executed, and to report to the Court; *quoad ultra* continue consideration of the petition."

Counsel for the Petitioners—Maconochie. Agents—Macrae, Flett, & Rennie, W.S.

Wednesday, June 7.

SECOND DIVISION.

[Lord Low, Ordinary.

PATTISON'S TRUSTEE *v.* LISTON.

Bankrupt—Assignation and Back-Letter—Sale—Right in Security—Delivery.

By assignation dated 25th June 1890, A, in consideration of the sum of £250 instantly paid to him by B, sold, assigned, conveyed, and made over to B the whole household furniture and effects in his dwelling-house. The assignation concluded with these words—"And I have herewith delivered up to B the said household furniture and effects, with the keys of said dwelling-house." By back-letter of the same date, B acknowledged that the assignation was truly in security of the advance of £250 with interest, and that in payment thereof he was bound to deliver up the assignation, and by the same letter A authorised B in the event of the £250 and interest not being repaid to B by 1st July 1891, to sell and dispose of the said furniture and effects in whole or in part and to account to him for the balance remaining after the debt was paid.

At the date when these letters passed between the parties the dwelling-house was unoccupied and the keys were in the hands of B as house-agent. The house with the furniture in it was occupied by A and his wife during July and August 1890, after which it was again shut up and the keys returned to B. After Martinmas 1890 the house was let furnished to two tenants in succession, the rent being collected by B and paid over to A without deduction. During the absence of the first tenant from town, and during the period between the departure of the first tenant and the entry of the second, the keys were left with B, and on these occasions he removed various articles of furniture, &c., without the knowledge of A.

In December 1891 A became bankrupt.

Held (*diss.* Lord Young) that no effectual security had been constituted over the furniture and effects in question in whole or in part in favour of B, and that they formed part of A's estate at the date of his sequestration.

In the summer of 1890 R. T. Pattison being in pecuniary difficulties, applied to George Liston, house-agent, Edinburgh, for a loan of money, which the latter agreed to give on the security of the furniture and effects belonging to Mr Pattison situated in his house in Chester Street. The transaction was carried out by Mr Liston advancing in loan to Mr Pattison the sum of £250, in return for which he received from the latter an assignation dated 25th June 1890, in the following terms—"I, R. T. Pattison, residing formerly at number 2 Chester Street, Edinburgh, and now at the Western Club, Glasgow, in consideration of the sum of two hundred and fifty pounds sterling instantly paid to me by George Liston, 83 George Street, Edinburgh, as the price thereof, of which I hereby acknowledge the receipt and discharge him, do hereby sell, assign, convey, and make over to and in favour of the said George Liston and his executors and assignees whomsoever, the whole household furniture, plenishing, and effects, including paintings, pictures, articles of vertu, plate, china, books, ornaments, bed and table linen, napery, and whole other articles, fittings, and effects of whatever nature or description belonging to me at present in my said dwelling-house number 2 Chester Street, Edinburgh, and I have herewith delivered up to the said George Liston the said household furniture and effects with the keys of the said dwelling-house." Of even date with that letter Mr Liston wrote and delivered to Mr Pattison a letter in the following terms—"Sir,—With reference to the assignation of your household furniture and effects granted by you in my favour of even date herewith, although the same is *ex facie* absolute, I admit that it is truly in security of an advance of two hundred and fifty pounds (£250) made by me to you contained in your promissory-note to me of this date, payable on June, Eighteen hundred and ninety-one, with interest thereon at the rate of six per cent. per annum, and whole expenses already incurred or to be incurred by me in relation thereto, and on repayment of the said advance, interest, and expenses, I shall be bound to deliver up the said assignation and promissory-note to you, but in the event of the said advance, interest, and expenses not being repaid to me on or before the said first day of July Eighteen hundred and ninety-one, I shall then be entitled at any time, as you by your subscription hereto empower and authorise me, to sell and dispose of the said furniture and effects in whole or in part, and account to you or your representatives for any balance that may remain after payment of the said advance, interest, and expenses and any preferable charges." This back-letter was signed by both Mr Liston and Mr Pattison before witnesses.

At the date when the letters above referred to passed between Mr Pattison and Mr Liston the house in Chester Street was unoccupied, and the keys thereof were in the hands of the latter as house-agent. The house, with the whole furniture in it, was occupied by Mr Pattison and his wife during the months of July and August 1890, when it was again shut up and the keys returned to Mr Liston. It was thereafter let as a furnished house to a Mr Stewart for a year from Martinmas

1890, and the rent for that year was collected by Mr Liston and paid over as received by him without any deduction to Mr Pattison. Mr Stewart went out of town in August 1891 for a few weeks, and on leaving he handed the keys to Mr Liston, from whom he again received them on his return. Mr Stewart quitted the house on 1st November 1891, more than three weeks before the period when his tenancy expired, and on doing so handed the keys again to Mr Liston. The house was again let with the furniture as at 1st December 1891, and was in the occupancy of the tenant who then entered at the date of Mr Pattison's sequestration on 15th December 1891.

During the time that Mr Stewart was absent from the house in August 1891, Mr Liston went to the house and took out of a lumber-room—which was not let to Mr Stewart, but was kept locked—a number of boxes in which plate, napery, and other articles belonging to Mr Pattison and his wife, which they did not wish the tenant to have the use of, had been packed. On the 4th of November after Mr Stewart had quitted the house, Mr Liston again went to the house and removed a considerable amount of pictures and furniture. The defender never told Mr Pattison that he intended to remove or had removed these articles, and Mr Pattison did not know that he had done so until after his sequestration.

In June 1892 John Wilson, C.A., Glasgow, trustee on the sequestrated estate of Mr Pattison, and Mrs Pattison with consent of her husband as her curator, raised an action against Mr Liston (1) to have it found and declared that at the date of Mr Pattison's sequestration the whole furniture and other effects in the dwelling-house No. 2 Chester Street, with the exception of the articles in said house belonging to Mrs Pattison, formed part of Mr Pattison's estate, and fell under the sequestration, and were vested in the pursuer John Wilson by the confirmation in his favour as Mr Pattison's trustee, and that the defender had no right of property or other right in or over such furniture or effects entitling him to withhold them from the pursuer John Wilson, and in particular that the defender had no such right under the assignation and relative back-letter; (2) to interdict the defender from selling or disposing of any part of the said furniture or effects belonging to the pursuers John Wilson and Mrs Pattison, or from preventing the pursuers from obtaining possession of said furniture or effects on payment of the price thereof; and (3) to ordain the defender to deliver to the pursuers the articles removed by him from No. 2 Chester Street.

The defender lodged defences, and pleaded —"(1) In virtue of the said assignation and possession following thereon, an effectual security was constituted over the subjects in question in favour of the defender. (2) The defender holding a lien over the said subjects is not bound to deliver them to the pursuer, and is entitled to retain or realise."

The Lord Ordinary (Low) after hearing proof, pronounced the following interlocutor on 13th December 1892:—"Repels the defences, and (1) finds, decerns, and declares in terms of the first conclusion of the summons under the three heads thereof; (2) Interdicts, prohibits, and discharges in terms of the second conclusion of the summons; and (3) Decerns and ordains the defender to deliver to the pursuers the articles set forth in the third conclusion of the summons, and in terms thereof."

"*Opinion.*—The question in this case is whether the defender acquired an effectual security over the furniture belonging to Mr Pattison, the trustee upon whose sequestrated estate is the principal pursuer.

"As regards the bulk of the furniture of which the defender never obtained actual possession, I am of opinion that no effectual security was constituted. The furniture was in the house No. 2 Chester Street, which was vested in Mr Pattison's marriage-contract trustees. The house was either occupied by Mr Pattison himself, or let to tenants along with the furniture. The rent was paid for the house as a furnished house, and was collected by the defender (who acted as house-agent in connection with this property), and accounted for by him to Mr Pattison.

"The defender, however, maintained that he had possession by having the keys of the house. The assignation in the defender's favour of the furniture and effects in the house, which with relative backletter is the foundation of the security which he claims, bears that Mr Pattison has 'herewith delivered up to the said George Liston the said furniture and effects with the keys of the said dwelling-house.' The defender says that he actually obtained and kept the keys of the house, and that in that way he had possession of the furniture.

"But the defender had the keys of the house before the assignation as the house-agent who had charge of it, and there was no new delivery of the keys to him at the date of the assignation as possessor of the furniture. The defender simply continued after the assignation to have the same possession of the keys which he had before the assignation, such possession, namely, as was necessary to enable him to fulfil his duties as house-agent. Shortly after the assignation Mr Pattison himself resided in the house, and then it was first let to one tenant and then to another. Of course the occupier of the house—whether Mr Pattison or a tenant—had the keys, which were handed back to the defender as house-agent when a period of occupation came to an end. I am of opinion that such possession of the keys did not constitute possession of the furniture such as is required to constitute the real contract of pledge.

"But the defender in August and in November 1891 took possession of certain articles of furniture which were in the house, and he has still possession of them, and he contends that at all events as regards these he has a perfectly good security.

"The question is one of novelty and

difficulty, and it is necessary to see the precise circumstances under which possession was obtained—[*Here his Lordship stated the circumstances of the case.*]

"There is a distinction between the articles removed in August and those removed in November.

"In regard to the latter, it seems to me that the defender was not entitled to remove them, and that he cannot found upon the possession which he obtained. When articles were removed on 4th November the defender had possession of the keys, but he had so as the house-agent employed by the proprietors to look after the house and furniture. Mr Stewart had left the house before the expiry of his lease—which was current when the articles were removed—and had handed the keys to the defender as representative of the lessor. Further, the defender was at that time under employment to find a new tenant for the house and furniture after Mr Stewart's lease expired, and the furniture which he took away was part of the furniture which he was employed as house-agent to let. In such circumstances I am of opinion that the defender was not entitled to remove any part of the furniture without Mr Pattison's consent, and that the possession which he obtained cannot avail him.

"The boxes removed in August 1891 are in a different position. They were not among articles let to Mr Stewart, and were kept in a room which was not let to him, and of which the defender had the key. The articles had been packed in the boxes and put into the room by Mr Pattison when he was in the house in August 1890, and the defender says that he subsequently got a lock put on the door, and kept possession of the key. It seems to me that the defender had the key of that room as Mr Pattison's agent, and was custodier for Mr Pattison of the articles in the room, and not as pledgee of the articles. It is true that the defender held, for what it was worth, an assignation of all the articles in the house in security of the loan. But he had not received any specific articles in pledge, and what he did appears to me to have been to attempt to create the contract of pledge by using the power he had over the articles as custodier for the purpose of taking possession of them. I am of opinion that he was not entitled to do so. I do not think that one party to a contract can change its character to his own advantage without the consent of the other party. It is true that the defender had an assignation *ex facie* absolute to all the furniture and effects in the house. But the assignation was qualified by the back-letter, and the case was argued entirely upon the footing that the defender's right was one of security only, no special point being made of the fact that in form the assignation was absolute.

"I am therefore of opinion that the pursuers are entitled to decree."

The defender reclaimed, and argued—This was an absolute conveyance, there being no qualification in the conveyance except that the purchaser was not to part with the goods sold before a certain date. Pledge was a lower contract than the one here entered into. There was here a transference of proprietary right—*Hamilton* v. *Western Bank of Scotland*, December 13, 1856, 19 D. 152. Defender got actual delivery of the furniture by the delivery of the keys—Bell's Comm. (7th ed.) i. 186; Erskine's Inst. ii. 1, 19; *Maxwell & Company* v. *Stevenson & Company*, April 4, 1831, 5 W. & S. 269; *Commercial Bank of Scotland* v. *Gourlay & Muir*, November 18, 1892, 30 S.L.R. 89. Even if it was held that in this case delivery of the keys was not delivery of the furniture, it was not necessary under the Mercantile Law Amendment Act 1856 where there was an absolute conveyance that actual delivery should follow in order to transfer the goods. Besides, the defender had entered into possession of the furniture and effects in the house, or at least of part of them. He had an assignation of the articles, which was a continuing mandate to take delivery, and he became the proprietor as soon as he entered into possession.

Argued for pursuer—There was no sale here; only a loan in security of the furniture. There had been no real delivery. No doubt delivery of the keys was actual delivery if the keys were delivered in order to exclude the seller. But here the keys were in the possession of the defender as house-agent, not as purchaser of the furniture, and Mr Pattison had not been excluded; he was in occupation of the house and furniture either personally or by tenants paying him rent as landlord down to the date of his bankruptcy. The goods removed by the defender were carried off by him illegally, without the knowledge or authority of Mr Pattison. Some of these goods belonged to Mrs Pattison, and were locked up with others belonging to her husband in order to keep them from being used by the tenants, but Mr and Mrs Pattison had never locked up these goods in order that they might be specially reserved as security for the defender. No delivery of any sort had passed on the assignation, and there being no sale, all the furniture and effects, except those which belonged to Mrs Pattison, were the property of the bankrupt at the date of his sequestration—*Mackinnon* v. *Max Nansen & Company*, July 2, 1868, 6 Macph. 974; *Stiven* v. *Scott & Simson*, June 30, 1871, 9 Macph. 923 (opinion of Lord President Inglis, 936).

At advising—

LORD TRAYNER—[*After stating the facts*]—These, I think, are the whole material facts; but before dealing with the legal questions arising therefrom which were argued before us I think it right to advert for a moment to the nature of the transaction which took place between the bankrupt and the defender. If it had been a transaction of sale, the right of the defender in the subjects sold, although not delivered, would not have been prejudiced by the supervening bankruptcy of the seller. These rights would have been pre-

served to him by virtue of the provisions of the Mercantile Law Amendment Act of 1856, and the decisions following upon that Act, of which the case of *M'Bain* v. *Wallace* may be taken as an example. But if the transaction was one of loan made on the security of moveables *retenta possessione* of the debtor, then the Act of 1856 has no application, nor has the law laid down in the decisions I have referred to. Now, I think it clear beyond dispute that the transaction we are dealing with was one of loan on security and not sale. The bankrupt's letter is no doubt expressed in language appropriate to a contract of sale, but the mere use of such language would not bar the bankrupt, had the matter been disputed, from showing that the contract was not sale but something else—*Clever* v. *Kirkman*, 33 Law Times, N.S. 672. Much less would the mere language have barred the trustee (the present pursuer) from maintaining that position. But there is here no dispute about the contract. The defender's letter I have already quoted from admits that the right given to him by the bankrupt was "truly in security of an advance;" and in the present action the defender does not pretend to any right as a purchaser, but in his plea-in-law contends only (1) that by the bankrupt's assignation and possession following thereon an effectual security was constituted over the subjects in question in his favour, and (2) that the defender holding a lien over the said subjects he is not bound to restore them. The rights of security or lien here alternatively claimed are not the rights of a purchaser. Indeed, in the argument before us the defender did not pretend to any right as a purchaser; the argument was strictly directed to support the pleas-in-law I have referred to. The transaction therefore between the bankrupt and the defender not being one of sale but of loan on security of moveables, there were three questions argued before us, viz. (1) Whether by the letter of 25th June (having regard to the terms in which it is expressed) an effectual security over the furniture in question was created in favour of the defender without actual delivery of the furniture following thereon? (2) Whether the delivery of the keys operated as delivery of the furniture? and (3) Whether the letter of 25th June authorised the defender to take possession of the furniture so as to make the security in his favour effectual if and when possession was taken.

The first of these questions is attended with no difficulty. We are dealing here admittedly with a security, not a sale. Now, it is quite certain that an effectual security over moveables can only be effected by delivery of the subject of the security. Nothing short of delivery will suffice. The words in the letter of 25th June—"I have herewith delivered up to the said George Liston the said household furniture and effects"—in themselves have no operative effect; they are not equivalent to delivery. If the statement in the letter correctly represented the fact, the delivery of the subject would have made the security effectual; but if the statement did not correctly represent the fact, and if, in truth, no delivery was given, the statement will not avail anything, whatever the parties may have intended or thought. In a word, the mere statement that delivery has been given, or is hereby given, is not delivery nor equivalent to delivery. If, therefore, the defender has nothing in the way of delivery to rely upon except the mere statement in the letter, his security has not been made effectual.

The second question does not appear to me to be attended with more difficulty than the first. In fact the keys of the house were not delivered on 25th June to the defender, for they were then in his possession. That in itself, however, is not a material circumstance. The keys being actually in the defender's hands, as house-agent for the bankrupt, it was unnecessary to go through the new form of giving them into the bankrupt's hands and receiving them again as in a different character. The real question is, did the defender retain the keys after 25th June on any other footing or for any other purpose than that on or for which he had previously held them. I think this question must be answered in the negative. It does not appear doubtful that if the bankrupt on 25th June, or at any other time prior to sixty days before bankruptcy, had delivered to the defender the keys of the house where the furniture was situated for the purpose of giving thereby delivery and control of the furniture to the defender to the exclusion of the bankrupt, that such a proceeding would have been delivery sufficient to make the security effectual. Such a proceeding, however, must have been adopted with the intention of delivering the furniture to the defender; there could be no delivery without intention. In my opinion no such delivery took place. The keys of the house were held by the defender after 25th June on no footing and for no purpose other than the footing and purpose previously existing. It is clear that there was no intention of excluding the bankrupt from the occupation of the house or use and control of the furniture. The bankrupt was in actual possession of both in July and August, not on any title from the defender, but on his own title as owner. They were subsequently both in the possession of the bankrupt's tenants, the rents for such possession being paid or accounted for to the bankrupt. In my opinion, therefore, there was no delivery of the keys to, or retention of the keys by, the defender for the purpose or with the effect of thereby giving him delivery of the furniture in the bankrupt's house. Apart from the mere words in the letter of 25th June, there was no change in the position of the parties as regards either house or furniture; and as I have said, the mere words of the letter could not operate delivery.

The third question is, whether the letter of 25th June authorised the defender to take possession of the furniture so as thereby to make his security effectual. On

this question, as on the others I have dealt with, my opinion is adverse to the defender. In the first place, the letter of 25th June contains in terms no authority to the defender to take such possession, and in my opinion no such authority was intended to be given. It was not thought of, because both parties seem to have been under the impression that because the transaction as expressed in the letter took the form of a sale and not a security, and because it expressed that delivery had been given, that nothing more was necessary to secure the defender. Further, it was not intended to give any such authority, nor intended that the defender should take possession of the furniture, because that would have given the transaction the publicity which the bankrupt was anxious and the defender willing to avoid. I cannot, therefore, now read into the letter of 25th June an implied authority which the writer of it never intended to grant, and which the defender did not ask in the view that it was not needed. In the second place, the letter of 25th June does not contain any obligation to deliver the furniture which the bankrupt could have been compelled to implement specifically. He could have been sued for payment of his debt, but not for delivery of the furniture. Neither, therefore, on the ground of implied authority, or obligation to grant such authority, does the letter of 25th June, in my opinion, authorise the taking possession of any part of the furniture in question by the defender.

I was at one time under the impression that there might be a difference between the defender's right to the effects removed by him in August, and those removed by him in November. The difference I thought lay in this—that the effects removed in August had previously been placed in a room or closet, there locked up, and the key delivered to the defender. Had this been done in order to delivery—to give the defender control of those effects and exclude the bankrupt therefrom — I should have held that these effects had been delivered so as to make the defender's security *quoad* them effectual. But it appears from the proof that the purpose of locking up these effects was merely to exclude them from the use and occupancy of the tenant of the house, and in no way intended to increase or otherwise affect the right of the defender in such effects. I have therefore come to be of opinion that the effects removed in August and November stand in the same position, and must be dealt with in the same way.

On the whole matter, I think the interlocutor of the Lord Ordinary should be affirmed. The case is one of some hardship for the defender. He lent his money on a security which he thought he had effectually obtained, and which undoubtedly the bankrupt meant to give. But the question with the present pursuer is merely whether such a security was effectually obtained by the defender, and I am bound to say, that in my opinion, it was not. That the decision bears hardly upon the defender is no reason for refusing the bankrupt's other creditors their legal right.

LORD JUSTICE-CLERK—I have had an opportunity of reading the opinion of Lord Trayner, and I concur in it.

LORD YOUNG—My brother Lord Trayner concluded his opinion by saying that the judgment we are to pronounce is one of hardship to the defender, because there is no doubt he intended to obtain, and Pattison intended to give him, a security of £250 which he had advanced over this furniture. I agree in that. I think not only the intention but the contract was that he should have the furniture, though his right was to be used only to the effect of securing his debt. But I am unable to concur in holding that that end was not capable of being legally attained by the course which they took to accomplish. As my judgment differs *toto cœlo* from Lord Trayner's, in which your Lordship concurs, it is incumbent on me to state the grounds for my dissent.

I begin by considering what would have been the state of matters if the back-letter had not existed, and the contract had stood on the letter of 25th June 1890 only. What would have been the rights and obligations of parties apart from that collateral agreement? On the face of it, the contract is one of sale. It bears that Pattison has sold to the defender for a certain price goods which are specified generally as the furniture and effects in the house, but quite sufficiently specified to identify the subjects of sale. It also expresses an obligation (which would have been implied) to deliver the goods to the buyer. Now, when that contract was entered into, was it by law valid or not? The truth of the transaction was that the buyer did not intend to acquire the goods for his own use or to sell them again, but intended to use his right as a buyer for the purpose of securing the loan he had made. Would that intention, being quite understood by the parties, have affected the validity of the contract of sale? I know of no reason why it should, and I think none was suggested. In the case of *M'Bain* we were all of opinion that such an intention on the part of both parties did not affect the validity or operate effect of the contract of sale, and it is only the more clearly a case in which that was decided that we reversed the judgment of the Lord Ordinary — my brother Lord Rutherfurd Clark—upon it. I myself expressed it thus—"I think it is probably true that the respondents did not desire to purchase the ship either for use or as a speculation, and that they were only willing to accommodate the shipbuilder with advances of money on what was thought to be good security for repayment, viz., a contract which would make them the owners of the ship as by purchase, and whereby their advances should be accounted payments to account of the price. Assuming this to have been the

intention of the parties, there was nothing fraudulent or reprehensible in it that I can see, and I am ignorant of any rule of law which hinders its accomplishment."

I therefore conclude that in this case it is not doubtful that the defender was the buyer and Pattison the seller, and that their contract was valid and enforceable. Why should it not be so? My brother has said that there was no obligation to deliver expressed in the contract (which, as I said, would indeed have been implied). But the contract says he was to "deliver up to the said George Liston the said" furniture, "with the keys" of the house. Is that not an obligation to deliver, and could delivery have been withheld? If the defender had come next day and said, "You have had my £250, and I wish delivery," it would have been no answer at all to say that it was only a security. The defender would have replied, "Well, I wish possession of my security," and to that there would have been no answer at all.

I shall now consider the effect of the back-letter. It is a collateral agreement, and is to this effect only, that the defender is to use his contract of sale only to the effect of obtaining repayment of his advance. That is an honest agreement. How does it affect the validity of the contract? Why is he not to have delivery though the limitation of his right as buyer is that he is only to use it to the effect of obtaining a delivery? Had he got delivery this back-letter would have restrained him from using the goods except in terms of his agreement, but that would not affect his right to get delivery in the least. It is the very point put by Lord Trayner, that he was not entitled, though that was essential to his security. To that I am unable to assent. Therefore I think that this contract—there being no question of bankruptcy law or of the rights of other creditors, for Pattison was not bankrupt till some months afterwards—ought to receive effect according to the intention of the parties to it.

Then followed the bankruptcy about four months afterwards. But why should he not have delivery notwithstanding the bankruptcy? It is said that the back-letter prevents him from having it, because it states that his right is only to be used to the effect of repaying the advance. But if there was a valid contract of sale, and the back-letter did not destroy it, then—assuming that he had not got delivery in August and November, to which point I will return—the Mercantile Law Amendment Act gives him delivery.

Now, that the effect of the contract of sale was not destroyed by the back-letter is the very point in *M'Bain's* case. In that case the trustee for creditors desired to prevent the purchaser from taking possession of the goods sold by reason of the collateral agreement, pleading that it was not a case of sale but of security. That was the point argued and decided. We agreed with the Lord Ordinary in that case that there was a collateral agreement, though it was established not by a back-letter, but otherwise. The Lord Ordinary said (8 R. 366)—"Does this writing express the true contract? I do not think that it does." And after showing on the evidence that there was a collateral agreement, he said—"It is hardly contended that any possession was changed, and therefore the security is unavailing by reason of want of possession." Now, we decided to the contrary of his Lordship's opinion, that the pledge was unavailing for want of possession. It was there argued, on the authority of *Simpson* v. *Duncanson*, M. 14,204, that there was constructive delivery, or an equivalent to it. We thought that *Simpson* v. *Duncanson* did decide that in the case of a purchase of a ship still in the builder's yard by instalments, delivery before bankruptcy was not necessary to enable the purchaser to claim the ship against the trustee in bankruptcy. There was constructive delivery which rendered reference to the Mercantile Law Amendment Act unnecessary. We therefore gave the purchaser—though he was only a money-lender—a right to obtain delivery of the ship as against the trustee for creditors. That is diametrically contrary to what we are about to decide here.

Our decision in the case of *M'Bain* was affirmed in the House of Lords. The House of Lords did not require to decide as to constructive delivery (and Lord Selborne thought that *Simpson* v. *Duncanson* might be a doubtful decision) because the House thought the Mercantile Law Amendment Act applied, and that where it applied delivery need not of course be considered. Some of their Lordships also doubted if the collateral agreement—though they all held that it existed—could be enforced as if it was only a moral obligation. But they all repudiated the contention that the Act was not applicable to a contract of sale if there was a collateral agreement that the sale was intended to be only a security for lent money. Lord Selborne said with regard to this matter of the collateral agreement—"Now the interdict is simply to prevent those things from being done . . . which are authorised by the contract, and necessary to enable possession to be taken of the ship to be sold, and such use, as I have already said, to be made of the building-yard as is absolutely necessary or indispensable. The interdict seeks to prevent that, and the question is, is it according to contract or not? If the contract is good . . . these things appear to me to be authorised by the contract; to refuse an interdict which would prohibit them appears to me a necessary consequence. If your Lordships are of that opinion, it appears to me that to go further and to enter into the question of the ulterior rights of the parties under any collateral agreement which may exist between them would not only be necessary to protect any rights which may exist under such an agreement, but in the present state of the evidence I think your Lordships have not the materials upon which it would be possible or satisfactory to make any such declara-

tion, or right to attempt it." Lord Selborne did not think it necessary to decide whether the collateral agreement was enforceable, but had he thought that it affected the rights of parties he would have required to decide it.

Lord Blackburn puts it more distinctly still (p. 113 of 8 R.) It has been endeavoured to be argued that if there was here by the side of the contract of sale a collateral agreement that the ship should be only held as security, that would prevent the warrant of sale operating under the Mercantile Law Amendment Act so as to require no delivery to prevent any diligence of sequestration. I cannot agree with that argument at all (that is, he agreed with our judgment), and again he says—"It is not necessary to decide" as to the collateral agreement. But supposing there was this completed collateral contract, not only an honourable contract, which I have no doubt there was, but a binding, legal, and enforceable contract that this should be a security, I do not see the slightest ground for saying that that undoes the effect of the Mercantile Law Amendment Act.

Lord Watson, too, says—"The learned Judges in the Court below have indicated that in this case it is their view that a collateral contract was constituted of a nature which undoubtedly may co-exist with the contract of sale in question." So he is of opinion, too, that such a collateral agreement may co-exist with a contract of sale. He goes on—"I forbear to offer any opinion upon that point, because I cannot find any such case raised upon this record. But if the appellant has any such right, if he can instruct any such contract, I do not think his interest would be prejudiced by the form of judgment pronounced in the Court below."

On these points I am clearly of opinion that if there was no delivery here the case is indistinguishable from that of *M'Bain*.

But delivery was taken. In August the house was empty. The defender having the keys took possession of certain furniture. It is entirely immaterial that he was a house-agent and had that reason also for being in possession of the keys. He had a right, in my opinion, to take delivery. There was no infringement of any rule of bankrupt law, and none could be suggested. He was using the keys for one of the purposes for which he had them—for it is plain from the contract of sale that he had them for that purpose as well as any other. Suppose Pattison had handed over the furniture in August, the trustee could not have challenged that. He was not then bankrupt. We were told then that there were paraphernalia of Mrs Pattison's in one of the boxes. I am not speaking of them but of the subjects of sale of 28th June 1890.

On principle, and on the authorities, I think the defender is right, and that the judgment of the Lord Ordinary should be reversed.

LORD RUTHERFURD CLARK—I have felt much difficulty, but I have come to agree with Lord Trayner.

If I thought that the decision of the House of Lords in *M'Bain* ruled the case before us, I need hardly say that I would have followed that decision. But as I read the opinions of the noble Lords, they held that there was a true sale. Here the documents prove that there was no sale, but only the form of a sale. I do not think that the House of Lords intended to decide that by using the form of a sale a good security could be created over moveables *retenta possessione*. It is true that by such a form a good security may be created over land. But there is no analogy, for the infeftment of the creditor delivers to him the subject over which his debt is secured.

LORD TRAYNER—I desire to add that I think my judgment is not at all opposed to that in the case of *M'Bain*. If I had thought that that judgment ruled the case, or that this case fell under the principle of it, I would have felt bound to follow it. But I think this case falls within the case put by Lord Watson of an agreement which "in reality was one for a loan upon security, and not for a sale and purchase."

The Court adhered.

Counsel for the Pursuer — Dickson — Wilson. Agents — Skene, Edwards, & Bilton, W.S.

Counsel for the Defender — Young — Chree. Agent — Alexander Campbell, S.S.C.

Thursday, June 8.

SECOND DIVISION.

[Sheriff of Fife and Kinross.

YOUNG AND ANOTHER *v.* NICOL.

Parent and Child — Paternity — Proof — Corroboration.

Evidence *held* sufficient to prove the paternity of an illegitimate child.

M'Bayne v. *Davidson*, February 10, 1860, 22 D. 738, *followed*.

Observations (*per* Lord Trayner) as to the rules of evidence applicable to actions of filiation.

Jane Young, daughter of Andrew Young, miner, Denend, with consent of her father, brought this action of affiliation and aliment against Andrew Nicol, Lochgelly. The pursuer alleged that she was in the habit of going to her work past the railway station at Cardenden, where the defender was engaged as a porter. About the New Year 1892 the defender had connection with her within the station premises, and about the same time of year he had connection with her on four other occasions. As the result of this intercourse a child was born on 5th September 1892. The result of the proof was to show that on several occasions the pursuer and defender had been seen talking together, by various persons, on different occasions, and in sus-