footpaths set apart for foot-passengers. I assume for the reasons I have stated that this footpath, although of extraordinary breadth, was set apart in point of fact and maintained for the use of the foot-passengers, and that the Magistrates are now only by this prosecution checking what they represent as a comparatively recent innovation, which in their judgment is detrimental to the safety of foot-passengers who use it. If they have acted indiscreetly in reserving so much to be protected against vehicular traffic for the safety of foot-passengers, they will correct that if they ascertain that such a course is according to the general feeling of the inhabitants of the place where they are acting as magistrates and guardians of the public safety. I have no reason to know what the prevailing public opinion upon that question is, but in the meantime I see no grounds upon which I can interfere with the efforts of the Magistrates to promote the interests of the public safety by instituting prosecutions such as this to stop the traffic of vehicles along what is in fact a footpath. I am therefore of opinion that this appeal ought to be dismissed, there being, in my judgment, no error in point of law on the part of the Magistrates who pronounced the conviction.

LORD TRAYNER—I concur in the result at which your Lordships have arrived.

The Court dismissed the appeal and affirmed the determination of the inferior Judge.

Counsel for Appellant—Comrie Thomson —Ure. Agent—John Rhind, S.S.C.

Counsel for Respondent — Jameson — Clyde. Agents—J. & A. Hastie, W.S.

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# COURT OF SESSION.

*Thursday, May* 26.

## SECOND DIVISION.

[Sheriff of Aberdeen, Kincardine, and Banff.

## ANDERSON (DAVIDSON'S TRUSTEE) *v.* URQUHART.

*Bankruptcy—Lease — Compensation—Balancing of Accounts—Landlord and Tenant.*

A lease provided that in the event of the tenant becoming bankrupt it should, in the option of the proprietor, become *ipso facto* null and void, and that in the event of the lease coming to a termination at any time during the currency of let the tenant should be entitled to receive from the proprietor the value of the grain crop and some other articles, as the same should be fixed by arbitration. The tenant died insolvent. After his death none of his representatives desired to carry on the farm, and the landlord entered into possession thereof. Thereafter the tenant's effects were sequestrated, and a trustee was appointed on the sequestrated estate. A reference was entered into between the landlord and trustee under which the valuation of the grain crop, &c., was determined.

*Held* that the landlord having got possession of the grain crop, &c., before the date of the sequestration, was entitled to compensate the amounts due by him under the reference by the debt due to him by the tenant for arrears of rent and interest on improvement expenditure.

By lease between Beauchamp Colclough Urquhart of Meldrum and Byth and John Davidson, dated 23rd May 1888 and 2nd December 1889, the former let the farm of Auchnagorth for the period of nineteen years to the latter and his heirs, "excluding sub-tenants and assignees, legal or voluntary, and creditors or managers for creditors in any way or shape, unless with the consent of the proprietor." In the lease it was declared "that this lease is granted by the proprietor and accepted by the tenant under and subject to the general articles, conditions, and regulations established by the proprietor for the tenancy of all farms on his estates of Meldrum and Byth, signed by him on the thirtieth day of January, and recorded in the books of Council and Session on the third day of February, both in the year Eighteen hundred and sixty-four . . . and declaring that the said articles, conditions, and regulations . . . shall, in so far only as they are consistent with the terms of this lease, be held to form part thereof, and be binding on the parties hereto as part of the lease in the same manner as if they had herein been verbatim inserted." It was further contracted in the lease that "in case of the tenant not obtaining a renewal of this lease at the expiry hereof, or in the event of this lease coming to a termination at any time during the currency of the period of let, then the tenant shall be bound to leave to the then incoming tenant or to the landlord, at the valuation of parties mutually chosen, whatever manure is made after the seed time of the last crop, and shall be entitled to receive payment from the then incoming tenant or the proprietor the value of the first year's grass, and of the grain crop, and for the ploughing and rent of fallow land, and for the wire fencing on the farm, as the same shall be fixed by arbitration."

In the articles and regulations incorporated in the said lease, the following provisions were included—"10. . . . No turnips shall be planted for seed unless such seed is to be used on the farm or the written permission of the proprietor be previously obtained by the tenant. The whole straw, chaff, turnips, and other green crops, and one-half of the hay, shall be consumed upon the farm, and none sold or carried off without the written permission of the proprietor first had and ob-

tained . . . and the tenant shall be bound to lay upon the farm all the dung produced upon the same, and never to sell any produced thereon. 14.—In the event of any tenant becoming bankrupt, or being sequestrated . . . during the currency of his lease . . . the lease shall, in the option of the proprietor, become *ipso facto* void and null, and he shall have power *brevi manu*, without any process of declarator or other process at law, to resume possession of the farm at the first term of Whitsunday or Martinmas after the occurrence of any one of these events; . . . and the tenant and his creditors shall be bound to remove from the farm at the first term of Whitsunday or Martinmas after any one of these events shall have taken place."

In September 1888 new farm buildings were erected by the landlord on the farm, the tenant agreeing to pay interest at 5 per cent. per annum in excess of expenditure beyond £350.

On 13th September 1891 John Davidson, the tenant, died. At the time of his death he was insolvent, and unable to pay his debts. None of the deceased's representatives desiring to carry on the farm, the landlord entered into possession of it. Thereafter the deceased John Davidson's effects were sequestrated, and on 17th December 1891 John Anderson, farmer, Auchneive, Tarves, was appointed trustee on the sequestrated estate.

By minute of reference dated 6th and 7th January 1892 the trustee in the sequestration, of the first part, and the landlord, of the second part, entered into a reference, in which, after narrating the death of the tenant, his insolvency, the appointment of the first party as trustee, the second party's position as proprietor, the decision of the deceased's representatives not to carry on the farm, the second party's possession and his agreement with the second party to acquire the subjects and effects specified at valuation, the parties referred to arbiters named to fix and determine (1) the quality of the grain crop on said farm of Auchnagorth—said crop to be threshed out by at least two threshings at the mutual expense of the parties, and the price to be the fiars' prices of the county for crop Eighteen hundred and ninety-one; (2) the value of the whole turnips on said farm; (3) the value of all the dung on said farm; (4) the value of the grass and clover seeds sown down with the grain crop of Eighteen hundred and ninety-one; (5) and the value of the wire fencing and other paling on the farm; and whatever said arbiters or oversman shall determine in the premises, the said parties bind and oblige themselves to implement and fulfil to each other in every respect."

The valuations ascertained under the said minute of reference were as follows:—

| | |
|---|---|
| 1. Grain Crop . . . . | £272 2 1 |
| 2. Turnips . . . . | 51 8 1 |
| 3. Dung . . . . | 8 8 0 |
| 4. Grass and Clover Seeds . . | 8 16 10 |
| 5. Wire Fencing . . . | 21 19 6 |
| | £362 14 6 |

On 25th February 1892 Mr Urquhart, the landlord, lodged a claim in the sequestration, in which he deponed that the late John Davidson at the time of his death was resting-owing to the claimant for arrears of rent (including therein the interest in the improvement expenditure agreed to be paid by him) the sum of . . . £331 18 10

"*Deduct*—Compensating Claim, as under:—

"Amount of valuation of turnip crop, dung, grass and clover seeds, and wire fencing on the farm taken over by Mr Urquhart in terms of the lease thereof, dated 23rd May 1888 and 2nd December 1889, docquetted with reference hereto, and herewith produced, . £90 12 5

"Estimated value of grain crop of 1891 on the farm taken over by Mr Urquhart in terms of the said lease—say 185 quarters, at £1, 5s. per quarter, . . . 231 5 0

321 17 5

"Estimated balance to rank as an ordinary claim . . . . . £10 1 5"

Upon this claim the trustee in the sequestration pronounced the following deliverance—"In regard to this claim the trustee finds (1) that the claimant has no power under the lease to acquire a preference to the prejudice of other creditors, and (2) that as the turnip crop, dung, grass and clover seeds, and wire fencing, and also the grain crop of 1891, were taken over by the claimant under agreement with the trustee under this sequestration, and not from the deceased, there can be no compensation. The trustee accordingly disallows the said deduction of £321, 17s. 5d., and admits the claim to an ordinary ranking of £331, 18s. 10d."

Against this deliverance the landlord appealed to the Sheriff of Aberdeen, Kincardine, and Banff at Aberdeen, and craved "that the said deliverance may be recalled, and that the trustee be ordered to rank the appellant as a creditor on the said sequestrated estate, to the effect of entitling him to compensate his claim on the said sequestrated estate by setting off against it the sum payable by him to the trustee on the said sequestrated estate for turnip crop, dung, grass and clover seeds, and wire fencing, and also the grain crop of 1891 taken over by appellant in terms of the lease, or so much of said sum as may be required to compensate the appellant's claim, and in the event of the appellant's claim being in excess of said sum, to the effect also of entitling the appellant to an ordinary ranking in respect of such excess."

On 4th April 1892 the Sheriff-Substitute (W. A. BROWN) pronounced the following interlocutor—"Recals the deliverance of the trustee: Finds that the appellant is entitled to compensate the amount due by him in respect of the valuation fixed under the minute of reference between him and the trustee by the arrears of rent due to him, including therein the interest on improvement expenditure agreed to be paid by the deceased John Davidson under agreement subsequent to the lease, and to

be regarded as rent: Remits the appellant's claim to the trustee to be disposed of in accordance with the foregoing finding: Finds the trustee liable in £2, 2s. sterling of expenses, and decerns.

"*Note.*—By the general regulations of the estate, which are incorporated in the lease, it is provided that it shall be irritated by bankruptcy in the option of the landlord, and in the lease itself there is a clause 'excluding sub-tenants and assignees, legal or voluntary, and creditors or managers for creditors in any shape or form, except with the consent of the proprietor.' The tenant died on 13th September 1891, and sequestration of his estates having afterwards been taken out, it was intimated by the trustee that he did not desire to take up the lease, and the landlord accordingly entered upon possession himself. The parties in the end entered into a reference dated 6th and 7th January last, and the question in the case is, whether the landlord is entitled to compensate the valuations ascertained under it amounting to £362, 14s. 6d. by the arrears of rent amounting to £331, 18s. 10d. The trustee rejected this view, and his deliverance was supported as sound mainly on the authority of the recent judgment of the Court in *Caird* (*Taylor's Trustee*) v. *Paul*, January 24, 1888, 15 R. 313. As the Judge in the Inferior Court, whose opinion was corrected by that decision, I naturally approach the question with some reserve and diffidence; but after the best consideration I have been able to give it, I have come to the conclusion that the case is not ruled by the judgment in the case of *Caird*, but by the principle of compensation or retention recognised in balancing accounts in bankruptcy. I do not understand that any doubt was thrown or intended to be thrown on that rule of law, the exclusion of the landlord's right of retention being rested solely on the specialty that the trustee had entered into an agreement with the landlord's representative apart from the lease, and therefore there is no concursus of debt, and credit did not exist. Here there is no agreement separate from the lease, but only a minute of reference to practical men to liquidate the obligations arising under it, and the claim for the valuations and the arrears of rent arising *hinc inde* on the same consensual contract, viz., the lease, the conditions of the plea of compensation are fully qualified. An attempt was made to distinguish the present case from that of *Caird* by the fact that here there is a Martinmas outgo, the grain crop being in the stackyard; but I do not see that that is anything but an accidental circumstance, the steps taken by the trustee in regard to the subjects of valuation not being, as in *Caird's* case, in virtue of a covenant which he has succeeded in negotiating with the landlord on behalf of the creditors, but in pursuance of obligations which were incumbent on him as taking up the estate of the bankrupt. No doubt he abandoned the lease, but that operated only to relieve him from future liabilities; the reference he entered into and could not escape from as taking the estate *tantum et tale* as it existed in the bankrupt. It was contended on behalf of the trustee that in every case there must necessarily be an agreement between the trustee and the landlord, but that is true only in the sense that that is required to liquidate the provision of the lease. In *Caird's* case there was something beyond that, for what was done practically amounted to waiver of the landlord's rights under the lease, and an election to contract with the trustee personally. I think that is made clear in the opinion of the Lord President, who points out that under the special agreement matters were dealt with which could not have been brought into settlement between the trustee and the landlord at the end of the lease, and that these were brought into existence while the process of division was going on, and after the bankruptcy. I take it, therefore, that the implication of the judgment is that where there is no such special agreement bringing new obligations into play the way is clear for the application of the equitable and familiar principle on which the landlord here relies. From the documents now produced it appears that the deceased agreed to pay interest on improvement expenditure on the footing that it was to be treated as rent."

Against this interlocutor the trustee appealed to the Court of Session in terms of section 170 of the Bankruptcy (Scotland) Act 1856 (19 and 20 Vict. cap. 79), and argued—This was simply an attempt to create a right similar to hypothec. A landlord's claim for arrears of rent was not good against a poinding by the creditors of the bankrupt tenant. In this case the sequestration was equal to a completed poinding in terms of section 108 of the Bankruptcy Act 1856. No preference could be constituted by a landlord's right in a lease to buy stock at a valuation at the termination of the lease—*Stewart* v. *Rose*, February 2, 1816, Hume, 229; *Macgregor* v. *Hunter*, November 21, 1850, 13 D. 90 (Lord Cunningham's opinion, p. 97); *M'Gavin* v. *Sturrock's Trustee*, February 27, 1891, 18 R. 576. Besides, in this case the landlord had departed from his rights under the lease by entering into a new agreement with the trustee. The minute of reference was wholly a new arrangement between the landlord and the trustee; its second and fourth clauses had no reference to the clause of the lease founded on. The landlord's rights were therefore based on an arrangement made after the date of the bankruptcy, and he could have no preference over the other creditors of the bankrupt—*Taylor's Trustee* v. *Paul*, January 24, 1888, 15 R. 313.

Argued for the respondent — On the tenant dying a bankrupt, the landlord in terms of the lease acquired a right to take over the grain crop, &c., at a valuation, and he had a right to do so without the consent of the trustee in bankruptcy or anyone else. The turnips under the articles and regulations incorporated in the lease were practically in the same

position as the grain crop. By entering into possession of the farm before the date of bankruptcy the landlord had made the crops, &c., his own property—*Moncrieff* v. *Hay*, December 6, 1842, 5 D. 249. But under the lease he was bound to pay for them at a valuation, and the minute of reference was entered into by the appellant and the respondent in order to ascertain what was to be paid. In neither *Stewart* v. *Rose* nor any of the other cases quoted by the appellant had the landlord got possession of the stock before the creditors. *Macgregor* v. *Hunter* was a case of specialties, and did not bear out the abstract proposition stated in the rubric. In *Taylor's Trustee* v. *Paul* the landlord derived his rights solely from an arrangement with the bankrupt's trustee.

At advising—

LORD YOUNG—The facts of this case are short and simple enough. A farm was let upon a lease containing clauses of a very familiar kind about the incoming tenant taking over at a valuation some fencing and grass and crop left there either by the landlord or the out-going tenant at the time. Upon his out-going the tenant is taken bound to leave the fencing, crops, seed in the ground, and some other things to be paid for in like manner at a valuation. The lease contains the ordinary stipulation that if the tenant should become bankrupt the contract of lease should thereby come to an end, and the landlord should be entitled to enter into possession. Now, the tenant here was not made bankrupt in his lifetime, but he died insolvent. It is admitted, and is in one of the minutes, that he died in a state of insolvency in the month of September, and in the month of November, a few days after the term of Martinmas, his estate was sequestrated, and the appellant in this appeal appointed trustee. The landlord in fulfilment of his obligation took over the fencing, seed in the ground, and the grass crop and grain crop at a valuation. The case would have been the same, in my opinion, so far as the question of law raised is concerned, if there had been a fixed price stipulated. If the parties had seen their way to fix a sum (it would be more or less speculative no doubt) which was to be paid by the landlord for the fencing and the seed in the ground and the grain crops, then he would have fulfilled his obligation by taking it over and paying the sum which was stipulated. But the compact was that he should pay for it at a valuation. Upon the tenant's death in a state of insolvency the lease was at an end by its terms, and the landlord was entitled to enter into possession, and he did. If he had not, the place would have been vacant, for there was not anybody else entitled to enter into possession. There was at that time no trustee in bankruptcy, and even if there had been, he would not have been entitled to enter into possession, because the lease provided that it should terminate by the fact of bankruptcy, and that the landlord should be entitled to enter into possession. But he did enter into possession, including in his possession the fencing, the seed in the ground—anything that was growing—and the grain crop which was then upon the premises.

Now, what was his obligation? His rights were satisfied by giving him possession of these things. What was his obligation? His obligation was to pay according to valuation. As I have already pointed out, it would have been the same as regards the law if it had been an obligation to pay a fixed sum—say, £320, or any other sum you please. That was his obligation. In order to render it more specific, the trustee for the creditors in the discharge of his duty—it was no more than according to his duty—entered with the landlord into a reference to competent people to determine the amount, and they determined it at £362, 14s. 6d. Well, that was what he was to pay for what he was in possession of in implement of the contract in the lease, and payment of that is demanded, and he says—"Yes, but the party to whom I owe that is owing me £331, 18s. 10d., and I am entitled to set the one against the other;" and if the party who owed him is the tenant or the tenant's representative in the tenant's obligation under the lease, that is, in my opinion, an unanswerably true and sound proposition. Now, the trustee here is not a creditor under any contract which he made as trustee. He made none. I think he made no contract as trustee except with reference to the turnips, as to which I shall have a single word to say. The agreement to nominate the valuers who were to determine the amount was not a contract under which any obligation to deliver goods or to pay the price of goods arose at all. It was merely explicating the contract which had been made by determining the sum of money. Well, then, the contract under which the tenant at the time of his bankruptcy—at the time of his death—and the trustee as now coming in his place, is bound to pay rents amounting to £331, 18s. 10d. is the contract of lease between the landlord and the deceased bankrupt. The contract under which the landlord on his part is bound to pay the £362, 14s. 6d. is the contract of lease between the same parties. Why shall the one not be set against the other? There is no answer to that question except one—that there is no reason, and the one must be set against the other. Then it is said that that is not the true view, the true view being that there was no contract of purchase or sale or other contract under which the landlord was entitled to get possession of his goods on the one hand, and was bound to pay the price on the other; that there was no contract of that kind between him and the deceased bankrupt. That is merely to say that he has right to get the articles, and his obligation to pay for them is under a contract entered into with the trustee in the bankruptcy. If that had been so in point of fact, I should have assented to the conclusion, but I am very clearly of opinion that it is not so in point of fact, and that the case in point of fact is correctly stated, as I

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.

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*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