quired as aforesaid he shall be held to have abandoned his appeal, and shall not be entitled to insist therein except upon being reponed as hereinafter provided."

Sub-section 3 of the same section provides—"It shall be lawful for the appellant, within eight days after the appeal has been held to be abandoned as aforesaid, to move the Court . . . to repone him to the effect of entitling him to insist in the appeal, which motion shall not be granted . . . except upon cause shown, and upon such conditions as to printing and payment of expenses to the respondent or otherwise as to the Court shall seem just."

On 21st February 1881 Elizabeth Goudie or Allan appealed to the First Division against an interlocutor of the Sheriff-Substitute of Lanarkshire in an action at her instance against Richard Sandeman. Thereafter the appellant having applied for admission to the poor's roll in the Court of Session, the Court on 25th February remitted the application to the reporters on *probabilis causa litigandi*. On 4th March the appellant presented a note to the Lord President setting forth that she was without funds wherewith to print the record, interlocutors, and proof, and that the period of fourteen days within which under the provision of the Act of Sederunt above quoted she was required to print and box the same would expire on 7th March, before which date the application for the benefit of the poor's roll would not be disposed of by the reporters. She therefore prayed the Court "to dispense *hoc statu* with printing, or otherwise to extend the time for printing until the application for the benefit of the poor's roll should be disposed of.

The respondent opposed the motion, on the ground that it had not been made within eight days of the process having been received by the Clerk.

The Court refused the motion, holding it to be incompetent because not presented within eight days of the process having been received by the Clerk, but *observed* that the appellant might still, under sub-section 3, move the Court, within eight days after the appeal should be held to have been abandoned under sub-section 1, to repone her to the effect of entitling her to insist in the appeal.

Counsel for Appellant—Sym. Agent—W. T. Sutherland, S.S.C.

Counsel for Respondent—J. P. B. Robertson. Agent—M. Macgregor, S.S.C.

Friday, March 4.

SECOND DIVISION.

[Lord Lee, Ordinary.

DUNCANSON *v.* DANIELS (JEFFERIS' TRUSTEE).

Security over Moveables—Hiring—Bankruptcy.

On the completion of a new hotel the proprietor arranged with a tenant that each should expend £10,000 in furniture to stock it, and the furniture provided by the proprietor should be let to the tenant along with the hotel, he undertaking to purchase it by instalments. Of even date with the lease of the hotel there were therefore executed (1) a lease of the proprietor's share of the furniture, which was appropriated to special rooms and entered in an inventory appended to the lease; (2) a deed of agreement whereby the parties agreed each to provide £10,000 of furniture for the hotel, and the tenant bound himself to purchase the landlord's furniture yearly in lots of the value of £1000 each, the rent of £500 paid for the furniture being to be diminished by £50 for each £1000 thus paid to the proprietor. The tenant having become bankrupt, his trustee claimed the furniture on the ground that it all belonged to the bankrupt, and that the arrangement contained in the deeds was only an arrangement intended to create a security for the proprietor, who was only a creditor for the price of that which he had purchased. *Held* that the relation was truly that which the deeds bore to constitute between the parties, viz., a contract of hiring, and that therefore the trustee was not entitled to the furniture set apart for the proprietor in the inventory annexed to the lease of furniture.

By lease dated 1st and 16th August 1878 John Duncanson, builder in Glasgow, and proprietor of the Grand Hotel there, let to Lewis Jefferis of London that hotel for twenty-one years from Whitsunday 1878. The rent was to be for the first year £1500, and to rise gradually till in the fourteen later years of the lease it should be £2500. The furnishings of the hotel would, it was estimated, cost £20,000. The tenant was unable to provide the whole sum required for this purpose on entering into possession. It was therefore agreed that he should provide £10,000 worth, and that Duncanson also should provide furniture to the amount of £10,000, conform to an inventory to be subscribed as relative to the lease, and should let to his tenant the furniture so purchased by him. It was also agreed that the tenant should purchase this furniture and pay for it by instalments of £1000 each in accordance with the agreement hereinafter quoted. The nature of the arrangement will appear from the extract hereafter given from the deeds in which it was embodied. In addition to the lease of the hotel above narrated the parties entered into a lease of the same date as that lease entitled "Lease of Furniture in the Grand Hotel," which bore to let Jefferis "All and Whole the furniture enumerated in the inventory and subscribed as relative hereto to be purchased by the first party (Duncanson) . . . and that for the period of ten years from and after the term of Whitsunday 1878, which is hereby declared to be the commencement of this lease—"Declaring also that should the second party or his foresaids become notour bankrupt during the currency of this lease, then and in that event it shall be in the power of the first party or his foresaids to declare this lease null and void, by giving notice in writing addressed to the said second party or his foresaids, and delivered at the said hotel; and the said first party and his foresaids shall thereupon have full power and authority, without any declarator or other process of law, to bring this lease to an end, and to take possession of or relet the furniture hereby let; and declaring that it

shall not be lawful to the second party or his foresaids to remove the said furniture hereby let, or any part thereof, from said hotel during the currency of this lease without the consent in writing of the first party or his foresaids." The rent under this lease was to be £454, 15s. 11d. for the first year, and £500 for the subsequent years. Jefferis, the second party, bound himself to keep up the furniture in good condition, replace all broken and damaged furniture "so far as falling under this lease, whether such breakage or damage may be occasioned by the said second party or his foresaids' use of the said furniture, or by any other cause whatever;" also to leave the furniture in good repair, and to give the first party (Duncanson) all reasonable opportunities for inspecting its condition. He also bound himself to pay to the first party a yearly sum sufficient to insure the said furniture and the furniture in the hotel belonging to himself for £20,000, the policies to be in the names of both parties, and the proceeds in case of a fire to be expended in replacing the furniture destroyed. Lastly, he bound himself "to give up and cede possession at the expiry of the lease of such portions of the furniture as may not have been previously purchased by him." Of the same dates with the two leases above narrated, the parties—Duncanson being described as before as the first, and Jeffries as second party—also executed a deed of agreement (afterwards on 21st June 1879 registered for preservation and execution in the Books of Council and Session), whereby on a narrative of these leases, "and whereas the said parties have each agreed to invest the sum of £10,000 in the purchase of articles of furniture to be placed in the said hotel as the furniture thereof, and the first party's share whereof is contained in the lease last before mentioned," the following was declared to be the agreement of parties:—"*First,* The first said party agrees and binds himself to purchase said furniture to the extent of the sum of £10,000, all conform to the said inventory thereof subscribed as relative to the foresaid lease of said furniture, divided into ten portions, each portion containing descriptions of articles of furniture of the value of £1000 sterling, and to place the said articles of furniture in said hotel during the period between 1st May and 24th June 1878, when the whole must be delivered, either in one or more lots: *Second,* The said second party agrees and binds himself and his foresaids to purchase furniture to the extent of the like sum of £10,000 sterling, and to place the said furniture in the said hotel during the period between 1st May and 24th June 1878, when the whole must be delivered, either in one or more lots: *Third,* The said second party agrees and binds himself and his foresaids that he and they shall purchase from the said first party, who agrees and binds himself and his foresaids to sell to the second party and his foresaids, on the dates after specified, the following lots of the said furniture, at the prices after mentioned, viz., the articles of furniture enumerated under the head lot number one of the said inventory, on the 15th day of May 1879, at the price of £1000, payable on the said 15th day of May 1879; the articles of furniture enumerated under the head lot number two of the said inventory, on the 15th day of May 1880," and so on yearly till 15th May 1888: "Declaring that no sale of any portion of the said furniture shall take place until payment of the price thereof, the said respective lots of furniture remaining the property of the said first party or his foresaids until payment of the respective prices thereof as above provided; but on payment of the price of each of the said respective lots, the property of such lots so paid for shall *ipso facto* vest in and belong to the second party or his foresaids absolutely, and free from payment of the rent applicable thereto stipulated for in, and the whole conditions of, the said lease of furniture before referred to: Declaring further, that *simul ac semel* with payment of the price of each of said lots, the first party and his foresaids shall be bound validly and effectually to renounce and discharge the said lease thereof hereinbefore and after referred to, so far as regards the lot or lots of furniture which may have been paid for as aforesaid, at the expense of the second party and his foresaids, reserving the said lease in full force and effect so far as regards the lots of furniture the price of which may not then have been paid." The fourth head of this agreement provided that on payment of each of these sums of £1000 there should be a deduction from the rent stipulated for in the lease of the furniture of £25 for the half-year ensuing such payment, and the like sum for each subsequent half-year of that lease. Thus by the end of the ten years of that lease the rent of £500 payable for the furniture would be extinguished.

Jefferis gave his acceptances for £10,000 to Messrs Green & King, furnishers, who were to furnish the hotel. On 4th March 1878 Duncanson wrote to Green & King ordering furniture to the extent of £10,000, to be charged in ten distinct invoices, and to be selected by Jefferis and approved by Duncanson, both as to quality and value. By this letter Duncanson agreed to pay £4000 on 21st June 1878, and the balance of £6000 as soon as the furnishing of the hotel should be completed. Both these sums were afterwards duly paid. In June 1878, while the furnishing was going on, Duncanson had presented to him by Green & King an inventory of furniture to an amount a little exceeding £10,000. He objected to it on the ground that he wished the furniture apportioned to him separated into various rooms, and after a short time he objected that the prices were also too high. After some communings the prices were reduced, and the furniture apportioned to rooms, while that of twenty-one additional rooms were added to his inventory, which was then appended to the lease in terms of the agreement of parties. By the end of June the hotel was furnished, and the business of the hotel was begun in July. In June 1880 Jefferis was adjudicated bankrupt in the Bankruptcy Courts in England. Baker Philip Daniels was appointed trustee on his estates. He had then paid three half-years' rents under the furniture lease and purchased £1000 worth of furniture under the agreement. Mr Daniels as Jefferis' trustee claimed the whole furniture of the hotel, and intimated his intention to remove it. He alleged that the furniture belonged to Jefferis, and that it was never really let, the whole arrangement being an attempt by Duncanson to create a security. He alleged that down to the date of the bankruptcy Jefferis was at all events reputed owner of the whole furniture.

Duncanson then brought this process of sus-

pension to have the trustee interdicted from removing or selling the furniture contained in the inventory appended to the furniture lease.

He pleaded—"(1) The furniture in question being the property of the complainer, the respondents are not entitled to sell or cause to be sold, or remove or otherwise interfere with, the same without the complainer's consent."

The trustee pleaded—"(1) The furniture libelled being part of the bankrupt estate of Mr Jefferis, the note should be refused and interdict recalled. (2) *Separatim*, Mr Jefferis having been reputed owner of the said furniture, the present application cannot be maintained."

The Lord Ordinary (LEE), after a proof, the import of which will appear from his note printed below, granted interdict as craved, with this note:—

"*Note.*—At the date when Mr Jefferis became bankrupt he was in possession of the furniture in question. It was situated in the hotel occupied by him, and if no distinct title of possession other than that of property could be instructed, the trustee was well entitled to found on the presumption of law that possession of moveables presumes property.

"But a distinct title was produced, in the shape of the two contracts of lease dated in August 1878, and the relative agreement of same date. Upon the strength of the definite contract thus instructed the Lord Ordinary granted interim interdict in passing the note for the trial of the question. As, however, it appeared that Mr Jefferis had been in possession of the hotel and of the furniture prior to the date of the leases, and from the beginning of July 1878, and as it was alleged by the respondent that Mr Jefferis had been the real purchaser of the furniture, and that the lease was merely part of an arrangement for securing an advance on the furniture to the extent of £10,000, it appeared to the Lord Ordinary to be necessary that inquiry should take place concerning the original title of the bankrupt's possession, and that the complainer should lead in the proof.

"The result of the proof, in the opinion of the Lord Ordinary, is to show that the arrangement embodied in the deeds of 1st and 16th August had been deliberately adjusted and agreed to by the parties before possession was obtained by Mr Jefferis either of the hotel or the furniture specified in the inventory. And although the inventory was not fully completed till after 19th July, when the amended invoice was sent down by Messrs Green & King, the agreement under which Mr Jefferis obtained possession is proved to have been entirely consistent with the arrangement ultimately expressed in the formal deeds. Indeed, the deeds themselves had been adjusted in draft some time previously, and the only thing that prevented the execution of them before possession was given was the fact that the inventory of furniture was not completed.

"It is true that the object of the arrangement, as adjusted and expressed in the deeds, was to enable Mr Duncanson to give Mr Jefferis assistance to the extent of £10,000 in furnishing the hotel. But it is not proved that that assistance was to be given in the shape of an advance to Mr Jefferis, to be secured over the furniture. On the contrary, the Lord Ordinary thinks it proved by the correspondence, and by the evidence of Messrs Cowan & Mitchell, that the form in which such assistance was to be given, according to the agreement of parties, was that Mr Duncanson should purchase furniture for the hotel to that amount, and grant a lease of it on the terms ultimately expressed in the formal deeds. Mr Jefferis' letters of 29th December and 2d January, and Mr Duncanson's letter of 16th February, show that there was no misunderstanding on the point; and the evidence of Messrs Cowan and Mitchell proves that the deeds were adjusted with the knowledge and authority of all concerned, in the shape in which they were put, for the very purpose of enabling Mr Duncanson to give the required assistance in the form most favourable for himself, and so as to give him as effectual a hold of the furniture as possible.

"After all that has taken place, therefore, the question comes to be, What is the import and effect of the contract embodied in the lease and relative agreement? The Lord Ordinary has not arrived at the conclusion that the dispute resolves into this question without full consideration of the evidence adduced, and satisfying himself that possession was obtained under an obligation *bona fide* undertaken by Mr Jefferis to execute such a contract. But he refrains from any discussion of the evidence as unnecessary. The fact that Mr King considered Mr Jefferis to be the purchaser of the furniture (assuming it to be the fact) appears to him of very little consequence. Because the question is, What was the fact? and that depends, not upon Mr King's opinion, but on the contract between Mr Jefferis and Mr Duncanson, and the actings of parties. Mr King's reason for his opinion accordingly shows that what he went upon was that he got the order through Mr Jefferis, and that Mr Jefferis selected the furniture. Mr Duncanson's letter of 4th March, however—confirmed on 9th—shows that Mr King must have known that as between the parties Duncanson was the giver of the order, and Jefferis was to select the furniture subject to his approval. The Lord Ordinary cannot take it off the hands of Mr King that he did not supply any goods to Mr Duncanson on the faith of the letter of 4th March, and that that letter was only intended for Mr King's bankers. He thinks that Mr King, having got that letter and acted on it, both in getting advances from his bankers, and ultimately in getting payment from Mr Duncanson of the price of the furniture as therein promised, cannot be permitted to repudiate it. It is quite true that the hotel furniture had been ordered before the date of the letter of 4th March, but the footing on which it had been ordered was the same as therein expressed. This is clear from Mr Jefferis' letter of 2d January 1878. With regard to the form in which the transaction is entered in the books of Mr Jefferis, the Lord Ordinary thinks that the point chiefly to be considered is the substance of the contract, which in his opinion was, that for the purpose of enabling Mr Duncanson safely to aid Mr Jefferis in regard to the furniture there should be a purchase of furniture by him on his own account. The evidence of Mr Jefferis is as a whole perfectly candid, and quite consistent with this view.

"Much stress was laid upon the mode in which the furniture of twenty-one rooms was added to Mr Duncanson's invoice in the end of June. The

Lord Ordinary has felt that the way in which this was done introduces an element of difficulty in the complainer's case which would otherwise have been absent. But the additional furniture having been transferred to Mr Duncanson's invoice before possession had been given, it appears to the Lord Ordinary that any agreement to take possession under a lease of the articles as specified in an inventory must be applied generally to the whole. No distinction can well be made. Unless, therefore, the circumstances attending the addition of these articles could be held to give to the agreement a different complexion from that which it professes to bear, and to prove collusion or want of *bona fides*, it must depend on the contract, executed in terms of that agreement, whether it instructs a lease as the title of the bankrupt's possession, or a mere right in security of money lent. The Lord Ordinary is of opinion that the circumstances do not justify any conclusion that the deeds do not truly represent the contract of parties.

"Holding, therefore, that possession was obtained by Mr Jefferis under an obligation to execute a contract in terms of the lease No. 6, and relative agreement, the Lord Ordinary inquires, What is the import of that contract? It was contended for the trustee that it discloses a right of property in the bankrupt, and a mere security in favour of the complainer. If it be the true meaning of the instruments that the relationship of lessor and lessee should be apparent merely, the Lord Ordinary does not doubt that the real character of the lessee's right must receive effect. No reduction would be necessary, and in this case no ground of reduction is alleged. But it must be kept in view that if the tenant truly obtained possession under an obligation to enter into the contract, the fact that the furniture was in the lessee's possession at the date of the contract is no reason for construing it against the relationship which it appears to create.

"The contract may be said to consist of three deeds, all of the same date—1st and 16th August 1878—(1) A lease of the Grand Hotel for twenty-one years from Whitsunday 1878, but containing clauses which show that the tenant's occupation was to commence, and had commenced, only on 1st July, at a rent of £1500 per annum for the first three years, but rising ultimately to £2500 per annum; (2) A lease of certain 'articles of furniture, enumerated in the inventory thereof annexed,' for the period of ten years from Whitsunday 1878. The articles so described are referred to as 'to be purchased by the first party (Mr Duncanson), and to be placed in that portion of the building . . . . let or about to be let by the first party to the second party.' But this form of expression is explained by the fact that the drafts had been adjusted some months previously. There is a declaration that if the lessee becomes notour bankrupt the lessor should have power to bring the lease to an end and to take possession of or re-let the furniture. The rent is to be at the rate of £500 per annum, equal to 5 per cent. on £10,000. The lessee is to keep and maintain the furniture in like good condition as he acknowledges to have received it, and to replace all articles broken or damaged, and the lessor is to have free access to inspect it at all reasonable times. It is stipulated that the lessee shall insure the said articles of furniture, and the furniture in said hotel belonging to himself, to the extent of £20,000. (3) An agreement relating to these leases, and narrating that the parties had each agreed to invest £10,000 in the purchase of articles of furniture 'to be placed in the said hotel as the furniture thereof, and the first party's share whereof is contained in the lease last before mentioned.' Thereupon the parties agreed that the furniture to be purchased by each of them should be placed in the hotel between 1st May and 24th June 1878, the lessor's share being specified as conform to inventory subscribed as relative to the furniture lease, and being divided into ten portions, each containing articles of furniture to the value of £1000. The lessee is taken bound to purchase one of said lots annually, commencing 15th May 1879 with lot number one in said inventory, and so on until 15th May 1888, at which date the whole ten lots would be purchased, and the lease would come to an end. It is provided that the several sums of £1000 so payable by the lessee to the lessor shall respectively bear interest at the rate of 5 per cent. from the respective dates of payment during the not-payment thereof, 'but declaring that no sale of any portion of the said furniture shall take place until payment of the price thereof, the said respective lots of furniture remaining the property of the said first party or his foresaids until payment of the respective prices thereof, as above provided; but on payment of the price of each of the said respective lots, the property of such lots so paid for shall *ipso jure* vest in and belong to the second party or his foresaids absolutely, and free from payment of the rent applicable thereto stipulated for in, and the whole conditions of, the said lease of furniture before referred to.' Provision is also made for a proportional reduction of rent upon each payment of £1000, and for the earlier payment of some of the lots in certain contingencies.

"It appears to the Lord Ordinary that although the arrangement expressed in these deeds may be an unusual one, there is nothing in it at all inconsistent with the idea of a *bona fide* contract of lease being the true title on which the lessee held possession of the furniture. And he is of opinion, that assuming the deeds to represent the true contract of parties, there is no reason in law why that contract should not receive effect according to its terms. That the complainer and the bankrupt were both desirous to make the best arrangement possible for starting the new hotel; that the bankrupt had not the means himself to provide the requisite furniture; and that one object in view was to enable the bankrupt to become the tenant, and to occupy it suitably furnished—seem to account sufficiently for the form of the contract. But none of the facts contradict or throw doubt upon the deeds as representing the truth of the contract between the parties. Can it be said, then, that there was anything unlawful in the arrangement? Was it beyond the power of the parties to arrange that the object in view should be effected by Mr Duncanson becoming the purchaser of the furniture to the extent of £10,000, and giving the intending tenant the use of it for a hire equal to five per cent. on the price, with a stipulation that he should keep it in repair and purchase it in lots annually. The Lord Ordinary knows no

authority for such a view. He is of opinion that the law of Scotland allows a contract of that kind, if made in good faith, and that the cases of *Cowan* v. *Spence*, 21st May 1824 (3 Sh. 28); *Wight* v. *Forman*, 10th December 1828 (7 Sh. 175); and *Orr's Trustees* v. *Tullis*, 2d July 1870 (8 M. 936), afford proof that the law will give effect to such a contract against creditors if satisfied that it truly and honestly represents the engagements of the parties. The cases of The *Heritable Securities Investment Association* v. *Wingate*, 8th July 1880 (7 R. 1094), and *Cropper & Co.* v. *Donaldson* (*ib.* 1108), were decided upon the ground that according to the true meaning of the deeds the transactions were not really of the nature of lease or hiring, but were securities for moneys lent or acknowledged to be due, attempted to be created over moveables belonging to the debtor. The Lord Ordinary does not understand that the majority of the Judges differed from Lord Young upon the law. They took a different view of the facts; and, at all events, the Lord Ordinary holds that the decisions above referred to, and the case of *Marston* v. *Kerr's Trustees* (6 R. 898), make it clear that if the title of possession be a definite contract of hiring or lease, and be *bona fide* entered into, it is no objection to the contract that it enables the owner of moveables to give accommodation to an intending purchaser by allowing him to hire the subjects in the meantime and thus have the use and possession of them without ownership.

"The Lord Ordinary rejects, as inconsistent with the deeds, the contention that they instruct a present sale of the furniture by Mr Duncanson to Mr Jefferis, and that they contain no effectual condition suspensive of the transfer of property. He also repels, as unsupported by evidence, the plea of reputed ownership. And, for the reasons above stated, he is of opinion that the claim of the complainer has been established.

"It is right to explain that he delayed judgment in order that he might dispose at the same time of another action raised by the complainer against the respondent, and arising out of the matters in controversy in this case."

The trustee reclaimed, and argued that the proof and the documents, taken as a whole, showed that the transaction was really one of security for Duncanson as a creditor of Jefferis, the owner of the furniture. No such right of property as Duncanson claimed could be available while the goods were left with Jefferis.

Authorities—*M'Bain* v. *Wallace & Co.*, Jan. 7, 1881, *supra*, 226, and cases quoted in the Lord Ordinary's note.

At advising—

Lord Young—We think it is not necessary to have any further argument in this case, which has been exhaustively argued for the reclaimer. It would indeed be strange if Mr Robertson were to fail to state any argument worthy to be stated.

The case raises an important question of law, but we think the case clear, and that the Lord Ordinary is right. The intention of the parties is not doubtful, and I venture to think it a pity that language should have been used for obscuring it, in the apprehension that by stating it frankly the legitimate position of the parties would be judicially affected. The relation of the parties was this—Mr Jefferis, an hotel-keeper in London, desired to become tenant of an hotel in Glasgow which the other party Mr Duncanson was in course of building, and which was in 1877 on the verge of completion. It was a great undertaking to open it and carry it on, but Jefferis was prepared for it. The hotel was so large that the only question was how much it would exceed £20,000 to purchase the necessary furniture for it. Jefferis was not prepared to lay out so much, so in the course of the negotiation he told Duncanson that it would facilitate their arrangements if he could advance £10,000 for furniture. The tenant thus proposed that the landlord should accommodate him with £10,000 to furnish the house. In the result the landlord Duncanson agreed to do this provided that he should be satisfactorily secured. No security was available but the furniture itself, and Jefferis, who as an Englishman was familiar with bills of sale and the inconveniences attending them under the statute, which requires that they should be registered, proposed that Duncanson should if possible be content with a security not involving any registered deed. But after an agreement as to that matter was come to, on applying to a Scotch man of business they were told that a security could not be thus granted in Scotland. A bill of sale is a written contract of sale, just as a bill of lading is a written contract of carriage, the word bill being equivalent to written contract. By the law of England a sale of moveables passes the property of the article sold, and so prior to the statute to which I have referred a bill of sale of the borrower's furniture in favour of the lender passed the property to the lender and gave him a good security as on a property title. He became proprietor of the furniture just as if he had bought it, although he really only had entered into a contract of sale with the owner—a perfectly fair contract of sale—in which he was to be in the position of a buyer, limited if necessary to this, that he should not use those rights or that title to any further effect than to obtain payment of his money with interest But by the statute a bill of sale is required to be registered, and Jefferis was at first apprehensive of registration, lest that should affect his credit. I refer to that merely to interpret the letters and to show what was intended, viz., that there should be a loan, the lender being made proprietor of the furniture which his money was to purchase. If he had done that it is not doubtful (indeed it is conceded) that the furniture would have been his, and would not have passed to the creditors of Jefferis on his bankruptcy. But it is said, I think reasonably, that what was done was substantially the same. The tenant, who was to acquire the furniture, thought he would get it reasonably from Green & King, and the arrangement was that he (Jefferis) should order the whole £20,000 worth of furniture, and that Duncanson should put himself in the position of orderer to the amount of £10,000. That was assented to. It was very satisfactory to Green & King, for Duncanson became liable to them for £10,000 worth of it by his order. But the furniture was a *unum quid*, and the two purchasers desired Green & King to invoice £10,000 worth of it to Duncanson, sending it all to the hotel. Now this was done, and to accomplish the transaction—we think a legitimate transaction—it was necessary to divide the £20,000 worth, and the parties to make the division were Jefferis

and Duncanson, the only parties interested, and they did so by putting so much into the inventory, as it was agreed that Duncanson should have a property title too. The only two parties interested agreed that that should be the position of affairs, and it is an observation of no value whatever that the articles were put into the inventory at lower prices than were to be paid to Green & King. That was a matter for the parties themselves.

Duncanson having paid the £10,000, and having the furniture representing it inventoried as his with the consent of Jefferis, proceeded to give Jefferis possession of it by lease, the rent to be paid being according to the legitimate arrangement of parties equivalent to interest at 5 per cent. on the price paid by Duncanson for the thing leased. It was to be £500 a-year. That was the bargain. It was carried out by being reduced to formal deeds in July and August, in pursuance of the agreement of parties, but these deeds expressed the arrangement which had been acted upon all along. I put the question during the argument—After all this had passed, after the furniture had been sent in and divided, and the inventory made and the rent fixed and paid by the tenant, what as between Jefferis and Duncanson themselves was the title on which Jefferis held? There could be but one answer. Jefferis put his name to a deed, being *sui juris* and solvent, and in pursuit of a legitimate end, in which he says he holds £10,000 worth of furniture on a contract of hire. Who can say that was not his position? If he could not say so, neither could his creditors. If he had been transgressing the bankrupt law or committing any fraud someone might have had a right to object; but it was a perfectly fair open transaction, and neither he nor his creditors, nor his trustee, who takes *tantum et tale* as he had, could object. The suggestion in such cases always is that there is something unfair to creditors. But how? Nobody is entitled to suppose that the tenant of a great hotel like this has the property of the furniture. It may be with him on hire. That is a matter for inquiry. The result of inquiry here would have been that Duncanson was proprietor and Jefferis lessee of the furniture. There was absolutely nothing in which the creditors of Jefferis were interested, and the case is undistinguishable from that of Duncanson going to his own tradesman and ordering the furniture and sending it to the hotel. It would then have been in the hotel all the same, and Jefferis' possession would have been all the same. I am therefore of opinion—and I believe that is really the opinion of the Court—that here Jefferis held this furniture as lessee, or upon a contract of hire with Duncanson, and that so far as he did not in pursuance of that contract purchase it and pay for it before his bankruptcy it does not pass to his creditors or to his trustee, but remains the property of Duncanson.

Lord Craighill and Lord Lee concurred.

The Court adhered.

Counsel for Complainer — Asher — Guthrie. Agent—Thomas White, S.S.C.

Counsel for Respondent—D.F. Kinnear, Q.C. — J. P. B. Robertson. Agents — Hamilton, Kinnear, & Beatson, W.S.

Monday, January 31.

OUTER HOUSE.

[Lord Curriehill, Ordinary.

YOUNG *v.* DUNCAN AND OTHERS (DONALD'S TRUSTEES).

Donation mortis causa—*Delivery*—*Writ.*

A deposited a sum of money with commissioners for certain public works, taking the receipt in name of himself and B, his housekeeper, the sum being made repayable to them or the survivor of them. B had for several years lived with A, who was her cousin, keeping his house and attending him through serious illness. She and a brother of A both deponed that he had frequently spoken of his intention of providing for her, and shortly before his death had told them where the said receipt was to be found. A died without making any other provision for B. *Held* that the circumstances were sufficient to instruct a donation *mortis causa* and to dispense with the necessity of delivery.

This was an action raised by Mrs Margaret Peacock or Young and her husband for declarator that a sum of £200 contained in an interim receipt by the Dundee Water Commissioners, dated 28th May 1879, became the absolute property of Mrs Young on the death of John Donald, in whose favour along with Mrs Young the receipt was granted. The defenders were the trustees under a trust-disposition and settlement executed by the said John Donald, and they resisted the action, claiming the sum as part of the executry estate of the deceased. The pursuer, who was a married woman, but had for fourteen years been separated from her husband, had lived for three years in a house belonging to Mr Donald, who was her cousin, immediately above his own dwelling-house, and had acted as nurse and housekeeper to his mother, who lived with him, so long as she lived, and thereafter to Mr Donald himself, he being given to drink and in a very precarious state of health. Mr Donald died on 28th April 1880. The pursuers averred that during the period she acted as nurse and housekeeper to Mrs Donald, she (Mrs Donald) "frequently told her son to recompense the pursuer for her kind services, and he promised to do so. Accordingly the said John Donald, who was possessed of considerable means and estate, both heritable and moveable, on or about the 28th May 1879, in implement of his promise, and out of gratitude to the pursuer for her services to himself, uplifted from the British Linen Company's bank at West Port, Dundee, the sum of £200, and invested it as a loan to the Dundee Water Commissioners, and took a receipt from Mr Donald Farquharson, their treasurer, for the said sum, which was to be repaid to himself and the pursuer, or the survivor of them, exclusive of the *jus mariti* and power of administration of any husband the pursuer might marry." She further averred that Mr Donald informed her "that he had invested the sum of £200 for her, and that the interest would pay a rent of £8 a-year, and that she could give the money to her friends after her