, 1871, 10 Macph. 204; *Fraser* v. *Lawson*, December 21, 1882, 10 R. 396.

The complainer and respondent argued—The occupier of the farm was the only person who could lawfully shoot the ground game on this farm. The trustee was occupier. The tenant had granted a trust-deed in favour of the trustee, and *unico contextu* he had granted a renunciation of the lease. The trustee had kept on the former tenant as manager, but that did not constitute him the real occupier, as he had divested himself of all his rights in favour of the trustee. He merely acted as grieve for the trustee, and if he were to shoot ground game he needed a written order from the trustee *Dobie, &c.* v. *Marquis of Lothian*, March 2, 1864, 2 Macph. 789.

At advising—

LORD JUSTICE-CLERK—The object of this application for suspension and interdict was to have the respondent Anderson, the reclaimer here, restrained from destroying the ground game upon the farm of Barneil, the property of the complainer. Now, the only title by which the respondent could claim to have a right to destroy the ground game consisted of the lease under which he held the farm, and which he had renounced as at Martinmas 1889. He had made over his rights under this lease to a trustee by a deed dated 2nd April 1889; the note of suspension and interdict was presented upon 10th October of that year, and therefore it could have no application except between the 10th October and the Martinmas which is just past. It is therefore plain that there is no real interest in the question, as the time during which it is sought to restrain the respondent from destroying game is past.

But the only question that is before us now is, whether we should alter the interlocutor which the Lord Ordinary pronounced in the Bill Chamber, and that was —"Having considered the note of suspension and interdict, and answers thereto, in caution, passes the note, and meantime grants interdict as craved." Now, this being the question, and as we are in the Bill Chamber, the only question is whether sufficient justice has not been done to Mr Anderson by the landlord—the complainer—having found caution to make good any damage that might be done to the farm, because the respondent was not allowed to kill ground game during that short time—from 10th October to Martinmas. In my opinion no injustice can be done to Mr Anderson by the note being passed on caution found by the complainer. I think we ought to adhere to the Lord Ordinary's interlocutor.

LORD YOUNG—With respect to the finding of caution, I think that it is somewhat of a burlesque—a landed proprietor being ordained to find caution for any damage a small farmer, who is under trust, may suffer from not being allowed to kill hares and rabbits on the farm for about three weeks. I suppose the amount of caution would come to about £2. I do not think it worth a bond of caution; the landlord might consign the two pounds in the hands of the Clerk of Court. I cannot attach any importance to the question of caution one way or the other.

The case, however, struck me as so flimsy and unreasonable when we heard it fully argued, as we did upon the 2nd of November, that I wrote out my views upon it, which are the same as I now hold.

This is a note of suspension and interdict at the instance of the landlord of the farm of Barneil to interdict the respondent from killing ground game thereon. The respondent contends that he has right, as in a question with the complainer, to kill ground game on the farm till the term of Martinmas next—that is, till the 22nd of the present month of November—and it is not alleged that he ever claimed the right beyond that date. Whether or not he has the right till then is the only question between the parties. The note was presented on 10th October, when the utmost duration of the right claimed was six weeks—that is, between 10th October and 22nd November. To try the legality of the right alleged for this originally brief period of six weeks, the complainer saw fit to institute a process in this Supreme Court, and on the 26th October, when the period was reduced to twenty-six days, he prevailed on the Lord Ordinary to pass the note so that a record might be made up, and the question debated and decided necessarily after all interest in it had ceased. The whole period, viz., twenty-six days, which could ever be of any interest being covered by interim interdict. And now that the period is reduced to a fortnight, and the validity of this rapidly vanishing right has been fully argued before this Division by senior and

junior counsel, the complainer asks us, by affirming the Lord Ordinary's interlocutor, to determine that it is fitting that it should be further argued with a record made up on the passed note. I have pointed out that all interest in the case itself must cease in a fortnight, when even the interim interdict will expire, for it is not alleged that it was asked or granted because the respondent ever claimed a right after Martinmas or indicated an intention to kill ground game thereafter. It thus seems plain that by affirming the interlocutor of the Lord Ordinary we should sanction and so signify our approval of a course of procedure whereby costs would be incurred with no other object of interest to the parties than that it might eventually be decided which of them should pay these costs.

Such a course is so undesirable in the interest of both parties, not to speak of the time of the Court, that it ought if possible to be avoided, and I think it is possible. I shall state my reasons for thinking so.

The controversy between the parties is fully before us now on the note and answers and the documents printed, and the question on which it turns was, as I have stated, fully argued to us on that footing—neither party even hinting that there is any question of fact in dispute, or anything of any sort demanding or admitting of further inquiry. Assuming the respondent's right to kill ground game, there is no allegation or suggestion of excess in the exercise of it, or of anything objectionable in the mode and manner of exercising it, the complaint against him being stated and taken and argued on the footing that all he ever did or threatened would have been unobjectionable had he not granted the trust-deed which we have before us. The only question therefore regards the existence of the right, the respondent claiming no other than belongs to the tenant of the farm, and the complainer admitting that he has that right unless the trust-deed deprives him of it. Whether or not it does is thus the only question before us. On this question we had a full argument, and whether easy or difficult of decision I do not see how the further procedure proposed will assist us in the decision of it. Why, then, should we not decide it now? It may perhaps be said that a decision one way would lead to declaring the interdict prepetual, and that this is too serious a judgment to be pronounced in the Bill Chamber. When the question regards killing hares and rabbits, and the perpetuity is a fortnight, which will expire the week after next, I am unable to appreciate the view that the matter is too solemn and serious for decision in the Bill Chamber. But deferring to the views of the strictest formalist, I venture to think it clear that we may in the Bill Chamber refuse or dismiss a note of suspension as presented on insufficient grounds, although we might not there have sustained it as presented on sufficient grounds, or on grounds which we thought might possibly prove sufficient, otherwise than by passing it on to the Court. Now, my opinion is that this note has been presented on insufficient grounds, and ought therefore to be at once refused, and I do not feel constrained to abstain from giving immediate effect to this opinion, because had I formed another opinion it would only have led to the passing of the note whereby the case would have passed out of the Bill Chamber into the Court for more formal consideration there.

The trust-deed was executed on 2nd April last, and is in the usual and familiar terms of a deed whereby a debtor voluntarily conveys his whole estate to a trustee to pay his debts. It specially assigns the truster's current lease of the farm of Barneil, with the stock and crops thereon, and confers express power to renounce the lease at the ensuing term of Martinmas. It appears that the landlord (the complainer) was cognisant of the whole affair, as indeed he could hardly fail to be, the trustee being his factor. It also appears that he saw fit to obtain a renunciation of the lease from the truster himself as at Martinmas next, and the deed of renunciation signed by him of the same date as the trust-deed is produced. The truster continued to reside on and manage the farm exactly as before, and it appears from a clause in the trust-deed that it was contemplated and intended that he should.

We were referred to the terms of the lease excluding assignees and declaring an irritancy in the option of the landlord, in case the tenant shall voluntarily "divest himself of his property by trust-disposition or otherwise for behoof of his creditors." I fail, however, to see the relevancy of the reference. In the first place, there is no question before us regarding the validity of the assignation of the lease to the trustee as in a question with the landlord, and without expressing any opinion in the matter I shall, for the purpose of the only question before us, assume, if the complainer pleases, that it is invalid, an assumption so obviously fatal to the complainer's case that it is superfluous to point out how it is so. Neither, in the second place, is there any question before us regarding the landlord's right to insist on an irritancy of the lease before Martinmas, on the ground that the tenant has divested himself of his property by a trust for behoof of creditors. There would probably be a good answer to such a claim on his part, but he makes none such, and cannot in this suspension, which is presented on the footing that the lease subsists till Martinmas next.

I must therefore hold that the lease subsists, and has still a whole fortnight to run, and that the respondent, as tenant under it, is not only entitled but bound "to reside personally on the farm," and manage it as he has been and is doing. With the trust for creditors the landlord has, so far as I can see, no concern whatever, except in so far as he may see fit to accede to it as one of the truster's creditors if he be one. Whether or not he might have taken advantage of it as a ground for irritating the lease I do not inquire. That it cannot pos-

sibly be founded on to his prejudice is clear, and I think it also clear that except in the capacity of an acceding creditor he cannot found upon it to his own advantage or the prejudice of the truster.

These views are, I think, conclusive of the case. When plainly stated, the whole matter has indeed a very trifling aspect. A tenant farmer shortly before Whitsunday renounces his lease as at the following Martinmas, and the landlord accepts the renunciation. At the same time, with the landlord's knowledge and tacit assent he grants a trust of his whole estate, including the brief residue of his lease, for behoof of his creditors, undertaking meanwhile to continue in the occupation and management of the farm. He manages exactly as he had been in use to do, including the killing of ground game, all in a manner quite unobjectionable on the part of a tenant. Within six weeks of the end, and without any change of conduct on the tenant's part, it occurs to the landlord that not he (the tenant), but the trustee for his creditors (who might have been an Edinburgh accountant), is the proper person to kill the ground game, and he institutes proceedings in the Supreme Court to try the question. The trustee for creditors does not object to the truster's conduct, and plainly could not allege, as he certainly does not, that the creditors are interested to object. Quite as plainly the landlord's objection is not made in the interest of the creditors, but only to preserve the ground game for his own shooting, or perhaps (and more likely) because of some irritating personal collision between him and the tenant, whichever of them may have been to blame or most to blame for it. The sooner such an unreasonable, and I think unseemly litigation is terminated the better for both parties, and being of opinion, for the reasons which I have stated, that the complainer's case is unfounded in law, I am for dismissing the suspension now, and with expenses.

LORD RUTHERFURD CLARK—This is no doubt a very trifling case now that the time during which interdict is asked for has passed, but I think we must treat it in the same way as if we had given our opinion upon the 2nd November when we heard it argued.

We are in the Bill Chamber, and there are only two forms of judgment open to us. We may dismiss the note if we think that the allegations in it are plainly unfounded, or we may affirm the Lord Ordinary's interlocutor. We can do nothing else; we cannot declare the interdict perpetual in this process.

I should be glad to throw out the note if I thought that its statements were unfounded, but I am far from thinking that just now. I therefore think that the only proper judgment for us to give is to affirm the Lord Ordinary's interlocutor which passes the note upon caution.

LORD LEE—I do not feel called on or entitled to give any opinion on the reasonableness and propriety of the conduct either of the complainer in making this application, or of the respondent in claiming a right to kill ground game. I think that question depends on facts not ascertained. The respondent's allegation is that what he did, and claimed to do, was in protection of his crops. That is disputed, and the answer depends on the effect of the deeds, and the conduct of the respondent which is said to have rendered the application necessary.

My opinion is that the statement and answers disclosed a question to be tried between the parties, and that the Lord Ordinary rightly passed the note so that that question might be tried and decided.

With regard to the question of caution, I do not think it of much consequence. Possibly it was unnecessary. But I suppose it was demanded, and I think the Lord Ordinary rightly made it a condition, although it might be a mere matter of form.

The Court adhered.

Counsel for the Appellant—Rhind—Gunn. Agent—John Mackay, L.A.

Counsel for the Respondent—Low—C. N. Johnstone. Agents—Cooper & Brodie, W.S.

Saturday, November 30.

SECOND DIVISION.

[Lord M'Laren, Ordinary.

LINTON *v.* SUTHERLAND WALKER.

Landlord and Tenant—Lease—Conditions—Obligation.

The lease of a farm contained a condition that the proprietor should take over the sheep stock at a valuation on the expiry of the lease. Some months before this term arrived, the tenant, believing that his landlord was *vergens ad inopiam*, sold the sheep stock under warrant of the Sheriff, and sued the landlord for the difference between the price obtained and that which he alleged would have been obtained if the sheep had been taken over in terms of the contract.

Held that there was no breach of contract on the part of the defender, as the pursuer had rendered it impossible for him to fulfil his obligation under the lease.

By lease dated April 1869 Mr Sutherland Walker of Aberarder let to the now deceased George Linton, farmer, at Farr, and John Linton, his son, the Mains Farm of Aberarder, Inverness, for nineteen years from the term of Whitsunday 1869 as to the houses, lands in grass, hill and moor ground, and the separation of the crop of that year from the ground as to the arable land under crop. The lease expired at Whitsunday and separation of crop 1888.

It was provided by the lease that the proprietor should take the sheep stock on the farm at the expiry of the lease at a valua-