left on the ground be held to be the property of and belong to the landlord, and he shall be at liberty to sell the same at pleasure, and to impute the price in extinction *pro tanto* of the tenant's obligations."

There have been various authorities cited to us in support of the efficacy of the clause in question. I at once put aside all those quoted from the law of England; because notoriously, in this very matter of the requisites necessary for transferring personal property, the law of England differs greatly from ours. The case of *Kerr* v. *Dundee Gas Company*, 18th January 1861, 23 D. 343, occurred in our own courts, and affords authority entitled to the greatest respect. But I cannot regard it as a judgment to rule the present case. It involved no interpretation of a clause such as that now in question. The case was that of a contract to build a tank for the Dundee Gas-Light Company. The contractor became bankrupt, and had his estates sequestrated. The Court held, as to the materials which were lying on the ground, ready to be built into the tank, that the company were entitled to have these retained and used for that purpose; and the law has many analogies warranting these being considered as substantially in the same position with the already reared structure. The implements of the contractor, equivalent to the plant in the present case, the Court expressly held not to have passed in property to the gas company, but to have fallen under the contractor's sequestration; at the same time to have been subject to the use of the company for completing the work; they paying to the trustee a reasonable consideration for their use. Whether in these respects, the decision was right or not, I do not think the case affords authority for the determination of the present. If it did, I would say, with all humility, it is a case which would deserve reconsideration.

On the whole matter, I am of opinion that the clause relied on is ineffectual to vest any real right in the railway company, in competition with the trustee in the contractor's sequestration. If the contractors had become bankrupt, and had their estates sequestrated the next week, or the next day after the contract had been engaged in, I think this plant would, according to law, have passed under the sequestration. The mere lapse of time has operated no difference. And accordingly the railway company has not, as I understand, appeared as a defender in the present case to resist the claim of the trustee. With regard to the compearing defender, the cautioner for the contractors, I am of opinion that the deeds on which he relies are ineffective, even though granted with the railway company's assent, to compete with the trustee's right.

LORD JUSTICE-CLERK—I agree with Lord Neaves.

LORD COWAN—The decision in the case of *Kerr's Trustees* is, I think, so important an authority, and I regard it as having fixed principles so applicable to the present case, that I think I ought to notice that which was repeatedly stated in the course of the discussion of this cause, that the decision was that of a divided Court. As regards the principles applicable to this case, it was a decision of all the Judges who gave their opinion in that case as reported. I believe that it has been thought that I dissented from these principles; but that was not so; and therefore, in stating my entire concurrence in the opinion of Lord Neaves, I may explain that in the case of *Kerr* I did not differ from the other Judges with regard to the *effect* of the materials and tools, including the crane, being brought to the company's premises, and so put under their control, in completing any real right of property or pledge for which the company had contracted. But the tools, including the crane, appeared to me to have been brought to the company's premises solely for the contractor's own purposes in the execution of the work. On this ground I thought, erroneously I must hold, that the trustee's real right to the property of the tools and crane was subject to no burden and preferable right in security. Quite different is the legal principle to be applied when there is an *express contract* that materials and plant, when brought to the ground, shall be subject to a real right in the employer to secure fulfilment of the contract. The possession necessary to perfect the real right claimed in such a case arises from the fact of the subjects of the security having been brought to the company's premises.

LORD ARDMILLAN—I concur in the opinion of Lord Neaves.

LORD PRESIDENT—I also concur with Lord Neaves. The question was slightly amended after it came to us, and that must be kept in view. It stands, "Whether the pursuer is entitled to prevail in the reduction of the deeds libelled, in whole or in part, in so far regards the plant referred to in the record, without further inquiry or proof?" It is that question which we must be understood as answering in the negative.

Agent for Pursuer—H. Buchan, S.S.C.
Agent for Defender—James S. Mack, S.S.C.

Friday, July 9.

FIRST DIVISION.

SCOTT'S EXECUTORS *v.* GILLESPIE.

Agreement — Partnership — Books of Copartnery. Findings by the Court on agreement between parties as to division of profit.

This was an action of count, reckoning, and payment, brought by the executors of the late John Scott of Rodono, W.S., against John Gillespie W.S. Scott and the defender were in partnership from 1847 to 1854.

The Lord Ordinary (BARCAPLE) pronounced this interlocutor.

"*Edinburgh 20th May* 1869.—The Lord Ordinary having heard counsel for the parties, and considered the proof taken in terms of the interlocutor of 13th March last, and the closed record, Finds that, in terms of a letter, dated 21st June 1849, addressed by the deceased John Scott to the defender and assented to by him, the division of the profits of the partnership business, to be carried on by them for the three years from 30th June 1849 to 30th June 1852, was to be in the ratio of three-fourths to Mr Scott, and one-fourth to the defender: Finds that the said John Scott subsequently made a concession in the defender's favour, in regard to the division of profits for the two years from 30th June 1850 to 30th June 1852, by agreeing that for these two years the business income, up to £1600, should be devisible according to the foresaid original agreement, but that, of all profits

above that sum the defender's share should be one-third instead of one-fourth: Finds it is not proved that the concession so made by Mr Scott, applied to the year from 30th June 1849 to 30th June 1850, or that he ever made any further concession in regard to the division of profits for any portion of said three years from 30th June 1849 to 30th June 1852; reserves all questions of expenses, and appoints the cause to be enrolled for further procedure."

The defender reclaimed.

GLOAG for reclaimer.

LANCASTER for respondents.

The Court adhered to the first and second findings of the Lord Ordinary, and, *quoad ultra*, recalled.

LORD KINLOCH—The present is a process of accounting, having reference to the affairs of the firm of Scott & Gillespie, Writers to the Signet, carried on in partnership by the deceased Mr John Scott and the defender Mr Gillespie. The Lord Ordinary has pronounced on certain points in the accounting, and his findings are now to be reviewed by us.

There is no controversy as to the first finding, "that, in terms of a letter dated 21st June 1849, addressed by the deceased John Scott to the defender, and assented to by him, the division of the profits of the copartnership business to be carried on by them for the three years from 30th June 1849 to 30th June 1852 was to be in the ratio of three-fourths to Mr Scott and one-fourth to the defender."

I further agree with the second finding of the Lord Ordinary, which is to the effect "that the said John Scott subsequently made a concession in the defender's favour in regard to the division of the profits for the two years from 30th June 1850 to 30th June 1852, by agreeing that, for these two years the business income up to £1600 should be divisible according to the foresaid original agreement, but that of all profits above that sum the defender's share should be one-third instead of one-fourth." Whatever was the date of the letter appealed to by both parties on the subject of this concession, I consider the meaning thus put on it by the Lord Ordinary to be its only sound construction.

The important question between the parties is on the subject of a still further concession, alleged by the defender to have been made by Mr Scott with reference to these three years from 30th June 1849 to 30th June 1852, viz., that, in place of the sum of £1600 being taken as the limit of the primary division into fourths, the lesser sum of £1200 should be taken, and all above that sum divided into two-thirds to Mr Scott and one-third to the defender. If the defender is well founded in this allegation, the second finding of the Lord Ordinary would become immaterial, the whole three years being in that view under this last arrangement. But the Lord Ordinary has "found it not proved that Mr Scott ever made any further concession in regard to the division of profits for any portion of said three years from 30th June 1849 to 30th June 1852."

The point of discussion thus arising has had not a little difficulty thrown around it from the direct contrariety of statement made on the subject by the two partners respectively. It is not disputed on either side that, in the course of the year 1852, and whilst a balance still remained to be made of the three years prior to 30th June in that year, there were conversations between the two partners as to a fresh arrangement of profits. But Mr Scott has stated, in various records of his testimony still extant, that this arrangement was altogether prospective, applicable to the period posterior to 30th June 1852; whilst the defender states that it was intended to govern retrospectively the division for the three previous years. There is not the slightest room for thinking that either party is in this doing anything but stating honestly, and in good faith, his true belief on the subject. The honour of both parties remains wholly unimpeached. There has been more or less misapprehension, probably on both sides. But the great discrepancy between the statements creates at first sight some embarrassment, and would go far to deprive the question of solution if nothing was before the Court but the oral testimony of the respective partners.

There is other evidence, however, within reach, to which, in this state of things, it is necessary to have recourse. And the first and most important item consists of the books of the firm. The books of every copartnership are rightly said to be, in the general case, the writ of all the partners. Certainly they must always constitute evidence of the highest value, in regard to the copartnership arrangements, where nothing appears to affect their accuracy and trustworthiness.

The books of Scott & Gillespie, as regularly and formally balanced for the three years in question, show a division of profits exactly in terms of the statement by the defender, viz., a division up to £1200 of three-quarters to Mr Scott, and one-quarter to the defender, and, of all profits beyond this sum, of two-thirds to Mr Scott, and one-third to the defender. This division stands out on the face of the books in plain and full expression, so as to leave no doubt what is meant. And it is not merely contained in a single note or jotting, as at first appeared to be the case. The Court has satisfied itself, by means of the production of the books, that it pervades the accounts both of the company and the respective partners, according to the most correct forms of book-keeping.

There is, further, some important evidence as to the authority on which the books were so made up. Mr Lamb, now solicitor in Nairn, was formerly in the service of Messrs Scott & Gillespie; and he depones that, about October 1852, he, being then assistant cashier, entered the division of profits for these three years, from the dictation of Mr Rendall, then principal cashier, since dead. He is shown a memorandum prepared by Mr Scott, setting forth the identical division inserted in the books, and he says—"It is my impression that that was the document from which Mr Rendall dictated to me the division of profits for the years 1850, 1851, and 1852."

Mr Scott admits the preparation of this memorandum, and that it was given to Mr Rendall for his guidance in making up the books, Mr Rendall being book-keeper as well as cashier. But he says that it was merely illustrative of the proposed future arrangement, and was not intended to be applicable to the three previous years, and was erroneously so applied. Mr Scott is no doubt here stating what he conscientiously believed at the time of making the statement; but not only the oral testimony, but the real evidence in the case, is adverse to the accuracy of his recollection. In October 1852, and indeed through the whole of that year, there could be no preparation of a balance for any year subsequent to 30th June 1852; the balance for the first of these years could not be

made till after 30th June 1853; and any instructions for a balance given during 1852 could only apply to the three previous years, the balances for the whole of which were, from circumstances in the business which are fully explained, all made up at the same time in the after part of that year. Not only so, but the memorandum prepared by Mr Scott and given to Mr Rendall, whilst exactly tallying with the arrangement averred by the defender to have been the ultimate arrangement for these three years, and as such to be embodied in the books, is essentially at variance with the arrangement agreed on by the parties for regulating the after years. It was an arrangement, as already said, for dividing the first £1200 of profits into three-fourths and one-fourth, and all above that sum in the proportion of two-thirds and one-third. Now, the arrangement agreed on for the after years was that, first, a sum of £200 should be laid aside preferentially for Mr Scott, and that all the profits beyond should be divided in the proportion of two-thirds to Mr Scott and one-third to the defender, a mode of division different in form, and to some extent different in substance also. The inference at once arises that Mr Scott's memorandum was not intended, as he afterwards erroneously thought, for the regulation of the after years, but constituted Mr Rendall's authority for making up the books for the three past years, exactly as they now appear.

It is admitted by Mr Scott that he looked into the books, and saw them made up as they now appear, once and again in the course of the two subsequent years. The division of profits as therein set forth was, as already said, express and unambiguous. Mr Scott's attention was specially called to the matter by a letter to him from the defender, dated 10th August 1853, bearing reference to this very subject of the division of profits, and nothing else. The defender in this letter contrasted the division for the previous years with that which was current for the three new years of which the first had just closed. The first he states exactly as in the books; he second he states as made on the different footing of deducting £200 for Mr Scott preferentially, and dividing the balance into two-thirds to Mr Scott and one-third to himself, giving himself thereby an advantage of £33, 6s. 8d. over the division for the three previous years. With the matter thus prominently brought before him, Mr Scott admittedly stated no objection till the month of April 1854, when, or shortly afterwards, he undoubtedly took up the ground subsequently maintained by him, that the whole proceedings were erroneous and required rectification.

I have, in these circumstances, formed a clear opinion that the Court has no alternative except to take the entries in the books as accurately expressing the agreed on division of profits for the three years in question. The books constitute the appropriate evidence *inter socios* of all copartnership arrangements. It will require some special and exceptional circumstances to warrant a deviation from the application of this rule. In the present case the additional evidence confirms, and does not contradict, that of the books. I think it is impossible, in opposition to these books, to give any weight to the adverse recollection of a single partner. However honestly entertained his impressions may have been, they cannot be effectually set up against the legal and sufficient evidence of the copartnership records.

The practical result is, that the interlocutor of the Lord Ordinary should be affirmed as regards its two first findings, and recalled *quoad ultra;* that the Court should find it proved that in the year 1852 it was agreed between Mr Scott and the defender that, for all the three years from 30th June 1849 to 30th June 1852, the sum of £1200 should be taken as the amount of profits to be divided, in the proportion of three-fourths to Mr Scott, and one-fourth to the defender, and all the profits above that sum should be divided in the proportion of two-thirds to Mr Scott, and one-third to the defender; and should remit to the Lord Ordinary to proceed in the accounting on that footing.

Agents for Pursuers—Scott, Moncrieff, & Dalgety, W.S.

Agent for Defender—M. M. Bell, W.S.

Tuesday, July 6.

BARNS GRAHAM *v.* DUKE OF HAMILTON.

Property—Mineral Lease—Reserved Right to Minerals—Use of Underground Passages for conveying Coal. In a feu-right the superior reserved the minerals, with power to sink pits, &c., and free ish and entry for winning and removing the minerals. *Held* that he was not entitled to use any of the roads or passages, which had been constructed for removal of the reserved minerals, for removing minerals raised in other lands.

The pursuer is proprietor of the estate of Cambuslang, in the county of Lanark, of which estate, with the exception of a small part held of the Crown, the defender, the Duke of Hamilton, is superior. In the pursuer's titles there is a reservation to the superior of the coal and limestone within the bounds of a certain part of the estate, with power to set down coal pits, shanks, and sinks, and win coal and limestone within the bounds of the said lands, or any part thereof, "and to make all engines and easements necessary for carrying on the said coal and limestone work, and fee ish and entry thereto for making sale thereof, and away taking the same; the said Duke and his foresaids always giving satisfaction to the said John Hamilton" (the pursuer's author), "his heirs and successors, for any skaith or damage they may sustain through downsetting the coal pits, sinks, or shanks, or by winning the said coal or limestone, or by the roads and passages for away taking the same, in manner particularly mentioned," &c.

The Duke of Hamilton is also proprietor of the coal in the lands of Morristown and Clydesmill, adjoining Cambuslang, and not belonging to the pursuer. The pursuer now brought this action against the Duke of Hamilton, and also against J. & C. R. Dunlop, trustees for the firm of Colin Dunlop & Co., ironmasters, alleging that it had recently come to his knowledge that the Dunlops, in virtue of a lease from the Duke of Hamilton, and with the Duke's sanction, had worked and carried away a quantity of coals by underground, through the estate of Cambuslang, these coals being to a great extent raised from seams in lands not belonging to the pursuer, and not within the limits of the Duke's reserved rights. He alleged that, while the defenders were entitled to sink pits on the pursuer's lands to which the clause of reservation applied, and to make the necessary roads and passages therein, for winning and taking away the coal found