have stated it already, that the landlord's right to the goods—the crop, seed, fencing, anything else—is under the contract of lease, and his corresponding obligation to pay the price now ascertained to be £362, 14s. 6d. is under the precise contract of lease between the same parties. I am therefore of opinion with the Sheriff-Substitute that there is here a *concursus debiti et crediti*, and that in the balancing of accounts the one claim must be set against the other and a ranking given for the balance.

I do not think it necessary in the view which I have expressed to enter upon any examination of any of the cases. I do not think there is any case to the effect that if a creditor has got possession of part of what would have been the bankrupt estate had he not got possession of it under a lawful contract with the bankrupt himself, he is not entitled to set any liability to pay money in respect of it, against a similar liability on the part of the bankrupt in his favour. I put the case of a furnished house—the house is let on lease, the furniture is sold, and the tenant is under an obligation at the termination of the lease to leave the premises, and to leave the furniture in them. It may be the same furniture or other furniture, the landlord being bound to take it, and bound to pay either a fixed price or a price to be ascertained by valuation. I put the case that this lease has endured for three years, and that then the tenant dies. The landlord enters into possession of house and furniture; he may let it as a furnished house to a tenant, *i.e.*, another tenant, or he may live in it, and occupy it himself. What is his obligation? The furniture is his; his obligation is to pay for it. But then there is a similar obligation on the part of the tenant to pay his rent, and the one may be set against the other. There is no case to the contrary of that, and I cannot distinguish between grain crops or wire fencing upon a farm, and furniture in a house.

My opinion, therefore, is in accordance with the judgment of the Sheriff-Substitute upon everything except only the turnips, but I agree in the result with respect to the turnips also. By the regulations under which the farm was held, no turnips were to be removed from the farm. Many landlords, or the managers for landlords, think that it is most for their advantage—because for the welfare of the farm—that turnips should not be removed, but should be consumed upon it. The tenant is at liberty to consume them, the animals consuming them leaving a relic behind which enriches the farm. To enforce that the turnips shall be grown and so used as to be for the benefit of the farm, the tenant is prohibited at the conclusion of his lease from removing any turnips. He may use them, but if he has not used them, the landlord is entitled to insist that they shall be left on the farm at the conclusion of the lease. That is the contract Now, the trustee in bankruptcy had no right to take these turnips; he had no more right than the tenant himself had, and the tenant had none, for according to the quite intelligible contract which I have just referred to, the contract was that they were to remain there, and that was binding upon the trustee and upon the creditors, and the turnips which it was contracted should remain, could not have been removed by poinding creditors or in any way whatever. The landlord seems to have been willing to pay for the turnips which were left, and not to press the stipulation in the regulation to the extent of saying—"I will take these turnips and feed my sheep with them without paying anything." I think it seems probable that that was his legal right, but he agreed to pay for them. Only upon such an agreement to pay for these turnips, which could not be removed from the farm, I think he is entitled to set-off against it the claim for the rent of the land during the time these turnips were grown upon it.

In short, in respect of what I have said, and literally making no distinction in the result between the turnips and the other matters which are referred to, my opinion is that the appeal ought to be dismissed with expenses.

LORD RUTHERFURD CLARK—The material fact in this case to my mind is that the landlord was in possession of all the articles upon the farm before the date of the sequestration. If that had not been so, I think some serious questions might have arisen for our determination, but as I hold that possession took place before the date of the sequestration, I concur.

LORD TRAYNER and the LORD JUSTICE-CLERK concurred.

The Court adhered.

Counsel for Appellant—Rankine—Watt. Agents—Winchester & Nicolson, S.S.C.

Counsel for Respondent—H. Johnston—A. S. D. Thomson. Agents—Mitchell & Baxter, W.S.

Wednesday, February 3.

SECOND DIVISION.

[Sheriff of Lanarkshire.

SPROUL *v.* M'CUSKER.

Bankruptcy—Cessio—Debtors Act 1880 (43 *and* 44 *Vict. cap.* 34), *sec.* 9—*Discretion of Sheriff.*

A grocer having become insolvent granted a trust-deed for creditors, under which he paid 3s. in the pound. One of his creditors refused to accede to the trust-deed, and while he received the dividend did not discharge his debt. The debtor having thereafter obtained employment as a joiner, this creditor by using arrestments and poinding had obtained other 2s. in the pound. The debtor presented a petition for *cessio*. His state of affairs

showed practically no assets. His other creditors were his mother-in-law, who had lent him a little money, his landlord, and two tradesmen. These persons had become his creditors since the date of the trust-deed. In his examination he expressed his intention, if he could, to pay these creditors in full, but said he did not propose to make any arrangement to pay the creditor above mentioned, who accordingly opposed the granting of *cessio*. *Held* that the debtor was entitled to *cessio*.

John Sproul, journeyman joiner, 244 Cumberland Street, Glasgow, raised a process of *cessio* in the Sheriff Court there. He stated that he was notour bankrupt, was unable to pay his debts, and that his inability to pay his debts arose through misfortunes and business losses.

According to the state of affairs Sproul's only assets were worth £3, 5s. The furniture in the house he occupied was stated to be his wife's. The state showed that there were five creditors, whose debts amounted in all to £56, 7s. 3d. The chief creditor was James M'Cusker, commission agent, to whom Sproul owed £27, 10s. 3d. He opposed the granting of *cessio*. One of the others was Sproul's mother-in-law, to whom he owed £11, and his landlord, to whom he owed £13, 10s. The other two were tradesmen. The state of affairs also showed that Sproul had previously been in business as a grocer, but in 1889 had been obliged to grant a trust for creditors, under which they received 3s. per pound.

From the examination of Sproul it appeared that M'Cusker, the objecting creditor, was then a creditor for the same debt, and had received the dividend. The debt arose from M'Cusker having signed bills for Sproul to enable him to buy out his partner in the grocery business. The other creditors under the trust-deed had discharged Sproul on receiving their dividend, but M'Cusker had not. The application for *cessio* was brought in consequence of arrestments of wages and a poinding used by M'Cusker, whereby he had obtained £1, 18s., or other 2s. per pound on his debt. The other creditors at the date of the application for *cessio* were not pressing their claims. Sproul deponed with regard to the creditors other than M'Cusker—"I intend to pay them when I am able;" further, with regard to M'Cusker—"I have already offered to pay M'Cusker £18, 10s. M'Cusker offered to accept £15 in full of his debt before the presentation of the petition. I do not propose to make any arrangement now." Sproul's wages, when fully employed, were 34s. a-week, but on an average over the year about 25s. per week. He offered to assign them to the extent of £5 for behoof of his creditors.

Upon 17th September 1891 the Sheriff-Substitute (BIRNIE) gave decree of *cessio*.

"*Note.*—If the case of *Hairstens*, 13 R. 207, is to be read as meaning that *cessio* is incompetent in the absence of substantial assets, this *cessio* is incompetent; but Lord Shand differed in that case, and, as I read the succeeding case of *Reid*, 1890, 17 R. 757, there is no one absolute rule. As explained by Lord Shand in both cases, *cessio* is the equivalent of sequestration in small estates, and is the commencement of discharge, and it is a question of circumstances whether it ought to be granted or not. In the decisions, so far as reported, either in the Supreme or the Sheriff Courts, the verdict has generally been against the debtor, but in the present case no improper conduct is averred. The opposing creditor has already obtained more than 5s. per pound, and he is the only creditor opposing. It seems to me the debtor ought to be permitted in such circumstances to commence the proceedings necessary for his discharge. When he applies for his discharge, it will then be open to consider if he should not give over some portion of his income to the opposing creditor. In some instances debtors have been ordained to do so as a condition of obtaining *cessio*—*Calderhead*, 1890, 17 R. 1098; *Simpson*, 1888, 16 R. 131—but the present debtor has no sure income, and might fail innocently in any obligation taken by him."

M'Cusker appealed to the Sheriff.

Upon 21st November 1891 the Sheriff (BERRY) recalled the interlocutor and dismissed the petition.

"*Note.*—The question whether a petition for *cessio* should be granted is one of discretion, depending on the circumstances. I give great weight to the opinion of the Sheriff-Substitute, who in the present case has thought that the circumstances are such as to justify the grant, but after a careful consideration of the debtor's deposition, along with the statement of affairs he has lodged, I have come reluctantly to the conclusion that it ought not to be granted *in hoc statu*. The debtor is a working joiner earning weekly wages, which he states at present at 34s. per week. His liabilities are given at £56, 7s. 3d., and his assets at £3, 5s. The largest creditor is Mr M'Cusker, to whom £27, 10s. 3d. is due, and who opposes the debtor's application. Besides Mr M'Cusker there are only four creditors, one of whom, Mrs Gillies, the debtor's mother-in-law, is not, as he says, pressing him, and the others, including his landlord Mr Armour, he says that he means to pay in full. It would thus appear that while paying other creditors in full, he proposes to make no provision for the debt of Mr M'Cusker, his principal creditor. 'I do not,' he says, 'propose to make any arrangement now,' *i.e.*, for Mr M'Cusker. From the existing assets, as set forth in the debtor's statement, it is plain that no means of satisfying any of the debts can be looked for. Even if the £3, 5s., at which his assets are estimated by the debtor, were realised from the articles of household furniture and joiner's tools of which they are said to consist, nothing, after payment of the trustee, would remain for the creditors. There are, in truth, practically no assets for distribution. In refusing the application at present, it is not, I think, necessary to say that a grant of *cessio* is incompetent where there are no assets, but the fact of there being no

assets leads one to look carefully at the position of the debtor before granting his application. Here it is not favourable to the application that the debtor avowedly contemplates making no provision towards the payment of one creditor, while intending to pay other creditors in full. It would, in my opinion, be an abuse of the process of *cessio* to allow a debtor, who comes forward with a statement that he has in effect no assets, to make it a handle for defying a particular creditor, as the debtor here proposes."

Sproul appealed to the Second Division of the Court of Session.

Authorities—*Ross* v. *Hairstens*, November 16, 1885, 13 R. 207; *Reid* v. *M'Bain*, May 16, 1890, 17 R. 757; *Calderhead* v. *Freer & Dobbie*, July 9, 1890, 17 R. 1098.

At advising—

LORD JUSTICE-CLERK—The appellant has been hardly dealt with in this case. It is necessary to look into the circumstances in which the present respondent appealed to the Sheriff against the interlocutor of the Sheriff-Substitute granting *cessio*. This applicant for the benefit of *cessio* is a working joiner, earning when fully employed 34s. a-week. Unfortunately for him he went into business as a shopkeeper some time ago and was unsuccessful, and since then his circumstances have been bad. At the time of his failure in business he executed a trust-deed for creditors, and under this trust 3s. per pound were paid to the then existing creditors. Since then this creditor who is now opposing the *cessio* has got 2s. more per pound from him, or in all 5s., which would be sufficient dividend for the applicant to have paid if it had been paid to all the creditors, and if the question now were whether he could get a discharge under *cessio*. He has no other opponent, the other creditors being content to take the 3s. per pound and leave him alone.

These being the circumstances, I am of opinion that this applicant is entitled to decree of *cessio*.

The remaining question is as to the conditions upon which it is to be granted. The cases cited on that point are cases in which the debtor had a salary, and in these cases the applicant was obliged to assign part of it for his creditors' behoof as a condition of obtaining decree of *cessio*. But this man is not in receipt of such an income. He is a working man with weekly wages. I do not think that the case is appropriate for such a condition, all the more so as it is clear that when the appellant comes to apply for a discharge conditions applicable to his circumstances as then existing may be introduced into the discharge.

LORD YOUNG—I am of the same opinion. I am not disposed to agree with the Sheriff that there is good ground for refusing *cessio* in the fact that the appellant has expressed his intention of paying his creditors in full with the exception of the respondent His intention to pay in full is a laudable one, and whether he has good grounds for not including this particular creditor within that laudable intention, I have no means of knowing. He has somehow stirred up that creditor—his present opponent—to stand upon his utmost rights, for he has done diligence against him by arrestment and poinding, and in this way has recovered somewhat more than 3s. per pound.

It was explained that this *cessio*, in which all the creditors except this one concur, is prosecuted only to prevent the continuation of these proceedings on the part of the respondent in the future. I think we shall do justice by affirming the judgment of the Sheriff-Substitute.

LORD RUTHERFURD CLARK and LORD TRAYNER concurred.

The Court recalled the Sheriff's interlocutor and remitted to the Sheriff to grant decree of *cessio*.

Counsel for the Pursuer and Appellant—Younger. Agent—W. B. Wilson, W.S.

Counsel for the Defender and Respondent—Chisholm. Agents—Smith & Mason, S.S.C.

Wednesday, May 18.

FIRST DIVISION.

[Lord Wellwood, Ordinary.

LOUTTIT'S TRUSTEES *v.* HIGHLAND RAILWAY COMPANY.

Property—Sale—Servitude of Access—Implied Grant.

A piece of land was described in a disposition as being bounded on one side by a roadway. This roadway was the private property of the disponer; it was fenced off from the subjects sold, and at the date of the sale access to these subjects was obtained by a small gate, which opened on to the private road close to its junction with a public road.

Held that the disponee was only entitled to a continuance of the existing access, and had otherwise no right to use the private road as an access to the subjects sold to him.

Property—Sale—Warrandice—Latent Defect—Action of Damages.

Observations by Lord M'Laren as to when a purchaser, who discovers after the sale some defect in his title or in the subjects sold to him, has a right to claim damages from the seller while retaining possession of the subjects sold.

By disposition dated 30th March 1874 the Highland Railway Company acquired from James Henderson of Bilbster three roods of ground in the neighbourhood of the town of Wick, and abutting on the river of that name. The disposition contained