ture of the kelp delivered in 1869—such as the comparatively late period of the year at which it was made, the difficulty there was in getting weed in the spring, the wetness of the weather, up at all events to the 22d of June 1869, and the character of the locality from which a considerable portion of it came—which are, in the opinion of the Lord Ordinary, of themselves sufficient in a great measure to account for its defective quality."

The pursuer reclaimed.

FRASER and BLACK for him.

SHAND and MACLEAN in answer.

The Court unanimously recalled the Lord Ordinary's interlocutor. There was no doubt a special warranty which the pursuer was bound to satisfy, but it was not to the effect that the kelp would contain the same per centage of iodine as that sent by the "Flora Kelso," but that it should be of "the same kind and quality." That stipulation was fulfilled when it was gathered on the same shore and treated in the same way as the former cargo. It had been proved that it would be impossible to find kelp which contained 20½ lbs. of iodine per ton, as it was alleged by the defender the kelp of the "Flora Kelso" had done.

This result was obtained by the defender from an analysis, the principle of which he refused to explain, and therefore the presumption in favour of the difference of quality which would have existed if the analysis of the two cargoes had been properly conducted did not hold.

Agent for Pursuer—J. Curror, S.S.C.
Agents for Defender—J. & R. Macandrew, W.S.

Tuesday, July 12.

SECOND DIVISION.

ORR'S TRUSTEE *v.* TULLIS.

Sale—Plant of Newspaper—Bona fides—*Delivery—Possession—Tenant—Transfer.* The proprietor of a newspaper, who held the copyright and himself printed and published it, became embarrassed, and ultimately sold the copyright and whole printing plant to the defender, who was his landlord in the premises in which the business of the paper had been carried on. The contract of sale was completed under certain powers of redemption by the purchaser, and thereafter the seller took a new lease of the premises, renouncing the old one, and also took a lease from the defender of the copyright and plant. The seller continued his possession under this arrangement for six years without any challenge of the contract of sale. Meanwhile the defender had paid the full price of the subjects; was gazetted as proprietor of the copyright; had paid rent for seven years, had insured the subjects in his own name as owner; and his right as owner of the subjects had been judicially asserted more than once in sequestrations for rent, the lease being fully set out in the several petitions, and the printing plant being specified as part of the subject for which rent was due. *Held*, in an action at the instance of the trustee on the sequestrated estate of the seller, that the contract of sale in question was a *bona fide* and not a simulate transaction, and that under it there had been possession of the subjects by the defender through his tenant the seller, and that the property was thereby effectually transferred.

This was an action of reduction brought by the trustee on the sequestrated estate of John Cunningham Orr, some time proprietor of the *Fife Herald*, against Robert Tullis, residing in Markinch, formerly residing in Cupar, and the object was to set aside certain deeds whereby the copyright, plant, &c., of the *Herald* were transferred to Mr Tullis by Mr Orr in the year 1863, or, at all events, to obtain declarator that the subjects in question had never been validly transferred to Mr Tullis, and fell under the sequestration of Mr Orr. It appeared that Mr Orr was proprietor of the newspaper in question, and held the copyright, and himself printed and published the paper, carrying on his business in premises rented from the defender. In 1863 he got into embarrassments, and entered into an arrangement with the defender, whereby he sold to the latter, subject to certain powers of redemption, the copyright and whole printing plant on the premises, and agreed to renounce his lease of the premises, and take a new lease of the premises, copyright, and plant. Orr continued in possession under this arrangement till 1869, when he became bankrupt, and his trustee then brought the present action, in which he pleaded, in the first place, that the transaction was simulate, and not a *bona fide* sale; and, in the second place, that, at all events, the defender had never obtained possession so as to vest him with the property either of the copyright or plant.

The Lord Ordinary (GIFFORD), on advising a proof, pronounced the following interlocutor:—"The Lord Ordinary, having considered the closed record and proof adduced by the parties, and having heard parties' procurators, assoilzies the defender from the reductive conclusion of the libel, and also from the first declaratory conclusion, being the first alternative conclusion of the libel: Finds that the copyright, proprietorship, or right of publication of the newspaper called *The Fife Herald, Kinross, Strathearn, and Clackmannan Advertiser*, was effectually transferred to and vested in the defender prior to 29th March 1869, being the date of the sequestration of the estates of John Cunningham Orr, and that the same was not attached by the said sequestration; but finds that the various moveable articles and effects specified and contained in the inventory annexed to the conveyance, dated 21st October 1863, No. 7 of process, not having been delivered to or taken possession of by the defender prior to the said sequestration, the property thereof still remained vested in the person of the said John Cunningham Orr, and that the said articles were effectually attached by the said sequestration, and were carried to the pursuer, as trustee in the sequestration, for behoof of the creditors of the said John Cunningham Orr; and finds and declares that the said moveable articles specified in the said inventory are the property of the pursuer, as trustee foresaid, and that he is entitled to obtain possession of the same, and to dispose thereof for behoof of the creditors: *Quoad ultra* assoilzies the defender from the whole other declaratory conclusions of the summons, and decerns: Reserves meantime all questions of expenses, and appoints the cause to be enrolled with a view to the disposal of the remaining conclusions of the action.

"*Note.*—Under the interlocutor pronounced by Lord Barcaple, dated 24th November 1869, a very long and elaborate proof has been led. Indeed

the Lord Ordinary cannot help repeating what he said at the time, that the proof appeared to him to be needlessly protracted and detailed. In the Lord Ordinary's view there can be no reasonable doubt as to the facts of the case; but the questions of law thence arising are delicate, difficult, and important.

"I. The Lord Ordinary is of opinion that the pursuer has entirely failed to substantiate his averments of fraud, or any of them, and that he has failed to make good any grounds for reducing or setting aside the minute of agreement, the conveyance, and the lease, all dated 21st October 1863, or the supplementary agreement of 9th August 1867, or any of these writs. The Lord Ordinary has accordingly assoilzied the defender from the reductive conclusion of the summons.

"It is needless to examine the evidence in detail. The Lord Ordinary believes, in all its particulars, the testimony given by the defender, by Mr Arthur Russell, banker, Cupar, and by Mr John M. Douglas, writer, Cupar, the agent by whom the deeds were prepared. The material parts of the evidence of these witnesses are really uncontradicted by any one, excepting by Mr Orr, the bankrupt, for the Lord Ordinary can attach no weight to the evidence of H. R. Mackenzie. Even Mr Orr, the bankrupt, himself admitted that at the time the transaction was gone into, in 1863, he considered himself quite solvent, although much pressed for want of money to carry on his business.

"The case of fraud attempted to be made out by the pursuer rests upon Mr Orr's insolvency in 1863, and upon that insolvency being known to all the parties. But it is not proved that *de facto* Mr Orr was insolvent in 1863, and it is abundantly established that, whether insolvent or not, the contracting parties believed him to be solvent, and went into the transaction on that footing. Indeed, the admitted fact that the pursuer on the faith of the transaction paid away £955 is the strongest possible real evidence, not only of his entire *bona fides*, but of his belief, and that of his advisers, that Orr, who received the money, was not in insolvent circumstances.

"The transaction was not in any sense a scheme to obtain a preference for the then existing creditors of Mr Orr, and the Lord Ordinary has failed to find the slightest evidence implicating the defender either in legal or in moral fraud. He may have been imprudent or ill advised in laying out money on such an investment; but he certainly did not lay it out fraudulently, or in order to bring about any fraudulent purpose.

"II. The Lord Ordinary is further of opinion that the pursuer has entirely failed to establish that the deeds, which on their face embody one species of transaction, were really meant to carry out a different species of transaction, inconsistent with their terms.

"The element of fraud necessarily enters into this part of the case also, for, excepting in a case of fraud, much of the evidence relied on by the pursuer is utterly inadmissible.

"If, then, as the Lord Ordinary thinks, no fraud has been established, it requires a very short step further to find that the deeds themselves must be read and held to import the transaction which they expressly bear and set forth; and that they cannot be contradicted or explained away by parole evidence, by the alleged understandings of one of the parties, or by loose expressions occurring in the correspondence of the agents or of third parties.

"The pursuer's contention is, that although the deeds expressed an out-and-out sale, with a lease, and with certain stipulations authorising the redemption of the subjects sold, they were really intended to embody an agreement of loan, with an assignation in security thereof; and then the pursuer proceeds to challenge the validity of such a security.

"The Lord Ordinary sees no ground for reading the deeds otherwise or in any different way from that in which they are expressed. The legal effect of the deeds is a totally different question; but in order to determine the legal effect the deeds must be read as they stand, and the Lord Ordinary thinks it quite impossible to hold them as importing a transaction of loan, which they expressly repudiate.

"It seems quite clear that there was no loan. There was no obligation to repay. No action for payment would have lain against Mr Orr; and had the subjects perished, they would have perished, not to Mr Orr, but to the defender.

"It is true that in some respects a sale with a clause of redemption resembles a loan or security, but the legal effects and the legal character of the two contracts are totally different.

"The parole evidence leaves no doubt as to the real history of the case. A loan was originally proposed, and the defender was willing to have granted a loan if he could have been made legally secure. But he was advised by Mr Douglas that he could not get a legal security for a loan, and that his money would not be safe unless he made an out-and-out purchase of the copyright and plant. The idea of loan was then definitely abandoned, and throughout the whole subsequent negotiations everybody, including Orr himself, knew that what was to be gone into was not a loan, but a sale. It is impossible to allow Mr Orr to repudiate the deeds not only executed by him, but engrossed in his own hand, and to contradict the language of these deeds, language which is almost suspicious because of its very explicitness. It is not unworthy of notice that Mr Orr has received a legal education, and he must have understood perfectly the nature of the deeds which he extended and executed. He sought and he obtained no back-bond of any kind, and no letter of declaration explaining or controlling the deeds. And it is incompetent to attempt to explain or control them by parole proof.

"The expressions occurring in Mr Douglas' letter, when the letters are read as a whole, are in no way inconsistent with the transaction being precisely that which the deeds bear. When Mr Douglas uses the expression 'security,' he plainly does not mean a pledge or security for a loan, for he had expressly refused to allow his client to give a loan. The word is used as a short mode of expressing the defender's legal rights in reference to the investment. In common language deeds and securities are spoken of without any necessary reference to loans or mortgages. But even were it otherwise, Mr Douglas' letters could not destroy the defender's rights.

"Nor is the Lord Ordinary at all moved by the correspondence of Mr Morrison, or by the parole evidence relative to the registration of the *Fife Herald* under the Newspaper Act, 6 and 7 William IV., c. 76. When rightly understood, it seems clear that the proposal to get Mr Tullis registered as a bond-holder necessarily involved a change on the existing transaction, and the execution of new

deeds; and this was quite in the view of the parties. No such change, however, was ever effected; and the defender was registered, not as a bond-holder, but as the proprietor of the newspaper, which upon the face of the deeds he certainly was. Further, the proposal about registering the defender as a bond-holder did not come from the defender himself, but from his uncle, and there is no evidence that the defender either authorised or was cognisant of the terms in which Mr Morrison wrote.

"On this part of the case the Lord Ordinary has no hesitation in holding that the deeds must be read and must receive effect exactly as they stand. He thinks it impossible to declare that they mean anything different from or anything inconsistent with their precise terms. He has, therefore, assoilzied the defender from the first alternative or first declaratory conclusion. Here the Lord Ordinary thinks it right to note, that as great part of the proof, probably more than three-fourths, relates to the two first conclusions, if the Lord Ordinary is right in assoilzieing the defender therefrom, the defender will be entitled to a large part of the expense of the proof in whatever way the ulterior questions of law may be disposed of.

"III. In dealing with the legal effect of the deeds, and with the rights which the defender has acquired under them, the Lord Ordinary will first consider the 'copyright,' as it is called, of the *Fife Herald*—that is, the proprietorship of or right to publish that newspaper.

"The Lord Ordinary is of opinion that the proprietorship of or right to publish the *Fife Herald* was effectually conveyed to and completely transferred to and vested in the defender prior to the date of Mr Orr's sequestration. He thinks that the defender did everything that was necessary to complete the transfer. There is very little authority on this point, but the view which the Lord Ordinary takes is shortly the following:—

"The proprietorship of a newspaper is not, strictly speaking, a right of copyright. It is not a right to publish any specific literary composition or literary matter, and probably does not fall under the Copyright Acts. It is a right to continue a serial publication under a given name, every issue being necessarily a new composition or compilation, and the value of the right consisting in the circulation which the past management of the newspaper has secured, and in its popularity as an advertising medium. It is an incorporeal moveable right, which undoubtedly is patrimonial, capable of being transferred by assignation, or of being attached by diligence. And the question is, How is the transference of such a right completed?

"It cannot be by tradition or delivery in the literal sense, for the right is intangible and incorporeal. It must, therefore, be by the exercise of the right, or by such public assertion thereof as the nature of the case admits.

"Now, it so happens that by public statute, 6 and 7 Will. IV., cap. 76, regulating duties on newspapers, it is enacted (section 6), that no person shall print or publish a newspaper until there has been delivered at the proper office a written and signed declaration containing a variety of particulars, and among other particulars the name of the proprietor or proprietors. And if the proprietors are resident within Great Britain, the declaration must be signed by them. By a subsequent section such declaration is declared conclusive evidence against the parties subscribing the same, and the register is open to the public, who may inspect it at all times without fee or reward.

"In the present case such a declaration was made and registered under date 9th August 1867. The declaration, which is signed both by Mr Orr and the defender, bears that the defender is the sole proprietor of the *Fife Herald*, and that Mr Orr was merely the printer and publisher thereof. The Lord Ordinary thinks that great weight must be attached to this official and public declaration. It fixed the legal rights and liabilities both of Mr Orr and of the defender. In the case of *ex parte* Baldwin and *ex parte* Foss, 15th March 1858, 2 De Gex and Jones, 230, 27 Law Journal, Bankruptcy, 7, the property of a newspaper was held not to have been transferred from a bankrupt because he had continued the sole registered proprietor under the statute. And Lord Justice Turner explains that although the statute may be primarily intended for fiscal purposes, the registry furnishes the means by which the ownership of the property may be known to the world, and thus the statutory declarations are *indicia* of the property which must be attended to for the purpose of taking the property out of the disposition of the bankrupt.'

"Still farther, the Lord Ordinary thinks that the right to publish was used by the defender. No doubt he exercised that right through Orr, who continued to be the printer and publisher. But Orr published by authority of the defender, and he paid the defender a large annual sum for liberty to do so, and this throughout a series of years.

"Nor was there anything done inconsistent with the defender's proprietorship. The imprint of the newspaper both before and after the transfer merely announced that Orr was printer and publisher, and did not state who was proprietor. And although, previous to the agreement of 1863, Orr used a business invoice or letter-heading mentioning that he was proprietor of the newspaper, this was discontinued whenever the agreement was signed, and the copperplate containing the heading was given up to the defender.

"In the whole circumstances, therefore, the Lord Ordinary thinks that the transfer of the right to publish the *Fife Herald* was sufficiently completed. Everything was done which the nature of the case fairly admitted. See Bell's Comm. vol. i, p. 176, where instances are given where in cases of necessity—such as sale of sheep, stock, &c., imperfect or symbolical acts of possession are held sufficient to complete the transfer.

"IV. The Lord Ordinary, however, has come to an opposite conclusion regarding the plant and printing materials assigned by the conveyance of 21st October 1863, and mentioned in the inventory relative thereto. These never having been delivered either actually or constructively prior to the sequestration, were, the Lord Ordinary thinks, not transferred to the defender, but remained subject to the diligence of Orr's creditors, and were attached by his sequestration.

"(1) The plant and materials in question were ordinary corporeal moveables, undoubtedly capable of actual delivery, and there was nothing in their character or position to make actual delivery impossible, or to introduce a necessity for constructive delivery.

"(2) They were in the natural possession of Orr at the time of the sale, used by him in his

ordinary business, and apparently at his entire disposal. They continued in Mr Orr's custody till his sequestration in 1869, and during all these years, from 1863 to 1869, they were used and employed by him, in precisely the same way as they had been before the agreement of sale. In regard to these moveables the case is undoubtedly one of sale *retenta possessione*.

"(3) Not only so, but it was matter of precise agreement and stipulation that Mr Tullis, the purchaser, should not get possession except in certain events. All he was to get in the first instance (agreement, article 1st) being a conveyance in exchange for the price. By article 11th of the agreement it is provided, that in case Mr Orr become bankrupt, grant a trust-deed for creditors, or fail to publish the newspapers, then Mr Tullis 'shall be entitled to take instant possession' of, *inter alia*, the plant 'contained in said inventory.' Nothing can more clearly show that Mr Tullis was not to have possession sooner.

"(4) Now, at common law, sale *retenta possessione* does not pass the property, but leaves it exposed to the diligence of the seller's creditors.—See Bell's Comm. i, 167, 171, and 252. It is needless to quote cases, for the rule has received ample illustration, and the only difficulty is whether the present case does not fall under some of the exceptions which the exigencies of trade have introduced. Reference may be made to the cases of *Macarthur* v. *Brown*, 9th July 1858, 20 D. 1232; *Gibson* v. *Forbes*, 9th July 1833, 11 S. 916; *Matheson* v. *Allison*, 23d December 1854, 17 D. 274; *Anderson* v. *M'Call*, 1st June 1866, 4 M. 765. The Lord Ordinary thinks that, in the present cases, there are no circumstances which could be held equivalent to delivery.

"(5) The payment of rent was much insisted on by the defender. But this was mere matter of contract between Orr and Tullis, and it would be very dangerous to hold that delivery is dispensed with in a sale whenever there is an agreement either by the purchaser to pay store rent, or by the seller to pay hire for the continued use of the subject sold. None of the cases support this doctrine.

"(6) Nor is the defender's case strengthened by the fact that the payment of the rent under the lease was on several occasions judicially enforced. This might make the transaction more or less known, but what is wanted is not publication but actual or constructive delivery. A public advertisement might make a contract of sale quite notorious, but that would not dispense with the necessity of tradition.

"(7) Stress was laid on the circumstances, fully detailed in the evidence, that the initials of the purchaser were painted on the principal articles of the plant, and that thereafter a small printed label, bearing 'Robert Tullis, owner,' was pasted upon the presses, cases, and boxes containing types, &c. It was ingeniously urged that this was equivalent to marking growing trees which are sold, or branding cattle which are to be left in the seller's parks.—See 1 Bell's Comm. 176. The case of *Eadie* v. *Young*, 15th June 1815, Hume's Decisions, 705, which in some respects is similar to the present, was strongly founded on. The Lord Ordinary, however, has not been able to hold the painting or labelling as equivalents to possession. There is an obvious difference between labelling the plant in a printing-office and affixing a name-plate to carts at the usual place where the owner's name is affixed. This was the *species facti* in Eadie's case, and this, coupled with payment of hire, was held equivalent to delivery. There was, however, great difference of opinion, and to extend the principle to the present case would really be to introduce a new mode of taking delivery of moveables.

"(8) And, lastly, in the Lord Ordinary's opinion, the Mercantile Amendment Act does not apply to the present case, or entitle the defender to demand delivery after the sequestration. This seems sufficiently established by the case of *Sim* v. *Grant*, 3d June 1862, 24 D. 1033. In that case the continued possession and use of the subject by the seller was held to exclude the purchaser's right, and to admit the diligence of the seller's creditors. It does not appear that it would have made any difference if the seller had agreed to pay, and had actually paid, a hire for the use. See also the case of *Wyper* v. *Harvey*, 27th February 1861, 23 D. 606, which contains valuable observations on the Mercantile Amendment Act. Reference may also be made, as illustrating the present case by contrast, to *Union Bank* v. *Mackenzie*, 27th March 1865, 3 M. 765. The decision in that case would have been different if the tenant who possessed the moveable machinery had been previously in possession, and had sold it to the bank.

"The judgment which the Lord Ordinary has pronounced does not affect the defender's right to the Main's printing machine and to the fixtures. The trustee has only been found entitled to the moveables sold by the conveyence of 21st October 1863, but not delivered before sequestration.

"V. The Lord Ordinary thinks that the present case does not fall to be decided on the doctrine of reputed ownership. A good deal of evidence was led by the pursuer as to Mr Orr being the reputed owner both of the 'copyright' and of the plant. In the Lord Ordinary's view, almost the whole of this evidence is irrelevant and inapplicable to the circumstances of the present case.

"(1) As to the so-called 'copyright' or right of publication: This being an incorporeal right, it is more than doubtful whether mere repute of ownership, if unaccompanied by any of the *indicia* of property of which the case is susceptible, would be of any importance. It seems plain that the mere guesses or suppositions of persons who had no means of knowledge, and who never made any special inquiry, would never make Mr Orr proprietor, or admit the diligence of his creditors. A great deal of the evidence relied on by the pursuer is, in the Lord Ordinary's opinion, utterly worthless. If the Lord Ordinary is right in holding that the property of the newspaper was effectually transferred by the public registry of Mr Tullis as proprietor and otherwise, it would require something much stronger than exists in the present case to make it subject to the diligence of Mr Orr's creditors on the ground of reputed ownership.

"(2) As to the plant:—Here also, in the Lord Ordinary's view, the doctrine of reputed ownership is inapplicable. For if the property was never taken out of Mr Orr, then his creditors may attach it whether he was reputed owner or not. Where there is real ownership there is no necessity for reputed ownership.

"In any view, however, the Lord Ordinary thinks that the reputed ownership of the plant *de facto* came to an end in 1667, when Mr Douglas, with his own hands, painted the initials of Mr Tullis on all the principal articles of the plant. It

is clear from the evidence that this scene became publicly and widely known, and is even said to have destroyed Mr Orr's credit. Now, the Lord Ordinary has held that this painting and labelling did not pass the property; but if, contrary to the Lord Ordinary's opinion, it should be held that the property was passed, then it appears that the painting and labelling was sufficiently public to destroy the repute of ownership.

"As the proof led did not include questions of damages or accounting, and as there are petitory conclusions still to be disposed of, the Lord Ordinary has appointed the cause to be enrolled for further procedure, and he reserves in the meantime all questions of expenses."

The defender reclaimed.

SHAND and J. C. SMITH for him.

FRASER and RHIND in answer.

At advising—

LORD JUSTICE-CLERK—The Lord Ordinary in this case has negatived the plea of fraud, and has found that the transaction, which was the subject of the deeds under reduction, was a fair and honest one. He has on this ground sustained the claim of the defender to the copyright of the newspaper, and the pursuer does not impugn the judgment to this extent. But he has found that the property of the moveable articles in the inventory libelled never passed to the defender, in respect they never were delivered, and to this last point only the able argument we have heard was addressed.

The Lord Ordinary in his note has explained, with great ability and fullness, his views on this subject; and Mr Fraser, in his concluding address, enforced them in a very powerful speech. As the case involves a question of considerable importance, I shall state my opinion in some detail.

I shall consider the question, in the first place, without reference to the provisions of the Mercantile Law Amendment Act, of the import of which I shall speak in the sequel. It was contended for the pursuer that the law of Scotland adopted to the full extent the doctrine of the Roman law, that in the contract of sale tradition is necessary to transfer dominion, and that without actual delivery the property sold remains with the seller subject to the buyer's personal claim for delivery. He also maintained and quoted a series of decisions to prove that the law of Scotland did not sanction equivalents for delivery, and that recourse to symbols, or notarial instruments, or specific marking or segregation of the subject of the sale, were ineffectual to complete the real right.

I am inclined to think that Mr Fraser was mainly successful in his demonstration of these propositions. But they do not seem to me to exhaust the case, which lies in a point beyond them.

Tradition, or delivery, in a sale of moveables is important only as the means of obtaining possession, and possession is the true completion of the contract of sale. It is not correct to say—although the position is supposed to be sanctioned by the high authority of Lord President Blair in the case of *Broughton* v. *Aitchison*—that some ostensible corporeal act, some change in the actual local situation or custody of moveables sold, is necessary to pass the property. That is only true when possession has not been attained by the purchaser. It is not true when possession has been attained.

The simplest illustration of this is the case in which the thing sold is at the time of the sale in the possession of the purchaser. If a man hire a horse or carriage, and purchase it while his contract of hire is current, the property has passed, for no delivery could make the possession more complete than it was before. But as possession may be acquired and held through another just as effectually as by the owner himself, so, when the subject of the sale is in the hands of a third party who holds for the buyer, the property is as effectually transferred as if the buyer personally had possession. Accordingly, it is certain that when goods sold are in the warehouse of a third party the transference of the goods is complete from the time when the third party ceases to be the hand or custodier of the seller, and becomes the hand or custodier of the buyer. The buyer then has as much possession as the seller had, and farther delivery is superfluous.

But the contract of deposit is only one of a numerous class of subordinate titles to possession, in all of which the possessor holds for the proprietor from whom his right is derived—(see Erskine, 2, 1, 19–21).

Thus the owner of a thing lent or deposited possesses it by the borrower or depositary, "the proprietor of lands by his tenant or steward, as in the case of pledge, where the proprietor is considered as possessing the subject by the creditor to whom it was impignorated in so far as is necessary for supporting his right of property. The same doctrine holds in liferenters, tacksmen, and generally in every case in which there are inferior rights affecting any subject distinct from the property of that subject."

Possession, therefore, may be complete without any ostensible act. "Creditors," says Lord Ivory in the case of *Shearer*, 18th November 1842, "are bound to know that many honest occasions of possession may arise in the daily complication of human affairs without any radical title of property in the mere possessor on which they would be safe to rely on a ground of credit."

Thus, if moveables, such as furniture, are burdened by a liferent, they may be the subject of an immediate sale by the owner, although they cannot be the subject of immediate delivery. If the article sold is under a contract of location or hire to a third party, delivery cannot be made while the rights of the tenant or the hirer continue. If it be the subject of impignoration or lien the same thing may be said. But in these cases the true doctrine is that the property passes from the time that the liferenter, or tenant, or pledge-holder, by intimation or otherwise, truly holds for the purchaser. The transference of the property is not suspended in these cases until these rights expire, but the possession of the purchaser is complete through the possession held under the inferior or subordinate rights.

I do not stop to review the authorities up to this point, for in cases in which the possession is with a third party these principles admit of no question. But what shall be said if the seller, in parting with the ownership, himself acquire a subordinate title of possession? Shall his continued possession be ascribed to his former ownership, or to his new title? Although this is not a new question, I have found it difficult, and, as far as I know, it is hitherto undecided in Scotland.

The cases relied on by the pursuer were, without exception, instances in which the seller con-

tinued to possess on his title of ownership,—at least, in which he had no other specific title. It may no doubt be said that a seller who is under a personal obligation to deliver a thing sold, holds as trustee or mandatory for the buyer until his obligation is performed; and that as the law presumes ownership possession in that case, notwithstanding the personal contract, so it will presume it in the case of any other contract which is purely personal.

But there is a clear distinction between cases in which possession is simply continued by the seller and those in which a new title of possession, specific and determinate, with known rights and limits, is acquired by him. This distinction is well brought out by comparing the case of *Macdougall* (2 D., p. 500) with that of *Anderson* (11 D., 270). In the latter the Court, by a narrow majority, held the property of furniture bought from the trustee in a sequestration, but allowed to remain in the bankrupt's possession, not to have been transferred; but much was rested on the fact that the purchaser had made no contract with, and had granted no specific title to, the former owner. The rule of the civil law, from which the principles of our law of sale are mainly derived, was very distinct on this matter. It is laid down, both in the Pandects and the Code, that the reservation of a liferent, the acceptance of a lease by the seller, is equivalent to tradition; and such is the view taken by Pothier and Domat. Mr Bell (vol. i, p. 175) speaks with approbation of this principle, and quotes the Roman jurists as authority for his doctrine,—that when unfinished goods are purchased and left with the seller for completion, the property has passed. Mr Brown, on the other hand, in his book on Sale, stoutly denies that this rule of the Roman law has ever been admitted with us; and I see that the last editor of Mr Bell thinks that the author has allowed himself to be carried too far in the direction of English analogies.

In this conflict of authority, and in the absence of any direct decision, I think it is not difficult to reconcile these contending views. It may be true that in the case of goods sold remaining in the custody of the seller, there is a presumption of simulation raised against any inferior title flowing from the buyer, which he may pretend. But this presumption will be stronger or weaker according to circumstances; and if the good faith of the transaction is clearly proved, will altogether disappear. In such a case the question of possession must be judged of according to the legal title of the parties.

In this case the Lord Ordinary has held, and I entirely agree with him in that result, even had it been questioned, which it is not, that the original transaction by which Tullis acquired the property of the copyright, fixtures and types, was not simulate, but substantial and real; and it follows that the lease granted to Orr in terms of the stipulation in the agreement was equally substantial and real in intention and design, whether effectually completed or not. Had the challenge been made *de recenti*, it might have been more difficult for Tullis to have proved the good faith of the entire transaction. But in the time which has elapsed, the truth and reality of the transfer has been put beyond doubt. The full price was paid; Tullis was gazetted as proprietor of the copyright; the rent was paid for seven years; the articles in question were insured in the name of Tullis as owner. The marking of the initials of Tullis on the articles, although of little use as symbolical delivery, is a fact of importance as indicating the intention of the parties; and lastly, Tullis' position as landlord in respect of these printing materials was, on more than one occasion, judicially asserted in sequestrations for rent, the lease being fully set out in the several petitions, and these articles being specified as part of the subject for which the rent was due.

The lease of the types thus stands in a much more favourable position than if it had been a solitary transaction. The rent stipulated in the lease was a *cumulo* sum for all the separate subjects—premises, the copyright, the fixtures, and the types. I find it impossible to hold that it was a real transaction as to some of these and simulate as to others; still less, that it was a sale as regarded part and a security only as regarded the rest. And therefore I am of opinion that Tullis has been throughout in possession of these types through his tenant, and that the property passed from the first.

I concur with the Lord Ordinary that there is no case here of reputed ownership, and I have only farther to say a word on the application of the Mercantile Law Amendment Act.

If the views I have above expressed be correct, the printing materials in question were delivered, and therefore the first section of the Mercantile Law Amendment Act does not apply.

If, however, I am wrong in these views, I think the case very clearly falls under the provision of the section in question.

There are only two conditions necessary to introduce the remedy of the statute; 1, a completed contract of the sale; 2, that the subject sold has been allowed to remain in the custody of the seller. In every case in which these two conditions unite, the statute applies.

In this case there was a completed contract of sale, and, if the goods were not delivered, they were allowed to remain in the custody of the seller. Therefore the pursuer cannot interfere with their delivery to the purchaser.

I think the *dicta* in the case of *Sim* have been entirely misapprehended. What was found there was that there was no contract of sale; and the reference to beneficial enjoyment by the Lord President and Lord Cowan was intended to show that the stipulations of the contract were inconsistent with a sale having been completed. There is no room for such a view in this case. The beneficial use enjoyed by Orr was the result of the contract of lease,—a contract which was entirely consistent with the completion of the personal contract of sale.

Lord Cowan—The interlocutor of the Lord Ordinary has definitively settled certain of the questions on which parties were at issue under the record.

The averment of fraud on which the pursuer relied, his Lordship holds has not been in any respect substantiated by the proof, and from the reductive conclusion of the summons on that ground the defender has been assoilzied. It has also been held by his Lordship that the pursuer has entirely failed in showing that the deeds which embodied the transaction of parties in 1863 set forth a different species of transaction from that which they profess to effect. These findings have been acquiesced in by the pursuer, and it must be held that, whatever may be the legal result of the

transaction, a *bona fide* sale of the copyright and of the plant, as set forth in the writings between the parties, was actually effected for the price of £955. The consequence is, that the price having been paid, the sale as a personal contract is unchallengeable. Still farther, the pursuer has not disputed the soundness of the judgment pronounced by the Lord Ordinary upon the effect of the written agreement of 1863, and of what followed on it in operating a valid transference to the defender of the copyright of the newspaper mentioned. All these matters are to be taken as conclusively disposed of, there having been no argument addressed to the Court against the interlocutor under review upon any one of them. The only question that is for consideration—and it is certainly not a little delicate and difficult—is whether the plant, as it is called, has been effectually transferred along with the copyright in property to the defender under the deeds of 1863, and the proceedings which have been taken thereon; in other words, whether not merely a personal right to the plant, &c., has been acquired by the defender, but also a real right thereon, or a *jus in re?* I have felt the solution of this question to be attended with great difficulty; and it is not without hesitation that I have arrived at a conclusion adverse to that presented to the Court in the very able argument of Mr Fraser.

The principles of the law of Scotland are generally to the effect so powerfully contended for upon the authorities to which reference was made. Without delivery or tradition there can in general be no effectual transference of moveable property; but in special circumstances, and in the peculiar position in which moveables may, in the multifarious transactions of trade in the present times, come to be placed at the time of the sale,—there may be acts consented to by both parties, and sufficiently made public, which, when done in *bona fide*, the law will hold equivalent to delivery. Instances of this are mentioned by Mr Bell in the 1st vol. of his Commentaries, p. 172 to 183, and reference may be in particular made to his statement at § 16 of that discussion:—"Where the evidence of the contract is clear, where the subject purchased is specific, and where there is no ground for pleading on the effect of reputed ownership, as giving additional credit to the holder of these goods, there is a constructive tradition sufficient to transfer the property, the price being paid." And the question here truly resolves into this, whether, having regard to the peculiarities which occur in this case, there has not been every step taken with a view to complete the real right, which the nature of the transaction admitted of or required?—whether, in short, there has not occurred what is legally sufficient and equivalent to delivery?

The detailed view of the peculiarities of the case, and of the proceedings taken by the defender to validate the sale, which your Lordship has given, makes it unnecessary for me again to go over the specialties of the case with any minuteness.

The sale was effected in 1863, and is now admitted to have been entered into in *bona fide*. The price of the subjects, £955, is admitted to have been fully paid by the defender at the time. The personal contract is complete and unchallengeable under the writings embodying the transaction. And it is only in 1869, six years afterwards, that the pursuer challenges the completion of the real right on the ground of no actual delivery having taken place, the subjects having thereby, as alleged, been left exposed to the diligence of the seller's creditors, and therefore to have been now attached by his sequestration. One cannot but look with some jealousy on a challenge of this kind *post tantum temporis;* still, if neither actual delivery, nor what may be deemed in the circumstances equivalent thereto, has passed, the apparent injustice which the defender will suffer must be submitted to by him as unavoidable. But is there not sufficient here to satisfy the requirement of the law when it says, that not by personal paction, but by delivery, the transference of moveable property is effected?

The copyright, the transference of which was part of the same transaction, has been held to be well vested in the defender, and this appears to me to be a circumstance deserving of some weight. The premises in which the seller printed the newspaper by means of the plant, which by the same agreement were to be transferred along with the copyright, belonged in property to the defender, and were in the occupancy of the seller as his tenant when the transaction was arranged. The agreement entered into in these circumstances was, that the seller's current lease being renounced, and the stipulated price being paid for the copyright and plant, a new lease should be granted of the premises and of the whole plant therein, by the defender as proprietor of both, to the seller for a fixed rent, the endurance of the lease to be until 1873. Under this lease the now bankrupt seller has continued to possess, and to make payment of the rent all along, and until his sequestration. His title to occupy the premises, and to use and possess the plant, was exclusively that of tenancy, and the whole actings of parties proceeded on that footing. For what acts of possession occurred in assertion of his real right on the part of the defender? Immediately on this sale a policy of insurance in name of the pursuer, as owner at once of the premises and of the plant, was opened, and has been since maintained. So I read Mr Douglas' evidence. There are those three successive applications in 1865–66–67 to the Judge Ordinary of the bounds, all setting forth his rights as proprietor, and the occupancy, not of the premises only, but of the plant, on the part of the bankrupt as that of a mere lessee. Farther, there is that limitation of the lease as regards a part of the subjects and relative reduction of the rent fixed in 1863, which occurred in 1866–67, mentioned in the last of the applications to the Sheriff in 1867. Unless it is to be held that the individual articles behoved to have been removed from the premises in October 1863, and afterwards in a few hours or days restored to the premises, to permit of a new course of possession, as tenant, to run upon a new lease, every thing that could be done by the defender appears to have been gone through. And no concealment of the fact as to this transfer of the proprietary right was practised, for it is not a little remarkable that the Lord Ordinary, while he justly holds that the mere painting and labelling which took place in 1867 could not avail to pass the property, states, in dealing with the plea of reputed ownership, "but if, contrary to the Lord Ordinary's opinion, it should be held that the property was passed, then it appears that the painting and labelling was sufficiently public to destroy the reputed ownership." It is indeed urged that possession was not contemplated in the very transaction itself, except in certain events. But I do not

so read the stipulation in the agreement, and in the relative lease of 1863, regarding this matter. The possession there referred to is that which any landlord may stipulate to take of the subjects of the lease, so soon as the tenant is overtaken by bankruptcy, or otherwise incurs an irritancy. It is not such a stipulation as occurred in the case of *Sim* v. *Grant*, where, in the very act of effecting the sale, it was stipulated that the subject of it should remain with the seller to be used by him for his own profit until the purchaser should choose to claim delivery of the subject. I cannot therefore think that the stipulation in this transaction, that the defender on the bankruptcy of the tenant should be entitled to take possession of the property he had set in lease, can at all militate against the legal effect of the circumstances otherwise, as amounting in this case to what is equivalent to delivery.

On the whole, without infringing on the general principle of law, or trenching upon any of the decisions, I am of opinion that the pursuer is not entitled to prevail in this action, on the ground of the *jus in re* as regards this property not having been vested in the defender on the occurrence of the sequestration of the seller's estate, under which the pursuer is trustee. I concur in the conclusion at which your Lordship has arrived, that the plant has all along been in the pursuer's possession as owner, through Orr as his tenant.

Having formed this opinion, I think it unnecessary to consider whether, on the assumption that the real right has not passed to him, the defender could effectually plead the Mercantile Amendment Act. All I shall say is, that in my view the decision in the case of *Sim* v. *Grant*, which was arrived at after great deliberation, would present a formidable obstacle to such a plea on the part of the defender in the circumstances of this case; but, on the ground which I have stated, I concur in thinking that the interlocutor under review must be altered, and effect given to the defender's real right in this moveable property as well as in the copyright.

The other Judges concurred.

Agent for Pursuer—Robert Menzies, S.S.C.
Agent for Defender—J. D. Bruce, W.S.

Tuesday, July 12.

BILL CHAMBER.

GRANTS *v.* BOWLES.

Entail—Game—Lease. Held that a lease by an heir of entail, in possession of the sole and exclusive right to the whole shootings over the entailed estate, with the exception of the home farm and policies, for the period of nineteen years, was not binding on the succeeding heir of entail.

The late Mr Grant of Arndilly, heir of entail in possession of that estate, granted to the respondent Colonel Bowles a lease of certain farms and hill pasture and certain salmon-fishings in the Spey for nineteen years from Whitsunday 1866, and also the sole and exclusive right to the whole shootings over the estate of Arndilly, with the exception of the home farm and policies, "for the same duration of lease or as long as Mr Grant can legally grant me (the respondent) towards the nineteen years." Mr Grant died on 20th March 1870, and was succeeded by the complainer Mrs Menzies Grant as heiress of entail, who completed her title under the entail. The respondent having advertised the said shootings to let for the ensuing season, and having disregarded the complainer's intimation that his right to the shootings terminated upon the death of Mr Grant, the complainer lodged the present note of suspension and interdict, in which she craved interdict prohibiting the respondent from sub-letting the shootings of Arndilly, and from shooting or interfering with the game thereon.

CRICHTON for her.

W. F. HUNTER for respondent.

The Lord Ordinary on the Bills (MACKENZIE) granted the interdict craved, and passed the note in order that the question of law might be tried. His Lordship added to his interlocutor the following Note:—

"The late Mr Grant of Arndilly was proprietor under a strict entail of the estate of Arndilly. Mr Grant let to the respondent Colonel Bowles on 28th May 1866 certain farms and hill pasture at a rent of £205, and certain salmon-fishings in the Spey at a rent of £20, for nineteen years from and after Whitsunday 1866, and also the sole and exclusive right to the whole shootings over the estate of Arndilly, with the exception of the home farm and policies, for, as the respondent's offer bears, 'the same duration of lease, or as long as Mr Grant can legally grant me towards the nineteen years.' The rent for the shootings was £125 yearly, payable by two instalments, the first at 1st February thereafter, and the second at 1st August in the succeeding year. It was stipulated in the respondent's offer that he was to be entitled to sub-let the whole or any part of the shootings and fishings. Mr Grant died on 20th March 1870, and was succeeded by the complainer Mrs Menzies Grant as heiress of entail, who has completed her title under the entail. The respondent having advertised the said shootings as extending to about 12,000 acres, in Mr Snowie's list of shootings, dated 10th April 1870, with the services of one gamekeeper, to be let with the shooting lodge and salmon-fishings at a rent of £650 per annum for the ensuing season, and having disregarded the complainer's intimation that his right to the shootings terminated upon the death of Mr Grant, the complainers have lodged the present note of suspension and interdict, in which they craved interdict prohibiting the respondent from sub-letting the shootings of Arndilly, and from shooting or interfering with the game thereon.

"The question whether an heir of entail can grant a lease of the shootings over the entailed estate for nineteen years, which shall be binding after his death upon the future heirs of entail, has never been decided by the Court. In the case of *E. of Fife* v. *Wilson*, Dec. 14, 1859, 22 D. 191, the Lord Ordinary (Lord Ardmillan) held that such a lease was binding on the future heirs of entail. But the Court, holding that the lease of the shootings founded on had not been proved, recalled Lord Ardmillan's interlocutor, and did not decide the general question.

"It has been decided in the case of *Pollock, Gilmour & Company* v. *Harvey*, June 5, 1828, 6 S. 913, and by Lord Barcaple in the case of *Birkbeck* v. *Ross*, Dec. 22, 1865, 4 Macph. 272, that a lease of shootings is not effectual against a singular successor. In the first of these cases the Lord