sibly be founded on to his prejudice is clear, and I think it also clear that except in the capacity of an acceding creditor he cannot found upon it to his own advantage or the prejudice of the truster.

These views are, I think, conclusive of the case. When plainly stated, the whole matter has indeed a very trifling aspect. A tenant farmer shortly before Whitsunday renounces his lease as at the following Martinmas, and the landlord accepts the renunciation. At the same time, with the landlord's knowledge and tacit assent he grants a trust of his whole estate, including the brief residue of his lease, for behoof of his creditors, undertaking meanwhile to continue in the occupation and management of the farm. He manages exactly as he had been in use to do, including the killing of ground game, all in a manner quite unobjectionable on the part of a tenant. Within six weeks of the end, and without any change of conduct on the tenant's part, it occurs to the landlord that not he (the tenant), but the trustee for his creditors (who might have been an Edinburgh accountant), is the proper person to kill the ground game, and he institutes proceedings in the Supreme Court to try the question. The trustee for creditors does not object to the truster's conduct, and plainly could not allege, as he certainly does not, that the creditors are interested to object. Quite as plainly the landlord's objection is not made in the interest of the creditors, but only to preserve the ground game for his own shooting, or perhaps (and more likely) because of some irritating personal collision between him and the tenant, whichever of them may have been to blame or most to blame for it. The sooner such an unreasonable, and I think unseemly litigation is terminated the better for both parties, and being of opinion, for the reasons which I have stated, that the complainer's case is unfounded in law, I am for dismissing the suspension now, and with expenses.

LORD RUTHERFURD CLARK—This is no doubt a very trifling case now that the time during which interdict is asked for has passed, but I think we must treat it in the same way as if we had given our opinion upon the 2nd November when we heard it argued.

We are in the Bill Chamber, and there are only two forms of judgment open to us. We may dismiss the note if we think that the allegations in it are plainly unfounded, or we may affirm the Lord Ordinary's interlocutor. We can do nothing else; we cannot declare the interdict perpetual in this process.

I should be glad to throw out the note if I thought that its statements were unfounded, but I am far from thinking that just now. I therefore think that the only proper judgment for us to give is to affirm the Lord Ordinary's interlocutor which passes the note upon caution.

LORD LEE—I do not feel called on or entitled to give any opinion on the reasonableness and propriety of the conduct either of the complainer in making this application, or of the respondent in claiming a right to kill ground game. I think that question depends on facts not ascertained. The respondent's allegation is that what he did, and claimed to do, was in protection of his crops. That is disputed, and the answer depends on the effect of the deeds, and the conduct of the respondent which is said to have rendered the application necessary.

My opinion is that the statement and answers disclosed a question to be tried between the parties, and that the Lord Ordinary rightly passed the note so that that question might be tried and decided.

With regard to the question of caution, I do not think it of much consequence. Possibly it was unnecessary. But I suppose it was demanded, and I think the Lord Ordinary rightly made it a condition, although it might be a mere matter of form.

The Court adhered.

Counsel for the Appellant—Rhind—Gunn. Agent—John Mackay, L.A.

Counsel for the Respondent—Low—C. N. Johnstone. Agents—Cooper & Brodie, W.S.

Saturday, November 30.

SECOND DIVISION.

[Lord M'Laren, Ordinary.

LINTON *v.* SUTHERLAND WALKER.

Landlord and Tenant—Lease—Conditions—Obligation.

The lease of a farm contained a condition that the proprietor should take over the sheep stock at a valuation on the expiry of the lease. Some months before this term arrived, the tenant, believing that his landlord was *vergens ad inopiam*, sold the sheep stock under warrant of the Sheriff, and sued the landlord for the difference between the price obtained and that which he alleged would have been obtained if the sheep had been taken over in terms of the contract.

Held that there was no breach of contract on the part of the defender, as the pursuer had rendered it impossible for him to fulfil his obligation under the lease.

By lease dated April 1869 Mr Sutherland Walker of Aberarder let to the now deceased George Linton, farmer, at Farr, and John Linton, his son, the Mains Farm of Aberarder, Inverness, for nineteen years from the term of Whitsunday 1869 as to the houses, lands in grass, hill and moor ground, and the separation of the crop of that year from the ground as to the arable land under crop. The lease expired at Whitsunday and separation of crop 1888.

It was provided by the lease that the proprietor should take the sheep stock on the farm at the expiry of the lease at a valua-

tion to be made by two persons to be mutually chosen, the stock to be inspected and delivery thereof taken at Whitsunday, and the price to be fixed between that term and the term of Martinmas following, it being understood and agreed that the valuators should take into consideration the price of stock at the Inverness July Wool Market and the Falkirk September and October Trysts, and the price to be payable at the term of Martinmas 1888.

About Whitsunday 1888 John Linton, who had succeeded his deceased father, formed the opinion that Mr Sutherland Walker was in pecuniary difficulties. He therefore required him to find security for payment of the value of the sheep stock on the farm before delivery of it was made. To that demand Mr Sutherland Walker made no reply.

In September 1888 Linton presented a petition to the Sheriff for warrant to sell the sheep stock. That petition was duly served upon the proprietor, who did not enter appearance, and warrant was granted to Messrs Macdonald, Fraser, & Company to sell the sheep by public auction, and they did so. Messrs Macdonald, Fraser, & Company consigned the sum realised by the sale in the hands of the Clerk of Court, and the net proceeds, amounting to £1492, 19s. 2d., were paid by order of the Sheriff to Linton on 1st November 1888.

Linton alleged that if the stock had been taken over and paid for in terms of the lease he would have received therefor the sum of £1901, 15s., and he raised this action against Sutherland Walker for £408, 15s. 10d., the difference between that sum and the sum realised.

Upon 3rd August 1889 the Lord Ordinary (M'LAREN) found that the pursuer had not set forth any relevant or sufficient grounds in support of his claim to the sum of £408, 15s. 10d.

"*Opinion.*— . . . I shall begin with the claim arising out of the sale of the sheep stock, because it is out of this matter that the difference has arisen which resulted in the present action. Under the conditions of lease the tenant was to vacate the farm at Whitsunday, and was to be paid the value of the sheep stock at the next term of Martinmas, the value to be ascertained by two persons mutually chosen, with power to name an oversman. It was conditioned that the valuators should take into consideration prices of stock at the Inverness July Wool Market and the Falkirk September and October Trysts, the price to be payable at the term of Martinmas. Valuators were named, and they agreed upon an oversman, but no award has been made. In his narrative of the proceedings subsequent to the termination of the lease the pursuer states (Cond. 8)—'Prior to the term of Whitsunday 1888 the pursuer ascertained that the defender was in pecuniary difficulties, and subsequent to that term he ascertained that he had not paid the interest on the heritable securities over the estate of Aberarder due at that time. The pursuer therefore required the defender to find security for the due payment of the value of the sheep stock on the farm before delivery of it was made.' This demand has, as will be seen, a very important bearing on the issues in this case, and it is desirable in the outset to consider whether the pursuer was within his rights in calling on the landlord to find security. The lease, it is admitted, gave no such right. As to any supposed right arising *ex lege* the conditions of the case seem to be these—On the expiration of the lease the pursuer was creditor for the price in a personal contract of sale, in which it was agreed that the purchaser of the sheep should have six months' credit, in order that time might be given for a fair determination of the price by reference to markets to be held during the period for which credit was given. I am not aware of any rule of law which entitles a seller who has agreed to give credit to call upon his debtor to find security. Indeed, I am reasonably certain there is no such law. The seller, however, is not without his remedies. If he has delivered the stock he may, on suspicion of the debtor's insolvency or inability to pay, use arrestment or inhibition in security of the price, and it will then be determined in an application for the recal of the arrestment or inhibition whether the seller's apprehensions were reasonable, and such as will entitle him to maintain his diligence. If the stock has not been delivered the seller may, on suspicion of the purchaser's inability to pay, withhold delivery, and then, in an action by the purchaser to compel delivery, it will be determined whether the seller had good grounds for the action taken. In the present case the tenant would neither give unconditional delivery nor take the responsibility of refusing delivery, but called upon his landlord to give security, and in this demand I think he was not well founded. The defender seems to have acted not unreasonably in the matter, because, as stated in his answer to article 8, he 'was willing, and proposed that the pursuer should retain the sheep'—that is, until Martinmas—'and for this purpose that he should have the house and the use of such parts of the steading as he might require, as well as the crop on certain parts of the farm, free till 1st October 1888.' This was of course a mere proposal, and as it was not accepted the proposal is not an element in the decision of the main question. It is, however, to be considered that a tenant who refuses delivery of sheep stock to his landlord may be in the embarrassing position of having a stock in hand which he must remove from the farm, and for which he must find pasture elsewhere. The proposal of the defender, if accepted, would have relieved the tenant from this disadvantage, because it secured him in the possession of the sheep until the agreed-on period of delivery, at the same time providing him with necessary pasture, and a residence for the tenant himself, or whoever he might appoint as caretaker. It appears to me that up to this point the defender's action is unexceptionable. He was not bound to give personal security, and at the same time he was willing that the pursuer should have all the security which the retention of the sheep on

the farm could afford to him. . . .

"The next proceeding is that referred to in condescendence and answers 12 and 13. It is there explained that the pursuer first obtained authority from the Sheriff to clip the sheep and sell the wool, and thereafter to sell the sheep and consign the price in the hands of the Clerk of Court. The sale of the sheep stock by order of the Sheriff was an evident breach of the contract of sale into which the tenant had entered with his landlord. He was bound to deliver that identical stock at Martinmas, and the supposition that he could get rid of his obligation under cover of the warrant of the Sheriff is to my mind altogether inadmissible. If the defender had opposed the sale I do not doubt that his opposition would have been successful. He, however, did nothing, and it is probable that he was not anxious to take over the stock. The sheep stock when sold produced the sum of £1492, 19s. 2d. The pursuer asserts that they were of the value of £1901, 15s., and the pursuer claims the difference between these two sums under the second head of the petitory conclusions. I have endeavoured, with the assistance of counsel, to find out what is the obligation in consequence of which the defender is supposed to be liable for this sum of money, but in this endeavour I have been unsuccessful. The defender was the purchaser of the sheep on terms which bound him to pay the price at Martinmas. He never refused to pay the price, and never had the chance of doing so. The pursuer, instead of delivering the stock according to agreement, chose to sell them at a public sale, making use of the Sheriff's warrant, which, however, in my opinion does not in the least alter the complexion of the transaction. I could have understood that the defender might have a claim for breach of contract in consequence of the non-delivery of the stock had he thought fit to make it. But how the pursuer's breach of contract should give him a claim against the party to whom he has failed in his obligation is altogether beyond my comprehension. The solution of the case is briefly this—The pursuer distrusting his landlord's solvency or ability to pay, instead of carrying out his contract chose to sell the sheep to other parties. Apparently he thought that the price obtained at a judicial sale was more worth having than the prospect of payment of a larger sum by a debtor whose obligation he distrusted. This was a matter for his own judgment, so long as the other party to the contract acquiesced or did not interfere. It may be that the proceeds of the judicial sale are less than the valuation which would have been put upon the stock by a referee. If so, the substitution of the lesser price for the larger one was the act of the pursuer himself, and as such can give rise to no action against any other party."

The pursuer reclaimed, and argued—The pursuer as creditor for the value of the sheep was warranted in his actings when his debtor was *vergens ad inopiam*, and the pursuer was ready to show that his landlord was in that condition at the time the sheep were sold—Bell's Prin. 46, 69; *Dove* v. *Henderson*, January 11, 1865, 3 Macph. 339; *Symington* v. *Symington*, December 3, 1875, 3 R. 205; *Craer* v. *Morrison*, June 2, 1882, 9 R. 890; *Ferguson* v. *Fyffe*, November 4, 1868, 6 S.L.R. 68; Bell on Sale, 120. If a purchaser became *vergens ad imopiam* before the delivery of an article sold, and so was unable to complete his part of the bargain, the seller was entitled to sue him for damage which had been inflicted by this failure on his part—Benjamin on Sale, 756; *ex parte Chalmers*, January 31, 1873, L.R., 8 Ch. App. 289; *ex parte Stapleton*, February 6, 1879, L.R., 10 C.D. 586.

The respondent argued—He was not *vergens ad inopiam*, but even assuming this, the pursuer could not sue him for damages. The defender was willing to take delivery of the sheep at the time appointed in the lease, viz., Whitsunday 1888, but the pursuer broke his part of the bargain, by putting it out of the power of the defender to fulfil his obligation. In the English cases quoted bankruptcy had been intimated, and it was necessary that there should be that intimation, or something equally clear before they could apply.

At advising—

LORD JUSTICE-CLERK—The facts which have led to this inquiry are very simple. The pursuer Mr Linton was the tenant of the defender Mr Sutherland Walker of Aberarder in the farm of Mains of Aberarder. By the conditions of the lease it was provided that at the termination of the lease at Whitsunday, and the separation of the crop 1888, he should be paid by the defender—his landlord—the value of the sheep stock on the farm at a valuation. The arbiters were to take into consideration the prices obtained at the Inverness Wool Market in July, and at the Falkirk September and October Trysts. The price was to be payable at Martinmas 1888. In the summer of that year the pursuer seems to have formed the opinion that his landlord was *vergens ad inopiam*, and therefore that if he waited till Martinmas for the fulfilment of the obligation he might never get the price of the sheep stock. If the defender was *vergens ad inopiam* the pursuer was certainly entitled to take steps to secure himself from loss by the expected failure of the defender. But what he did was to apply to the Sheriff for warrant to sell the stock. He obtained this warrant, and he then sold the sheep for £1492, 19s. 2d., which sum was at first consigned with the Sheriff-Clerk, but subsequently was paid over to the pursuer by order of the Sheriff. The point in controversy is, whether he is entitled to claim from the defender a further sum of £408 as damages for breach of contract. This sum is the difference between the price obtained in July for the sheep and that which the pursuer says would have been their value at the time for taking them over if the defender had been in a position to do so.

The pursuer says that the defender's con-

tract was to take delivery of the sheep, and pay for them the price which the arbiters might fix, that he was not in a position to do so, and that he is in breach of contract accordingly. Now, it is true that where the term of payment has not come there may be a breach of contract by the person whose obligation is to be performed coming into a position in which he cannot perform it. This may be the case, even although the contracting party's inability may arise and be acted upon by the other party a considerable time before the term for performing the contract arrives. But it is a totally different case where the creditor, on the ground that the debtor is *vergens ad inopiam*, proceeds to act so that it must be rendered impossible for the debtor to fulfil the obligation. I may say in passing that I think it makes no difference that the pursuer sold the sheep by warrant of the Sheriff. It would have been the same if he had sold them at his own hand. His case is that he is entitled to secure himself from loss by the method of taking the sheep and selling them to someone else than his landlord, and that as he has done so, the defender, who was *vergens ad inopiam*, has broken his contract. Now, I cannot see that he has done so. He may have been *vergens ad inopiam*. But if the pursuer chose to act on the footing that because he saw the defender to be *vergens ad inopiam* he was entitled to secure himself as he best could by selling the sheep, I cannot adopt the proposition that he may also claim damages from the defender for breach of contract which he the pursuer has himself made it impossible for the defender to fulfil.

I think the pursuer's proposition is one for which no authority rests in our law. Mr Bell in his Principles, sec. 46, says that a creditor whose debtor is *vergens ad inopiam* may take steps to protect himself, but he says nothing to the effect that he may also claim compensation for the breach of contract. I observe, too, that in the latest edition of that book the passage I alluded to stands without any authority being cited from later decisions with regard to it which at all gives colour to such an idea.

I am of opinion that the judgment of the Lord Ordinary is right and should be affirmed.

LORD YOUNG—I am of the same opinion. The pursuer was entitled to protect himself by withholding delivery of the sheep stock. I think he may be grateful that he has been able to save himself—if indeed he has done so—from loss greater than he would have otherwise incurred. But I think he is not also entitled to damages.

LORD RUTHERFURD CLARK and LORD LEE concurred.

The Court adhered.

Counsel for the Reclaimer—Lord Advocate — Rhind — P. J. Blair. Agent — William Officer, S.S.C.

Counsel for the Respondent — Guthrie. Agents—John Clerk Brodie & Sons, W.S.

Saturday, November 30.

SECOND DIVISION.

GAVIN *v.* ROGERS & COMPANY.

Reparation—Master and Servant—Onus of Proving Cause of Accident.

A labourer employed in ballasting a ship was injured by the fall of tackling for hoisting the ballast on board, which belonged to his employers and was supplied by them. It was proved that the weight hoisted at the time was about 3 cwt., whereas the breaking strain of the tackling was 10,000 pounds, and that the same tackling had been used for discharging the ship's cargo, and for putting some 350 tons of ballast on board some days before. In the interval the ship had been in the dry-dock. The cause of the tackling breaking was not proved, but from the state of the iron after the accident it was suggested for the employers that while the ship was in the dry-dock, and unknown to them, the tackling had met with a fall which had altered its structure and weakened its bearing power.

Held that it lay with the workman to establish fault on the part of his employers, or of those for whom they were responsible, and that this he had failed to do.

Diss. Lord Lee, who thought the case ruled by those of *Fraser*, 9 R. 896, and *Walker*, 9 R. 946, and was of opinion that the employers were responsible for an accident which happened through a defect in tackling supplied by them, and not shown to have been undiscoverable upon ordinary examination.

James Gavin, labourer, 87 Overgate, Dundee, was upon the morning of 17th March 1888 one of a squad of men engaged in ballasting a ship lying in the Victoria Dock, Dundee. The ballast was hoisted on board by means of a block and tackle, gin, or pulley, the wheel of which was supported by a frame attached to a ring by means of an iron pin round which it could revolve as a swivel. This swivel-pin formed one piece with the ring. As the first bucket of ballast, containing about two and a half cwt., was being hoisted, and when it was only a foot or two from the ground the swivel-pin broke close to the ring, and the wheel fell from a height of about forty feet, and struck the said James Gavin on the head, rendering him insensible. He had only begun to work at the job for the first time when the accident happened. The injuries he sustained confined him to the infirmary for fourteen days, and incapacitated him for some time for regular employment. He accordingly brought an action in the Sheriff Court at Dundee against his employers Messrs W. T. Rogers & Company, stevedores, East Dock Street, Dundee, and W. T. Rogers, the sole partner of the firm, for reparation—damages £50.

The pursuer averred — "Said gin or