would probably have been in itself conclusive, because these executors, it would seem, were or held for the pursuer's authors, but in the view I take it is not necessary, and would not be right, that I should put the defender to the expense which a proof would involve."

Counsel for the Pursuer—J. A. Reid—Laing. Agents—Philip, Laing, & Company, S.S.C.

Counsel for the Defender—Dundas—Macphail. Agents—Mackenzie & Kermack, W.S.

Friday, March 19.

FIRST DIVISION.

[Lord Kyllachy, Ordinary.

TORRANCE (GUNN'S TRUSTEE) *v.* WARDLAW AND ANOTHER (TRAILL'S TRUSTEES).

Bankruptcy—Illegal Preference—Construction of Agreement—Statute 1696, *cap.* 5—*Bankruptcy Act* 1856 (19 *and* 20 *Vict. cap.* 79), *sec.* 110.

A landlord entered into an agreement with a farm-steward whereby the latter was to receive 95 acres of a certain farm rent free as part of his salary. It was stipulated that at the commencement of the agreement the whole stock and implements on the farm were to be sold except the stock and implements necessary to work the 95 acres. These latter were to be valued in the same way as if the land-steward were an incoming tenant, and were also to be valued at the termination of the agreement, the difference in value thus ascertained being paid, as the case might be, either to or by the farm-steward, who was also to give the landlord a similar valuation at each term of Whitsunday.

On the death of the farm-steward the landlord entered into possession of the stock and implements of the farm and sold them.

Within sixty days of the farm-steward's death his estates were sequestrated.

In a question with the trustee in the sequestration, *held* (*aff.* judgment of Lord Kyllachy) that the Act 1696, cap. 5, and sec. 110 of the Bankruptcy Act 1856, did not apply, that the landlord was entitled to take possession of the stock and implements on the death of the farm-steward which terminated the agreement, and that he was bound to account to the trustee only for the difference in amount between the valuation at the beginning and the valuation at the end of the agreement.

On 8th April 1887 David Wardlaw and Others, Traill's trustees, entered into an agreement with George Gunn, land-steward, Castlehill, Caithness, to the following effect:—(1) The Home Farm of Castlehill was for the greater part to be let as grass parks with the exception of 95 acres. (2) "These 95 acres to be given rent free to Mr George Gunn as part of his salary as ground officer. In addition to this Mr Gunn to receive a free house, coal, and a money salary of £50 per annum." (3) If the permanent grass in any part of the grass parks was to give way, Mr Gunn was to take a course of cropping of that part, and an equivalent acreage of the 95 acres to be let as grass parks. (4) "The whole of the stock, crop, and implements on the farm to be sold before Whitsunday 1887, except three horses and the implements necessary to work the 95 acres. The horses and implements retained, as well as the corn crop of 1887, fallow break, dung, &c., to be valued by an auctioneer as if Mr Gunn were incoming tenant to the farm at Whitsunday 1887." (5) The agreement to be yearly, and terminable at four months' notice by either party. On the termination of the arrangement, a valuation to be made in the same way as at the commencement, and the difference in value to be paid either to Mr Gunn or by Mr Gunn, as the case might be. (6) Mr Gunn to give the factor on the estate at each term of Whitsunday a valuation of the stock, crop, implements, &c., on the farm.

Mr Gunn took possession of the farm, stock, implements, &c., in terms of the agreement. In October 1894 Traill's trustees intimated to him the termination of the agreement at Whitsunday 1895.

Mr Gunn died on 14th May 1895, and thereupon Traill's trustees caused an inventory thereof to be made and took possession of the said stock and implements, and on the 17th of May sold them, retaining the proceeds in their possession.

On 6th July 1895 the estates of Mr Gunn were sequestrated, and Mr William Torrance was appointed trustee in the sequestration.

On 5th May 1896 Mr Torrance raised an action against Traill's trustees concluding for declarator that the stock and implements on Castlehill Home Farm belonged to George Gunn at his death and vested in the pursuer as his trustee under the Bankruptcy Statutes; and further that the defenders were bound to account to the pursuer for their intromissions with the said stock, implements, and other subjects.

The pursuer founded on articles 4 and 5 of the agreement, and averred, *inter alia*—(Cond. 6) . . . "From and after Whitsunday 1887, up to the date of his death, the said George Gunn carried on said farm occupied by him under said memorandum solely for his own behoof and without accounting to the defenders in any way for his intromissions. By defenders' instructions the said George Gunn's name was entered in the valuation roll as tenant of the said farm of Castlehill, and they required him to pay the tenant's taxes therefor, which he did. He held said farm as tenant under the defenders, and was

treated by them as such. He received possession of and dealt with said farm implements, stock, and crops as his own absolute property, and the value of said subjects was treated by the defenders, the said trustees, as a debt due to them by him. On the faith of said implements, crops, stock, and other subjects on said farm being his own property, the said George Gunn obtained extensive credit and incurred debts of large amount, which are still unpaid." . . . (Cond. 7) "In the latter part of the year 1894 the said George Gunn was in embarrassed circumstances, and he was rendered notour bankrupt in December 1894. In consequence thereof, the defenders, the said trustees, who were aware of Mr Gunn's circumstances, it is believed, gave notice to the said George Gunn in terms of said memorandum, terminating the arrangement contained therein at 26th May 1895, being Whitsunday 1895 (old style.) The said George Gunn continued notour bankrupt from December 1894 down to his death." . . . (Cond. 9) "The estates and effects condescended on belonged to the said George Gunn at his death, and therefore vested in the pursuer as his trustee under the Bankruptcy Statutes. The defenders the said trustees have lodged an affidavit and claim (which is referred to) upon the estate of the said George Gunn. In said affidavit and claim they claim to be ranked for, *inter alia*, the sum of £8, 14s. 4d., 'being the difference between the value of the steelbow effects and others handed over to the said deceased George Gunn at his entry to the farm of Castlehill, and the amount thereof as realised at a displenishing sale and valuation at his outgoing, conform to state of debt herewith produced.' The pursuer as trustee has called upon the defenders to account to him for the above subjects unwarrantably taken possession of by them, but they decline or delay to do so, and the present action has been rendered necessary."

In answer to the pursuer's averments in articles 3, 4, and 5 of the condescendence the defenders made certain statements as to a subsequent agreement between the parties as to the valuation of the fallow break and dung. "(Ans. 6) Admitted that at Whitsunday 1887 Mr Gunn got entry to the farm, including the land under corn crop and young grass, and the fallow break, and got possession of the stock and implements and dung, and that he thereafter, until his death, continued to occupy said farm, and to possess said stock and implements, all on the terms set forth in said memorandum of agreement modified as above explained. Admitted that Mr Gunn's name was entered on the valuation roll as tenant of the farm of Castlehill, and that he paid the tenant's taxes. *Quoad ultra* denied. Explained that, in fulfilment of the 6th article of the said memorandum, Mr Gunn from time to time furnished the defenders' factor with valuations of the stock and implements on the farm. The horses and implements, of which he obtained possession on his entry to the farm, were still there unchanged at his death. (Ans. 7) Believed to be true that Mr Gunn was in embarrassed circumstances in the latter part of 1894. Not known and not admitted that he was notour bankrupt. (Ans. 9) Admitted that the defenders refuse to pay over to the pursuer the sum received by them as detailed in the two preceding articles. Explained that they dispute that Mr Gunn, or the pursuer as his trustee, was entitled to credit for the value of the young grass, fallow break, or dung, or of the thrashing-mill, and that they maintain that they are entitled to retain the other sums to account of the sum of £330, 13s. 2d., being the amount of the valuations as at Mr Gunn's entry. *Quoad ultra* denied."

The pursuer pleaded, *inter alia*—"(3) The deceased George Gunn having been notour bankrupt at the date of his death, and the defenders having acquired an illegal preference over his other creditors by taking possession of the said estate and effects, the pursuer is entitled to decree, as concluded for. (4) The defenders' averments in answer to condescendence 3, 4, and 5, can only be proved by writ or oath. (5) No relevant defence."

The defender pleaded—"(1) No title to sue. (4) On a sound construction of the memorandum of agreement the articles handed over to Mr Gunn, or in any event the horses and implements, did not become his property, but were merely hired to him. (5) The defenders having lawfully obtained possession of the stock, implements, &c., are entitled to set off against the sums received by them therefor the amount of the valuations as at Mr Gunn's entry."

The Bankruptcy Act 1856 (19 and 20 Vict. cap. 79), sec. 110, enacts that any preference or security for any prior debt acquired by legal diligence on or after the sixtieth day before his death, or subsequent to his death, and any preference or security acquired for a prior debt by any act or deed of the debtor which has not been lawfully completed for a period of more than sixty days before his death, shall be of no effect in competition with the trustee.

On 12th November 1896 the Lord Ordinary (KYLLACHY) repelled the pursuer's fifth plea-in-law.

"*Opinion.*—The pursuer here is the trustee in the sequestration of the deceased George Gunn, land steward on the estate of Castlehill in Caithness. Mr Gunn died on 14th May 1895, and his estates were sequestrated on the 6th July following. The present action is brought to recover certain alleged property of the bankrupt, of which it is alleged that his employers and landlords (the Castlehill trustees) unlawfully took possession after his death. The property is said to have consisted of certain farm stock, farm implements, dung, first year's grass, fallow break, and growing crop on a farm which the deceased was allowed to occupy as part of his wages.

"The defence is that the subjects and things in question—some—viz., the dung, first year's grass, and fallow break—never were the deceased's property; and that the

rest, viz., the stock, implements, and growing crop, assuming them to have been in that category, became the defenders' property on the deceased's death, or at all events at the term of Whitsunday, a few days later. They are said to have become so by virtue of the agreement under which the deceased held the lands, and which agreement is expressed in a document dated in April 1887, and titled 'Memorandum in regard to the Management of Home Farm after Whitsunday 1887."

"I do not think it necessary to recite the terms of this agreement, which for the present purpose is sufficiently set forth on record. It was in effect a steelbow arrangement, the deceased getting handed over to him without payment at Whitsunday 1887 the stock, implements, growing crop, young grass, fallow break, and dung upon the farm at that date; and the landlords being, on the other hand, entitled at the termination of the tenancy to obtain possession of the corresponding subjects with which the farm should then be equipped. It was of course contemplated that there might and must be changes during the tenancy, and in that view it was provided that there should be a valuation at incoming and another at outgoing, and that any difference should be paid in money by the one party to the other. As appears from the valuation made at incoming, No. 28 of process, this agreement was slightly modified after the memorandum was executed, but for present purposes the differences need not be considered. They come merely to this—that certain cattle not mentioned in the memorandum were handed over by the landlords and valued as part of the stock, and that the young grass, fallow break, and dung were not valued at all, the assumption no doubt being that the value of such subjects would necessarily be much the same, one year with another.

"Such being the agreement, what happened it appears was this. The arrangement being terminable on four months' notice, notice was in October 1894 given to terminate it at Whitsunday 1895, but on 14th May 1895, as I have already said, Mr Gunn died. It is said, but not admitted, that he had become notour bankrupt in December of the previous year. I shall consider the effect of that presently. But in any case he died, as I have said, shortly before Whitsunday, and after his death the defenders (the landlords) resumed possession of the farm and its contents. Whether they are to be held as having done so at the date of the death or at Whitsunday is not material. I rather take it that the tenancy terminated at the date of the death. But whether that is so or not, it is beyond doubt that for some time before the sequestration the defenders were in full possession of the farm, and of everything upon it which is now in dispute.

"Now the question is, whether in these circumstances it can be held that the stock, implements, and others in dispute were nevertheless at the date of the sequestration, on 6th July, the property of the deceased or his representatives. In my opinion that is a proposition which is not maintainable. I am not able to doubt that at least from Whitsunday onwards the property was in the defenders. They (the defenders) had by the memorandum of 1887 a contract right on the termination of the tenancy to take possession as their own of everything which the pursuer now claims; and that contract right was completed and made real by possession lawfully taken in due course, as I have described, prior to the sequestration. No act of delivery or other formality was necessary, because none was prescribed. The contract was executed just as it fell to be executed, and having been so before the sequestration, any claim which the pursuer might have otherwise had, is in my opinion excluded. The case, in short, is not, in my opinion, distinguishable from the case of *Davidson's Trustees*, 19 R. 808, where a similar question was raised and decided by the Inner House.

"In the view which I have expressed it is not necessary to consider whether in any case the pursuer's claim could be held to extend to the way-going crop, first year's grass, dung, and fallow break. It may be at least matter of doubt whether, looking to the terms of the deceased's tenancy, he or his creditors had any right of property in these subjects. I refer on this point to that part of my opinion in the case of *Sturrock*, which was affirmed in the Inner House, and to the authorities there quoted.

"It is said, however, and this is a different matter, that the pursuer is entitled to challenge and set aside the whole transaction as constituting a fraudulent preference under the Act of 1696, cap. 5. And the suggestion seems to be that the deceased having been (as alleged) notour bankrupt at the date of his death, the transfer of property which, on his death or at Whitsunday, took effect as regards the subjects and articles in dispute, was a voluntary act or deed of the deceased operating in favour of prior creditors. Of course, if I had thought that any relevant case had been stated on this head, I should have allowed a proof, the fact of notour bankruptcy not being admitted. But I confess that I am not able to see how the Act of 1696, cap. 5, can be brought into this case. The tenant was dead, the farm was vacant, and the defenders in taking possession did so, not in virtue of any act or deed of the deceased or his representatives, but in virtue of the original agreement, and of nothing else. No doubt if that agreement (the agreement of 1887) had been an agreement having reference to a prior debt, and if it had been performed, as it was, within the period of bankruptcy, the date of the agreement might have been held to be the date when it was performed; and so by construction the whole transaction might have been held to have been a voluntary alienation in breach of the Act. I need hardly, however, say that no such case arises or can be held to arise here. The transaction of 1887 had nothing to do

with a prior debt. Even if entered into within the period of bankruptcy it would have been protected as a *novum debitum*. Again (the agreement being what it was) had the deceased lived and voluntarily renounced his tenancy at some term within the period of bankruptcy, and by such renunciation had conferred on the defenders rights of property which but for his action would have passed to his creditors, the Act of 1696 might have given the creditors redress. But here again no such case has to be considered. The present case, so far as the Act of 1696 is concerned, is, I think, not substantially different from the quite familiar case of a lease—say of a sheep farm—when the tenant on the one hand receives the sheep stock at entry on certain terms, and, on the other hand, is bound at the outgoing to leave the sheep stock to the landlord or incoming tenant on similar terms. It has never, so far as I know, been suggested that if such an arrangement happens to be carried out before sequestration, but within the period of bankruptcy, actual or constructive, the rights acquired *hinc inde*, although resulting, it may be, in benefit to the landlord, and in prejudice to the creditors, could be reduced as in contravention of the Act of 1696.

"I am therefore prepared to hold that, in so far as the pursuer's case is laid upon the Act of 1696, cap. 5, his averments are irrelevant."

The pursuer reclaimed, and argued—The Lord Ordinary was wrong. The defenders had stated no relevant defence. The landlord here had attempted to acquire an illegal preference over the other creditors by stepping in and taking possession of the moveables after Mr Gunn's death. But such attempts would not be encouraged by the Court—*Paterson's Trustee* v. *Paterson's Trustees*, November 13, 1891, 19 R. 91. A landlord could not create a security in his own favour over a tenant's moveables—*M'Gavin* v. *Sturrock's Trustee*, February 27, 1891, 18 R. 576. It was true that the preference was given by no deed of the tenant's, but the Act 1696, cap. 5, had always received a liberal interpretation. It was settled law that a general obligation to deliver goods at some future time was struck at by that statute, and that if such an obligation was fulfilled within the period of constructive bankruptcy the preference so obtained would be cut down—*Gourlay* v. *Hodge*, June 2, 1875, 2 R. 738. That was the true nature of the contract here.—The Bankruptcy Act 1856, sec. 110, also referred to.

Argued for the defenders—The Lord Ordinary was right. Mr Gunn was not a tenant. He was merely ground officer with a right to occupy certain lands as part of his remuneration. His executors would have had no title to possess. Nothing had been done here which was struck at by the Act 1696, cap. 5, or the Bankruptcy Act, sec. 110. No deed had been granted by Mr Gunn, and that in itself sufficiently distinguished the case from *Paterson's Trustee*, *ut sup.* There was nothing in these statutes to strike at a creditor making a security effectual—*Scottish Provident Institution* v. *Cohen & Co.*, November 20, 1888, 16 R. 112. There was no proof of notour bankruptcy, and in any event the stock was taken possession of by the landlord under a contract entered into years before the sequestration of Mr Gunn's estate—*Lindsay* v. *Adamson & Ronaldson*, July 2, 1880, 7 R. 1036. A landlord was entitled in a question with the trustee in a tenant's bankruptcy to set off his claim for arrears of rent against any sum due by him to the tenant—*Davidson's Trustee* v. *Urquhart*, May 26, 1892, 19 R. 808; *Smith* v. *Harrison & Co.'s Trustee*, December 22, 1893, 21 R. 330—*M'Vicar*, 1764, 5 Br. Sup. 899, also referred to.

At advising—

LORD ADAM—[*After narrating the facts*]—It appears to me that when Mr Gunn died on 14th May 1895 the arrangement dated 8th April 1887 came to an end, and the defenders were then entitled to enter into immediate possession of the farm. It is alleged that Mr Gunn was notour bankrupt at the time, but however that might be, he had not been sequestrated, and no trustee was in existence. Nor had any creditor attempted to acquire a preference or right over any of the articles into possession of which the defenders had entered, and no diligence had been used by poinding or otherwise. In these circumstances the defenders had only to deal with matters as under the agreement, without the intervention of any third party. That being so, it appears to me that the defenders were entitled to take immediate possession of the articles embraced in the agreement as their own, paying only the difference of value, if any, appearing in the valuation taken at the termination as compared with that taken at entry. They did enter into immediate possession of the articles, and having thus obtained full and legal possession of the articles, it appears to me that they became again their property—if they had ever ceased to be, as the defenders deny. The articles therefore did not, in my opinion, vest in the pursuer on the subsequent sequestration of Mr Gunn. In terms of the contract the pursuer is only entitled to the difference, if any, between the valuation at entry and at the termination of the arrangement.

I do not see that the Act 1696, cap. 5, has anything to do with the case. The arrangement under which all that I have described took place was not a fraudulent transaction, and the death of Mr Gunn, which brought the arrangement to a termination, surely cannot be called a voluntary act on his part.

LORD M'LAREN concurred.

LORD KINNEAR—I agree with your Lordship. I do not think it very material to consider whether the agreement of 1887 left the parties in the ordinary position of landlord and tenant as to the subject in dispute, or whether these relations might not be modified in respect of other considerations. However that may be, I am satisfied

with your Lordship that the effect of the agreement was, that upon the bankrupt's death the defenders were entitled to enter into possession of the articles in dispute subject to any question which may still remain open under the interlocutor allowing a proof.

It cannot be suggested that the agreement of 1887 was a fraud upon the creditors or in any respect prejudicial to them. It appears to me to be unassailable on any such ground, and that the only question is, whether the death of the bankrupt is an event which is struck at by the Act of 1696 or any similar provision of the Bankruptcy Act of 1856. It appears to me to be quite clear that it is not. The effect of the agreement as made was to enable the defenders to enter into possession of the articles in question without any additional security or any additional aid, and therefore there was no voluntary act or preference of any kind within the period of constructive bankruptcy that could bring the case within the scope of the statutes.

LORD ADAM intimated that the LORD PRESIDENT, who was absent, concurred.

The Court refused the reclaiming-note and adhered.

Counsel for the Pursuer—W. Campbell—D. Anderson. Agent—J. A. Pattullo, S.S.C.

Counsel for the Defenders—Clyde—Chree. Agents—John C. Brodie & Sons, W.S.

Thursday, March 18.

WHOLE COURT.

ROBERTSON & BAXTER *v.* INGLIS.

Foreign—Competition—Arrestment—Real Right in Moveables—Lex Situs.

Held (by a majority of the Whole Court, *diss.* Lord Young) that a competition between an arrester and a party claiming, under an English contract, a real right in moveables situated in Scotland is to be determined by the law of Scotland as the *lex situs.*

Right in Security—Pledge of Document of Title—Intimation—Factors Act 1889 (52 *and* 53 *Vict. cap.* 45)—*Factors (Scotland) Act* 1890 (53 *and* 54 *Vict. cap.* 40), *sec.* 1.

The Factors Act 1889 provides by section 3 that "a pledge of the documents of title to goods shall be deemed to be a pledge of the goods."

The owner of goods in the custody of a warehouse-keeper under warrants which bore that the goods were held to the order of the owner or his assignees by indorsement, indorsed the warrants to a third party in implement of a contract assigning the goods in security.

Held (by a majority of the Whole Court, *diss.* Lord Young) that the above section did not dispense with the rule of common law requiring intimation to the warehouse-keeper in order to constitute a real right to the goods in favour of the indorsee of the warrant.

Question whether the above section has reference only to the extent of the mandate of a mercantile agent, and applies only to questions between the principal (the true owner of the goods) and parties contracting with his agent.

Opinions affirmative by the Lord Justice-Clerk, Lord Kinnear, Lord Trayner, Lord Moncreiff, Lord Kyllachy, Lord Stormonth Darling, Lord Low, and Lord Pearson.

Opinions contra by the Lord President, Lord Young, Lord Adam, Lord M'Laren, and Lord Kincairney.

Question (by the Lord Justice-Clerk, Lord Kinnear, Lord Kyllachy, Lord Kincairney, and Lord Low) whether the indorsation of the warrant in implement of an assignation of the goods in security constituted a pledge of the document of title in the sense of the section.

On 14th December 1893 Messrs Robertson & Baxter, wine and spirit merchants in Glasgow, sold to Mr Walter C. Goldsmith, wine merchant, London, certain parcels of whisky, which were duly delivered to him, and thereafter lay at his order in the bonded warehouse in Glasgow belonging to the Clyde Bonding Company. Warrants or delivery-orders in the following terms were issued for the whisky by the Clyde Bonding Company to Goldsmith:—

"Warrant for ten hhds. whisky transferred in our books and held to the order of Walter C. Goldsmith or assigns by endorsement hereon. Rent commences 3/6/95.

$\frac{94}{359}$ $31/40 Ten hhds. whisky.

F O

p. CLYDE BONDING CO.
3d. Stp.
JNO. W. MATHIESON.

"*Endorsed on back*—
WALTER. C. GOLDSMITH.
R. W. INGLIS.
Transfer to my name.
pro. J. W. BASHFORD,
W. J. PENWARDEN."

On 10th December 1894 Goldsmith entered into the following agreement of deposit or hypothecation with Mr Robert William Inglis of Bigods Hall, Dunmow:—

"To Robert William Inglis, Esq.

"*London, December 18th,* 1894.

"In consideration of your advancing to me the sum of £3000, I hereby deposit with you (having full power and authority to do so) the wines and spirits specified in the schedule hereto, as a security for the payment of the said sum of £3000, with interest thereon until the date of payment at the rate of £7 per centum per annum, with full power for you to sell the same without further consent from me, either by public or private sale at your option, in the event of my not paying the said amount and interest when demanded; and after reimbursing yourself out of the