tion came too late. Like any other objection to a step of procedure as not being conform to Acts of Sederunt, it must be taken in the Single Bills, otherwise the party making it will be held to have waived it. But (2) the judgment of 19th June, in which the Sheriff declared the interdict perpetual, was really a judgment disposing "of the whole subject-matter of the cause" in the sense of section 53 of the Court of Session Act of 1868 (31 and 32 Vict. c. 100). By it the real question between the parties, viz., as to usage of trade, had been decided. Under section 68 of the Act the defender had six months to appeal. The subsequent interlocutor pronounced by the Sheriff-Substitute on 23rd June fell to be regarded *pro non scripto*. It merely referred back to the interlocutor of April 3rd allowing proof of the damage sustained by the pursuer.

At advising—

LORD PRESIDENT—The last point which was argued to us for the appellant is completely untenable. So long as there is a conclusion standing in the summons for £200 which is insisted in by the pursuer, and regarding which the parties have joined issue, it is impossible to say that the merits are exhausted by an interlocutor which so far from disposing of that pecuniary conclusion prescribes further procedure for its determination.

With regard to the appealability of the interlocutor allowing a proof, I think all the points raised are concluded by authority. Whether the fifteen days are to be computed from the 3rd of April, the date of the Sheriff-Substitute's interlocutor which allowed the proof, or from the 19th of June, the date of the interlocutor by which the allowance of proof was affirmed by the Sheriff-Principal, the appeal comes too late, and the case of *Davidson*, to which we were referred, is a decision in point.

It has been pointed out that this objection to the competency comes at an inappropriate stage. Here again I am bound to say that I cannot get over the case of *Shirra* v. *Robertson*, in which what turned out to be an incompetent appeal was sent by interlocutor to the roll, and only objected to when the case came out for hearing. The Court held that they were bound to determine the question of competency when that was raised, even when this was only done at the stage at which the merits were to be discussed.

I think that we have here to do with an appeal which arises *in pari casu* with that in the case of *Shirra*, and that we must follow its authority all the more, as I observe that the Lord President delivered the judgment of the Court after consultation with the Judges of the other Division.

I think, therefore, that we ought to sustain the objections to the competency of this appeal.

LORD ADAM concurred.

LORD M'LAREN—I agree with your Lordship that under the authority of the case of *Shirra* this appeal is incompetent. I should like, however, to add that I could not regard the circumstances of that case as constituting a precedent for extending the principle there applied to all other cases. There are undoubtedly conditions of procedure depending on the provisions of Acts of Sederunt which may be waived by parties, especially with reference to the time of lodging of papers, and according to our practice such conditions the Court will not seek to enforce if parties are agreed in dispensing with them.

As a general rule, when objection is to be taken to a step of procedure as not being taken within the time prescribed by an Act of Sederunt, the objection ought to be taken *in limine*. If it is not taken when the case appears in the Single Bills, the objection may be held to be waived, so that it cannot be revived after the case has been sent to the roll. That principle has not been applied to the case of appeals from Sheriff Courts, and it is desirable that we should not disturb the existing rule of practice.

If the point were open, I must say I cannot see why parties should not be allowed if they please to waive difficulties of the kind, or why if a respondent has not discovered that he is injured by such an informality, he should be treated as if he were injured by it when the case comes on for hearing on the merits.

LORD KINNEAR—I concur with your Lordship.

The Court sustained the objection to the competency of the appeal.

Counsel for Appellant — J. C. Watt. Agents—Mackenzie & Black, W.S.

Counsel for Respondent — M'Kechnie—Shaw. Agents—Carmichael & Millar, W.S.

Friday, November 13.

FIRST DIVISION.

[Lord Kyllachy, Ordinary.

WALKER (PATERSON'S TRUSTEE) *v.* COYLE AND OTHERS.

Bankruptcy—Lease — Illegal Preference — Act 1696, *c.* 5.

By agreements purporting to be "minutes of lease," entered into in 1879 and 1880, the trustees of J. P. "let" to J. S. P. certain premises, and the pawnbroking stock therein, J. S. P. being bound to pay a rent of a fixed amount for the premises, and 5 per cent. on the value of the stock handed over to him. It was provided that J. S. P. should keep books showing his intromissions with the business, and that in the event of the stock falling below the value at which it had been handed over to him, the trustees should have a right to enter into possession of the premises and stock, and

that J. S. P. should be bound to cede possession thereof on receiving fourteen days' notice. On 24th April 1888 J. S. P. executed deeds of renunciation of the lease in favour of the trustees, who at once entered into possession of the premises and stock of pledges therein. Four days afterwards J. S. P. was sequestrated.

Held that under the agreements the trustees parted with the only right they had in the pledges, and only acquired the personal obligation of the bankrupt in a certain event to deliver over to them the pledges then in his possession; and therefore that the deeds of renunciation were ineffectual as granted within sixty days of bankruptcy in satisfaction of a prior debt within the meaning of the Act 1696, c. 5.

By agreement purporting to be a "minute of lease" entered into by Michael Coyle and others, the testamentary trustees of James Paterson, as first party, and his grandson James Somerville Paterson as second party, dated 30th December 1878 and 14th May 1879, the trustees "let in lease" to James Somerville Paterson, and his heirs and successors, the premises situated at No. 2 and 4 Richmond Place, Edinburgh, "together with the pawnbroking business stock therein of the value of £1100 sterling," belonging to the trustees, from December 1878 to Martinmas 1885, at a yearly rent for the premises of £50, payable half-yearly, "and the said James Somerville Paterson and his foresaids paying in respect of the said lease of said business stock therein interest on the said sum of £1100 at the rate of 5 per cent. per annum," payable also half-yearly, and it was declared that the premises should be used and possessed by the second party for carrying on the pawnbroking business then carried on there, and for no other purpose whatever. By the second clause it was provided that so long as the sum of £1100, or any part thereof, belonging to the trustees should be allowed to remain in the business, and not be paid out as thereinafter provided for, the second party should be bound to keep regular books showing his intromissions with the business, and that the first party should have free access at all times to such books, and to inspect the stock of pledges in the premises, and that the second party should make up a balance-sheet every half-year, to be exhibited to the first party, showing the position of the business at the time. The clause then proceeded—"And with full power to the said first party and their foresaids during the currency hereof, at any time they may think proper, in the event of the stock of pledges at the time being found to be under the amount or value of said sum of £1100, if not paid out, to enter into and resume possession of the premises, business, and stock of pledges and others therein, and to intromit with, sell, and dispose of, and realise the same in such manner as they may think proper, without any other warrant from the second party or his foresaids than this agreement, in which case the said second party binds and obliges himself and his foresaids peaceably to cede possession of the said premises, business, goods and effects to the said first party or their foresaids on receiving fourteen days' previous notice in writing of their intention so to do: Declaring that the said second party or his foresaids shall not be entitled to object to the said first party or their foresaids entering to the possession, management, and disposal of the said premises, business, goods and effects on any ground or pretence whatever, but shall only be entitled to retain possession on instantly making payment to the said first party or their foresaids, or consigning in bank in their names, the said sum of £1100, with interest thereon at the foresaid rate, and rent of premises that may be due at that time, and any expenses that may have been incurred; but declaring that the said first party or their foresaids shall be bound to hold just count and reckoning with the said second party or his foresaids for his intromissions with the said goods and effects, and to pay to him or his foresaids any balance that may remain after deducting all claims at the instance of the said first party for the said sum of £1100 sterling, interest thereon, rent, and expenses." In the third clause the second party bound himself to keep the stock of pledges up to the value of £1100 so long as the sum of £1100 remained in the business, and it was provided that the stock of pledges should be insured in the name of the first party, the second party being bound to repay them the premiums of insurance. The fourth clause provided that on the termination of the lease the whole stock of pledges, with the exception of forfeited pledges, which should be sold by auction, should be inventoried and valued by neutral parties. If the valuation exceeded the sum of £1100, and that sum were not paid out, the second party was to be paid the excess; if it fell short of £1100, he was to make good the deficiency, the whole stock then becoming the property of the first party. The fifth clause empowered the second party to remove the stock to other premises, and declared that in that event the stock should still remain the property of the first party. Under the sixth article the second party was entitled to pay out the sum of £1100, in which case only the premises and fixtures would remain the property of the first party.

A similar agreement was entered into in 1880 between the same parties with regard to premises situated at No. 21 Greenside Row, Edinburgh, and the pawnbroking stock therein, the only differences being that the rent of these latter premises was fixed at £25, and the value of the stock was stated to be £800.

In pursuance of these agreements James Somerville Paterson entered into possession of the premises and stock at Nos. 2 and 4 Richmond Place and 21 Greenside Row, but in the year 1881 he removed the stock at the Greenside Row premises to the other premises belonging to the trustees at 3 Catherine Street, Edinburgh.

In 1884 the trustees, at J. S. Paterson's request, advanced to him sums amounting in all to £350, the receipts granted by him bearing that the money advanced was "to be expended in increasing the stock of goods farmed" by him, in the proportion of £300 to the Catherine Street shop and £50 to the shop in Richmond Place.

After the termination of the agreements in 1885 they were renewed from year to year by tacit relocation. In the year 1888 J. S. Paterson's affairs had become much involved, and he was in arrear with the rent and interest due by him to the trustees. The trustees accordingly in March of that year employed Mr George Russell to report on the value of the pledges in the two shops. On 20th April Mr Russell reported that the stock of pledges in Richmond Place amounted to £989, 18s. 2d., and in Catherine Street to £1115, 8s. 7½d., and that to these sums should be added 10 per cent. interest over all, £210, 10s. 8d.—total value of the pledges, £2315, 17s. 5½d.

On 24th April 1888, J. S. Paterson, without having received the fourteen days' notice to which he was entitled under the agreements, executed renunciations of both leases in favour of the trustees, who at once entered into possession of the premises and stock of pledges therein. Four days afterwards, on 28th April, J. S. Paterson's estates were sequestrated.

This action was raised by the trustee in J. S. Paterson's sequestration against James Paterson's trustees, and concluded for payment of £2250, with interest from 24th April 1888, or otherwise for decree ordaining the defenders to account for their intromissions with the bankrupt's estate, and for payment of the sum which should be found due.

The pursuer pleaded—"(1) The transfer of said pledges being made and granted within sixty days of bankruptcy, and at the time when the bankrupt was known by the defenders to be insolvent, was an alienation struck at by the Statute 1696, cap. 5, and a fraud against the bankrupt's creditors at common law."

The defenders pleaded—"(5) The said deeds not being invalid either at common law or by statute, the defenders should be assoilzied. (6) The actings complained of having been lawful and in conformity with the contracts under which James Somerville Paterson possessed the pawnbroking business in question for many years, the defenders should be assoilzied."

Proof was allowed, from which it appeared, in addition to the facts already narrated, that the amount realised by the trustees from the sale of the pledges delivered to them by the bankrupt was £2430, 1s. 6d. The further results of the proof were immaterial to the ground on which the case was decided.

On 25th July 1891 the Lord Ordinary (KYLLACHY) pronounced this interlocutor:—"Finds that the deeds libelled, dated 24th April 1888, were granted by the bankrupt in contravention of the Act 1696 c. 5, and are therefore ineffectual: Finds that the defenders are bound to count and reckon with the pursuer for the proceeds of the bankrupt's property received by them under the said deeds: Finds of consent that the said proceeds amount to £2153, 10s. 3d. as brought out in the state No. 220 of process: Allows interest on the said sum at the rate of 4 per cent. from 1st September 1888 until payment, and decerns against the defenders accordingly, &c.

"*Opinion.*—The view which I take of this case is perhaps a narrow one, but it is, I think, sufficient for the decision. I hold that the stock-in-trade, which was the subject of the deeds challenged, was in law the property of the bankrupt. I further hold that the bankrupt was under no legal obligation to execute the deeds challenged except after fourteen days' notice. And that being so, I hold that the deeds challenged being executed immediately upon demand, and within four days of sequestration must be held to have been voluntary deeds granted in satisfaction of a prior debt within the period of constructive bankruptcy, and so to be reducible under the Act 1696, c. 5.

"I am not able to accept the defenders' views of the bankrupt's position. They represent him as having been merely tenant of the two businesses, and of the pledges which formed their stock-in-trade. The businesses, they say, belong to them, the defenders, and they say that the pledges were their property. Or if the right which a pawnbroker has in his pledges is not correctly described as a right of property, they say alternatively that they are the true creditors in the contracts of pledge made by the bankrupt, he being merely their agent in making those advances, and being bound on the termination of his agency to transfer everything to them subject only to certain pecuniary claims arising *hinc inde* in the event of the value of the contracts being found to be above or below a particular sum.

"I do not think that either of those views is tenable. It is not, I think, possible to treat a pawnbroker's pledges as an ordinary stock of goods. But if it were so, the law of Scotland does not, as I understand it, enable an owner of goods to retain the property of such goods after he has hired them out on the footing that the hirer shall dispose of the goods on his own account, and be merely bound to replace them with other goods of equal value. In other words, the contract of steelbow, while recognised out of favour to agriculture as between landlord and tenant in agricultural or pastoral farms, has never, so far as I know, been extended, *e.g.*, to goods let or attempted to be let with the shop.

"Neither do I think it is possible to treat the bankrupt as being merely the defenders' agent. It is plain, I think, upon the agreements that he was conducting the two businesses for himself; that the contracts which he made were his contracts truly as well as nominally, and that in substance he was the owner for the time of the two businesses and their stock-in-trade, subject only to an obligation of divestiture on certain terms after the lapse of a certain

period or upon the occurrence of certain events.

"It is not therefore I think doubtful that the deeds under challenge were alienations of the bankrupt's property in favour of prior creditors. The question is, whether being so, and being executed within sixty days of bankruptcy, there is anything to exclude the operation of the Act 1696, c. 5.

"That question I think depends entirely on this — whether they were voluntary deeds in the sense of that statute. I cannot doubt that they were deeds in favour of prior creditors in the sense of the statute. The defenders were not, it is true, creditors in a pecuniary debt. It is probably correct to say that they were only creditors in an obligation *ad factum præstandum*. But I cannot agree with defenders' argument that the statute only applies to pecuniary debts. The case of *Gourlay* v. *Hodge*, 2 R. 738, is indeed an authority to the contrary.

"Were, then, the two deeds in question voluntary? I have come to be satisfied that they were. Had the obligation in the two agreements been to divest and cede possession immediately on the ascertainment in the prescribed manner of a deficiency in the stock of pledges, there would have been room for the argument that the bankrupt did no more than fulfil exactly and literally a previous obligation, which he was legally bound to fulfil, and to fulfil there and then. And I confess that notwithstanding some apparent authority to the contrary, I should have had great difficulty, had the facts raised it, in rejecting that argument. But I have not been able to see any good answer to the pursuer's point, that in any view of his position the bankrupt was not bound—that is to say, could not have been compelled—to execute the deeds in question at the time he did, or at any other time prior to the sequestration. He was entitled under the agreements to fourteen days' written notice. He waived that notice, and executed the deeds on demand. The result was that the deeds were executed and possession given four days before the sequestration, whereas if he had stood (in the interest of his general creditors) on his legal rights, the sequestration would have supervened before the deeds were executed. I think for these reasons that the deeds must be held to have been, in the sense of the statute, 'voluntary,' and must accordingly be set aside.

"As to the amount for which decree shall be pronounced, I understand that the parties are agreed that the sum of £2153, 10s. 3d. brought out by Mr Craig, C.A., in the state No. 220 of process, is correct. I shall accordingly decern for that sum, with interest at 4 per cent. from 1st September 1888, being, I think, a fair date to take as the average date of realisation."

The defenders reclaimed, and argued—1. The agreements entered into between the bankrupt and the defenders purported to be minutes of lease, and there was nothing impossible in the idea of letting a group of things. It was done in the case of cattle, manure, &c., in the case of steelbow—Hunter on Landlord and Tenant, i. 312—and there was a strong resemblance to the present contracts in a class of agricultural leases common in some of the northern counties where the tenants were taken bound to keep the fences, mills, &c., up to the heritors' standard. If the relation between the bankrupt and the defenders was not that of landlord and tenant, then the bankrupt must be looked upon as the defenders' mandatory, put in by them to manage the business, and the profits which he made after paying the 5 per cent. to the trustees must be looked upon as commission. The provisions in the second clause binding the bankrupt to keep books showing his intromissions, and giving the defenders a right of re-entry in the event of the stock of pledges falling below a certain value, and the provision that the insurances were to be taken in the defenders' name, all favoured the view that the bankrupt was a lessee, mandatory, or agent. Whatever the nature of the contract might be, there was at anyrate no assignment to the bankrupt of the pledges, or of such right of property as the defenders had in them. They were handed over to him to "farm." Further, the second article of the agreements gave the defenders an immediate right of re-entry on it being ascertained that the stock of pledges had fallen below the stipulated value. The fourteen days' notice did not refer to their right of re-entry, but to the tenant's obligation to cede possession. The Act 1696, c. 5, therefore did not apply in respect that (1) no right of property was transferred by the defenders to the bankrupt, and the trustee's right could not be greater than that of the bankrupt; (2) the deeds of renunciation were unnecessary, as the defenders had an immediate right of re-entry after it was ascertained that the stock of pledges had fallen below the stipulated value; and (3) the deeds of renunciation were granted in fulfilment of an obligation from which the bankrupt could not escape—Bell's Comm. (7th ed.) ii. 211; *Taylor* v. *Farrie*, March 8, 1855, 17 D. 639 (opinion of consulted Judges, p. 649). 2. The event which gave the trustees a right of re-entry had occurred. Interest should not be added to the sums advanced in the pledges, for according to the proof that had not been done when the agreements between the bankrupt and the defenders were entered into. 3. The £350 advanced by the defenders had been advanced to increase the "stock of goods farmed" by the bankrupt, and therefore that sum must be added to the value of the stock originally handed over to them in considering whether he had or had not fulfilled his obligation with regard to the up-keep of the stock.

The pursuer argued — 1. Whatever the contract might be called, the agreements in effect gave the bankrupt authority to take possession of the pledges and uplift the money paid to redeem them. Though there was no obligation to repay cash, there was an obligation to repay in a more convenient form by handing over the stock of pledges. The contract was therefore

one of loan, and nothing else. The deeds of renunciation were therefore struck at by the Act 1696, c. 5, as having been granted in security of a prior debt. The cases in which that Act had been under the consideration of the Court established that in order to exclude its operation three points were essential—(1) that the deed should be granted in the ordinary course of business; (2) that it should be granted in fulfilment of an immediate and unconditional obligation; and (3) that that obligation should be to deliver or grant a security over a specific subject—*Taylor* v. *Farrie, supra*; *Steven* v. *Scott & Simson*, June 30, 1871, 9 Macph. 923; *Moncrieff* v. *Union Bank*, December 16, 1851, 14 D. 200; *Gourlay* v. *Hodge*, June 2, 1875, 2 R. 738; *Gourlay* v. *Mackie*, January 27, 1887, 14 R. 403; *Rhind's Trustee* v. *Robertson & Baxter*, March 4, 1891, 18 R. 623. None of the three conditions was fulfilled here—(1) the obligation was not in the ordinary course of business, the whole agreement between the parties being of the most unusual kind; (2) the deeds were granted in fulfillment of a conditional and not immediate obligation; and (3) that obligation did not refer to a specific subject. Further, under the second article of the agreements the defenders were bound to give the bankrupt fourteen days' notice before entering into possession, and the bankrupt was entitled to fourteen days' notice before ceding possession. He had waived his right in granting the renunciations, and the Lord Ordinary was therefore right in holding that they gave the defenders an undue preference—Bell's Comm. (7th ed.) ii. 198-9. 2. The event which gave the trustees a right of re-entry under the deed had not occurred, because interest should be added to the amount advanced on the pledges in order to ascertain their value, and if this was done, the value of the pledges was found to be more than that stipulated, even taking the advance of £350 into consideration. 3. That advance, however, should not be taken into consideration, as it was not made under the agreements, and so the final clauses therein had no reference to it.

At advising—

LORD PRESIDENT—The estates of James Somerville Paterson, pawnbroker in Edinburgh, were sequestrated on 28th April 1888. Four days before his sequestration he ceded possession of the pledges in his shops in Richmond Place and Greenside Row to the testamentary trustees of his grandfather James Paterson, who were his landlords in those shops. The pledges so taken possession of have been realised by James Paterson's trustees, and the question in the present action is, whether they can retain the proceeds against the trustee in the sequestration, who claims them mainly on the ground that the delivery over of the pledges by the bankrupt was in contravention of the Act 1696, c. 5.

The defence is rested on the stipulations of two agreements entered into between the defenders and the bankrupt so long ago as 1879 on the occasion of the bankrupt beginning business. It appears that the business had originally been that of James Paterson, the grandfather; that after his death his son, and then someone else, had been placed in possession under arrangements similar to that adopted in the present instance, and that the business had thus been continuously carried on for many years. Accordingly when the bankrupt began business, he *de facto* went into possession of a going business in premises belonging to his grandfather's trustees.

The agreements under which he did so apply, the one to the Richmond Place and the other to the Greenside Row shops, but their provisions are, in scheme and substance, the same, and the deed relating to Richmond Place was the one taken for illustration at the debate. This agreement, then (to use the singular), requires analysis, so as to distinguish its legal results from its phraseology. One part is sufficiently plain, viz., that which lets the shop to the bankrupt at a rent of £50 per annum for six and a-half years from Martinmas 1878, (possession being in fact continued after the expiry of that period from year to year). But, together with the shop, there purports to be let "the pawnbroking business stock therein of the value of £1100 sterling belonging to the first party," . . . the said James Somerville Paterson and his foresaids paying in respect of said business stock therein interest on the said sum of £1100 at the rate of 5 per cent. per annum.

At the termination of the lease the forfeited pledges were to be sold, and the other pledges were to be valued. If the money thus shown was over £1100 the bankrupt was to be paid the excess, if it was under £1100 he was to pay the deficiency, the extant pledges being delivered over to the trustees. The bankrupt had right, under the 6th head of the agreement, at any time, on giving one month's notice, to pay off the £1100, and on this being done, his obligations were limited to payment of the rent of the shop. On the other hand, so long as the £1100 remained unpaid, the bankrupt was bound to keep up the stock to that value, the trustees having right to examine his books, and also the pledges in the shop. Then follows the clause upon which the defenders acted in the proceedings now challenged—"And with full power to the said first party and their foresaids during the currency hereof at any time that they may think proper, in the event of the stock of pledges at the time being found to be under the amount or value of said sum of £1100, if not paid out, to enter into and resume possession of the premises, business, and stock of pledges and others therein, and to intromit with, sell, and dispose of, and realise the same in such manner as they may think proper without any other warrant from the second party or his foresaids than this agreement, in which case the said second party binds and obliges himself and his foresaids peaceably to cede possession of the said premises, business, goods, and effects to the said first party or their foresaids on receiving fourteen days' previous notice in writing of their intention so to do:

Declaring that the said second party or his foresaids shall not be entitled to object to the said first party or their foresaids entering to the possession, management, and disposal of the said premises, business, goods and effects on any ground or pretence whatever, but shall only be entitled to retain possession on instantly making payment to the said first party or their foresaids, or consigning in bank in their names the said sum of £1100, with interest thereon at the foresaid rate, and rent of premises that may be due at the time, and any expenses that may be incurred; but declaring that the said first party and their foresaids shall be bound to hold just count and reckoning with the said second party or his foresaids for his intromissions with the said goods and effects, and to pay to him or his foresaids any balance that may remain after deducting all claims at the instance of the said first party for the said sum of £1100 sterling, interest thereon, rent, and expenses."

When we turn from this agreement to the facts of the situation, it is seen how little the written stipulations correspond with the legal results. When the bankrupt was put in possession of the business there were delivered over to him certain watches, clothes, and other articles held in pledge for loans. His business was, in the ordinary course, to deliver up the pledges to those borrowers who redeemed—becoming proprietor of such pledges as were unredeemed within the statutory period, to sell them in due course, and, on the other hand, to take in new pledges, which in turn were redeemed or matured, and were sold. Accordingly the so-called stock was entirely fluctuating, and the articles which were delivered to him by the defenders in 1878 had necessarily passed out of his hands years before his bankruptcy.

The words of the lease therefore which are applied to the so-called stock are, so far as legal effect goes, wholly inappropriate and ineffectual. When the bankrupt was put in possession of the pledges extant in 1878, with the object that he should deal with them as a pawnbroker for his own behoof, Mr Paterson's trustees parted with the only right they themselves had in those pledges. "Where a thing is lent" (says Erskine, iii. 1, 18) "which cannot be used without either its extinction or its alienation, the property of it must needs be transferred to the borrower, who cannot otherwise have a right from the proprietor to make the proper use of it." This, Erskine says, in discussing *mutuum*, where the lender is proprietor, and not merely pledgee; but the principle is applicable whether the lender has the higher or the lower right to bestow on the borrower.

All therefore that the defenders held by the agreement under these clauses was a personal obligation by the bankrupt, in a certain event, to deliver over to them all the pledges he had in the shop, of what sorts soever these might be. The event was the shop being found to contain pledges of less value than the stipulated £1100, and £1100 not being made forthcoming in money.

The question then is, whether this is an obligation which can be implemented within sixty days of bankruptcy, and I am of opinion that it cannot. It is, I think, impossible to assimilate the case to those in which the specific performance within the sixty days of agreements entered into before that period has been sustained. Two vital differences exist. In the first place, the obligation, of which performance was here obtained, is not an obligation to give or to do a specific thing; it is simply to hand over the whole contents of the shop, and the fact that those contents were pledges constitutes a peculiarity but not a difference. In the second place, under the agreement performance of this obligation was not stipulated for forthwith as part of the agreement, but, on the contrary, was necessarily not to be so given, but only on demand being made in a certain event, that event being the defenders' interest under the contract coming into danger owing to the diminution of business. In my judgment this surrender was in contravention of the Act 1696, c. 5, and directly contrary to the spirit of our bankruptcy law.

The ground of my opinion renders it unnecessary to consider the waiver of notice by the bankrupt upon which the Lord Ordinary has rested his decision. Nor is it necessary to consider, on the one hand, the pursuer's argument, that even assuming the surrender to be unobjectionable on the statute, the valuation did not in fact show a deficiency of value, inasmuch as requisite allowance fell to be made for the enhanced value of the older pledges, or on the other hand, the defenders' contention that certain advances by them subsequent to the agreement increased the amount of value which they were entitled to require. But our attention was called to a correction which must be made on the sum for which the Lord Ordinary has granted decree, in order to give to the pursuer what was actually realised by the defenders for the subjects in dispute, and it will therefore be necessary, if your Lordships should concur, formally to recal his Lordship's interlocutor in order to substitute £2430, 1s. 6d. for £2153, 10s. 3d. as the principal sum decerned for.

LORD ADAM concurred.

LORD M'LAREN—This is a claim at the instance of the trustee on Paterson's sequestrated estate founded on the Statute 1696, c. 5. The security sought to be set aside was of this nature. The pawnbroking business carried on by the deceased James Paterson passed to his testamentary trustees, and they were desirous of enabling Mr Paterson's son (the insolvent trader) to carry on the business for his own profit, while retaining in their hands a right of property in the assets of the business so far as they could lawfully do so. With this object they executed a deed purporting to be a lease, and dated 14th May 1879, whereby they let to the bankrupt for a term of years the premises Nos. 2 and 4 Richmond Place, Edinburgh, together with the pawnbroking

business and stock therein estimated as of the value of £1100. The tenant was put under obligation to keep up the estate to the value of £1100, and it was provided that if the stock of pledges (together with any sum which the tenant might have repaid to the trustees) should be found during the currency of the lease to be of less value than £1100, it should be lawful to the lessors (Paterson's trustees) to resume possession of the stock of pledges and other subjects, and to dispose of such stock as their property. The tenant was also taken bound to cede possession of the premises, business, and stock of pledges upon fourteen days' notice in writing of the intention of the lessors to exercise their powers.

On 24th April 1888 the tenant, being then insolvent, executed at the request of his father's trustees, a renunciation of his rights under the lease, and the trustees immediately entered into possession.

Four days later, on 28th April, the estates of the tenant were sequestrated under the Bankruptcy Act, and the creditors, after consideration, authorised these trustees to institute this action for the recovery of the stock or its value as property of the bankrupt. It is to be kept in view that neither the defenders nor the bankrupt are in a position to assert an absolute right to the stock of pledges. The pledges are the property of the pledgers. Nevertheless the creditors' right in these pledges, with the correlative right of sale which is given by the Pawnbrokers Acts, is a valuable asset, and the question is, whether this right is an asset of the bankrupt, or whether it belongs to the defenders in virtue of their reserved powers under the lease, and the renunciation following on the assumed exercise of these powers.

The Lord Ordinary on the evidence has found that the deed of renunciation referred to, and also a renunciation of a lease in similar terms of these premises, were in contravention of the Statute 1696, cap. 5. His Lordship's view of the case is summarised in the first paragraph of his opinion, in which he holds that the renunciations are voluntary deeds, because they do not proceed on a notice in writing in terms of the lease. I agree with the Lord Ordinary that the circumstances under which these deeds were granted, especially the absence of the fourteen days' premonition prescribed by the lease, are material to the question of fraudulent preference in the sense of the statute. But in the argument addressed to us the Lord Ordinary's judgment was supported on the view that the so-called lease was a deed incapable of creating an effective security over the stock of pledges, and therefore that, irrespective of any question as to the sufficiency of notice, the deed of renunciation must be taken to be an alienation of the bankrupt's estate.

It appeared to us that the case could not be satisfactorily decided without considering the question of the validity and sufficiency of the lease as a deed of security, and as I understand we are all of opinion that no effective security was or could be constituted by a deed which vested the possession of the pledges in the person of the bankrupt, it is proper that in affirming the Lord Ordinary's interlocutor we should state that our judgment proceeds on this ground.

It may simplify the consideration of the question if I suppose, as matter of argument, that instead of a stock of pledges the parties to the lease of the premises in Richmond Place were treating with respect to an ordinary stock-in-trade—a stock of goods kept for sale in those premises. The supposition is that the stock was originally the property of the defenders, and that along with the premises they professed to let the stock-in-trade to Mr Paterson, taking from him an obligation that he should keep up the value of the stock, and stipulating for re-entry in case of default.

The mere statement of such a form of security is sufficient to exhibit its essential unsoundness. Even as regards such part of the goods assigned as might remain unsold at the date of the bankruptcy, it is plain that the security would not be effectual, because in the case supposed the goods are not given on hire (which would mean that the identical goods are to be returned to the lessor), but are given to the grantee to be sold for his profit, the right of the granter being only the right to demand equivalent goods. The granter's right after he has parted with the possession of the goods is accordingly a *jus crediti*, and nothing more, because there is no real distinction between a loan of coin or money with an obligation to repay in equivalent coin and a loan of a stock of goods with an obligation to restore equivalent goods to be purchased out of the proceeds of sale.

In the case of a loan of money, anyone would admit that the lender's right is limited to a dividend, even if he could prove that the identical sovereigns which he lent were in the pocket of the bankrupt at the time of his sequestration. And so in the case of an assignment of stock to be used by the assignee in his trade, the question whether the goods have in fact been converted is an altogether irrelevant consideration if the goods were made over to the trader for the purpose of being sold for his profit.

Now, the difference between the present case and the case supposed is, that the defenders had not the absolute property of the pledges, but only a qualified right in them, which might be made effectual to the extent of the money advanced on pledge by the sale of the pledges. I do not doubt that if a pledgee lends or gives the use of a pledge to a third person under the condition that the specific article is to be restored, the pledger and pledgee retain their respective rights in the thing notwithstanding the bankruptcy of the person to whom it was entrusted. But if the pledgee makes over the thing to another person, giving that person all the right which he has in it, including the power of sale in the event of the pledge being unredeemed, and stipulating only for restoration in money or

money's worth, I see no difference in principle between such an assignment and the case of assignment of the lender's individual property with a relative obligation to restore the value of the goods. In the case before us the right of the defenders in the pledges was only a qualified right, but the question of security or preference in bankruptcy is independent of the nature of the right of the cedent in the thing conveyed, and depends only on the quality of the assignee's obligation. If that obligation can be fulfilled by a payment in money or goods *in genere* the obligation is personal, and only gives rise to a claim to participate in the distribution of the bankrupt's estate. This, in my view, is all that the defenders can claim under each of the two deeds challenged by the trustee.

It is perhaps unnecessary, but it may be satisfactory to the parties that I should say that we do not overlook the fact that the form of a lease is used. Where the substance of the contract between debtor and creditor is consistent with the existence of a right of security or real right in the creditor, form may be important, especially in determining the creditor's remedies, as in comparing, for example, the cases of a bond and disposition in security and an *ex facie* absolute deed, where the rights and remedies of the parties are different, depending on the terms and clauses of the deed of security.

But when, as in the present case, the contract is not in substance a security contract, it will not be made any better by giving it the name of a lease, while the rights conferred on the grantee are not those of a tenant but of an owner entitled to dispose of the subject at his pleasure.

I do not think it is necessary for the purposes of this case to enter on a review of the decisions in this chapter of bankruptcy law. The construction of the Statute 1696 is now very well understood, and I do not think that the circumstances of any of the previous cases throw much light on this case, which is indeed very special in its features. Probably the nearest case to the present is that of *Gourlay* v. *Hodge*, 2 R. 738, where the debtor in exchange for an advance undertook "within one month from this date" to give delivery-order for grain, and the obligation was held only effectual to give a ranking in bankruptcy. The whole subject is most fully discussed in the elaborate and luminous opinion of the late Lord President in *Steven* v. *Scott & Simson*, and I shall conclude by reading a few lines from that opinion which appear to me to be directly applicable to the present case—"An obligation of a general kind to give security is plainly nothing at all in itself. It is an obligation no doubt that the party is bound in honour to fulfil, but it is an obligation not applicable to any particular subject, and it is not in itself a specific obligation, and until it is made special in some way or other it cannot be said to be a security for the debt at all. In that view it is only when the so-called obligation is fulfilled that there comes to be any security. And therefore that is the point of time at which the security is granted, and if that point of time occur within sixty days of bankruptcy the application of the statute is clear, because that is security given within sixty days for a prior debt."

In the present case the fulfilment of the obligation to restore was the executive of the deed of renunciation. As between the debtor and the creditor there is nothing to be said against the deed, but because it is a deed in satisfaction of an antecedent obligation it is annulled by the statute, and it follows in my opinion that the trustee is entitled to decree in terms of the Lord Ordinary's interlocutor, with the variation suggestion by your Lordship.

LORD KINNEAR was absent.

The Court adhered to the Lord Ordinary's interlocutor except in so far as it decerned for the sum of £2153, 10s. 3d., with interest on said sum at the rate of 4 per cent. from 1st September 1888 until payment; and in place thereof, of consent of parties decerned for the amount of £2430, 1s. 6d., with interest on said sum at said rate of 4 per cent. from said 1st September 1888 until payment, and found the pursuer entitled to additional expenses, &c.

Counsel for Pursuer—W. Campbell—Crole. Agents—Menzies, Bruce-Low, & Thomson, W.S.

Counsel for Defenders—D.-F. Balfour, Q.C.—Baxter. Agents—Duncan Smith & Maclaren, S.S.C.

Friday, November 13.

FIRST DIVISION.

[Lord Stormonth Darling, Ordinary.

SMYTH *v.* MUIR AND OTHERS.

Process — Summons — Declarator — Payment—Competency.

Two limited companies bought separately from the firm of B & Company several properties at prices amounting in all to £79,000. A shareholder in the two companies sued these companies, and their directors, and the private firms of B & Company and F & Company, for declarator that the sale of these properties was null and void, and that the directors of the two companies were not entitled to enter into the sale, and to have the two firms ordained to repay the sum of £79,000 to the two companies in the proportions paid by each respectively, or to have the directors of the two companies ordained to pay to them the sum of £79,000. The pursuer did not seek reduction of the sale.

He alleged that the two firms were represented in the directorate of the two companies; that B & Company