therefore the conclusion insisted in by Allan is one for damages—damages for breach of that part of the contract which is relative to the moveable subjects. Now, there can't be a claim for damages for non-implement of that part of the contract, unless he could also have brought an action for implement thereof. The result of doing so would be this, that the pursuer would demand that the defender should buy the goodwill and fittings of the business without getting any right whatever to the premises in which the business was conducted.

That would be a very strange result, especially looking to the nature of the contract as stated by the pursuer on record. He says in article four of the condescendence:—"Immediately on the advertisement appearing, the defender put himself into communication with both pursuers, and various communings took place among them as to the sale of the subjects and effects. In the course of their communings the pursuer, the said John Allan, explained to the defender that he would under no circumstances accept him as a tenant, and that he would only transact with him on the footing of his proposing to acquire the property of the subjects and the goodwill of the business. This the defender stated to be his sole intention and desire."

Now, here the property of the subjects and the goodwill of the business are inseparably tied together, and we see the same thing through the whole record, and in the communings through which the transaction was completed.

In these circumstances, I have no doubt that the claim of damages for Alexander Allan cannot be supported. I am therefore of opinion that the defender should be assoilzied.

The other judges concurred.

The Court pronounced this interlocutor:—

"The Lords having resumed consideration of the cause, with the minute for Alexander Allan jun., No. 9 of process, and heard counsel: Find the claim made by the said Alexander Allan, as stated in the said minute, is not founded on any relevant allegation of damage for breach of contract; therefore assoilzie the defender from the whole conclusions of the summons, so far as not already disposed of, and decern: Find the pursuer Alexander Allan liable to the defender in expenses, and remit the account thereof to the Auditor to tax and report."

Counsel for the Pursuers—Dean of Faculty (Clark) and Brown. Agent—Alex. Morison, S.S.C.

Counsel for Defenders—Balfour and Moncreiff. Agent—George Andrew, S.S.C.

Thursday, March 11.

SECOND DIVISION.

APPEAL—PATON *v.* TURNBULL.

Lease, constitution of—Liability for Rent.

Circumstances in which the owner of certain heritable subjects, having disponed them in security of debt, and continuing in possession after his sequestration, was *held* to have relinquished his right of ownership, and incurred liability as tenant of the premises.

This was an appeal from the Sheriff Court of Roxburghshire for Alexander Paton, merchant, Glasgow, in an action at his instance against John Turnbull, draper, Jedburgh. The summons concluded for payment of £82, 10s., being rent for a shop and other premises alleged to have been occupied by the defender as tenant of the pursuer. It appeared that the defender was originally owner of the subjects, but had conveyed them by an *ex facie* absolute disposition, dated 28th November 1868, to Barclay, Paton & Co., merchants, Glasgow, in whose right the pursuer now stood. The disposition was made in security of debts due by the defenders to Barclay, Paton & Co., and was qualified by a minute of agreement, by which, *inter alia*, power was conferred on the disponees in certain events to sell the subjects disponed, and to enter into possession thereof. The defender was sequestrated in April 1871, and the pursuer's firm ranked on his estate, and accepted a composition, but did not renounce the security held by them, and the trustee in the sequestration refused to interfere with the subjects disponed. The defenders continued in the occupation of the premises, but at Whitsunday 1871 the pursuer's firm made notarial intimation to the tenants on various parts of the subjects disponed, including the defender, that the rents would thereafter be payable to them. The rent thus due by the defender for the half year ending Martinmas 1871 was recovered by Barclay, Paton & Co., on a decree in absence pronounced against the defender for payment thereof, and several payments were made subsequently by the defender in name of rent, as the pursuer alleged. The pursuer accordingly maintained that the defender was tenant of the premises, and as such liable in payment of the rents thereof. The defender, on the other hand, denied that he had paid the sums referred to as rent, and contended that he had continued to possess the premises as owner, his *ex facie* absolute conveyance of the subjects being qualified by the minute of agreement.

The Sheriff-Substitute (RUSSELL) found that the facts set forth did not infer any contract of lease between the parties, or constitute the defender tenant of the subjects occupied by him, and the Sheriff (PATTISON) adhered to this judgment.

Appellant's authorities—Hunter on Landlord and Tenant, ii., 262, 263, 534.

Respondent's authorities—*Rankin*, 19th Nov 1868, 7 Macph. 126; *Abbott*, 25th May 1870, 8 Macph. 791; Bell's Conveyancing, vol. ii. pp. 1075 1076.

At advising—

LORD JUSTICE-CLERK—I cannot agree with the judgment of the Sheriff. Looking to the decree in absence pronounced in the Sheriff-court for a sum which was sued for as rent due at Martinmas 1871, and to the payment following thereon, and the subsequent termly payments made by the defender, I cannot resist the conclusion that the relation of landlord and tenant was constituted between the pursuer, or the firm whom he now represents, and the defender. These payments are alleged by the latter to have been made in satisfaction of debt, and not for rent at all. But no debt is specified, and, as the defender was a discharged bankrupt, no debt can have been due. I am therefore of opinion that the pursuer's claim for rent is well founded, and that this appeal should be sustained.

Lord Neaves—I have no fault to find with the proposition that a proprietor in possession of subjects disponed in security cannot always be removed at once by a heritable creditor, or that his possession as owner cannot at once be converted into possession as tenant. But there is no doubt that he *may* become tenant, and the question whether he has done so or not is one of facts and circumstances. In this case the defender took no objection to the notarial intimation that he was to be held as tenant, and he paid his rents, first under decree and then voluntarily. I am of opinion that by so doing he then accepted the position of tenant, and that he still is tenant. A party may insist on retaining his original possession as radical proprietor, but when once he becomes tenant he cannot go back.

Lords Ormidale and Gifford concurred.

The Court sustained the appeal, and gave decree in favour of the pursuer, with expenses.

Counsel for the Appellant—Dean of Faculty (Clark), and Mr Mair. Agents—Macnaughton & Finlay, W.S.

Counsel for the Respondent—Mr Macdonald and Mr Darling. Agent—Adam Shiell, S.S.C.

Friday, March 12.

SECOND DIVISION.

SPECIAL CASE—BLACKWOOD & OTHERS.

Succession—Testament.

Circumstances is which the last will of a testator was *held* cancelled, and a prior will was *held* confirmed, in accordance with an implied direction to that effect contained in an undated letter which was found along with the two wills in the repositories of the deceased, and which declared that the later will was to take effect only in a certain event, which did not occur.

John Blackwood, surgeon, Catrine, Ayrshire, died in January 1875, unmarried and without issue. He had for many years resided on the most friendly terms with his only brother William, who was also a bachelor. In the repositories of the deceased were found lying together two holograph testaments and a holograph letter addressed to his brother. By the earlier of the testaments, which was dated 15th June 1859, his brother was left sole executor and universal legatory, under burden of payment of debts and a legacy to his servant. The later will was dated 1st September 1871, and by it the deceased appointed John Beveridge and Alexander M'Master his executors, and directed a new distribution of his moveable estate, making no mention of his brother. The holograph letter was *undated*, and was in these terms:—"Dear Brother,—You will perceive I have made the will very simple instead of entering them as legacies I would wish as soon as convenient to make the following donations from the estate £100 sterling to the Catrine Public School the money to be safely invested and the interest applied annually in giving prizes to the scholars £10 sterling to the Catrine Public Library £5 to the Catrine Funeral Society £5 to the Catrine Mortcloth Society (if distinct) from the Funeral Society £5 to Robert Pollock £10 to Charles Pollock.

"Do not delay making a will for yourself. You may perhaps find another drawn as if I happened to outlive you you can destroy it. I beseech arrange and part calmly with Janet the servant and besides the legacy you will require to pay her wages and give her a suit of mourning. (Signed) John Blackwood."

In these circumstances, the said William Blackwood, brother of the deceased (the first party), and the said John Beveridge and Alexander M'Master (the second parties) asked the opinion and judgment of the Court on the following queries:—"(1) Whether the party of the first part is entitled to administer the moveable estate of the deceased as executor under the testament of 15th June 1859? or, (2) Whether the parties of the second part are entitled to administer said estate as executors under the testament of 1st September 1871? (3) Whether, in the event of the estate falling to be administered by the first party, he will be bound to give effect to the undated letter by the testator before mentioned, and pay the legacies therein set forth? and whether he will be bound to pay the legacies set forth in the testament of 1st September 1871? and in the cases where there are legacies to the same parties both in the said letter and in the testament of September 1871, he will be bound to give effect to the letter or to the said testament, or to both? (4) Whether, in the event of the estate falling to be administered by the parties of the second part, they will be bound to give effect to the undated letter? and in the cases where there are legacies to the same parties both in the testament and in the letter, they will be bound to give effect to the testament or the letter, or to both?"

At advising—

Lord Justice-Clerk—This case turns upon the construction of the holograph letter. There is some difficulty in ascertaining its date and its precise meaning. It plainly alludes to the possibility of two wills being left by the deceased. The will first referred to in the letter is evidently the will first in date, and the letter qualifies it by additional legacies. The legacy left by that will to the servant Janet is implied in the letter, as already made. Then, in the second part of the letter the possibility is referred to of another will being found, "drawn as if I happend to outlive you," and, it is added, "you can destroy it." Is this to be held as a direction to cancel the second will? Clearly that is the only meaning of the words. I am of opinion that the whole holograph letter must be taken as cancelling the second will, and as confirming the first will, and qualifying it by additional legacies.

Lord Neaves—In the first paragraph of this letter a will *in esse* is referred to. Then, in the second paragraph another will is referred to as at least in contemplation, and is described as drawn on the basis of the testator outliving his brother, which will, the letter says, "you can destroy." He does leave another will, which clearly answers to the description given in the letter, and makes no mention of his brother. The explanation is obvious on this footing, and authority is clearly given to treat this second will as a non-entity.

Lord Ormidale—Three testamentary writings were left by this testator. The question is—What was his real intention? I construe the holograph letter as tantamount to a declaration in the second