Christie v. *Ruxton*, 24 D. 1182, which related to the title-deeds of an estate pledged for an advance of money, but the case was decided on the broad ground stated by Lord Benholme (and concurred in by Lord President Inglis) that, 'by our law it is incompetent to impignorate title-deeds or mere documents of debt, so as to give a title of possession of these moveable subjects capable of competing with right to vindicate their possession competent to the proprietor of the estate or the creditor in the bond who has acquired right to the estate or to the debt by singular and onerous title from the impignorator.' His Lordship quotes a passage from Baron Hume's Lectures which fully sustains the general principle, and supplies an illustration exactly meeting the present case, for, after asserting the preference of an assignee to a bond who has intimated his assignation but has never possessed the bond, over one who has got delivery of the bond but has not intimated, Baron Hume adds, 'In the same way he who duly arrests has right to the document of debt arrested, wherever that document may be.' If that be the law of Scotland, as I believe it is, the liquidator is in the position of having 'duly arrested,' and is therefore preferable to the mere pledgee of the document.

"It was urged for the respondents that Mr Bell in his Commentaries had adopted a different view. But whatever may be said of some observations about the deposit of title-deeds, it is plain that he agrees with Baron Hume as to documents of debt, for at p. 24 of vol. ii. (Lord M'Laren's edition) he says—'It seems in the same way inconsistent with the true principles of law to sanction a burden on the real right even to moveables or debts, without an act of permanent or temporary transference of the right itself, unless in the case already mentioned of the debts and vouchers being inseparable." And—"It is not necessary, in order to transfer a debt, that the instrument or bond should be delivered to the assignee, but the debt itself may be attached by arrestment in whose hands soever the bond may happen to be, so that the possession of the document gives no apparent property.' And the paragraph concludes with the general statement—'The pledge of the document cannot therefore be the regular way of constituting a security over such a subject.'

"Two recent cases were cited by the respondents—*Meikle* v. *Pollard*, 8 R. 69, and *Robertson* v. *Ross*, 15 R. 67, which were said to recognise a pledge of books and papers as effectual to the full extent here contended for. But I do not read these cases as inconsistent with the general principle laid down by Baron Hume and Mr Bell. In both cases the question arose with trustees under voluntary deeds—a not unimportant distinction—and in both the right to retain the documents was claimed, in the one case by an accountant, and in the other by a factor, merely until they were paid for the work in connection with which the documents had been delivered to them. In neither case therefore was there any question of the validity of a pledge in security for money lent of documents of debt where a right to the debt itself had been acquired by arrestment. Indeed, the cases were treated as falling under the same principle as the right of an artificer to retain possession of an article entrusted to him for repair until payment of his account.

"I need hardly add that the respondents rest their case on the express contract contained in the minute of January 10th, and not on the right of retention known as banker's lien. The latter would not avail them, for it extends merely to 'unappropriated negotiable instruments belonging to the customer in the hands of the banker' —*Horsbrugh* v. *Royal Bank*, October 24, 1890, 28 S.L.R. 35, *per* Lord President, 39.

"I therefore come to the conclusion (1) that it was *ultra vires* of the Executive Council to create a security over the guarantee fund in favour of a particular creditor, and (2) that in any view the hypothecation or pledge of the letters was ineffectual to constitute a preference over the fund in competition with the liquidator, who is entitled to possession of the letters as accessories of the fund. All that I require to do is to find and declare that the respondents have no valid security or preference over the guarantee fund or the letters of guarantee for repayment of the advances mentioned in the petition."

Counsel for the Liquidator—A. S. D. Thomson. Agents—Davidson & Syme, W.S.

Counsel for the British Linen Company—Comrie Thomson — Guthrie. Agents — Mackenzie & Kermack, W.S.

Saturday, December 20.

OUTER HOUSE.

[Lord Kincairney.

FINDLAY *v.* STUART.

Landlord and Tenant—Commonty—Right of Pasture Incident to Lease—Lease—Interpretation of—"As Presently Possessed."

The tenants in succession of a farm adjoining a commonty, in which their landlord had a *pro indiviso* share, had for many years used the commonty for pasture. In 1876, S, who had previously been tenant but without a formal lease, obtained a lease of the farm for nineteen years, the farm being described as of a certain acreage "as presently possessed by the said S." Besides the landlord of S, the other proprietors *pro indiviso* of the commonty were two neighbouring proprietors. By dispositions from the whole of the proprietors having right to the commonty, F acquired the whole proprietary rights in the commonty. The disposition by S's landlord contained a clause saving the

rights of other parties having interest therein.

In a note of suspension and interdict brought by F against S to have him interdicted from pasturing sheep on the commonty, *held* that under his lease S had a right of pasturage on the commonty for the proper stocking of his farm as incident to his tenancy, and that that right was reserved in the disposition by his landlord of his rights in the commonty to F.

The complainer John Ritchie Findlay was heritable proprietor, duly infeft, of the lands and estates of (1) Aberlour, conform to disposition in his favour by Thomas Duff, Esq., of Aberlour, dated 4th and recorded in the Division of the General Register of Sasines applicable to the county of Banff 6th, both days of July 1885; (2) Kinermony, Edinvillie, and others, conform to disposition in his favour by the Right Honourable Alexander William George, Earl, now Duke of Fife, K.T., dated 4th November and recorded in the said register 3rd December, both in the year 1886; and (3) Buchromb, conform to disposition in his favour by Alexander Grigor Allan, solicitor, Elgin, and others, dated 8th and 9th and recorded in the said register 16th, all days of November 1888. All the said lands and estates lie in the county of Banff. Embraced within the boundaries of the said three estates acquired by the complainer are the lands and others which were formerly an undivided commonty known as the Bluehill lands or Bluehill commonty, and which consist entirely of moor and heather-covered ground. The said lands and others had from time immemorial exclusively belonged to, and had been possessed as a commonty in *pro indiviso* shares by the Earl of Fife and the proprietors of Aberlour and Buchromb estates, and they were acquired by Mr Findlay under the dispositions specified, which include the whole proprietorial rights in and to the commonty. The disposition by the Earl of Fife contained a clause declaring that so far as the subjects disponed consisted of commonty lands, "the same are disponed without prejudice to the rights of any other parties having right or interest therein."

The respondent Alexander Robb Stuart was tenant of the farm of Drumfurrich and Allawick and part of the croft of Ryehillock under a lease from the Earl of Fife dated July 1876 for the term of nineteen years from Whitsunday 1877. These lands marched with the Bluehill commonty. In the lease they are described as "All and whole the farms of Allawick and Drumfurrich and part of the croft of Ryehillock, as presently possessed by the said Alexander Robb Stuart, lying in the parish of Aberlour and county of Banff, and extending to 127 acres or thereby arable and 15 acres or thereby pasture land (but declaring that these measurements are not guaranteed)." Subsequently to the date of the lease, viz., in September 1886, the Earl of Fife disponed the lands embraced in the lease to David Edward of Collargreen.

The complainer averred, *inter alia*—"In the course of the present year the said respondent has illegally, and without any right or title whatever, pretended a right to pasture sheep and cattle on the lands and and others known as the Bluehill commonty, and that to any extent he pleases. The respondent has recently pretended to sub-let to a person from Perthshire, named —— M'Diarmid, who deals extensively in sheep, a right of pasturage over the whole of the said commonty; or otherwise, has for a money consideration taken on to graze on said commonty a large number of sheep belonging to or under the charge of —— M'Diarmid or other person unknown. The said sheep do not constitute any part of the ordinary stocking of the respondent's farm."

The respondent averred in answer—"In 1877 the respondent's father, who had previously for many years been and was then tenant under the said Earl of the said farm of Drumfurrich, and as such had been possessing the said commonty from the commencement of his lease, offered for himself and the respondent to take a lease for nineteen years, from said term of Whitsunday 1877, of the said farm of Allawick, with part of the croft of Ryehillock, to be combined with his said farm of Drumfurrich. The said offer was accepted, and the respondent's father and the respondent have since possessed the said combined farms and croft and the said commonty. The said farms and croft march with the said commonty, and until the complainer unwarrantably and illegally erected a wire fence around said commonty in July or August last 1889, the respondent and his father have continuously for the last thirteen years, and their predecessors the tenants of the said farms and croft under the Earls of Fife have from time immemorial, in the knowledge and with the consent of their landlords, used and possessed and pastured sheep and cattle upon the said commonty, and have done so in virtue of their rights and titles as tenants of the said farms and croft. . . . The said commonty is and has all along been recognised both by the landlord and by the tenants as essential to the profitable working of said farms, and a necessary pertinent thereof, and without it the stock of sheep and cattle which the respondent and his father and their predecessors have kept upon them could not be maintained, and would have to be materially reduced, to the great loss of the tenants. The said lease confers right to use the said commonty, which was expressly stipulated for at the time it was granted. . . . The respondent, however, does not assert, and never has asserted, any right to allow sheep other than those constituting the proper stock of his holding to graze on the said commonty."

A proof was allowed, the result of which appears from the opinion of the Lord Ordinary.

The Lord Ordinary (KINCAIRNEY) on 20th December 1890 pronounced the following interlocutor:—"Finds it admitted by the respondent that he is not entitled without

the authority of the complainer to let the pasturage on the Bluehill commonty or any part thereof: Finds that the respondent has since 1877 pastured his sheep and cattle on the Bluehill commonty, as tenant of the lands of Drumfurrich and Allawick and the croft of Ryehillock, being lands adjacent to the said commonty, which belonged to the Duke of Fife: Finds that he had right to do so under his lease of said lands: Finds that his right and interest in said commonty were reserved in the disposition granted by the Duke of Fife to the complainer dated 3rd December 1886: Therefore repels the reasons of suspension and dismisses the action, and decerns, reserving all questions in reference to the fence erected by the complainer round said commonty: Finds the respondent entitled to expenses subject to modification, &c.

"*Opinion.*—In this action about the grazing of the Bluehill commonty the proof allowed by interlocutor of 14th June 1890, affirmed by interlocutor of the First Division on 9th July, has now been taken—the respondent leading in the proof—with the result that there is now no great difficulty as to the facts, but a very considerable difficulty as to the law.

"The Bluehill commonty is bounded by the lands of Kinermony and Edinvillie which belonged to the Duke of Fife, the lands of Aberlour which belonged to Thomas Duff, and the lands of Buchromb which belonged to Gregor Allan and others; and it belonged as an undivided commonty to these proprietors. Their title-deeds have not been produced or founded on, and it does not appear—what is not altogether unimportant—how the commonty is described.

"The complainer acquired Aberlour in 1885, Kinermony and Edinvillie by disposition recorded on 3rd December 1886, and Buchromb in 1888, and along with these properties he acquired the sole right to the Bluehill commonty.

"The respondent is tenant of a farm composed of what were two separate farms called Drumfurrich and Allawick and the croft of Ryehillock. They belonged to the Duke of Fife and adjoin the commonty. The respondent's lease is dated 14th July 1876, and is for nineteen years from Whitsunday 1877, when his tenancy began, so that it will expire at Whitsunday 1896. The lands of Drumfurrich, Allawick, and the croft of Ryehillock have been disponed by the Duke of Fife to Mr Edwards mentioned on record.

"The complainer has fenced the commonty, and he prays in this action for interdict against the respondent interfering with the fence or pasturing his cattle on the land. The real point involved is the respondent's right to pasture.

"The complainer avers on record that in the course of the present year the respondent pretended a right to pasture, and has sublet the pasturage to a Mr Macdiarmid; and he denies that the respondent and his predecessors have ever enjoyed any use, possession, or right of pasturage over the lands. He seems to aver or suggest that the respondent's use of the commonty was a novelty and an innovation on the previous state of possession.

"The respondent avers that he and his father have for the last thirteen years, and that their predecessors—the tenants of said farm and croft under the Earls of Fife—have from time immemorial with the knowledge and consent of their landlords, pastured sheep and cattle upon the commonty in virtue of their rights and titles as such tenants. The said commonty, he avers, 'is and has all along been recognised by the landlord and tenants as essential to the profitable working of the farm, and a necessary pertinent thereof.' The respondent further says that he does not assert and never has asserted any right to allow sheep other than those constituting the proper stock of his holding to graze on the said common. No question, therefore, exists on that head.

"The facts as regards possession brought out by the proof do not correspond with the averments of either party, and are as far off as possible from the averments of the complainer. They appear to be so clearly established that they may here be stated without going into any detailed examination of the proof.

"The Bluehill commonty lies to the south of a public road. It was not fenced in any way, nor apparently very accurately defined. It appears to have been largely used as a resting place for cattle and sheep on their way to the markets in the south of Scotland, and also to the markets at Elgin and in Aberdeenshire. There is some attempt to show that the drovers were only allowed to rest on the common for twenty-four hours, and were then turned off by the tenants. But I certainly do not think that any practice or understanding of that kind has been sufficiently proved.

"It is proved conclusively that it was used for pasture by the tenants of the lands adjoining it, and in particular by the respondent and his father and by their predecessors in the respondent's farm. It could not have been otherwise. It was an unoccupied and unfenced common immediately beside them. The tenants of the adjacent farms would unless prevented use the adjacent commonty as a matter of course; and I cannot doubt that the privilege of using it enhanced the value of the adjacent farms to the tenants, and if it did so it must have increased the rents to the landlord.

"I do not find any proof that it was used by anyone except these tenants and the drovers. The case of the complainer—not suggested on his record—now is that it was used by anyone who chose, that no one received any right, but that no one was forbid or prevented. There is in the proof an attempt to show occasional interference by the factor or ground officer, but it seems to me that the evidence on that point comes to very little on either side. Alexander Grant, who was ground officer of the Earl of Fife and his trustees from 1871 to

1886, says—'The Bluehill commonty was under my jurisdiction, and I had to look after it. . . . Ever since I remember, the M'Donalds (respondent's predecessors in Drumfurrich) kept sheep on the Bluehill commonty. I had no instructions to put them off. . . . No particular instructions at all about it.' And on cross-examination he says—"Practically I left the commonty very much to take care of itself.'

"Mr Leslie, who became factor in 1878 (succeeding Mr Malcolm Stewart, who has since died) says—'I never gave any instructions in any way to regulate the possession of the commonty. So far as I was concerned acting for Lord Fife the commonty was just occupied by whoever pleased.' And Mr Cameron, factor on the complainer's estate, and for Aberlour for ten years before the complainer acquired it, says —'Having only a share in the commonty we never troubled our heads about what was done with it. I did not try to regulate the possession of the commonty. (Q) You left it just as a no-man's land?—(A) Yes.'

"There is no proof at all that any of the tenants of the adjacent lands had in their leases any written right to the commonty, and I think these passages bring out the result of the proof. The proprietors practically took very little concern, if any, with the commonty. They did not possess it except through their tenants. But their tenants did possess, and possessed in the way in which a commonty is ordinarily possessed, by pasturing sheep and cattle on it, and if any question had arisen about the Duke of Fife's right to the commonty or the extent of it, he would have been entitled to refer to the grazing by his tenants as proof of his possession. The drovers used it when they had occasion. There is no proof that it was used or possessed by anyone else.

"The respondent founds (first) on the terms of his lease by which there are let 'the farms of Allawick and Drumfurrich and part of the croft of Ryehillock as presently possessed by the said Alexander Robb Stuart extending to 127 acres or thereby arable and 15 acres or thereby of pasture land (but declaring that these measurements are not guaranteed) and right to pasture cattle on the unplanted portion of the Brae of Allawick.' The respondent referred to cases in which, where a lease referred to previous possession, measurements were regarded as demonstrative and not taxative. But I think it quite clear that these cases have no application whatever. No inexactness of language or measurement could stretch 140 acres or thereby so as to include Bluehill commonty many times more extensive than the farm. Nothing can be clearer than that the commonty cannot be included in the description of the subject let unless by force of the words 'as presently possessed.'

"The complainer maintains that these words can only be understood to refer to the lands expressed and defined by measurement. I understand the respondent to maintain that they may be held to refer to the mode of possession of these lands and to the advantages incident to their possession, and in particular to the privilege of grazing cattle and sheep on the commonty. The words would bear either construction, and the question which is to be preferred may depend on the view taken of the use made of the commonty by the respondent and his predecessors. If that use can be regarded as mere trespass of which no notice was taken the words could not easily be read with reference to it, but if it was an incident of the farm it appears to me that they might.

"The respondent referred to the estate regulations which are by reference made part of the lease and which contain clauses in regard to the allocation and management of commonties. But these regulations are included in the lease *per aversionem* and, no doubt, would have been included in the same way although there was no commonty at hand, and I do not see that any clear inference can be drawn from their inclusion in this lease.

"The respondent himself laid much stress on a letter by the factor to him dated 26th May 1877, which he considered to refer to the commonty, and to explain why no mention was made of it in the lease. I think it perfectly obvious that he is quite mistaken, and that this letter contains no such reference.

"The respondent further depones that when he took the farm, the factor Mr Stewart, now dead, had pointed out the commonty to him on the map, and had pointed out to him that it would enhance the value of his farm, and that he would get a good rent for it by letting it as winter pasture, and I observe that his predecessor M'Donald also says that he had asked the factor about the commonty. On this point the respondent referred to *Duncan* v. *Scott*, June 20, 1876, 3 R. (H. of L.) 69, and *Galloway* v. *Cowden*, January 30, 1885, 12 R. 578. Reading these two cases together, and having regard in particular to the explanation offered by Lord Craighill in the case of *Galloway* of the judgment of the House of Lords in the earlier case, I am not prepared to say that this evidence is incompetent, but I hardly think that it can be accepted as satisfactory. Since the factor is dead the evidence is neither corroborated nor contradicted. The respondent plainly has misunderstood the factor's letter of 26th May 1877, and he may have misunderstood his words. The respondent did not surely require to have the commonty pointed out to him on a map. He knew its situation, and he knew that the tenants were not prevented from using it, and he could judge for himself of its value.

"The respondent further maintained that this hill pasture was of great value to him, that it was a proper and necessary incident of his farm, and that he could not work the farm without it. On this point there is a good deal of conflict of evidence. I think that the respondent overrates, and that the witnesses for the complainer underrate, the value of this pasturage. But I think that it is of some not inconsiderable value, and

is no doubt an addition to the farm not unimportant. But still I do not think it proved that the farm could not be worked without it, although not so advantageously.

"The complainer urged that there was no writing whatever relating to the farm or the letting of it, whether advertisement or letter or offer or acceptance or lease, which made the most remote allusion to this commonty, and that seeing the description in the lease was so explicit, and that the respondent being so careful as the correspondence showed he was, the commonty would certainly have been mentioned if it had been intended to be included; and certainly I have found no written reference to the commonty except it be the words 'as presently possessed' in the lease or the reference to the regulations.

"I mention this only to show that I do not overlook the complainer's argument that the respondent's conduct was inconsistent with his case, seeing that he should not have paid the full rent to the disponee of the Duke of Fife, but should have paid part to the complainer. That is a consequence of the respondent's contention which he may well have overlooked and I do not attach much importance to that argument.

"These being in my view the facts and contentions of the parties, the respondent's case appears to stand thus—He took a farm adjoining a commonty on which his predecessors had pastured without hindrance from the landlord. He continued to use the commonty in a similar manner for eight or nine years without a formal lease, and when a formal lease was executed nothing was said expressly about the commonty but the farm was let as previously possessed by him. Can he maintain in these circumstances that the right of pasturage on the commonty was an incident of his right of tenancy? I am, on the whole, disposed to think such a contention well founded. I have not been referred to any decisions bearing directly on this question, but I was referred to a passage in Hunter's Landlord and Tenant, ii. 189, in which he says expressly that if there be a right of commonty attached to the land let by a lease the tenant is entitled to use it. The author must have had in view a case in which the lease was silent as to the right to pasture on the commonty. I have not found any authority for this dictum. But it appears not unreasonable to regard such a privilege as incident to a lease and as fairly covered by a clause referring to the tenant's possession of the lands let. When a farm is let adjoining a proper commonty it seems a fair inference that a right to pasture in the commonty is let along with the farm if the proprietor be not occupying it otherwise.

"If this action had been raised by the Duke of Fife, I think the respondent would have had a good defence, and would have been warranted in arguing that in offering his rent he relied on retaining right to pasture in the commonty, and in consequence gave a higher rent than he would have done, and that it would be unfair and against the good faith of the contract to deprive him of that right during his lease. I think that the respondent could have maintained in a question with the Duke of Fife that the right of pasturage subject to the regulations was an incident of his lease, and that the Duke would not have been heard to maintain that the possession was not of right, but was to be ascribed to mere disregard of a part of his property which had little value.

"If that would have been so, the question is, whether the present complainer is not in the same position? and I think it must be answered that he is. I think so chiefly because of a special clause in the disposition by the Duke of Fife to him declaring that so far as the subjects disponed consisted of commonty lands 'the same are disponed without prejudice to the rights of any other parties having right or interest therein.'

"It was said that this clause was accounted for by the fact that the complainer had not at that time acquired the lands of Buchromb, and that it was inserted to save the rights of the proprietor of Buchromb. But it seems a very inappropriate clause if all that was meant was to save the rights of one proprietor, which rights, besides, could not by possibility be affected by the disposition. It seems easier to suppose that it regarded the possible rights of tenants acquired by contract with the Duke of Fife which might or might not be affected by the disposition to the complainer, and certainly it covers such rights.

"I am disposed to think that if the respondent had a right good against the Duke of Fife, that right, whatever it may be, is protected by this clause, and that the complainer can put his rights to this commonty no higher than the rights of the Duke of Fife, and I have already said that I think the Duke could not have succeeded had he raised this action. It is unnecessary that I should say anything as to the conditions and limitations attending the respondent's right, or that I should decide any question about the fence with which the complainer has enclosed the commonty, and which, notwithstanding this judgment, he may have been fully entitled to do. Little was said on this subject at the proof, and nothing in the argument."

Counsel for the Complainer—Graham Murray—M'Lennan. Agents—Henderson & Clark, W.S.

Counsel for the Respondent—Ure—Wilson. Agent—Andrew Newlands, S.S.C.