which would be the effect of suspending the decree.

Now, the first question is as to whether the respondents have made sufficient averments to support the decree in absence sought to be suspended, and I look on this as the most difficult part of the respondents' case, for they are not only seeking to maintain possession but to declare a right as existing in them. They say they produce a lease which they acquired by a transaction with the heir of the original tenant Now there is a certain amount of proof offered of this averment—(First) A letter from a person said to be the heir, willing to sell to Barbour for £10, and said to be completed by Barbour paying £10, the account being produced. (Second) There is a recognition of that possession by the landlord as flowing from some title when we see receipts for 8s. a-year as feu-duty or feu-rent, which is exactly the sum payable under the long lease. Now, it is said that all this is to be disregarded by reason of what took place in the process of removing. But I confess that I am not moved by it all. There is nothing exceptional in it except the question of the security or proprietary right which Barbour held. There was no question with regard to the leasehold property at all. Decree was pronounced for the whole subjects, but it was not carried out for some reason for the leasehold subjects, for the allegation is that Oliver continued to possess notwithstanding the decree, and paid ground rent from time to time, and even the ground rent was sued for and received by the proprietor. Now, whatever was the effect of the decree, if we accept the allegation of the respondents here, it is plain it was never acted upon, not because Barbour pleaded the right as a tenant in that action (which he did not), but because after decree had been pronounced he bought the lease up and the landlord recognised him as tenant. But this leaves the respondents in the difficulty as to whether they can connect themselves with the long lease. I think they should have brought the heir into the case to declare the lease in a question with him, and if this had been done I think there would have been less difficulty in their case than if they had tried the question with the proprietor. But I think where they have not followed it out it would have been safe to allow a proof, so that the whole matter might be cleared up.

The Court adhered.

Counsel for Complainer — Pearson — Armour. Agents—Beveridge, Sutherland, & Smith, S.S.C.

Counsel for Respondents—Scott—Low. Agents—Ronald & Ritchie, S.S.C.

Wednesday, June 20.

SECOND DIVISION.

[Sheriff of the Lothians.

MILLER (TRUSTEE OF ALLAN & CO.) *v.* GUNN & CO.

Sale — Clause of Pre-emption — Bankruptcy — Security over Moveables — Mercantile Law Amendment Act 1856 (19 *and* 20 *Vict. c.* 60), *sec.* 1.

A merchant, in consideration of an advance of £100, granted in favour of the person making the advance a document bearing to be a receipt for that sum as the price of certain goods there and then sold, but "to be returned to me upon repayment of the above amount." Thereafter he became bankrupt, and was sequestrated, and the goods which had remained in his possession till after the sequestration were removed by the creditor. In an action against him by the trustee for delivery of the goods as falling under the sequestration—*held* that the transaction was a sale with a right of pre-emption in the seller's favour, and that the goods did not fall under the sequestration.

On 13th December 1880 Mr Allan, sole partner of Allan & Co., boat-builders in Leith, granted the following document in favour of Mr Gunn of William Gunn & Co., shipping agents, Granton—

"*Leith, December 13th*, 1880.

"I have this day sold William Gunn, of Granton, sixty-nine nets, buoys, and fittings now lying in store in St Ninian's Church building, for the sum of One hundred pounds stg., say £100. The said nets, buoys, and materials to be returned to me upon repayment of the above amount." £100

"Received the above amt. D. Allan
13·12·1880."

Allan & Co. had previously been receiving considerable advances from Gunn & Co. to assist them in completing vessels which they were building. The nets were allowed to lie in the premises named in the document quoted above, which were rented by Messrs Allan & Co. On 19th October 1881 the estates of Allan & Co. were sequestrated, and the pursuer Hugh Miller, C.A., was subsequently appointed trustee thereon. On the 20th October, the day following the sequestration, Gunn & Co. sent for and removed the nets. The trustee raised this action against William Gunn & Co. for the purpose of having them ordained to deliver up to him, as trustee, the nets as belonging to the sequestrated estates.

He pleaded — "The nets, buoys, and fittings having been the property and in possession of D. Allan & Co. at the date of their sequestration, and having been illegally taken possession of by the defenders thereafter, decree should be granted ordaining the defenders to deliver them to the pursuer."

The defenders averred that as they required nets in six months' time they had agreed to buy them for £100 from Allan & Co.; that Mr Allan had asked a larger sum, but that they had refused to give more, but had agreed that should the amount be repaid before they might come to use the nets, they should be returned, and this under-

standing was given effect to in the concluding clause of the above receipt.

They pleaded—"The nets, buoys, and fittings not having been the property of D. Allan & Co. at the date of their sequestration, but, on the contrary, having been the property of the defenders, the present application ought to be dismissed."

Proof was taken in which David Allan deponed that the sum of £100 was an advance or loan on the nets, and that Gunn & Co. were not given possession of the nets either by delivery of the key to them or otherwise. He also deponed that the last clause was put into the receipt to show that the transaction was a loan. William Gunn on the other hand deponed as follows—"About the time of the transaction in question I was advancing Mr Allan cash on ships that were being built by his firm. One of these ships—'The Sea Queen'—was sold. On 13th December 1880, when I went to Mr Allan's place, he wanted another advance, which I was not willing to give, because I had already advanced more than the stipulated sum on each vessel. I declined to give him any more advances. I knew about the nets being in the place, and I said, 'I will pay you £100 for your nets if you will sell them. He said 'I don't care about doing that unless you give me the option of getting them back.' They were not to be required for about six months, and I did not make any objection to that. He said he thought they were worth more than I was paying for them. I took the key and looked at the nets. I brought back the key to Mr Allan's office, as there were other goods in the store besides those nets. After I came back I paid the money in the office. I am now shown the receipt which I got. We were not contemplating having to use the nets until the month of June or July, and the option mentioned was given on that account."

The Mercantile Law Amendment (Scotland) Act 1856 (19 and 20 Vict. c. 60) provides (sec. 1)—"From and after the passing of this Act, where goods have been sold, but the same have not been delivered to the purchaser, and have been allowed to remain in the custody of the seller, it shall not be competent for any creditor of such seller, after the date of such sale, to attach such goods as belonging to the seller by any diligence or process of law, including sequestration, to the effect of preventing the purchaser or others in his right from enforcing delivery of the same, and the right of the purchaser to demand delivery of such goods, shall from and after the date of such sale be attachable by or transferable to the creditor of the purchaser."

The Sheriff-Substitute (HAMILTON) found it proved that the nets did not form part of the sequestrated estate of D. Allan & Co., on which the pursuer was trustee, but were the property of the defenders—therefore dismissed the petition.

"*Note.*—The Sheriff-Substitute reads the receipt dated 13th December 1880 as importing a sale to the defenders of the articles therein mentioned, which are those here in question, at the price of £100, with a right of pre-emption in favour of the sellers, D. Allan & Co., upon payment of the same amount. At the date of the sequestration of D. Allan & Co.'s estate this right of pre-emption had not been exercised, and though the articles still remained in the possession of the bankrupts, that circumstance did not affect the defenders' right to demand and enforce delivery—Mercantile Law Amendment Act 1856, sec. 1."

The pursuer appealed, and argued—He was entitled to challenge the removal of the nets as being a fraud on the bankrupt's creditors. The document under consideration was in no sense one of sale. It was nothing more than an attempt to create a security over moveables without possession. The *onus* lay on the defenders of showing that they were in right of the nets in virtue of a contract of sale.

Authorities—*Miller's Trustee* v. *Shield*, March 19, 1862, 24 D. 821; *Stiven* v. *Scott & Lowson*, June 30, 1871, 9 Macph. 923.

The defenders replied—The receipt imported a sale to them of the nets with a right of pre-emption in favour of the sellers on payment of the same amount. At the date of the sequestration this right had not been exercised, and though the articles still remained in the bankrupt's possession, under the provisions of the Mercantile Law Amendment Act 1856, sec. 1, they had a right to demand and enforce delivery.

Authority—*M'Bain* v. *Wallace & Co*, January 7, 1881, 8 R. 360—*aff.* July 27, 1881, 8 R (H.L.) 107.

At advising—

LORD JUSTICE-CLERK—This case belongs to a troublesome category of cases, but I do not regard it as a difficult example. The alleged sale is one of fishing-nets in a store. It seems that the alleged purchaser had lent money to the proprietor of the nets, and as a matter of mercantile convenience, and in consideration of a further advance, it was agreed between them that the former should pay £100 for the nets although they were not to be required for six months. If the amount should be repaid before the purchasers might come to use them, then the proprietors were to have a right of pre-emption. This agreement was given effect to in the receipt in process.

Now, I think on the face of that document, the transaction is one of sale and nothing else. The nets remained in the proprietors' warehouses, and at the date of the sequestration the right of pre-emption had not been exercised. The question then arises, is the trustee in the sequestration entitled to set aside the transaction in respect that the sale was not completed by delivery? It is said that being a sale no delivery was necessary under the provisions of the Mercantile Law Amendment Act, and so the Sheriff has held. Now, I see no reason for doubting that the document expresses the reality of the transaction, for the money was actually paid. It is said the clause of pre-emption reduces it to a security. I do not think so. It is of no moment whatever, and in my opinion it does not destroy the character of the sale. On the contrary, I am of opinion that there was nothing whatever to prevent the buyer from removing the nets when he chose. In the case of *M'Bain* v. *Wallace*, in which our judgment was affirmed by the House of Lords, it was said there was a collateral obligation in regard to the amount for which the vessel might sell. But we considered it doubtful if such an obligation ever existed, and the House of Lords adopted our view. I need not, however, go into the facts of that case, because I am of opinion that a clause like this does not affect the character of the transaction as a proper transaction of sale.

LORD CRAIGHILL concurred.

LORD RUTHERFURD-CLARK—If the transaction recorded on the document of 3d December 1881 is to be regarded as a true document of sale the appellant admits he has no case, and the point raised for our consideration is that the transaction though in form a sale was in reality only a security. I confess I have great sympathy with that view, for I fear great danger to the law in cases where parties resort to apparent transactions of sale in order to obtain a security which is not tolerated by the law of Scotland.

I do not think, however, after what has been said by your Lordship, and after the case of *M'Bain* v. *Wallace*, that I can differ. I confess I have a strong feeling that this was nothing more or less than an attempt to get security for the money lent, but I do not think, having regard to the case of *Wallace*, that it is proved, and therefore I assume the transaction was a true sale and conveyance.

LORD YOUNG was absent.

The Court dismissed the appeal and affirmed the judgment.

Counsel for Appellant—Salvesen. Agent—William Lowson, Solicitor.

Counsel for Respondent—W. C. Smith. Agent—Beveridge, Sutherland, & Smith, S.S.C.

COURT OF JUSTICIARY.

Wednesday, June 20.

GLASGOW CIRCUIT.

(Before Lord Young.)

H. M. ADVOCATE *v.* SMILLIE.

Justiciary Cases—Wilful Fire-raising—Wicked, Culpable, and Reckless Fire-raising

If a person intentionally sets fire to premises, he commits the crime of wilful fire-raising; if while engaged in some unlawful act, or while in such a state of excitement as not to care what he is doing, one without deliberate intention sets premises on fire, he commits the crime of culpable and reckless fire-raising; but the setting on fire of premises by mere carelessness is not in ordinary circumstances criminal.

Circumstances in which under the above direction from the judge, a jury *found* a charge of wilful fire-raising, as also of wicked, culpable, and reckless fire-raising, against a panel, *not proven.*

Robert Smillie was charged with the crime of wilful fire-raising, or otherwise with the crime of wicked, culpable, and reckless fire-raising, in so far as having been at and prior to the 8th day of May 1883 in the employment of James Murray, ship chandler, Glasgow, as a porter, and having in that or in some similar capacity been occasionally, and in particular on or about the 7th day of May 1883, intrusted with a key of the oil-store or premises in or near Brown Street, Glasgow, occupied by the said James Murray, to enable him to obtain access to the said store or premises after business hours, and having on or about the said 7th day of May 1883 entered said store or premises after business hours by means of said key, or in some other manner to the prosecutor unknown, the said Robert Smillie did, on the 7th or 8th day of May 1883, . . . in or near the said oil-store or premises in or near Brown Street aforesaid, occupied by the said James Murray, wilfully, wickedly, and feloniously, or wickedly, culpably, and recklessly, set fire to the said store or premises, by applying a lighted lucifer match or matches, or other ignited substance or substances to the prosecutor unknown, to a quantity of hay or other combustible material or materials to the prosecutor unknown, on the ground flat or other part of the said store or premises; and the fire thus, or in some other manner to the prosecutor unknown, wilfully, wickedly, and feloniously, or wickedly, culpably, and recklessly, set and applied by the said Robert Smillie did take effect, and did burn and destroy part of the said store or premises, &c.

The panel pleaded not guilty.

It appeared from the evidence that the panel was on the day libelled intoxicated, and that about 8 o'clock p.m. he returned in that condition to the oil-store to place therein a wheelbarrow which he had been using; that with the assistance of a friend he entered the store by means of a key intrusted to him, and was with much difficulty induced by his friend to come out again; and that on his friend leaving him he had immediately returned to the store, and locked the door from the inside. Between 10 and 11 p.m. he was observed through the windows to have lighted some gas jets on the first floor, and to be smoking a pipe. The attention of two police constables was drawn to this, and they concluded from his movements that he was drunk, but on his turning down the gas they went away. Between midnight and one o'clock a.m. the police again saw the panel with some gas jets lighted and his coat off. They knocked loudly demanding admittance, and thereupon the gas was once more turned down, and they went away. A few minutes later the premises were found to be on fire, and damage to the extent of £150 was sustained before it was extinguished. In the interval (as it afterwards transpired) the panel had left the building, and he was not found till next day. Evidence was further led (overruling an objection by the panel's counsel to its admissibility) that about five months prior to this occurrence the panel had explained to a companion in a previous employment that he could set premises on fire without risk of detection by placing a lighted candle on a pile of newspapers laid on a floor, by which contrivance several hours must elapse between the application of the fire and its taking effect. It was elicited by the Court that the companion to whom this statement was made considered the panel to be weak-minded or "queer."

The Advocate-Depute in addressing the jury founded on this evidence of the panel's peculiar views anent setting buildings on fire as supplying a sufficiently intelligible motive for the crime of wilful fire-raising. The panel's counsel contended on the other hand that the fire was merely an unfortunate accident.