the Isla, it, so far as it went, added to the scouring power of that stream. Unfortunately the company did away with this old course of the Kempcairn; and all the witnesses agree that this was a mistake. But then, having diverted the stream, the company seem to have bought ground from Lord Seafield, and formed a course for it which ended in a water-course in Lord Seafield's land, which water-course again led into the old course of the Isla. A tenant of Lord Seafield afterwards made a new water-course, which, however, led like the other into the old course of the Isla. There is no doubt at all that the result has been to gorge the old channel with what sometimes is a large quantity of water having a very inadequate escape, and to add to the water-logged condition of the pursuer's lands. The odd defence of the defenders is, that as they did not directly conduct the water into the old channel, but only led it into a water-course, which again leads to the old channel, they are not responsible. I cannot accede to this view. The diversion of the Kempcairn from its proper access to the Isla, and the throwing it on to this other part of Lord Seafield's lands, which drain into the old channel, was one of the works of the defenders, and on the evidence I consider it proved that this has contributed to injure the drainage of the pursuer's lands. The mere fact that the defenders, in order to cure this, may have to get something done by Lord Seafield's leave, cannot release them from the fulfilment of their contract obligation; and the same remark applies to the similar difficulty raised by the defenders about the possibility of some of the necessary remedial works on the bed of the Isla having to be executed on lands not belonging to themselves.

The operative conclusion of the summons has been subjected to criticism, some of which is just, but probably an effective decree might be founded upon it. In the meantime it might be in accordance with practice to pronounce a declaratory finding and continue the cause with a view to enabling the defenders to put things right if they are minded to do so. I would propose that we should recal the Lord Ordinary's interlocutor, and find that the railway works of the defenders have interfered with the drainage of the pursuer's lands so that it has become ineffective, and that the defenders have failed to fulfil the obligation incumbent on them under and in terms of the disposition of 11th August 1859 to preserve the said drainage effective. By adopting a declaration of this kind we shall protect the defenders against the suggestion that we are enforcing against them any obligation arising out of the statutes, or from anything other than the specific conventional obligation undertaken in this particular deed.

LORD ADAM, LORD M'LAREN, and LORD KINNEAR concurred.

The Court recalled the interlocutor of the Lord Ordinary, and found "that the railway works of the defenders have interfered with the drainage of the pursuer's lands so that it has become ineffective, and that the defenders have failed to fulfil the obligation incumbent on them under and in terms of the disposition of 11th August 1859 to preserve the said drainage effective."

Counsel for the Pursuer—Guthrie, Q.C.—Clyde. Agents — J. K. & W. P. Lindsay, W.S.

Counsel for the Defenders — Balfour, Q.C. — Ferguson. Agents — Gordon, Falconer, & Fairweather, W.S.

Thursday, November 4.

SECOND DIVISION.

[Sheriff-Substitute of the Lothians and Peebles.

SAWERS *v.* KINNAIR.

Lease — Sequestration in Security of Rent currente termino—Removal Terms (Scotland) Act 1886 (49 *and* 50 *Vict. c.* 50), *sec.* 4.

The tenant of a shop under a lease for five years ending Whitsunday 1900 became bankrupt on 14th May 1897. The judicial factor on his sequestrated estates paid the rent due on 15th May, but did not intimate abandonment of the lease till 28th May. The landlord on 21st May presented a petition for sequestration in security of the rents payable at Martinmas 1897 and Whitsunday 1898. Interim sequestration was granted, but was recalled in respect of consignation on 27th May.

Held that under the Removal Terms (Scotland) Act 1886, sec. 4, the year for which the rents sought to be secured were payable did not begin till noon on 28th May 1897, and that the landlord had no right of hypothec over the tenant's effects for these rents until the year for which they were payable had begun to run —*Thomson* v. *Barclay*, February 27, 1883, 10 R. 694 (interpreting the practically identical provision in sec. 3 of the Removal Terms (Burghs) (Scotland) Act 1881) *followed.*

This was a petition for sequestration in security of rent presented in the Sheriff Court at Edinburgh by Mrs Henrietta Lauder or Sawers against William Kenneway Kinnair, dressing-case maker, Edinburgh, and Charles J. Munro, C.A., Edinburgh, judicial factor on his sequestrated estates. The pursuer prayed the Court in common form for sequestration of the furniture, goods, and effects in the premises leased by him from the pursuer in security and for payment of £17, being the half-year's rent due at Martinmas 1897, and of the further sum of £17, being the half-year's rent due at Whitsunday 1898.

The pursuer averred — "(Cond. 1) The pursuer is heritable proprietrix of the premises and others situate at No. 13 South

Frederick Street, Edinburgh, and the defender, the said William Kennoway Kinnair, is the tenant of the said subjects under missives of lease, dated 25th and 26th March 1895, entered into between him and Thomas White, Solicitor before the Supreme Courts of Scotland, Edinburgh, on behalf of and as duly authorised by the pursuer. Under the said missives, which are herewith produced, the said subjects were let to the defender, the said William Kennoway Kinnair, for the period of five years from the term of Whitsunday 1895, with a break in favour of the said defender at the term of Whitsunday 1898, at the yearly rent of £34 sterling per annum, payable by equal proportions at the terms of Martinmas and Whitsunday in each year. (Cond. 2) The defender entered into the occupancy of the said subjects at the said term of Whitsunday 1895. On 14th May 1897 the estates of the defender William Kennoway Kinnair were sequestrated, and the said Charles J. Munro was appointed judicial factor thereon. At Martinmas 1897 there will be due the half-year's rent of £17, and at Whitsunday 1898 the further sum of £17 will be due. (Cond. 4) The pursuer has received reliable information by the defenders that the goods and effects in the premises are to be at once fraudulently removed therefrom and sold with the view of defeating the landlord's right of hypothec."

The defenders averred—"(Ans. 2) Admitted that the estates of the said William Kennoway Kinnair were sequestrated on 14th May 1897. Explained that the rent due at Whitsunday 1897 has been paid, and that the trustee in the sequestration has intimated that he does not intend taking up the lease. On 27th May 1897 the sequestration for rent granted on 21st May was on consignation recalled, and the whole furniture, goods, and effects were removed from the pursuer's premises before 28th May."

The pursuer pleaded—"The pursuer's said right of hypothec being in danger of being defeated, she is entitled to sequestration warrant in security, and decree as craved."

The defenders pleaded, *inter alia*—"(1) The pursuer not having a right of hypothec over the effects inventoried is not entitled to decree as craved. (2) The furniture, goods, and effects in question having been removed from the pursuer's premises before 28th May last, they are not in any way subject to the pursuer's right of hypothec.

The Removal Terms (Scotland) Act 1886 (49 and 50 Vict. cap. 50) enacts as follows:—Section 4. "Where under any lease entered into after the passing of this Act, the terms for a tenant's entry to or removal from a house shall be one or other of the terms of Whitsunday or Martinmas, the tenant shall in the absence of express stipulation to the contrary enter to or remove from the said house (any custom or usage to the contrary notwithstanding) at noon on the twenty-eighth day of May if the term be Whitsunday, or at noon on the twenty-eighth day of November if the term be Martinmas, or on the following day at the same hour where the said terms fall on a Sunday." Section 3. . . . "'House' shall mean a dwelling-house, shop, or other building, and their appurtenances." . . .

The Removal Terms (Burghs) Scotland Act 1881, section 3 of which was practically identical with section 4 of the Removal Terms (Scotland) Act 1886, except that the former enactment only applied to "houses within the limits of any burgh," was repealed by section 2 of the Removal Terms (Scotland) Act 1886.

There was no averment on the record with regard to the date upon which the judicial factor abandoned the lease, but counsel for the pursuer stated at the bar that the intimation of abandonment was sent to the pursuer on 28th May and was received on the following day.

The petition was presented on 21st May 1897, and of that date the Sheriff (RUTHERFURD) granted interim sequestration.

On 27th May the Sheriff-Substitute (MACONOCHIE) "in respect of consignation by the defender Charles John Munro as trustee within mentioned of the sum of £34," recalled the sequestration for rent granted on 21st May.

On 1st July the parties by minute renounced further probation.

On 2nd July the Sheriff-Substitute issued the following interlocutor:—"Finds that the defenders have not stated a relevant defence, repels the defences, and, in respect of the consignation of the rent due under the lease founded on at the terms of Martinmas and Whitsunday next, continues the cause: Finds the defenders liable in expenses," &c.

Note.—"The Sheriff-Substitute is of opinion that under a lease for a term of years the landlord's right of hypothec subsists continuously from the beginning to the end of the lease, and is not affected by the provisions of the Terms Removal (Scotland) Act. The Sheriff-Substitute therefore holds that the case of *Thomson* v. *Barclay*, 10 R. 694, which counsel for the defenders specially founded on, does not apply here."

The defenders appealed to the Second Division of the Court of Session, and argued—In virtue of the Removal Terms (Scotland) Act 1886, section 4, the term ending Martinmas 1897 did not begin till 28th May. This was ostensibly a petition for sequestration *currente termino* in security of rent not yet payable. Such a petition could not be granted if presented before the term to which it applied had begun, as was the case here. This case was ruled by *Thomson* v. *Barclay*, February 27, 1883, 10 R. 694. If the rent is paid before 28th May as was the case here, there was no rent still remaining due for the period between the date of payment and 28th May. Sequestration was competent for payment of rent due and unpaid, and sequestration was also competent *currente termino* for current rent. What was sought here was neither of these, for all the rent due at the date of the presentation of the petition had been paid, and the next term had not yet begun to run. It was entirely incompetent to use sequestration

in security for a rent which had not begun to become due, and before the commencement of the term for occupation during which it would become due. In the case of *Donald* v. *Leitch*, March 17, 1886, 13 R. 790, referred to by the pursuer, the petition was not presented till 2nd June, as appeared from the report at page 791. The pursuer's only claim was for damages in respect of breach of contract, but she had no right of hypothec, and consequently no right to sequestration in security for the purpose of securing payment of such a claim.

Argued for the pursuer—If the defenders' contention was correct, then the right of hypothcc was practically in obeyance between 15th and 28th May in each year. It was not intended by the Removal Terms (Scotland) Act to effect any such result. The Act was passed for the sole purpose of doing away with the inconvenience due to there being different removal terms in different parts of the country, and it did not alter the rights of the landlord as regards hypothec and sequestration for rent. The rent for the term ending Martinmas 1897 began to become due immediately after 15th May, and consequently sequestration in security of that rent was competent on 21st May, when this petition was presented. See *Donald* v. *Leitch, cit.* The case of *Thomson* v. *Barclay* was distinguished, for there the tenant's lease came to an end on 28th May, and a new lease began on that date, Although the tenant was the same person it was none the less a new lease, and what was attempted there was to sequestrate the effects of the old tenant in security of the rent which would become due by the new one, which was obviously incompetent. Bankruptcy did not *ipso facto* terminate a lease. The lease did not come to an end until the judicial factor intimated that he proposed to abandon it. When this petition was presented the judicial factor had not intimated abandonment. The Bankruptcy (Scotland) Act 1856, section 119, enacted that nothing in that Act should affect the landlord's right to hypothec.

Lord Young—This case presents a question between the trustee of a bankrupt dressing-case maker and the landlord of the shop which the bankrupt occupied. The facts and circumstances of the case appear to me to be just such as must occur in every bankruptcy in which the bankrupt is the tenant of premises, and is made bankrupt *currente termino*. This bankrupt, as I have said, was a dressing-case maker, and he occupied premises in Frederick Street under missives of lease dated 25th and 26th March 1895. It is averred (Cond. 1) that under the said missives the said subjects were let to the defender the said William Kennoway Kinnair (the bankrupt) for the period of five years from the term of Whitsunday 1895. It is also averred (Cond. 2) that on 14th May 1897 the estates of the defender William Kennoway Kinnair were sequestrated, and the said Charles J. Munro was appointed judicial factor thereon. Then the judicial factor, acting as trustee in the sequestration, paid the rent due at Whitsunday 1897 for the term which was current on 14th May, that is to say, the term beginning at Martinmas 1896, and ending Whitsunday 1897. That was the term which was current on the 14th of May 1897 without any reference to the Removal Terms (Scotland) Act 1886. The sequestration and appointment of a judicial factor took place on 14th May, and therefore no question under the Removal Terms (Scotland) Act 1886 really arises, because the sequestration took place *currente termino*, that is between Martinmas 1896 and Whitsunday 1897, whether the term of Whitsunday 1897 was on 15th or 28th May. I refer, of course, to the sequestration of the bankrupt, not to the application for sequestration in security of rent which was made on 21st May. I confess I think the law is clear as to what are the rights of a landlord and the liabilities of the bankrupt's estate. So far as the bankrupt is concerned, he leaves on the expiry of the term which is current when he is made bankrupt. He is not entitled to remain on after that, and the landlord is not bound to keep him on as a tenant, but is entitled to enter upon the premises himself, or to let them to another tenant. The landlord may suffer loss and prejudice through losing his tenant, and perhaps not having his property occupied for some time. If this is so, he may have a claim of damages for the loss which he has suffered through the tenant's breach of contract, just as anyone else will have a claim of damages for the breach of any contract which the bankrupt fails to carry out, it being always open to the trustee, if he thinks right, and usually after consultation with the creditors, to take up and complete any contract instead of subjecting the estate to liability for a claim of damages for breach of contract. We are familiar with such cases, and in such cases the trustee and the estate will be liable for the carrying through of the contract. But it is not suggested here that the judicial factor took up the lease. He was entitled, but not bound, to do so, and there is nothing to suggest that he ever intended to do so. If he had done so here, there would have been an unanswerable claim on the part of the landlord, but no such case is made here. Notwithstanding this, however, on 21st May, the rent due for the term ending Whitsunday 1897 having been paid, the landlord was advised that the tenant would still be tenant for the year ending Whitsunday 1898, and that she should secure the payment of the rents which would become due at Martinmas 1897 and Whitsunday 1898. Accordingly application was made for sequestration in security of the rents so to become due. The judicial factor very properly and prudently consigned the amount of the rents, so as to enable a sale of the bankrupt's stock to take place for behoof of the creditors. But the question is still the same, namely, whether the landlord is entitled to have the goods on the premises sequestrated in security of these rents. I am very clearly of opinion that no such

rent was due or to become due. No relation of landlord and tenant continued to exist after 14th May 1897 between the landlord and the bankrupt, or between the landlord and the bankrupt's estate, and where there was no relation of landlord and tenant there could be no right of hypothec. As I have said, if the landlord has suffered any damage by the lease being broken instead of being carried on till the end of the five years for which it was to run, if she thinks she has any such claim, she may bring it and it will be considered, but she has no right of hypothec to secure payment of it. I am therefore of opinion that the judgment of the Sheriff-Substitute should be reversed.

The Sheriff-Substitute in his note refers to the case of *Thomson* v. *Barclay*, February 27, 1883, 10 R. 694, in which it was held that 28th May was to be taken to be the term day, both with respect to entry and removal and also with respect to the right of hypothec, and that goods might be removed from the premises at any date prior to 28th May without the landlord having right to demand their return to secure payment of the rent current between Whitsunday and Martinmas. Now, here the bankruptcy occurred on 14th May, which is before the expiry of the term current between Martinmas 1896 and Whitsunday 1897, whether that term is held to end on 15th or on 28th May, and I think that thereupon the bankrupt ceased to be tenant of the premises in question. In that view the Removal Terms (Scotland) Act, 1886 and the decision in the case of *Thomson*, do not affect this case, but I think it proper to state that not only do I feel bound by that decision, but also that I think it unanswerably right. The provision of the statute is as follows [*his Lordship read section* 4]:—I must therefore read the expression "term of Whitsunday" as meaning 28th May, and I must hold that the term ending Martinmas 1897 did not begin till 28th May in that year. In my opinion, therefore, the term for which rent would have been exigible at Martinmas, and in security of the rent for which sequestration was here sought, did not begin till 28th May, and I should have been prepared to make that the ground of my judgment if it had been necessary to do so. But, as I have said, I do not think it is necessary to determine that question in deciding this case, because the bankruptcy took place on 14th May, which was not only before the 28th, but also before the 15th.

LORD TRAYNER — I have reached the same result. I am of opinion that this case is not distinguishable from the case of *Thomson* v. *Barclay*, and that the decision in that case rules the present.

LORD MONCREIFF—But for the decision of the Court in the case of *Thomson* v. *Barclay*, 10 R. 694, there might, in my opinion, have been a serious question whether the Removal Terms (Scotland) Act 1886 applies to the case in hand; that is, whether the operation of the statute is not confined to producing uniformity in the custom whereby (in the words of the preamble) "for the purpose of a tenant's entry to, or removal from, a house a period beyond the date of the legal term of entry or removal is allowed within which such entry or removal may take place."

But I feel bound by the case of *Thomson* v. *Barclay*, which, as I read it, decides that the term of entry fixed by the statute —viz., 28th May — affects other incidents of a lease, and in particular, must be held as regulating the landlord's right to sequestrate. For instance, I understand it to decide that for the current rent of any given year—Whitsunday to Whitsunday—the landlord's right of hypothec only affects the furniture which was on the premises after 28th May of that year. Now, I am unable to distinguish that case from the present. It is true that the original lease in that case was a lease for a year, Whitsunday 1881 to Whitsunday 1882. But the tenant had agreed to continue the tenancy from Whitsunday 1882 to Whitsunday 1883. The tenant having failed to pay the rent on 15th May 1882 the landlord sequestrated on 23rd May. On 24th May the tenant removed his furniture from the premises. It was held that as the furniture was not in the premises after 28th May it could not be attached for the rent of the year—Whitsunday 1882 to Whitsunday 1883.

The lease in the present case is a lease for years, but that does not appear to me to affect the question. The question is the same, viz.—to which year does the interval between 15th and 28th May belong? If to the latter year—in this case Whitsunday 1897 to Whitsunday 1898—the landlord is right, because the tenant's sequestration did not affect his right of hypothec, and the furniture was in the premises after 15th May; if to the previous year—viz., Whitsunday 1896 to Whitsunday 1897 — he is wrong. Now if, as has been decided, the terms of entry and removal fixed by the statute affect at all the enforcement of the landlord's right of hypothec, I think they must be held to do so whether the lease in question is a lease for years or the renewal of a lease for a year.

If then the rent in security of which the landlord used sequestration was the current rent of a year which only began on 28th of May the landlord's claim is bad, because the furniture in question was removed from the premises before that date. On the authority of *Thomson* v. *Barclay*, and on that ground alone, I think the Sheriff-Substitute's judgment must be recalled.

LORD JUSTICE-CLERK—I concur. I think the case to which the Sheriff-Substitute refers applies to and rules the present. I have no doubt of the soundness of that decision, but whether I had or not I think it must be followed,

The Court pronounced the following interlocutor:—

"Sustain the appeal, recal the interlocutor appealed against, Sustain the first plea-in-law for the defenders and assoilzie them from the conclusions

of the action: Grant warrant to the Clerk of the Sheriff Court to deliver up to the defender Charles John Munro the sum of £34 with all interest due thereon, being the amount consigned by him on 27th May last, and decern: Find the defenders entitled to expenses in this and in the inferior court," &c.

Counsel for the Pursuer and Respondent—Cullen. Agent—Thomas White, S.S.C.

Counsel for the Defenders and Appellants—W. Campbell—A. M. Anderson. Agent—James Skinner, S.S.C.

Thursday, November 4.

SECOND DIVISION.

COUPER *v.* DIRECTORS OF AYR HOSPITAL.

Succession — Legacy — Specific Legacy — Whether Specific Sum Given or Investment.

A testatrix by her trust-disposition and settlement provided as follows:—"With respect to the disposal of £2000 in which I am liferented under the will of my late uncle . . . and of which I consider that I am entitled to dispose, I direct that the said sum, or so much thereof as may remain at my death, shall be divided equally among" certain legatees named. The testatrix' uncle had directed a sum of £2000 to be set aside or invested for behoof of the testatrix in liferent, and she had ultimately come to be in right of the fee also. In 1881, fifteen years before her death, and also some time before the date of her trust-disposition and settlement (no particular investment having up to that time been appropriated to meet this sum of £2000) it was arranged between the testatrix and her uncle's trustees that they should pay the residue of the estate to the testatrix, who had become entitled thereto, retaining only two ground-annuals, then valued at £2514, to secure her liferent under the provision of her uncle's will above mentioned, "the surplus of their value beyond the legacy" being declared to be at the testatrix' own disposal. These ground annuals ultimately realised £3547. The legatees maintained that they were entitled, in addition to the sum of £2000, to a share in the profit realised by the sale of the ground-annuals in so far as it represented profit on the sum of £2000 out of the total sum of £2514, the value of the ground-annuals in 1881.

Held that they were only entitled to £2000, and not to any share in the benefit of the investment.

The Reverend Dr Andrew Sym, minister of the parish of Easter or New Kilpatrick, died on 22nd July 1870, leaving a trust-disposition and settlement dated 20th December 1850, and two relative codicils dated respectively 26th December 1859 and 11th July 1870, whereby he disponed his whole estate, heritable and moveable, to the trustees therein named, for the trust purposes therein specified. The fourth purpose of the trust-disposition and settlement was as follows:—"*Quarto*, I instruct my trustees to set aside or invest, in such a way and on such security as to them may seem most advantageous, the principal sum of £2000 sterling, and to pay the interest or annual produce thereof, at the terms at which the same may be received by themselves, to or for behoof of my niece Lewis Sym, daughter of my deceased brother Dr James Sym, physician in Ayr, for her liferent use and enjoyment thereof during all the days and years of her life after my death, and the principal sum itself shall be held by my said trustees, subject to my said niece's liferent, for behoof of the child or children to be procreated of her body, equally among them, if more than one, payable only on such child or children attaining majority, but with power to my trustees, after the lapse of my said niece's liferent, to apply the whole or such parts of the interest or annual produce of said principal sum, as to them may seem proper, towards the maintenance, education, and upbringing of her said child or children during their minority, and in the event of there not being a child or children procreated of the body of my said niece, or failing such by death before attaining majority, then the said principal sum, and such part of the interest thereof as may not have been expended by my trustees as aforesaid, shall be accounted for or paid to my said sister Sarah Sym, or her heirs, or assignees whomsoever, and I legate and bequeath accordingly." The trust-disposition and settlement declared that the trustees shall have full power to sell, dispose of, and convert into money the testator's means and estate, so far as necessary or appeared proper, and to invest the trust-funds so far as requisite in securities, heritable or moveable, or in the purchase of property or stocks. Dr Sym's residuary legatee was his only sister Miss Sarah Sym. Dr Sym was survived by his sister Miss Sarah Sym, and his niece Miss Lewis Sym.

Miss Sarah Sym died on 14th September 1876, leaving a trust-disposition and settlement dated 27th January 1874, and relative codicil dated 15th January 1875, in which she disponed her whole estate to the trustees therein mentioned, for the trust purposes therein specified. By this trust-disposition and settlement and codicil, after directing her testamentary trustees to pay two legacies, she gave the following direction to her trustees:—"And fourthly, my said trustees and their foresaids shall hold, apply, pay, convey, and make over the whole rest, residue, and remainder of my means and estate, and the interest and other annual produce thereof, to and for behoof of my niece the said Lewis Sym, whom I hereby nominate and appoint as my residuary legatee, including in said residue my whole right, title, and interest