strangers. Had he sold to friends, then admittedly the condition of his licence would have been violated, and the same result is not obviated because the drink was gratuitously furnished. Members of the outside world were permitted or suffered—nay, were invited—to drink exciseable liquors on a part of the licensed premises in forbidden hours, and there are in these circumstances all the elements of a contravention.

The English decision which was cited is not an authority in this case, because the statutory provision as to which judgment was given was different from that which is here presented to the Court.

Lord Justice-Clerk—I concur with Lord Young, and with no difficulty. I should certainly always resist such a construction of the statute as would authorise the doing of illegal acts, but I should also resist a construction which would prevent innocent acts being done, and this is the nature of the construction which is sought to be put upon the statute here. In the present case it is admitted that the man did no harm. Now, there is no law in this country by which an act of this sort can be said to be an offence.

The provisions of the Act are in my opinion very simple and very reasonable, and easily observed. It was said here that a licence binds a publican not to suffer drinking in his house after certain hours. No one surely can contend that the meaning of this is that no drinking of any kind is to be allowed in the house. This would be absurd, and it was conceded at the debate that the landlord's own family might drink.

The words of the statute no doubt were, "permitting drinking;" but the notion of applying them to the facts of this case—holding that a man was not entitled to entertain his relations—was utterly and absolutely extravagant in itself, and unjust to the appellant.

Appeal sustained, with £7, 7s. of expenses.

Counsel for the Appellant—Kinnear—R. V. Campbell. Agents—Purves & Wakelin, W.S.

Counsel for the Respondent—Balfour. Agent—T. J. Gordon, W.S.

COURT OF SESSION.

Friday, March 8.

FIRST DIVISION.

[Lord Curriehill, Ordinary.

STIVEN (WATSON'S TRUSTEE) *v.* COWAN AND OTHERS.

Right in Security—Delivery—Change of Possession in Moveables.

In order to give to his cautioners in a cash-credit bond a security over his mills and the machinery in them, which should be preferable to that of his general creditors, A, the proprietor, assigned to them a sub-lease of the subjects, including the whole machinery and plant of every description. The assignation, with inventory annexed, was recorded on the 7th May. On the 2d May the mills had been stopped, and on the 3d May, in presence of a notary-public, the cautioners, with the assignation in their hands, had possession given to them of the whole subjects thereby conveyed, and got delivery of the keys, with which they locked the doors and gates of the premises. A notarial instrument was then expede in favour of the cautioners, who then on the same day granted A, the former proprietor, a lease of the subjects. The keys were returned on the evening of Sunday 4th May, and the mills were re-opened by A as usual on Monday the 5th. They continued to be worked and the machinery was possessed by him till the date of his sequestration, about five years afterwards. No rent was ever paid by A to his cautioners, and no consideration had been given by them.—*Held* that, although in the case of the mills themselves and the fixed machinery there was constituted a preferable heritable security, the transaction as regarded the moveables was an attempt to create a security over moveables *retenta possessione*, which was a form of security not recognised by the law of Scotland.

Observations (*per* Lord Curriehill) upon the statement of the law contained in Bell's Comms. i. 786, with regard to the accessory effect of heritable securities on those parts of the subject secured which are in their own nature moveable.

This action was raised by the trustee on the sequestrated estate of Henry Smyth Watson against John Cowan and John Cobb Watson, and also against Messrs Alexander Watson & Son, and concluded for declarator that at the date of his sequestration Henry Smyth Watson was proprietor and in possession of the steam and other engines and articles situated within certain mills at Pitscottie, and houses connected therewith, and that these formed part of his sequestrated estate, and that the defenders should be prohibited from exercising any acts of ownership over them. To these the defenders claimed to have a preferable right. The averments and pleadings of the parties and whole circumstances of the case as disclosed in the proof are explained at length in the following interlocutor and note of the Lord Ordinary (Curriehill), of date 12th July 1877:—

His Lordship's interlocutor found—"(1) That at the date of his sequestration Henry Smyth Watson was proprietor and in possession of the whole steam and other engines, . . . and in general the whole manufacturing, spinning, and working tools, machinery, articles, and utensils of every description then situated within the mills known as the Upper and Lower Mills of Pitscottie. (2) That by an assignation *ex facie* absolute granted by the said Henry Smyth Watson to the defenders, dated 28th April 1873, and along with a relative inventory of the machinery recorded in the Register of Sasines on 7th May 1873, and qualified by a back-bond or back-letter granted by the defenders to the said Henry Smyth Watson, dated 11th and 12th July 1873, a valid and effectual security preferable to the right of the pursuer as trustee on the sequestrated estate of the said Henry Smyth Watson was constituted in favour of the defenders over those

parts of the said engines, machinery, and plant, and others which were attached either directly or indirectly by being joined to what is attached to the ground or buildings for use in connection with the manufacture carried on in said mills, though they may have been fixed only in such a manner as to be capable of being removed without material injury either in their entire state or after being taken to pieces, including those loose articles which, though not physically attached to the fixed machinery and plant, are yet necessary for the working thereof, provided they be constructed and fitted so as to form parts of the particular machinery, and not to be equally capable of being applied in their existing state to other machinery of the kind; and before further answer appoints the cause to be enrolled, in order that the specific articles covered by the defenders' security may be ascertained; reserves all questions of expenses; grants leave to both parties to reclaim, if so advised.

"*Note.*—The question raised in the present action is—Whether Henry Smyth Watson, the bankrupt, created in favour of the defenders a valid security over the machinery of his cotton spinning-mills at Pitscottie preferable to the right of the trustee in the sequestration? The question arises thus—The mills are held under a long lease granted in 1825 by Mr Arnot of Chapel to James and William Yool, the ish being in 1882. The mills were in 1859 sub-let to James Annan, who then became absolute proprietor of the whole machinery, great and small, fixed and moveable, used in the mills and in connection therewith, except the two large water-wheels, which are the property of the landlord Mr Arnot. Annan's estates were sequestrated under the Bankrupt Statutes in 1872, and the sub-lease, mills, and whole machinery and utensils of every kind were sold in 1873 by the trustee in the sequestration as a going concern, and were purchased by Henry Smyth Watson at a price of upwards of £3000. Watson had not sufficient means to pay the price, but assistance was promised and given by the defenders, one of whom is his father-in-law and the other his brother, and both of whom appear to have taken a very active part throughout in the negotiation. Part of the price, to the extent of about £1000, was paid by Watson himself, and the British Linen Company's Bank agreed to advance £2000 of the remainder on the security of a cash-credit bond to be granted by Watson and by the defenders, the account to be kept in name of Watson.

It was originally intended that the mills and machinery should be conveyed directly by Annan's trustees to the bank by a conveyance *ex facie* absolute, and that the bank should thereafter grant a lease of the mills and machinery to Watson and a back-letter declaring that they held the subjects in security of their advances. If the transaction had been so carried out, the present question could not have arisen, because the bank would have held, as regards Watson and his general creditors, a position analogous to that held by the Union Bank toward the Messrs Durham and their general creditors in the well-known case of *Mackenzie* v. *The Union Bank*, 3 Macph. 765. They would have been the owners of the mills and the machinery, holding the same by an absolute title to the property thereof, and from them—and them alone—Watson would have derived his title of possession, which would have been one of tenancy only, at all events until by paying up all the bank's advances he had placed himself in a position to call upon the bank to denude in his favour.

But the transaction was not in the present case carried out in the form originally contemplated. The bank seems to have deemed it inexpedient to take a conveyance to the mills and machinery, and intimated that they would be content with the personal security of Watson and the defenders, and the cash-credit bond for £2000 was executed accordingly, the defenders, though bound conjunctly and severally with Watson, being truly only cautioners for him. It was arranged, however, that the latter should be placed in the same position as to security which the bank would have occupied if the original transaction had been carried out. But the circumstances were no longer the same. Watson had by this time not only taken possession of the mills and machinery, and begun to work the mills under an arrangement with the seller, but he had obtained from the seller an assignation to the mills and whole machinery, which, with an inventory of the machinery, was recorded in the Register of Sasines on 10th April 1873, under the Registration of Leases Act 1857. Watson was thus on 10th April 1873 in full possession of the mills and the whole machinery and plant, great and small, as proprietor thereof, and he continued to be in possession thereof as proprietor until his sequestration in 1877, unless it shall be held that by the transactions to be now explained he ceased to be owner of the mills and machinery, and became merely the tenant thereof under the defenders, after a valid transfer of the property and possession of the same to the defenders. It is therefore necessary to attend very carefully to what was done in May 1873.

"The circumstances are stated with fairness and general accuracy by the defenders themselves in their defences, and they are substantially as follows:—In order to give to the defenders, as his cautioners in the cash-credit bond, a security over the mills and machinery which should be preferable to his general creditors, the parties adopted the following plan:—On 28th April 1873 Watson, for certain good causes and considerations, but not for any price paid, assigned to the defenders the sub-lease and the mills, and the whole machinery, plant, and utensils of every description in and connected with the mills, conform to an inventory annexed to the assignation, and recorded for publication with the assignation in the Register of Sasines on 7th May 1873. On the afternoon of Friday, 2d May, the mills were stopped, and the keys were sent to Messrs W. & G. Pagan, solicitors in Cupar, who were the law agents of the defenders and also of Watson, to be held by them for the defenders. The mills remained closed during the whole of Saturday, 3d May, and on that day John Cobb Watson, for himself and as attorney for the other defender John Cowan, compeared at the mills, having in his hand the assignation and disposition granted by Watson in their favour, and then and there, in presence of a notary-public, required Watson to give to him the said John Cobb Watson, for himself and as attorney aforesaid, real, actual, and corporeal possession of the whole mills, machinery, and other matters and things thereby

conveyed, with which request the said Henry Smyth Watson complied, and gave delivery as required *ex propriis suis manibus*, especially of the whole machinery and articles as specified in the said inventory annexed to the said assignation, and also of the keys of the whole premises, it being stated that the works were to be shut up until the morning of Monday the 5th May. John Cobb Watson then locked up the doors and gates of the whole premises, and took away the keys for the purpose of being delivered to his constituents, and a notarial instrument setting forth the *res gestæ* was then expede in favour of the defenders. The keys were again placed in the hands of Messrs W. & G. Pagan, and the defenders on the same day (3d May), while the mills were still closed, granted in favour of Henry Smyth Watson a lease of the mills and whole machinery and utensils of every kind until the ish of the original tack, March 1882, at a rent of £200 per annum, to begin from and after the 5th day of May 1873, which was declared to be the date of the tenant's entry. The keys were retained by Messrs Pagan until the evening of Sunday, 4th May, when they were sent to H. S. Watson to enable him to reopen the mills on Monday 5th May, which he accordingly did, and he continued to work the mills and possess the machinery until his sequestration in 1877.

"It is thus clear that Watson's possession, if ever really interrupted at all, was interrupted only for one day, and that the change of possession, if any, was not marked by any outward or visible sign, for everything was done within the mills. And in addition to all this, the assignation was not recorded in the Register of Sasines until some days after Watson had reopened the mills and resumed possession thereof and of the machinery, to all outward appearance on the same footing as from the commencement of his possession in March. To complete the history of the case, it should be added (1) that Watson was not insolvent at the date of these transactions—indeed, most, if not all, of his debts appear to have been contracted only recently before his sequestration; (2) that the defenders did not at the time pay, and have not since paid, any money to or for behoof of H. S. Watson, all that they did being to join with him in granting the cash-credit bond for £2000, payment of which may now be demanded from them in consequence of Watson's bankruptcy; and (3) that they undertook that liability on the faith of obtaining from Watson full security over the mills and machinery. And the question now is, Whether and if so to what extent a valid security over the machinery preferable to the right of Watson's trustee has, by the deeds and transactions above narrated, been constituted in favour of the defenders?

"The trustee does not now dispute that the fixed machinery, and those articles which, though not fixed, are yet held in law to be trade fixtures in a question between landlord and tenant, and between the heir and executor of the tenant, are covered by the defenders' security. He conceded that this result necessarily followed from the judgment of the House of Lords in the recent case of *Brand's Trustees*, March 16, 1876, 3 Rettie (H. of L.) 16, and that a heritable security over mills and machinery would embrace all the trade fixtures which in the case of the tenant's death would have fallen to his heir. But with regard to the smaller machinery, and those articles which do not fall under the designation of trade fixtures, the trustee maintains that no real right either in property or in security has been established in the defenders, who are therefore as regards these articles merely unsecured creditors. He maintains that in this case there has been no real transfer of the property or of the possession of the machinery in question from the bankrupt to the defender; that the entire transaction amounts to nothing more than an attempt to create a security over moveables *retenta possessione*, and that no such security is recognised by the law of Scotland. The defenders, on the other hand, maintain (1) that the transaction was not a security transaction, but was an actual sale to them of the property of the machinery by a title *ex facie* absolute; (2) that the possession was actually transferred on Saturday, 3d May 1873, by the proceedings already detailed; (3) that, at all events, the publication in the Register of Sasines of the assignation to the sub-lease, and of the inventory of machinery thereto annexed, amounted to constructive delivery of the machinery; and (4) that ever since 3d May the actual possession which the bankrupt has had has been solely as their tenant and for their behoof.

"I am of opinion that none of these contentions of the defenders is sound, and that the argument of the trustee ought to prevail. With reference to the third of the defenders' arguments, viz., that publication of the inventory in the Register of Sasines amounts to constructive delivery of machinery which would otherwise be dealt with as moveable, I have only to say that it appears to me to be contrary to principle and unsupported by authority. The principle of law, apart from some recent statutory modifications of it in the case of sale, is, and has always been, that moveables in the possession of the owner cannot be effectually transferred or impignorated without delivery by the owner. The law regards as simulate all attempts to transfer or pledge moveables *retenta possessione*. The present case must be dealt with—at all events it was dealt with by both parties at the debate—as if the mills had been feudal in place of leasehold property, and as if the moveable machinery had been enumerated in an instrument of sasine expede by the defenders upon a conveyance of the mills, and recorded in the Register of Sasines. I am humbly of opinion that on principle, so far as the moveables are concerned, such an infeftment, even though recorded, would not effectually divest the granter or confer any real right upon the grantee so long as the moveables remained in the possession of the granter. It is true that Professor Bell (Com. i, p. 786), in speaking of the accessory effect of securities on those parts of the subject which are in their own nature moveable, makes an incidental observation tending to support the defenders' contention. He says—'This is a question which has frequently occurred of late in consequence of heritable bonds and other securities granted by the proprietors of cotton mills and other valuable machinery. . . . If the intention of parties were sufficient to determine the point, this would not probably be a frequent question, but it is necessary in order to complete the security that there should be an effectual tradition, and unless comprehended within the infeftment as part of thesub-

ject, things which are moveable cannot be conveyed in security, for there is no effectual transfer of moveables *retenta possessione.*" I am inclined to think that Mr Bell is here alluding to moveables such as building materials, and the like, which have been made heritable *destinatione*, and are thus part of the subject, and I am not aware of any instance in which articles properly moveable, and not made heritable *destinatione*, have been held to be validly pledged or mortgaged to an heritable creditor merely by being mentioned in the infeftment as part of the subjects covered by the security. To hold this would, I think, be contrary to the principle of the law, as stated by Mr Bell himself, and to the uniform and invariable practice.

"The question then comes to be, Whether in point of fact there has been here any valid or effectual transfer of the property or of the possession of the moveable machinery from the bankrupt to the defenders? Now, in dealing with this question it is necessary to bear in mind that from the beginning of March until the evening of Friday the 2d May 1873 the bankrupt had been in the full, open, and continuous possession of the mills as tenant under the long lease, and of the whole machinery therein, great and small, as undoubted proprietor thereof; and that on the night of Sunday, 4th May, the keys were restored to him, and that on the morning of Monday, 5th May, he re-opened the mills, and continued until his sequestration in 1877 to work them and to possess the whole machinery in the same open and apparently uncontrolled manner in which he had possessed them prior to 3d May. In these circumstances, it appears to me that the defenders cannot successfully maintain that their transaction with the bankrupt was, in so far as regards the moveable machinery, anything more than a simulate security granted by the bankrupt *retenta possessione.* The case of the *Union Bank* has already been referred to, but the circumstances are so different that it really has no bearing upon the present case, except in so far as it distinctly recognises the doctrine that a security over moveables is ineffectual to the creditor if the granter retains possession. The case of *Orr's Trustees* v. *Tullis*, 2d July 1870, 8 Macph. 936, more nearly resembles the present case. Tullis was proprietor of certain premises of which Orr was tenant, and in which he conducted the business of printing and publishing a newspaper. The copyright of the newspaper, the printing presses and machinery, and all the tools and utensils used in the business, belonged to the tenant Orr, who, in October 1863, sold the whole to his landlord for the price of £955, actually paid at the time. Orr at the same time renounced his lease of the premises, and obtained from his landlord a new lease of the shop, dwelling-house, printing-office, and whole printing plant, machinery, and utensils for ten years, at the yearly rent of £187. There was thus on the one hand no apparent change in the possession of the moveables, machinery, &c., from Orr to Tullis; but, on the other hand, it was proved that the transaction was a *bona fide* out-and-out sale for full value, by which the property of the machinery was transferred absolutely to the landlord. The landlord, moreover, was registered under the Copyright Act as proprietor of the newspaper. The stipulated rent was regularly exacted, and when payment was delayed, which happened on one or two occasions, the landlord produced and founded upon the lease in sequestration proceedings adopted by him against his tenant; and further, the machinery was, in 1867, all labelled with the name of the landlord as owner. In this state of matters Orr became bankrupt (six years after the date of the sale), and was sequestrated under the Bankrupt Statutes, and his trustee claimed the property of the machinery on the ground *inter alia* that the conveyance thereof, though *ex facie* absolute, was in security only, and that no change of possession having taken place in consequence of the conveyance, the property, in the moveable rights and effects which it professed to convey, did not pass either absolutely or in security to the landlord, but remained liable for the debts of the tenant, and attachable by the diligence of his creditors. The Lord Ordinary (Gifford) held that the moveable articles had not been delivered to, or taken possession of, by the landlord prior to the sequestration, and that the property thereof still remained vested in the person of the tenant, and that the said articles fell under the sequestration, and belonged to the trustee for behoof of the creditors. But the Second Division altered that judgment mainly on the following grounds, viz., that there had been a *bona fide* out-and-out sale of the plant by the tenant to his landlord for payment of an adequate price; that the whole course of dealing between the parties for a long course of years, and the public proceedings taken by the landlord in registering the copyrights and sequestrating his tenant's effects for rent, labelling the machinery with his own name as owner, proved the *bona fide* and real and substantial character both of the sale and of the lease; that good civil or constructive delivery of the articles had been made to the landlord; and that the possession of the bankrupt for six years before the sequestration had been truly possession for his landlord.

"But the circumstances of the present case are entirely different. Although the assignation of the lease and machinery is *ex facie* absolute, it is certain that no sale of the machinery was either made or intended to be made. The deed itself bears that no price was paid, and in point of fact no price was paid. The defenders merely undertook prospective liability to the bank for the amount of the cash-credit account to be kept in name of the bankrupt, and they have never yet paid or advanced one shilling either of principal or interest to or for behoof of the bankrupt. It is true that the bank is now calling upon them to pay the balance due under the cash-credit bond. But that circumstance will not convert the transaction of 1873 into a *bona fide* sale for a price paid when nothing of the kind took place at its date. The truth is that the transaction was entirely a security transaction, and it is expressly stated to be so by the defenders in the record. The assignation of the mills and machinery, though in form *ex facie* absolute, was not intended to be a title of property, its true character having been declared to be a security by the back-letter of July 1873. And not only was no price paid by the defenders, but they never received or asked payment of any rent for the mills and machinery under the so-called lease granted by them to the bankrupt on 3d May 1873. And it is plain from the whole proof that it never was intended that

any rent should be paid, so long at least as the bankrupt kept the defenders free from liability under the cash-credit bond by regularly paying the interest to the bank. In short, there was not here, as there was in the case of *Orr* v. *Tullis*, either a real and substantial sale of the machinery to the defenders or a real and substantial lease thereof by them to the bankrupt; and the device of shutting up the mills for a day and executing an instrument of possession cannot be held in law as amounting to a proper transference of the possession of the machinery from the bankrupt to the defenders. The whole transaction was therefore, in my opinion, a mere security by the bankrupt to the defenders for relief of their obligations under the cash-credit bond, and, in so far as regards the machinery, it was truly a simulate sale *retenta possessione*. In using the word 'simulate' I do not of course mean even to imply that there was in the transaction anything approaching to fraud on the part of the defenders or of the bankrupt. On the contrary, the transaction was a most natural and proper one. But, unfortunately for the defenders, it assumed a form which the law will not recognise as constituting an effectual security over moveable machinery.

"On the whole, therefore, I am of opinion, on this branch of the case, that while the defenders' security effectually embraces those parts of the machinery which are either fixed to the premises or fall under the denomination of trade fixtures, the pursuer is entitled to claim under the sequestration all the machinery in the mills properly falling under the denomination of moveable machinery.

"But here another question arises, viz., What part of the machinery is to be regarded as moveable in contra-distinction to the trade fixtures? This question must be decided as if it had arisen between the heir and the executor of the tenant; and if so, the rule for dividing the machinery is to be ascertained from the judgment of the House of Lords in the case of *Brand's Trustees*, already referred to. The rule is very clearly expressed in the interlocutor pronounced in that case by Lord Shand, which, although reversed by the Inner House, was returned to by the House of Lords, and I have accordingly embodied a similar finding in the foregoing interlocutor.

"The proof will probably enable the parties to agree as to the specific articles which are to be dealt with as properly moveable. But in the event of their not being able to do so, it may be necessary to remit the matter to a man of skill to report as to the proper division of the machinery. It appears to me that the proof is defective, inasmuch as it does not show whether or how far the articles which are not in any way fixed either to the premises or to the fixed machinery are, nevertheless, 'necessary for the fixed machinery and plant, and are constructed and fitted so as to form parts of the particular machinery, and not to be equally capable of being applied in their existing state to other machinery of the kind.'

"I ought to notice, in conclusion, that several of the articles of machinery contained in the inventory annexed to the defenders' assignation appear to have been removed by the bankrupt during his possession of the mills, and replaced by other machinery. It appears to me that these substituted articles, in so far as they are proper fixtures or trade fixtures, must be held as being a surrogatum for the original articles, and as being therefore covered by the defenders' security."

The defenders reclaimed.

Reclaimers' authorities—*Union Bank* v. *Mackenzie*, March 27, 1865, 3 Macph. 765; *Orr* v. *Tullis*, July 2, 1870, 8 Macph. 936; *Mure* v. *Gledden*, July 8, 1869, 7 Macph 1016.

Respondent's authorities — *Cabbell* v. *Brock*, September 23, 1831, 5 Wilson and Shaw, 476; *Anderson* v. *M'Call*, June 1, 1866, 4 Macph. 765; *British Linen Company* v. *Gourlay*, March 13, 1877, 4 R. 651; *Hamilton* v. *Western Bank*, December 13, 1856, 19 D. 152.

At advising—

Lord Deas—It is not disputed in this case that a good security was obtained by the defenders over the heritable subjects belonging to the bankrupt, and also over the machinery, so far as that machinery was of the nature of a fixture.

But the parties who obtained the security claim, in a question with the trustee on Watson's sequestrated estate, a preferable right to those parts of the machinery which are not of a heritable nature, and the question is, whether that claim is a good one? There is no rule of law more trite than that moveables cannot be transferred without delivery being given and possession being taken. For that purpose actual possession must be proved. The whole question then is, Whether the defenders had obtained actual possession of those moveables, so as to constitute a preferable right? There was no doubt an attempt made by the parties to give this possession. Was it successful? The deeds constituting the right in security—the assignation and back-bond—were granted at the end of April 1873, and the way in which it was attempted to complete them was this—On Saturday, May 3, 1873, one of the defenders, acting for himself and his partner, appeared in person with the deed in his hand, and in presence of a notary-public called upon the bankrupt to give him possession of the mill and its contents. A notarial instrument set forth that that was done. The keys of the gates were taken away by the agents for the defenders. On the evening of Sunday, 4th, the keys were returned to the bankrupt, who reopened the mills, and on the 5th the business recommenced as before, and work went on there till the sequestration, a period of five years. The deeds were recorded in the Register of Sasines on 7th May 1873. At the same time as the ceremony took place a lease had been granted by the bankrupt in favour of the defenders, and that lease of the mills and machinery was likewise recorded. After all this was done the back-bond was granted declaring that the deeds were merely a security for £2000. This was granted in July 1873. During the succeeding five years (the rent was £200 per annum) no rent was paid, and during all that time the bankrupt not only carried on business in the mills, but made changes in the machinery, &c., and all at his own expense, and everything was done on the footing that he was actually occupying under the original assignation from Annan's Trustee. We have that distinctly in his own evidence, and there can be no doubt of it. He never was really out of possession, unless that ceremony which I have described can be called a change of possession. I am of opinion that in the eye of the

law this was a mere sham change, and not sufficient to make a change of possession. None of the rights and none of the liabilities were changed, and it was in fact not a transfer of property at all. I am driven to the conclusion that if it was imagined that such a ceremony changed possession it was a mistake. Had the bankrupt paid the rent regularly and had the defenders accepted the liabilities of the property there might have been a question whether, as they had really got possession of the heritable property, they had not also got hold of the moveables also. But that is not raised.

The only other question is, Whether by recording these deeds in the Register of Sasines, which was quite inappropriate in the case of deeds dealing with moveables, anything was done equivalent to a change of possession? I think no one can really maintain that, and it is impossible to hold that such was the effect.

I am of opinion that the interlocutor should be adhered to.

The LORD PRESIDENT, LORD MURE, and LORD SHAND concurred.

The Court adhered.

Counsel for Pursuer (Respondent)—Kinnear—J. P. B. Robertson. Agents—Maclachlan & Rodger, W.S.

Counsel for Defenders (Reclaimers)—Campbell Smith—Readman. Agents—Boyd, Macdonald, & Company, S.S.C.

Friday, March 8.

FIRST DIVISION

[Lord Adam, Ordinary.

BEATTIE (INSPECTOR OF BARONY PARISH) *v.* MACKENNA (INSPECTOR OF GIRVAN PARISH) AND WALLACE (INSPECTOR OF GOVAN COMBINATION).

Poor—Settlement of Pauper Child where Father dead and Mother contracts Second Marriage.

A pupil pauper, born in 1866, became chargeable in 1875. Her father had died in 1866, his birth parish being at that time his parish of settlement. Thereafter the mother married a second time, but died in 1872.—*Held* that on her father's death the pupil acquired a settlement in the parish of his birth, which was not affected by the mother's second marriage, and that there was nothing in the facts of the case to take it out of the ordinary rule of law that a legitimate child follows the settlement of its father whether dead or alive.

Observations on the case of *Greig* v. *Adamson*, March 2, 1865, 3 Macph. 575.

This action was raised by the Inspector of the Barony parish of Glasgow against the Inspectors of the parishes of Girvan and of the Govan Combination regarding the settlement of Mary Ann Little, a pupil pauper child.

The following statement of the facts of the case is taken from the note to the interlocutor of the Lord Ordinary (ADAM):—"The pauper Mary Ann Little was born on 13th January 1866 in the Barony parish. She is therefore still a pupil. Her father John Little died in 1866. He was born in the parish of Govan, which was his parish of settlement at the time of his death. He was survived by his wife Abigail Sergeant or Little, and by his daughter the pauper. His wife was born in the parish of Girvan. His widow married in 1870 Richard Maise, who had then a residential settlement in the parish of Old Monkland. She died in 1872. Maise at this time still retained his residential settlement in Old Monkland. On 1st June 1875 the pauper became chargeable on the Barony parish. At this time Maise had lost his residential settlement in Old Monkland, and being an Irishman by birth, had no other settlement in Scotland. These seem to be the material facts in the case."

The Lord Ordinary found that the pauper had a subsisting parochial settlement in Govan parish in respect of the birth of her father in that parish. He added this note to his interlocutor:—

"*Note.*—[*After the statement of facts quoted above*]—The Lord Ordinary is of opinion that the pauper on her father's death in 1866 acquired in her own right a settlement in the parish of his birth—which was the parish of Govan. The Lord Ordinary further thinks that the marriage of the pauper's mother to Richard Maise in 1870 did not affect this settlement. In the case of *St Cuthbert's* v. *Cramond*, November 12, 1873, 1 Rettie 174, it was held that a residential settlement which a pauper, who was a pupil, had derived from his father was not lost by the second marriage of his mother. It appears to the Lord Ordinary that the same principle applies to a birth settlement.

"The pauper being a pupil is incapable of acquiring a new settlement in her own right, and the parish of Govan will therefore continue to be the parish of her settlement so long as she continues to be a pupil—*Craig* v. *Greig*, July 18, 1863, 1 Macph. 1172; *M'Lennan* v. *Waite*, June 28, 1872, 10 Macph. 908."

Govan parish reclaimed, resting their case chiefly on the cases of *Kirkwood* v. *Manson* and *Greig* v. *Adamson*.

Authorities—*Kirkwood* v. *Manson*, March 14, 1871, 9 Macph. 693; *Greig* v. *Adamson*, March 2, 1865, 3 Macph. 575; *Barbour* v. *Adamson*, May 30, 1853, 1 Macq. 376; *Carmichael* v. *Adamson*, February 28, 1863, 1 Macph. 452; *Crieff* v. *Fowlis Wester*, July 19, 1842, 4 D. 1538; *Allan* v. *Higgins*, December 23, 1864, 3 Macph. 309; *Crawfurd* v. *Beattie*, January 25, 1862, 24 D. 357; *Gibson* v. *Murray*, June 10, 1854, 16 D. 926; *Grant* v. *Reid*, May 25, 1860, 22 D. 1110; *Greig* v. *Hay and M'Lean*, May 18, 1858, 1 Poor Law Mag. 36; *Ferrier* v. *Kennedy*, February 8, 1873, 11 Macph. 402.

At advising—

LORD MURE—The question here raised for decision is, Whether the obligation to support a pauper who is a pupil, and whose father and mother are dead, attaches to the father's settlement, which was in the parish of his birth, or to the parish of the mother's birth settlement, or to that of the pauper's own birth.

The circumstances in which the question is