On the whole matter I am clear that the objections to the relevancy should not be sustained. On the other points the facts did, in my opinion, justify the conviction of the contravention charged.

LORD ARDWALL—I agree with the opinion just delivered by your Lordship. With reference to the opinion of the Sheriff-Substitute in giving judgment on the relevancy, I may say that I have read that opinion, and it seems to me very ably and clearly to set forth the grounds that exist for repelling the objections which were taken. I specially agree with it with regard to the effect of the Act of 1906. I think the provisions of the Act of 1906 do not interfere at all with the libelling of contraventions under the Act of 1875. They merely give ground for a defence in a charge of picketing, enabling those who were engaged in an alleged picketing to show that it was peaceful in the sense of section 2, sub-section 1, of the Act. The appellants attempted to prove that in this case, and apparently a full proof was led in this matter. The Sheriff-Substitute has given us the result of that proof, which we must now accept as the facts in the stated case, and looking at these I am quite convinced that the defence which was put forward under section 2 of the 1906 Act entirely fails on the ground stated by your Lordship. I concur that the conviction ought to be sustained.

LORD DUNDAS—I entirely agree that the appellants' argument cannot be given effect to, and that the questions ought to be answered in the way that your Lordship in the chair has indicated.

The Court answered the first question in the case in the negative and the fourth in the affirmative, and dismissed the appeal.

Counsel for the Appellants—Crabb Watt, K.C.—A. A. Fraser. Agents—Robertson & Wallace, S.S.C.

Counsel for the (Respondent)—A. M. Anderson, K.C.—Lyon Mackenzie. Agent—W. S. Haldane, W.S., Crown Agent.

COURT OF SESSION.

Wednesday, December 22.

FIRST DIVISION.

[Sheriff Court at Glasgow.

RYAN, MINUTER — LITTLE *v.* M'CONNELL.

Lease — Landlord and Tenant — Hypothec — Shop — Articles Purchased and Paid for but not Delivered.

A landlord's hypothec extends to articles in a shop which have not been delivered to the buyer, although purchased, paid for, and set aside.

On 8th July Andrew Little, writer, Glasgow, proprietor of a shop and warehouse at 174 Trongate, Glasgow, brought an action against Thomas M'Connell, sole partner of the firm of A. Barr & Company, house-furnishers, 174 Trongate, Glasgow, for sequestration of the "furniture, stock-in-trade, and other effects, subject to pursuer's hypothec, which are or have been within said premises, for payment and in security of" (1) the sum of £250, being the balance of rent due as at 28th June 1909, and (2) the sum of £75 a month from 28th June 1909 to 28th May 1910—the monthly rent of said premises under a lease from Whitsunday 1908 to Whitsunday 1909 at the yearly rent of £900, which had been renewed for the following year.

On 20th July 1909 James Ryan, Newton Street, Kilsyth, lodged a minute in the sequestration proceedings stating that certain articles of furniture which he had purchased from the defender, and which had been specified in the inventory in the sequestration, were his property, and that *quoad* them the sequestration should be recalled. The articles, consisting of a parlour suite and sideboard, an overmantel, a telescope table, an easy chair, four Edinburgh chairs, an Edinburgh arm-chair, a carpet, a kitchen table, a kitchen fender, kitchen fireirons, a kerb, with brasses and ashpan, and a bamboo pole, were purchased by Ryan on 3rd July 1909 and paid for on that date. They were not delivered but were set aside and marked as sold to the minuter, it being part of the contract between him and the seller that he (Ryan) should remove them not later than 9th July following.

The minuter pleaded, *inter alia*—"(1) The articles enumerated being the property of the minuter are not subject to the landlord's hypothec, and the sequestration *quoad* them should be recalled. (3) The articles sequestrated being in the premises at the date of the sequestration for a temporary purpose only, are exempt, and the sequestration should be recalled."

The pursuer pleaded—"(1) The articles referred to having been the property of the defender in the premises at 174 Trongate, Glasgow, are, until delivered, subject to the landlord's right of hypothec. (2) The said James Ryan having voluntarily allowed the said articles to remain in said premises, the same have been effectually attached by the landlord's sequestration for rent. (3) The minute is irrelevant."

On 4th August 1909 the Sheriff-Substitute (SMITH CLARK) repelled the minuter's pleas and found that the articles in question had been rightly included among the sequestrated effects.

On appeal the Sheriff (GARDNER MILLAR) adhered.

Note.—"The facts in this case are not in dispute. The minuter, who is a young man about to be married, purchased from a warehouse containing several flats, certain articles of furniture. He paid the price and the articles were marked as sold and set aside for him. He asked that they should be kept for a few days until it was convenient for him to take delivery. Subsequently the landlord sequestrated

for rent past due the goods in the warehouse, including those sold to the minuter. The minuter now asks that the articles belonging to him should be withdrawn from the sequestration.

"The agent for the appellant (the minuter) maintained that as the articles had been bought in market overt by a *bona fide* sale, and the price paid, the landlord's hypothec did not attach to those goods. The rule of law is laid down in Erskine's Institutes, ii, 6, 64, 'and in the case of a shop the tenant must, from the nature of the lease, have an unlimited power of selling his shop goods, for he rents the shop for that very end, that he may have it as a place of sale. By the shopkeeper's alienation of his goods therefore the property of them is lawfully transferred from him to the purchaser, and so no longer remains part of the hypothec; and if the landlord entertain any suspicion that the tenant is disposing of the shop goods to his prejudice, he may, as in the case already stated (sec. 61), secure for his own payment, by sequestration or arrestment, what yet remains in the shop not sold. Hence also it follows that purchasers of shop goods from a shopkeeper are secure against any action for restitution at the suit of the landlord.' The question that is raised therefore is, what is meant by the sale of the goods to the purchaser? Is it sufficient that there should be a contract for the sale of the goods or must it be completed by delivery? The Mercantile Law Amendment Act and the Sale of Goods Act are excluded by their terms in any question of the landlord's hypothec. We must take it, therefore, that the sale was not completed until delivery had taken place. Professor Bell, in his Principles, sec. 1277, lays down—'It (the hypothec) will not bar the tenant from selling his goods in his shop or warehouse. But a buyer, though he has paid the price, if he have not got delivery, will not prevail against the landlord.' He gives as his authority for this the case of *Kinniel* v. *Menzies*, where the Court altered the interlocutor of the Lord Ordinary on the ground that the agreement of sale, though *bona fide* made, had not been fulfilled by delivery, the goods sold still remaining in the possession of the seller. The Lords held that the articles of household furniture claimed by Menzies fell under the sequestration. That seems in accordance with the dictum of Bankton, vol. i, p. 387, that a landlord by setting a shop to a merchant consents to the buying of the shop goods from him, and therefore cannot trouble the buyers unless he had previously affected them by sequestring the same for the rent while in the merchant's possession. Now, the goods in the present case were unquestionably sequestrated while in the possession of the tenant, and accordingly I think the learned Sheriff-Substitute has come to the right decision in holding that the contract of sale without delivery did not put an end to the landlord's hypothec over the goods. His interlocutor must therefore be affirmed."

Ryan appealed, and argued—The case of *Kinniel* v. *Menzies*, (1790) M. 4973, relied on by the respondent, was not in point, for that was the case of a private house. The rule in the case of a shop was different, for a shopkeeper was entitled to sell goods even after sequestration had been laid on—Bankton's Instit. i, 387; More's Notes to Stair, lxxxiii; Brodie's Stair, 372; Hunter's Landlord and Tenant, ii, 380; Rankine on Leases, 348. In the case of a shop it was not necessary, in order to oust the landlord's hypothec, that there should be a *jus in re*—it was enough if there was a *jus ad rem* — and therefore purchasers could remove their goods unless the landlord had got a warrant to lock them up. If the risk had passed, the hypothec was ousted, and the risk had passed here—*Hansen* v. *Craig*, February 4, 1859, 21 D. 432. The case of the *Heritable Securities Investment Association, Limited* v. *Wingate and Company's Trustee*, July 8, 1880, 7 R. 1094, 17 S.L.R. 741, did not strengthen the doctrine laid down in Bell's Com., i, p. 180 *et seq.*, as to delivery being essential. *Esto*, however, that delivery was necessary to oust the hypothec, then there had been good constructive delivery here—*Gibson* v. *Forbes*, July 9, 1833, 11 S. 916. For other instances in which the hypothec had been held not to apply, reference was made to *Jaffray* v. *Carrick*, November 18, 1836, 15 S. 43; *Adam* v. *Sutherland*, November 3, 1863, 2 Macph. 6; *Bell* v. *Andrews*, May 22, 1885, 12 R. 961, 22 S.L.R. 640; *Pulsometer Engineering Company, Limited* v. *Gracie*, January 14, 1887, 14 R. 316, 24 S.L.R. 239.

Argued for respondent—Delivery, either actual or constructive, was necessary in order to oust the hypothec, and neither had occurred here. There was no authority for the proposition that a *jus ad rem* was sufficient in the case of a shop—Bell's Com., i, pp. 180-191; Ross' Leading Cases (Commercial), ii, p. 567, *note*. Mere convenience did not amount to constructive delivery—Bell's Prin. 1277; *Boak* v. *Megget*, February 13, 1844, 6 D. 662, at pp. 669 and 675; *Mathison* v. *Alison*, December 23, 1854, 17 D. 274, at p. 285; *Anderson* v. *M'Call*, June 1, 1866, 4 Macph. 765. The question was settled by authority—*Kinniel* v. *Menzies* (*supra*)—and neither the Mercantile Law (Scotland) Amendment Act 1856 (19 and 20 Vict. c. 60) nor the Sale of Goods Act 1893 (56 and 57 Vict. c. 71) had made any change in regard to the landlord's hypothec.

At advising—

LORD PRESIDENT—In this case a Mr Ryan bought in the shop of Thomas M'Connell certain furniture and paid for it; the furniture was not delivered at the time, but was allowed to remain in the shop with a view to future delivery. Unfortunately, before it was delivered the landlord executed sequestration in respect of his hypothec for rent, and the question now is whether Mr Ryan can have these articles withdrawn from the effect of the hypothec.

I think the matter is concluded by authority, and that the Sheriff is right in his judgment. Unless Mr Bell in his Principles is wrong, nothing further is to be said. He thus enunciates the law—Sec. 1277—"It [the hypothec] will not bar the tenant from selling his goods in his shop or warehouse. But a buyer, though he has paid the price, if he have not got delivery, will not prevail against the landlord." The authority upon which Mr Bell founds his proposition is the old case of *Kinniel* v. *Menzies*, M. 4973, decided in 1790. That was not the case of a shop, but the sale of furniture in a house without delivery, and counsel for the minuter tried to draw a distinction between a sale of house plenishing and the case of goods sold in a shop. That makes no difference, and I think Mr Bell was right in his statement of the law. The only distinction between a shop and a dwelling-house is that in the latter case if the tenant began displenishing so as to leave bare walls, the landlord would have a right to stop him, but he cannot do so in the case of a shop, which is let for the very purpose of selling goods that from time to time have to be removed.

The position of the minuter here may be hard. It might have been cured by the Mercantile Law Amendment Act and the Sale of Goods Act, but the landlord's hypothec was expressly reserved in both Acts; so we are here under the old law which provided that the property in goods did not pass until delivery. I am of opinion that the interlocutor of the Sheriff should be affirmed.

LORD KINNEAR — I agree with your Lordship. I think that if the question is to be determined by the law prior to the Mercantile Law Amendment Act, it is settled by authority, which is binding on us, and the landlord's right of hypothec is not affected by either of the statutes to which your Lordship has referred.

LORD CULLEN—I concur.

LORD JOHNSTON, who was present at the advising, gave no opinion, not having heard the case.

LORD M'LAREN was absent.

The Court refused the appeal, affirmed the interlocutors of the Sheriff and Sheriff-Substitute, and remitted the cause to the Sheriff-Substitute to proceed as accords.

Counsel for Minuter (Appellant) — Morison, K.C.—W. T. Watson. Agents—Cameron & Orr, S.S.C.

Counsel for Pursuer (Respondent) — Christie—T. Graham Robertson. Agents—R. & R. Denholm & Kerr, Solicitors.

Thursday, December 23.

FIRST DIVISION.

[Sheriff Court at Kirkcudbright.

BROWN *v.* MITCHELL.

Lease — Outgoing — Compensation — Improvements—Agreement—Construction—Artificial Manures — Feeding Stuffs — "Value"—Agricultural Holdings (Scotland) Act 1908 (8 *Edw. VII, c.* 64), *secs.* 1 (1), 4, *and* 5, *and First Schedule.*

A lease dated in 1900 provided that with reference to the Agricultural Holdings (Scotland) Act 1883 the compensation payable to the tenant on the determination of his tenancy should not exceed the rates and proportions specified in a schedule annexed to the lease, and that the compensation therein provided should be held as substituted for that under part third of the statutory schedule. The schedule annexed to the lease was not challenged as unfair and unreasonable. It provided, on the basis of a fraction of the "cost" of the manure varying with the year of application, for certain specified artificial manures under three heads, and proceeded—"IV. Other artificial manures. Exhausted by first crop—no compensation. V. Feeding stuffs. For linseed, cotton, and rape cakes, or for other purchased substances of equal manurial value consumed on the farm by cattle and sheep and pigs during the last year of the lease, one-third of the value thereof. If consumed on permanent pasture, three-sixths of the value thereof if applied in last year, two-sixths if in second last year, and one-sixth if in third last year. Exhausted in four years." In a note appended to the schedule it was, *inter alia*, provided—"From the amount to be paid in compensation for the unexhausted manurial value of feeding stuffs the arbiters shall deduct any sum which in their opinion has been or shall be paid to the tenant on account of any increased award, by reason of the manurial value of the feeding stuffs consumed, put upon the dung left by the tenant."

Held (1) that the schedule falling to be read as a whole, head IV was not void under section 5 of the Agricultural Holdings (Scotland) Act 1908, but validly precluded the tenant from claiming compensation for artificial manures, other than those specified, which had grown a crop; (2) that "value" in head V meant, not actual cost price, nor present cash value, nor residual manurial value, but original manurial value—*i.e.*, the value of the manurial constituents of the feeding stuffs such as nitrogen, potash, &c., before the feeding stuffs were consumed; (3) that the tenant was validly precluded from claiming compensation for feeding stuffs of the character specified in head V