station. The petitioner averred that for the last nineteen years the respondent and his family had been in the habit of trespassing on the land between the road and the railway station, chiefly with the view of getting a short cut from the houses to the station; and that there was thus a danger of a right-of-way being established from the station across the agricultural land to the houses beyond the road. The only specific act of trespass mentioned was of date 15th September 1875. The respondent explained that he and his family had occasionally crossed the land in question, but only when it was in grass, and that without objection on the part of the tenant; and that the entering on the land of date 15th September 1875 was on the authority of the tenant, for the purpose of protecting the corn from stray cattle.

The petitioner pleaded that he was entitled to sue for interdict without the consent of the agricultural tenant; and that the respondent was not entitled, without the petitioner's consent, to enter on the land in question.

The respondent pleaded that the petitioner had no title to sue, because the land was in the exclusive occupancy of his tenant, who was not a party to the proceedings, and that as he had not entered the land without the consent, or in opposition to the wishes of, the tenant, the interdict ought to be refused.

The Sheriff-Substitute refused the interdict.

The petitioner appealed.

Authorities cited for him—Taylor on Landlord and Tenant, ed. 1873, secs. 775, 784; *Copland* v. *Maxwell*, Nov. 20, 1868, 7 Macph. 142, and Feb. 28, 1871, Law Rep. 2 Sc. and Div. App. 103; *Breadalbane* v. *Campbell*, Feb. 12, 1851, 13 D. 647, Stair, ii. 4, 36, Erskine, ii. 9, 4.

The respondent was not called on.

At advising—

Lord Ormidale—There is here a bare allegation of trespass, but the land is not in the petitioner's possession, and it is not said that any injury to the subject has occurred, nor that the tenant in possession objects. I am of opinion that such an averment does not amount to a legal trespass. The tenant has a right of exclusive possession and absolute use (Bell's Prin. sec. 1224), but he is entitled to allow others to pass over the land.

Lord Gifford—This is a purely possessory question, in the discretion of the Sheriff. If a legal wrong was seriously threatened, it was his duty to grant interdict; but here the respondent claimed no legal right, but explained that what he did was done upon sufferance, and was confined to the period when the land was in grass. The alarm of the petitioner about a prescriptive right of ish and entry being reared up against him is quite unfounded. In dismissing this petition on the ground of sufferance, we are as distinctly interrupting prescription as if we had granted interdict, for which there seems to be no sufficient ground.

Lord Justice-Clerk—I concur. No abstract question of the rights of landlord and tenant is raised by this case. The only question is, whether the respondent is to be interdicted from taking a short cut to the railway station, which he now and then takes, apparently without objection on the part of the tenant? I do not say that if the station were near a populous village, and a case of habitual trespass were alleged, the landlord might not sue, altogether apart from the consent of the tenant.

Appeal dismissed.

Counsel for Appellant—R. V. Campbell. Agents—Maitland & Lyon, W.S.

Counsel for Respondent—Balfour—M'Kechnie. Agent—Thomas Carmichael, S.S.C.

Tuesday, June 12.

SECOND DIVISION.

[Lord Rutherfurd Clark, Ordinary.

GLASS *v.* HAIG & COMPANY.

Partnership—Contract—Construction.

A contract of copartnership, the object of which was to work certain minerals under a lease, provided that in the event of bankruptcy of either of the two partners, his interest should be ascertained, but that he should have no claim for the prospective value of the lease. One of the partners having become bankrupt — *Held* that the bankrupt partner was entitled to have the machinery and plant valued as for a going concern, but was not entitled to make a claim for the value of pit-sinkings.

This was an action brought by Glass, formerly a partner of the firm of John Haig & Company, against the said firm and against Haig, the sole remaining partner, for a count and reckoning as to the affairs of the Company at 29th May 1873, when it was dissolved by the bankruptcy of the pursuer, who was at the date of this action reinvested in his estate. The said company had been formed for the purpose of working a seam of limestone and fireclay on the estate of Nellfield under a lease acquired by the firm. A claim was made by the pursuer to have certain machinery and plant valued, and also the pit-sinkings in use at the time of the dissolution. The claim was resisted on the ground that the machinery and plant should be valued as for a winding up, and not as for a going business, and that the claim for the value of the pit-sinkings was a claim for prospective value, which was excluded by the following clause of the contract of copartnership:—"*Sixth*, In the event of the bankruptcy of either party, the partnership shall be dissolved, and the lease shall be the property of the solvent partner; the balance belonging to the bankrupt shall be ascertained; and the solvent partner shall give bills for the amount, by equal instalments at six, twelve, and eighteen months. Neither the bankrupt nor his creditors shall have any claim to the prospective value of the lease."

The Lord Ordinary pronounced the following interlocutor:—

"*Edinburgh*, 11*th January* 1877.—The Lord Ordinary having considered the cause, Finds that the defender is bound to account for the machinery

and plant at its value for use at the pit: Finds that the pursuer is not entitled to make any claim for the value of pit-sinkings: And with these findings remits to Mr T. Chalmers Hanna, chartered accountant, to take an account of the copartnery, and to report; with power to him to call for the production of all necessary writs and documents.

"*Note.*—In December 1871 the defender became tenant of a coal-field under a lease which endured for thirty-one years. On 22d April 1872 he entered into a contract of copartnery with the pursuer in order that the lease might be worked on joint-account, and it was declared that the copartnery should endure as long as the lease.

"The sixth article of the contract provides that in the event of the bankruptcy of either party the partnership shall be dissolved, and the lease should be the property of the solvent partner, the balance belonging to the bankrupt should be ascertained, and the solvent partner should give bills for the amount by equal instalments at six, twelve, and eighteen months; and that neither the bankrupt nor his creditors should have any claim to the prospective value of the lease.

"In May 1873 the estates of the pursuer were sequestrated, and the lease in consequence became the property of the defender. The pursuer was in December 1874 reinvested in his estates, and he now sues the defender for an accounting in relation to the copartnery.

"The pursuer does not dispute that the copartnery came to an end by his sequestration; but he contends that in settling his interest under it the lease should be valued as a going concern, and that he is entitled to have a value set on the pit-sinkings. The defender, on the other hand, contends that the valuation should proceed as on a winding-up, and that the pursuer has no claim for the value of the pit-sinkings.

"Both parties were desirous that the Lord Ordinary should decide the principle on which the interest of the pursuer should be settled. This he was willing to do as far as possible, but he wished that the parties should endeavour by mutual admissions to prepare the case for final judgment. Unfortunately they have not been able to agree. But they concurred in asking the Lord Ordinary to dispose of the following points on the record as it stands.

"With respect to the machinery and plant, the Lord Ordinary is of opinion that it should be valued as for use at the pit. The defender took it over and used it. The Lord Ordinary therefore thinks that the defender is bound to pay for it, not at its value for breaking up or removal, but at its value for use.

"But he thinks that the pursuer is not entitled to make any claim for the value of pit-sinkings. The pursuer does not maintain that he can claim repayment of the moneys contributed by him for the purpose of sinking pits. He claims only the value of the pit in so far as available for the output of minerals. To the Lord Ordinary this seems to be a claim for the prospective value of the lease—a claim which is excluded by the contract."

The pursuer reclaimed.

The defender was not called on.

At advising—

Lord Justice-Clerk—It is possible that under some circumstances a distinction might be drawn between the value of a mineral lease and the value of the pit-sinkings. But here we have the case of two gentlemen who enter into a copartnership for the purpose of working this mineral lease, and they contract with their landlord that the necessary excavations should be made. The 6th clause of the contract of copartnership provides—[*reads*]. The prospective value of the lease means the value at the date of the dissolution of the copartnership, that is, its value to a new tenant, an assignee, or purchaser. That necessarily includes the pit-sinkings. The machinery is not the subject of lease, and is also in a different position on the words of the lease. Therefore, notwithstanding the able and ingenious argument of Mr Rankine, I entirely concur with the Lord Ordinary.

Lord Ormidale—I concur. The pit-sinking is not a tangible moveable subject like the machinery. It is of value only in connection with the prospective value of the lease. The sinkings might indeed not pass on a sale; they might be closed up and a new pit opened, but in that case the old sinkings would become valueless.

Lord Gifford—I concur. The stipulation of the partners is that in the event of bankruptcy the insolvent partner shall lose his share of the lease. That, as Mr Rankine said, is not a penal clause, but it is the bargain of parties—a natural and not unusual bargain—and I think it must be given effect to. A lease at its inception has little value; it becomes valuable as the workings proceed. Take the illustration of the branch railway, the construction of which is provided for in the lease. On the other hand, towards the end of the lease the minerals might be near exhaustion. All these things enter into the commercial value of the lease, and here it is quite impossible to separate the lease and the sinkings.

The Court adhered.

Counsel for Pursuer—Rankine. Agents—M'Lachlan & Rodger, W.S.

Counsel for Defenders—M'Kechnie. Agents—Welsh, Forbes, & Macpherson, W.S.

Tuesday, June 12.

SECOND DIVISION.

[Lord Adam, Ordinary.

M'RAE *v.* WILLIAMSON BROTHERS.

Proof—Loan—Writ.

Entries in a defender's business books which *held* not to prove loan *scripto*.

This was an action by M'Rae, a commercial traveller, against a firm of timber merchants near Queensferry, and Alexander Thomson Williamson, South Queensferry, and Robert Williamson, Grangemouth, the individual partners of said company, for the sum of £50, with interest from 5th July 1876.

The pursuer averred that from 1st July 1876 till the end of September he had, according to