The defenders (with the exception of Bailies Stirling and Somerville) reclaimed.

SOLICITOR-GENERAL and HALL for them.

SCOTT for pursuer.

W. F. HUNTER for defenders Stirling and Somerville.

The Court adhered, finding the reclaimers liable in expenses.

Agents for Reclaimers—Maconochie & Hare, W.S.

Agent for Pursuer—Wm. Officer, S.S.C.

Agent for Defenders Stirling and Somerville—John Galletly, S.S.C.

Saturday, July 9.

SECOND DIVISION.

MORE, PETITIONER.

Process—Appeal—Service. Procedure under section 41 of the Titles to Land Consolidation Act 1868, where competing petitions for service have been appealed to the Court of Session.

Alexander, Agnes, and George More died infeft in the lands of Monkrigg and others, in Haddingtonshire, intestate and unmarried. Alexander, the last survivor, died on 19th June 1869. His nearest relation was the petitioner James More, of the custom house, Kirkcaldy. He accordingly came to Monkrigg, took possession of the house, and acted as chief mourner at the funeral. At the meeting of relations of the deceased thereafter, his agent claimed for him, without dispute, the characters of heir of line and of conquest to the deceased, and his brother and sister George and Agnes. Careful searches were made in the repositories of the deceased, and various family papers, certificates of births, &c., were found. The petitioner was decerned and confirmed executor of the deceased Alexander More in September following, and for several months continued in undisturbed possession of the property. On presenting petitions for service to the Sheriff of Chancery, it was found competing petitions to all the estates had been lodged by a claimant John More. Both claimants were agreed, and the family papers and birth registers proved, that William More, grandfather of Alexander, George, and Agnes More, had six sons and one daughter, viz., George, Isabel, James, William, David, John, and Thomas. George, the oldest son, came to Edinburgh, and became a baker in West Richmond Street. He amassed considerable property, which was increased by his children, and as they all died, as above stated, intestate and unmarried, the competition for their property arose.

James More senior, father of the petitioner, went to reside at Pathhead towards the end of last century; and the petitioner claimed the heritage and conquest of the Mores of Monkrigg, on the ground that they were the children of the oldest son of William More of Common Park, and that he was the only surviving son of the second son, viz. James More senior. John More was grandson of David the fourth son, and he opposed, asserting that James More senior was older than George More senior; that the petitioner was not a son of James More senior; and that the relatives of Alexander More nearer in blood than himself were all dead. On his application the estates were sequestrated. The Sheriff of Chancery conjoined the respective petitions, and granted both parties a proof, but before the proof began John More took the case, by appeal under the 41st section of the Titles to Land Consolidation Act of 1868, to the Second Division. The Court appointed a proof to be taken before one of themselves on June 27th, and appointed John More, as the earliest petitioner and as appellant, to lead in the proof. On June 22d John More lodged a minute, withdrawing from the competition.

The proof accordingly proceeded in absence, before Lord Neaves.

GLOAG and LEES for the petitioner.

The proof, after certification, appeared in the single bills on July 7th, and was sent to the Summar Roll, the case being already in it. Counsel having been heard, the Court unanimously held the petitioner's case fully made out, and in terms of the 41st section of Titles Act of 1868, remitted to the Sheriff of Chancery to serve the petitioner in the characters craved for.

Agents for Petitioner—Gillespie & Bell, W.S.

Tuesday, July 12.

FIRST DIVISION.

BOYLE *v.* HUGHES.

Agreement—Sale—Special Warranty. A agreed to supply kelp to B of the same kind and quality as he had supplied to him in a previous year. *Held* that this special warranty did not import that the kelp must contain an equal quantity of iodine, but merely that it was gathered on the same shore and treated in the same manner as the former cargo.

This was an action at the instance of Manus Boyle of Dungloe, Ireland, against F. H. Hughes, manufacturing chemist at Borrowstounness, to recover the sum of £329, 15s. 10d., being the balance due for kelp supplied to the defender.

The parties have had several previous dealings in kelp, and in 1868 Boyle supplied Hughes with a cargo of kelp per a vessel called the "Flora Kelso." By letters dated in March and July 1868, the pursuer agreed to furnish to the defender cargoes of "such kelp as you supplied per 'Flora Kelso' last year," at the price of £6, 14s. per ton of 21 cwts., to be delivered at Borrowstounness. Accordingly the kelp was delivered and certain sums paid to account of the price, and the present action is for the purpose of recovering the balance due.

The defence was that the kelp was disconform to order, and was of no value to the defender, in respect that it did not contain a sufficient percentage of iodine.

The defender alleged, "in point of fact, the kelp sent by the pursuer in August and September 1869 by the 'Albion,' 'Flora Kelso,' and 'Ada,' was entirely disconform to contract, and was not nearly equal in quality to that sent by the 'Flora Kelso' in 1868, as stipulated for. The value to the defender, as already explained, consists in the iodine yielded. The kelp per 'Flora Kelso' of 1868 yielded 20½ lbs. of iodine per ton of 20 cwts., whereas the kelp above mentioned sent in 1869 yielded only, as shewn by analysis, as follows:—

Kelp, per 'Albion,' . . .	10·67 lbs.
Do. per 'Flora Kelso,' of 1869	12·29 ,,
Do. per 'Ada,'	8·93 ,,

thus yielding on an average only one-half the amount of iodine yielded by the sample or pattern

cargo. The kelp so sent in 1869 was only worth at the utmost from £4 to £5 per ton."

The Lord Ordinary (MURE) allowed a proof, and thereafter pronounced this interlocutor and note:—"*6th April* 1870.—The Lord Ordinary having heard parties' procurators, and considered the closed record, proof adduced, and productions, Finds that in or about the months of March and June and July 1869 contracts were entered into between the pursuer and defender, under which the pursuer undertook to supply the defender, at the rate of £6, 14s. per ton of 21 cwt., with about 300 tons of kelp, of the same kind and quality as that which he had supplied to the defender by the ship 'Flora Kelso' in June 1868: Finds that in the months of August and September 1869 about 307 tons of kelp were delivered by the pursuer to the defender as in fulfilment of the above contract; and that the said kelp was on arrival rejected by the defender, as being disconform to contract, and is now lying in the stores of the defender, at the risk of the pursuer: Finds that the pursuer has failed to prove that the kelp so delivered to the defender was of the same kind and quality as that supplied by the 'Flora Kelso' in 1868; and that the defender was warranted in rejecting the said kelp as not being of the stipulated quality: Therefore assoilzies the defender from the conclusions of the action, and decerns: Finds him entitled to expenses, of which appoints an account to be given in, and remits the same when lodged to the Auditor to tax and report.

"*Note.*—The terms of the contract entered into between the pursuer and the defender relative to the kelp in question are clearly expressed in the correspondence which passed between the parties, in which it was conditioned, and agreed to on the part of the pursuer, that the kelp was to be of the same quality as that 'sent per "Flora Kelso" last year.' So that the main question raised for decision is, whether the kelp supplied under these contracts was of the stipulated quality?

"That the cargo of kelp per 'Flora Kelso,' purchased by the defender from the pursuer in 1868, was believed at the time to be, and was of a very superior quality, cannot, it is thought, admit of any serious dispute. In the letter of the pursuer announcing its shipment in June 1868, he describes it as 'about the best kelp ever left county Donegal;' and it is spoken of in similar terms by the servants of the defender. From the analysis, again, which was made of it by the defender himself on its arrival on the 1st of July 1868, it appears to have contained upwards of 20 lbs. of iodine per ton of 20 cwts., or about 21 lb per ton of 21 cwts. This analysis was entered at the time in a book kept by the defender for that particular purpose, which contains the analysis of all purchases of kelp made through a long series of years; and as the analysis shews a yield of iodine corresponding to the character given by the pursuer of the kelp when shipped, there seems no reason to doubt its general accuracy.

"The fact that the kelp yielded a very large quantity of iodine was made known to the pursuer in the autumn of 1868, when the defender was settling his account for the kelp purchased during that year, the other portions of which had turned out to be inferior in quality to that sent by the 'Flora Kelso,' and were paid for at a much lower rate. This was admitted in evidence by the pursuer, and although he says that he has no recollection of the analysis being read over to him from the book, the Lord Ordinary sees no reason to doubt that the account given of that matter by the defender and his principal clerk is correct.

"It was in this knowledge, therefore, of the quality of the kelp thus supplied to the defender in 1868, and of the fact that iodine was the ingredient which the defender chiefly looked to for the purpose of his manufacture, inasmuch as the other kelp furnished by the pursuer to the defender in 1868 was found fault with because of the deficiency of the yield of iodine, that the pursuer undertook in 1869 to supply kelp of the same quality as that sent by the 'Flora Kelso.'

"But the kelp supplied in 1869 appeared, upon being analysed, to be very inferior in quality to that sent by the 'Flora Kelso' in 1868, and, on the highest calculation, not to be capable of yielding more than 14-17 lbs. of iodine per 21 cwts. The analysis which brings out this result was made from a sample taken by the pursuer from the defender's stores, and which the defender says was a picked sample; but it is substantially confirmed by the analysis of other chemists, namely, Mr Mahony and Dr Wallace, who each of them found upwards of 13 lbs. of iodine per ton of 21 cwts. in samples taken from the same store. Holding 13 lbs. to 14 lbs. of iodine per 21 cwts. to be the average yield of the cargoes sent to the defender in 1869, —that is, at the rate of from 6 lbs. to 7 lbs. per ton less than the quantity obtained from the 'Flora Kelso' kelp; and there is, therefore, a deficiency in quality sufficient, in the opinion of the Lord Ordinary, to entitle the defender to maintain that he has not received kelp of the stipulated quality.

"Evidence has, however, been adduced with a view to show that the analysis made by the defender of the 'Flora Kelso' kelp in 1868 is not to be relied on; and, as against its accuracy, there is produced one made by Mr Tatlock of Glasgow of a sample of kelp sent to him by the pursuer in November 1869, which was found to contain only 12·70 lbs. of iodine per ton. This sample is said to have been part of one which was taken of the 'Flora Kelso' kelp in 1868, and kept by the pursuer in his office in Ireland, where it lay till November 1869. But there is no corroboration of the pursuer as to the manner in which this sample was kept, or as to where it was kept; and as it is not impossible that other materials may have been mixed with it during the eighteen months it lay in the shop, especially if any portion of it consisted of small or decomposed matter, the Lord Ordinary does not think that it would be safe to deal with it as being a proper sample of the 'Flora Kelso' kelp of 1868, or that the relatively small quantity of iodine contained in it can be accounted for by any supposed loss through exposure; for Mr Tatlock says that if kept dry in a tea-chest, which the pursuer says it was, the loss would not be appreciable, and kelp which only yields 12·70 lbs. of iodine per ton of 21 cwts. would certainly not come up to the description given by the pursuer at the time of the kelp shipped by the 'Flora Kelso' in 1868.

"The Lord Ordinary has therefore come to the conclusion that there is nothing proved on the part of the pursuer to discredit the general accuracy of the analysis made of that kelp by the defender on its arrival in 1868; while there are, on the other hand, circumstances connected with the manufac-

ture of the kelp delivered in 1869—such as the comparatively late period of the year at which it was made, the difficulty there was in getting weed in the spring, the wetness of the weather, up at all events to the 22d of June 1869, and the character of the locality from which a considerable portion of it came—which are, in the opinion of the Lord Ordinary, of themselves sufficient in a great measure to account for its defective quality."

The pursuer reclaimed.

FRASER and BLACK for him.

SHAND and MACLEAN in answer.

The Court unanimously recalled the Lord Ordinary's interlocutor. There was no doubt a special warranty which the pursuer was bound to satisfy, but it was not to the effect that the kelp would contain the same per centage of iodine as that sent by the "Flora Kelso," but that it should be of "the same kind and quality." That stipulation was fulfilled when it was gathered on the same shore and treated in the same way as the former cargo. It had been proved that it would be impossible to find kelp which contained 20½ lbs. of iodine per ton, as it was alleged by the defender the kelp of the "Flora Kelso" had done.

This result was obtained by the defender from an analysis, the principle of which he refused to explain, and therefore the presumption in favour of the difference of quality which would have existed if the analysis of the two cargoes had been properly conducted did not hold.

Agent for Pursuer—J. Curror, S.S.C.
Agents for Defender—J. & R. Macandrew, W.S.

Tuesday, July 12.

SECOND DIVISION.

ORR'S TRUSTEE *v.* TULLIS.

Sale—Plant of Newspaper—Bona fides—*Delivery—Possession—Tenant—Transfer.* The proprietor of a newspaper, who held the copyright and himself printed and published it, became embarrassed, and ultimately sold the copyright and whole printing plant to the defender, who was his landlord in the premises in which the business of the paper had been carried on. The contract of sale was completed under certain powers of redemption by the purchaser, and thereafter the seller took a new lease of the premises, renouncing the old one, and also took a lease from the defender of the copyright and plant. The seller continued his possession under this arrangement for six years without any challenge of the contract of sale. Meanwhile the defender had paid the full price of the subjects; was gazetted as proprietor of the copyright; had paid rent for seven years, had insured the subjects in his own name as owner; and his right as owner of the subjects had been judicially asserted more than once in sequestrations for rent, the lease being fully set out in the several petitions, and the printing plant being specified as part of the subject for which rent was due. *Held*, in an action at the instance of the trustee on the sequestrated estate of the seller, that the contract of sale in question was a *bona fide* and not a simulate transaction, and that under it there had been possession of the subjects by the defender through his tenant the seller, and that the property was thereby effectually transferred.

This was an action of reduction brought by the trustee on the sequestrated estate of John Cunningham Orr, some time proprietor of the *Fife Herald*, against Robert Tullis, residing in Markinch, formerly residing in Cupar, and the object was to set aside certain deeds whereby the copyright, plant, &c., of the *Herald* were transferred to Mr Tullis by Mr Orr in the year 1863, or, at all events, to obtain declarator that the subjects in question had never been validly transferred to Mr Tullis, and fell under the sequestration of Mr Orr. It appeared that Mr Orr was proprietor of the newspaper in question, and held the copyright, and himself printed and published the paper, carrying on his business in premises rented from the defender. In 1863 he got into embarrassments, and entered into an arrangement with the defender, whereby he sold to the latter, subject to certain powers of redemption, the copyright and whole printing plant on the premises, and agreed to renounce his lease of the premises, and take a new lease of the premises, copyright, and plant. Orr continued in possession under this arrangement till 1869, when he became bankrupt, and his trustee then brought the present action, in which he pleaded, in the first place, that the transaction was simulate, and not a *bona fide* sale; and, in the second place, that, at all events, the defender had never obtained possession so as to vest him with the property either of the copyright or plant.

The Lord Ordinary (GIFFORD), on advising a proof, pronounced the following interlocutor:—"The Lord Ordinary, having considered the closed record and proof adduced by the parties, and having heard parties' procurators, assoilzies the defender from the reductive conclusion of the libel, and also from the first declaratory conclusion, being the first alternative conclusion of the libel: Finds that the copyright, proprietorship, or right of publication of the newspaper called *The Fife Herald, Kinross, Strathearn, and Clackmannan Advertiser*, was effectually transferred to and vested in the defender prior to 29th March 1869, being the date of the sequestration of the estates of John Cunningham Orr, and that the same was not attached by the said sequestration; but finds that the various moveable articles and effects specified and contained in the inventory annexed to the conveyance, dated 21st October 1863, No. 7 of process, not having been delivered to or taken possession of by the defender prior to the said sequestration, the property thereof still remained vested in the person of the said John Cunningham Orr, and that the said articles were effectually attached by the said sequestration, and were carried to the pursuer, as trustee in the sequestration, for behoof of the creditors of the said John Cunningham Orr; and finds and declares that the said moveable articles specified in the said inventory are the property of the pursuer, as trustee foresaid, and that he is entitled to obtain possession of the same, and to dispose thereof for behoof of the creditors: *Quoad ultra* assoilzies the defender from the whole other declaratory conclusions of the summons, and decerns: Reserves meantime all questions of expenses, and appoints the cause to be enrolled with a view to the disposal of the remaining conclusions of the action.

"*Note.*—Under the interlocutor pronounced by Lord Barcaple, dated 24th November 1869, a very long and elaborate proof has been led. Indeed