CLARK and H. J. MONCREIFF for the pursuer.

The SOLICITOR-GENERAL and KINNEAR for the Officers of State.

At advising—

LORD PRESIDENT—There are two pleas upon which we have now to decide. These are the first and second pleas stated for the Officers of State in the paper which is dated 13th March 1866. These pleas involve the proposition that the report of the Sub-Commissioners is invalid, because, while it professes to give the valuation of the teinds according to rental bolls in use to be paid, it does not bear to proceed upon the consent of the titular and the heritor, and because the Bishop of Argyle, who was titular of one-fourth of the teinds, was not called. Now, the part of the Sub-Commission which directs effect to be given to rental bolls, is a little awkwardly expressed, "and which rental of teinds by the space of fourtie years in victuall nearhand the just availe both parties agree, and none oppose against the samen.' The construction which the Officers of State put upon this is, that it is not competent to give effect to a practice of paying by rental bolls, unless there be a positive agreement by all parties. I think this is too strict, and that the other clauses of the commission have not been subjected to the same strictness. If there has been an agreement by the parties truly interested, that is sufficient. The silence of one of the heritors will not render the valuation ineffectual after it has been allowed to stand for a long time. The Sub-Commissioners report that 40 bolls are the actual value of the teinds "as it now stands;" and further, that the patron and Colin Campbell, the parson who had right as titular to three fourths of the teinds and to the other fourth as tacksman, and the heritors with the sole exception of Neil Campbell of Kendmoir, agree to the valuation. They were all of one mind that 40 bolls represented the true value of the teinds. Now, I think it would be a bold thing to say that this was not a valuation which could be approved by the High Commission. It would not have been a sufficient objection that Mr Campbell did not consent, if the approbation had been brought immediately after the valuation was made. The difference that it has not been presented till after a long time makes it a worse objection. I think, therefore, that it is bad on the face of it, and affords no good ground for our refusing to approve of the sub-valuation. The absence of the titular, or rather of a portion of the titular, for it is only one fourth of the teinds which were held by the bishop, is the other objection. Now, I do not know that it is required for us to decide that a valuation by Sub-Commissioners may be good although the titular be not a party; though I may state that I think it has already been decided by the case of *Thomson*. The case of *Pringle* is a still higher authority to the same effect. Here it is impossible to say that the titular is not represented. The mere formal citation is not required. The interest of the titular—that is all his interest in the teinds—was fully represented by the parson, who had the sole interest in three-fourths, and was tacksman of the remaining fourth, and so had the beneficial interest of the whole. Proceedings before the Sub-Commissioners are not to be treated as strictly as those of a court of law. The Sub-Commissioners were not lawyers, but county gentlemen, who were chosen on account of their knowledge of county matters. It would be against the whole way in which sub-valuations have been treated to require formal regularity. I am therefore of opinion that both these pleas should be repelled.

LORD DEAS—I concur. Here there was a substantial agreement except on the part of Mr Neil Campbell. The only ground of his objection must have been that he thought the valuation too high, and there was no objection to his adopting the valuation when he thought it for his interest to do so. This is what he did. As to the other plea, that the titular was not called, I do not know that we have any good ground for holding that he was not called. We only know that he was not present. But he was substantially represented, and I, therefore, think that both pleas should be repelled.

The other Judges concurred.

Agents for the Pursuers—Macallan & Chancellor, W. S.

Agent for the Officers of State—Warren H. Sands, W. S.

Wednesday, June 9.

FIRST DIVISION.

CONNON *v.* LINDSAY AND OAKELEY.

Landlord and Tenant—Right in Security—Sub-lease—Bankrupt—Farm Implements—Possession. A creditor who had advanced money to a debtor, obtained a sub-lease of the debtor's farm, which was admittedly valid as between the creditor and debtor, as a right in security for the money advances. He also got an assignation to the stock. The debtor was sequestrated. *Held*, in a competition between the creditor and the trustee on the debtor's sequestrated estate, that the farm stock fell under the sequestration, the creditor never having obtained possession.

Sale—Pledge—19 and 20 Vict., c. 60—Transfer of Real Right—Possession of Moveables. Claim by the creditor, founded on section 1 of the Mercantile Law Amendment Act, that his right was complete without possession, *repelled*, that section relating only to cases of sale, not to cases of pledge.

Circumstances in which *held* that certain furniture had been purchased for the debtor, and belonged to him, although purchased with money advanced by the creditor.

In 1863 Oakeley became tenant of the farm and shootings of Kilmaronaig on a 19 years' lease. In August 1866 a missive offer by Connon for a sub-lease, and an acceptance by Oakeley, were subscribed by the parties. In 1867 the estates of Oakeley were sequestrated: but since that time he has been discharged without composition. This action was raised in May 1867, by Connon against Lindsay, the trustee on Oakeley's sequestrated estates, and against Oakeley, for declarator that the missives interchanged constituted a valid and subsisting sub-lease of Kilmaronaig, and that he (Connon) had the sole right to possess, as sub-tenant, the farm and shootings of Kilmaronaig, and had entered into possession on 1st August 1866, the date of the missives, and that the defender should be ordained to remove from the premises. The summons further referred to transactions between Connon and Oakeley, whereby in Autumn 1866 Oakeley had got furniture put into the house of Kilmaronaig and had got Connon to

make further advances on the security of the stock which Oakeley then had on the farm. It concluded that the farm stock and furniture in Kilmaronaig belonged to the pursuer, and that the defender should be interdicted from trespassing on Kilmaronaig. The pursuer admitted that the sub-lease he held was only a right in security. But he contended that it was in security merely of advances and relief of obligations, and did not embrace the price of the furniture supplied to Kilmaronaig. He further contended, that although Oakeley had been in possession of the house of Kilmaronaig and furniture therein, it was only as the hirer of the house and furniture, and that as the furniture was admittedly bought and paid for by the pursuer, it never was transferred to or became the property of Oakeley. As regards the stock, the pursuer argued that he had been, through an overseer or grieve, in possession of Kilmaronaig, and of the farm stock and implements. But even this possession was unnecessary under sect. 1 of the Mercantile Amendment Act (19 and 20 Vict., c. 60)—*Giffen* v. *Young.*

The defender the trustee on the sequestrated estate, being excluded under the principal lease, was only interested in maintaining that the stock and furniture belonged to the sequestrated estate. The defender (Oakeley) denied the validity of the sub-lease, and contended that, if it was valid, it truly constituted merely in Connon a right in security, and that the security thereby afforded covered every advance by Connon, including the furniture he supplied. The trustee on the sequestrated estate denied any possession by Connon, and maintained that the furniture had been purchased for and was the property of Oakeley, and the stock never left Oakeley's possession or was validly transferred to Connon. Possession was still necessary notwithstanding Mercantile Amendment Act—*Syme* v. *Grant.*

The Lord Ordinary (JERVISWOODE), on 9th March 1859, pronounced this interlocutor:—"Finds that, according to the true intent and meaning of the transaction, as entered into between the pursuer on the one hand, and the defender, Mr Oakeley, on the other, whereby in terms of the missive-offer by the pursuer to the said defender, dated 1st August 1866, and acceptance thereof by the defender, the farm of Kilmaronaig, and privilege and right of shooting over it, and over the farm and lands of Clachadow, with entry at the said 1st August 1866, were sub-let by the defender (the principal tenant thereof) to the pursuer; and, having regard to the actings of the parties under and in relation to the said offer and acceptance, the sub-lease thereby constituted was to have effect, for the purpose only of operating as a security in favour of the pursuer for the advances, and in relief of the obligations undertaken by him on behalf of the defender, and to no further or other effect; and, with reference to the preceding finding, assoilzies the defenders from the remaining conclusions of the summons, and decerns: Finds the pursuer liable to the defenders in expenses, so far as not already disposed of, allows an account of said expenses, &c.

"*Note.*—This case has assumed, in its course before the Lord Ordinary, a serious aspect, in respect of the extent of the investigation and discussion which it has undergone, and it is one, in its own character, of much importance to the parties, both as respects its merits, and the expenses of the investigation which has taken place in relation to the actings of the parties. But while the Lord Ordinary must regret this, the only duty which he has had, at the present stage of the process, to discharge has been to reconsider the whole of the evidence, and, in particular, to come to a conclusion in relation thereto on the leading question, on the determination of which the success of the pursuer here depended, *to wit*, whether or not the missive-offer of sub-lease, dated 1st August 1866, and acceptance thereof, in terms of the conclusions of declarator of the summons, 'are and constitute a valid and binding sub-lease of the said farm and lands of Kilmaronaig, and of the houses, grazings, and pertinents thereof.'

"The Lord Ordinary has, under his present judgment, refused effect to this conclusion, and in so doing has proceeded on the ground that the pursuer has failed to establish that the transactions between him and the defender had the effect of conferring, or was intended to confer, any such absolute right of lease as that which he seeks under the summons to have declared.

"The dealings between the pursuer and defender, which have given rise to this unfortunate litigation, took their origin in the necessity of the defender, on the one hand, to obtain in loan an advance of money, and in the desire on the part of the pursuer, on the other, to employ funds which he appears to have had at his command in a manner which, at the time, seemed to afford a fair opportunity for an advantageous investment.

"It is neither the duty, nor is it the inclination of the Lord Ordinary to find fault with this, and all that he feels called upon to say now is, that, in his opinion, the pursuer is mistaken in the view which he has in this process maintained as to the real character of the transaction between him and the defender Oakeley. That transaction the Lord Ordinary holds to have been truly one of loan by the pursuer, on the one hand, and of contraction of debt on the other, and that the sub-lease in favour of the pursuer cannot be justly founded on as conferring on him an absolute and indefeasible right as sub-tenant, or other right than one of security, such as it was capable of affording to the pursuer."

The pursuer reclaimed.

MILLAR, Q.C., and THOMS for reclaimer.

PATTISON and MACDONALD for respondent.

At advising—

LORD PRESIDENT—But for the minute of the pursuer I should have been for adhering simpliciter to the interlocutor of the Lord Ordinary, because the summons as it stands is a demand that the sub-lease and assignation shall receive effect as an absolute transfer of property. That demand however is now abandoned, and it is conceded by the pursuer that, as regards the sub-lease and transfer of the farm stock, the right was a right in security only. But he still maintains that the property of the furniture is his, and was so from the beginning. His manner of expressing himself in his minutes leaves no doubt as to that. It appears to me that in these circumstances we may give effect to the declaratory conclusion as to this lease by finding that it is a subsisting lease as between the pursuer and Oakeley, by the latter to the former, in security of advances made by the former; of course that will not effect the rights of the landlord in the principal lease, and the trustee for creditors, and that finding therefore appears safe enough.

The next question, therefore, is as regards the stock and implements on the farm, and as regards

that conclusion he comes in conflict with Oakeley and with his trustee. The first question is whether Connon obtained possession of the stock and implements before the sequestration? His right is admitted to be merely in security, and it is constituted, in the first instance, by the missive of October. That is the title by which, he says, his right in security to this moveable property is constituted, and the question is, whether it was clothed with possession before the sequestration?

His defence is, first, that he had possession under this title. It is an awkward circumstance for him that the stocking on the farm and the farm implements were in daily use, and in short were moveables, which, so long as a farm is carried on, are inseparable from the farm. It is difficult to see how he could possess them, seeing he never was in possession of the farm itself. He says he got possession in a way through Carruthers, but he also says expressly that from 1st August, when this arrangement was made with Oakeley, he left Oakeley in possession of the farm under that arrangement till Christmas. How Oakeley could continue in possession of the farm and not of the farm implements, I cannot understand, but having that possession, can it be said that Connon himself was in possession except through Carruthers? I think not. I think it is the fact that Connon was not quite aware of the necessity of having actual possession to make himself safe. I think he became aware in the course of the proceeding, and he showed that very remarkably when he sought to get possession of the farm by presenting to the Sheriff his petition of 12th January 1867. After that time according to his own view, Oakeley was no longer entitled to live on the farm. But what was the state of possession at that date? There cannot be better evidence of that than is to be found in the petition: —"That although the respondent became bound, by the foresaid missive offer and acceptance, to give the petitioner possession of the said farm and lands of Kilmaronaig and pertinents, with the shootings on the said farms of Kilmaronaig and Clachadow, at the 1st day of August 1866, and was allowed, by permission of the petitioner, to have the use of the dwelling-house on the said farm of Kilmaronaig, and of the horses and carriages, &c., till Christmas last, he still refuses to remove from the said dwelling-house, farm, and lands of Kilmaronaig, with the pertinents and shootings above-mentioned, and refuses, by himself and his servants, to give the petitioner possession thereof, although required to do so by the petitioner." I cannot conceive a more explicit statement. The respondent is in possession and will not remove. He will not give possession to the petitioner; and it is not suggested in the petition that Connon had been in possession and had gone out. It is a plain statement that under the missives of 1866 Connon at this date had never got possession, and that Oakeley remained. And the statement is repeated in the condescendence in the petition. That brings us to February. There is a good deal of communing in the meantime between Oakeley, Connon and Carruthers, but the next thing of importance is the sequestration, on 8th September. By that sequestration, if Connon had not obtained possession of the farm and stocking and farm implements, he never could get it after, for, apart from the Mercantile Law Amendment Act, the sequestration carried all. But Connon was not quite disposed to acquiesce in that view, or to take his defeat readily, and accordingly, on 16th April, he attempts to obtain possession *via facti*, and the contemporaneous descriptions of this are amusing and graphic. He got in but could not maintain himself in possession, for the trustee in the sequestration petitions in April, and gets a warrant of ejection on 2d May. It is important to see what the Sheriff did then, for he deals with the question of possession, and this is evidence of the greatest value. What he did was this. He repelled the defences; and "in respect it is not denied that the defender, pending the process of removing raised by him in this Court against Mr Oakeley, forcibly and *via facti*, and without legal warrant, took possession of the house and furniture at Kilmaronaig, then in charge of a servant placed there by Mr Oakeley,—Repels the defences, so far as stated against the present application, reserving any effect they may have in the said pending process; and grants warrant for summarily ejecting the said defender, his servants, and dependants, from the dwelling-house and other premises at Kilmaronaig described in the petition; and interdicts, prohibits, and discharges the said defender, and all others employed by him, from entering said dwelling-house or other premises, or trespassing on the said farm and lands of Kilmaronaig, and from removing, or in any way interfering with, the household furniture or other moveable property in or upon the said house and lands, or in any other way interfering with or obstructing the pursuer in the discharge of his duties as trustee on Mr Oakeley's sequestrated estates, except in so far as legal warrant may be granted in said depending process, or otherwise: And in respect the defender admits that he has removed a quantity of furniture from the said house to the premises of Duncan Sinclair at Cuilandalloch, Grants warrant to officers of Court to search for and take possession of said furniture, and carry the same back to the said dwelling-house, with power to open lockfast places; reserving all the defender's pleas and rights under the above mentioned process of removing; and declaring that nothing done under this decree shall in any way prejudice said rights and pleas, and all right he may have to the furniture in question as being his own property; reserving any claim of damage sustained by the pursuer in consequence of the unlawful conduct of the defender." This interlocutor of the Sheriff unquestionably proceeds on the assumption that Connon had no right of possession and had no existing possession either of the dwelling-house and furniture or of the farm. The one is put in the same position as the other. This interlocutor was brought under review in this case. The Lord Ordinary has assoilzied the defender, and therefore this interlocutor of the Sheriff is final as between Connon and the trustee. The ejection having taken place, what is the next view of Connon as to his position? He resumes the process at his own instance against the trustee in the Sheriff-Court, and puts in a revised condescendence, which it is very curious to contrast with the original. He says— "Although the respondent became bound by the foresaid missive-offer and acceptance to give the petitioner possession of the said farm and lands of Kilmaronaig and pertinents, with the shootings on the said farms of Kilmaronaig and Clachadow, at the 1st day of August 1866, and possession by the petitioner immediately followed upon the said missives, both in regard to the house which the

petitioner thereupon furnished at his own cost, and also in regard to the farms; and the respondent, Mr Oakeley, was thereafter allowed, by permission of the petitioner, to have the use of the dwelling-house on the said farm of Kilmaronaig, and of the horses and carriages, &c., till Christmas last 1866, he still refuses to remove from the said dwelling-house, farm, and lands of Kilmaronaig, with the pertinents and shootings above mentioned, and refuses, by himself and his servants, to give the petitioner possession thereof, although required to do so by the petitioner. Mr Oakeley personally left the farm-house of Kilmaronaig and proceeded to England on 19th December 1866, or about that date, but he refused to hand over the keys of the house to the petitioner, and hence the present action became necessary." This is a very curious statement. He says he obtained immediate possession under the missives, both as to the house and farm, and then left Oakeley in possession of the dwelling-house, and Oakeley refused to cede possession of the farm which was not left to him. This is plainly a mere device, and a device which runs through the whole argument of the pursuer, namely, representing that under the missives of August he really got possession, while in the other petition he candidly admits he never had possession. But, had he any possession in fact? Only through Carruthers, and the way in which that was attempted to be done was by converting Carruthers, Oakeley's servant, into Connon's servant. But Carruthers is not very loyal to the side he undertakes to support, and it is plain that, if he ever seriously understood that Connon was to be his master, he soon understood the reverse, for he engaged himself entirely in the interests of Oakeley. The contemporary letters are very important, as showing that Carruthers never was Connon's servant at the date when possession is said to have taken place, but continued to be Oakeley's servant, and that puts an end to the pretence of possession by Connon through his servant. It is unnecessary to go into the proof more fully, and therefore I hold that Connon, in so far as regards the stocking and implements on the farm, had a title—a sort of assignation—to these moveables, without any possession, and therefore that, according to the principle of common law, they fell under the sequestration and now belong to the trustee.

The only other question is under the Mercantile Law Amendment Act. The first section of that Act introduced a novelty into our law as to the sale of moveables. Under certain circumstances a sale shall be effectual to transfer the real right although the goods remain undelivered in the hands of the seller. But is that applicable to a right in security or a contract of pledge? I think not; for this reason, that the Legislature speaks of sale only, and not of pledge—the two contracts being as distinct from each other as can be. They sometimes resemble each other, and sometimes, in a special case, it is difficult to say whether it is a pledge or sale, as in the case of *Park* v. *Latta*, 16th February 1865. But the mere fact that, in a complicated transaction, it is difficult to say whether it is a pledge or a sale, does not make transactions the same. They are quite distinct. One is a right in security, and the other is an absolute transference. Here the pursuer has admitted that his right over the moveables is only a right in security; and, by force of that admission, I think he has deprived himself of his plea under the Mercantile Law Amendment Act.

The only remaining question is as to the furniture. Connon contends that, from the beginning, this furniture belongs to him, and never to Oakeley; that he bought it with his own money and never transferred it to Oakeley. The trustee contends, that it was bought for Oakeley, and that the right to it was in Oakeley, but that the money advanced to pay for it was Connon's. That is a mere question of fact, and I think Connon can be met by statements of his own, which are quite clear. In the letter of 25th September to Mr Officer, he says:—"When you asked me to undertake the furnishing of the house at Kilmaronaig, both Mr Oakeley and you assured me that the money would be paid by Martinmas, or at the New Year at most, and upon this understanding I became obligated for £435, value of furnishings, and £115 of other a/cs, and paid a/cs and charges to the amount of £357, and these, along with the considerations agreed to be paid to me, amounts in all to about £992, as will appear from the state I sent you. There is a further sum of £17 due to Mr Birrell for groceries; a sum due for cultivating the farm of £81; further expenses cultivating the farm, up to the New Year's Day, £50; Whitsunday rent and burdens, say £90; making in all a sum which I have either paid, or become obligated for, of about £1230. Against this I have the value of the stock, crop, implements of husbandry, and household furniture at Kilmaronaig, amounting, as per state, to £1040, thus leaving a clear deficiency of £190. In addition to this I have calculated in my securities a sum of £125 for corn, hay, turnips, and potatoes, which will be, for the most part, consumed before the New Year, leaving a total deficiency of £315, against which there can only be placed the increased value of the stocking and dogs, &c., which cannot come to anything like that sum. It is out of the question, therefore, to expect any further assistance from me." After this letter it is to be observed that he deals with his advances for the furniture as being in the same sense as his other advances. His Lordship then referred to other passages from the correspondence, and continued—All that is inconsistent with the notion that the furniture was Connon's, and points to this, that it was bought for Oakeley's house, and that the price was advanced by Connon under the security of August. After that it is not for Connon to maintain that the furniture is his property. Upon the whole matter, I am for assoilzieing from the conclusions of the action except from the declaratory conclusion as to the sub-lease.

The other Judges concurred.

Agent for Pursuer—W. Officer, S.S.C.

Agents for Defender—J. & W. C. Murray, W.S.

Wednesday, June 9.

SECOND DIVISION.

WALKER *v.* THE TRADES' HOUSE OF GLASGOW & OTHERS.

Property — Boundaries of Feu—Right of Access—Public Street—Declarator—Interdict. Circumstances in which the Court granted decree of declarator in favour of the proprietor of a feu that he was entitled to have a public street opened up along one of the boundaries of his property, and interdict against encroachments