

together, which was of the greatest possible importance for the consideration of the jury, and that was the circumstances under which the last paragraph note of the editor was written, because matters were then in a different state. The pursuer and the reporter came into a direct conflict, and there was a mutual charge of want of veracity by the one towards the other. In looking to the two letters between Mr Muir and the reporter, laid before them as part of the case, were the jury not bound to consider whether they were applicable to the facts in reference to the conclusion they should come to? He thought that most undoubtedly they were; and what conclusion could they come to but that the statement in the letter of the pursuer was not true, and that the statement in the letter of the reporter was true. Now, they came under these circumstances to read the note, in which certainly pretty strong language was used, and it was for the jury to say whether it was in the circumstances actionable or not. The meaning of the paragraph was just this—"We are satisfied that our reporter is stating a matter of fact truly, and we are satisfied that Mr Muir was not stating it truly." His Lordship gave no opinion on that point, but he thought the jury were quite entitled to say that the pursuer was not entitled, in the circumstances, to recover damages. Therefore he was not prepared to give the slightest countenance to disturbing the verdict.

LORD CURRIEHILL said that his opinion was very much influenced by this element in the case—that the newspaper publishers did not commence the series of papers complained of. He thought it was the duty of the publishers of the newspaper to put themselves right in this matter, and that they were entitled to give their own opinion as to the accuracy of the statements. He therefore entirely concurred with his Lordship.

LORD DEAS said that a practice prevailed very extensively among newspapers of publishing letters anonymously. He was not sure if it would not be very wholesome if everybody who wrote letters to the newspapers had their names put at the end of them; but certainly when newspapers were misled by wrong information given to them, it was a wholesome thing that the name of the party who gave the erroneous information should be published by them, when they thought the circumstances fairly warranted that being done. He concurred with his Lordship in refusing to disturb the verdict.

LORD ARDMILLAN concurred.

Agents for Pursuer—D. Crawford & J. Y. Guthrie, S.S.C.

Agent for Defenders—John Ross, S.S.C.

Wednesday, June 12.

SECOND DIVISION.

FLEMING v. BURGESS AND ROLES.

Bankruptcy—Trustee—Debt—Offer of Payment—Lease—Registration of Leases Act 1857—Petition—Assignment—Lis Pendens. A party who had acquired right to a lease in security of a debt, and applied, by petition, to the Sheriff to be put in possession under the Registration of Leases Act, was offered payment of his debt in full by the debtor's trustee on condition of his granting an assignation of the lease to him. He was willing to grant a discharge, but refused to grant the assignation, on the ground

that he held the subjects in security of another debt, to which he had acquired right after the date of the sequestration and of his application to be put in possession. Held that he was bound in equity to grant the assignation, and that he could not plead counter-equity as applicable to a debt acquired *pendente lite*, and after judicial demand for the assignation was made.

Burgess had granted to Fleming an assignation of a lease of heritable subjects in security of a debt. Burgess afterwards became bankrupt in 1864. Fleming presented the present petition to the Sheriff of Inverness, under the Registration of Leases Act 1857, craving to be put in possession of the subjects of lease. Subsequent to the sequestration, the petitioner acquired right to another debt, secured by a decree following upon an adjudication which had been led against the same subject in 1862. Roles, the trustee in the sequestration, offered payment of the first debt, which was preferable, upon assignation of the security; but the petitioner maintained that the trustee must be satisfied with a simple discharge. He said that it would be to his prejudice to grant the assignation asked by the trustee, because he was entitled to hold the lease as preferable security for both debts. The Sheriff-substitute (THOMSON) and the Sheriff (IVORR) held that the petitioner was not bound to grant the assignation, holding that the trustee had no higher right than Burgess had, who would not have been entitled to claim the assignation; and that the assignation of the decree of adjudication in favour of the petitioner was of itself a sufficient answer to the respondents' demand for an assignation; for no creditor can be compelled to assign a right to his own prejudice. The trustee advocated. The Lord Ordinary (BARCAPLE) recalled both these interlocutors, holding that, the petitioner not having acquired right to the decree of adjudication until after he presented his petition, he could not thereby *pendente lite* deprive the trustee of his right to demand an assignation of the lease, in the interest of the other creditors, upon his making full payment of the debt.

The respondents reclaimed.

A. R. CLARK and H. SMITH for them.

WATSON and TRAYNER in answer.

At advising—

LORD JUSTICE-CLERK—The case presented to us is that of a party having a security over a lease, and desirous of entering into possession under his security, to whom payment of the sum contained in his security is tendered by the trustee on the sequestrated estate of his debtor, and the question is whether he is bound to grant an assignation of the debt, or is justified in offering a discharge. Considering the numerous transactions in which such questions arise, there is surprisingly little authority to be found in our institutional writers on the subject. Mr Erskine's doctrine on the subject is stated with reference to cases in which the party paying is actually bound along with the debtor. But there can be no question that that equitable remedy is in much more extensive operation, and, as laid down in the case of *Smith v. Gentle*, is applicable to all cases in which the creditor is putting diligence in force in order to recover payment. It is daily in operation in cases in which a creditor in an heritable security demands payment of his bond; and the same principle would seem to be applicable where a

party, instead of enforcing payment by personal diligence, is seeking to enter into possession of the property of his debtor.

The right to demand an assignation rests entirely upon considerations of equity as to the position of parties. A discharge is all that, in strict law, can be demanded; but where an assignation in favour of a third party who advances the money necessary to pay the debt, while it benefits the debtor, does no harm to the creditor, and the creditor is insisting upon implement of his obligation, the Court will intervene in the debtor's favour. The same considerations of equity which cause the strict law to be varied in favour of the debtor, precludes its application in cases where the creditor would suffer injury. A creditor receiving payment of his debt is not held to be under any obligation to assign, if the assignation shall be to his prejudice. He cannot, of course, be called upon by a debtor who himself pays his debt, to grant any such deed.

The demand for an assignation here is met by two answers. In the first place, it is urged upon us that the trustee is truly no more than a representative of the debtor, and reference is made to the case of *Ewart and Latta*, and to the opinion of Lord Westbury, who says in that case, that the trustee can maintain no higher ground in reference to his demand than the debtor himself could do.

The trustee does no doubt represent the bankrupt in a certain sense, but he is, in virtue of his confirmation, an adjudging creditor. The right of an adjudger in implement, and the right of an adjudger for debt, warrant legal reversion. He is administrator of the estate for the interest of all the creditors, and an assignation would plainly be an auxiliary in his administration. In the case of *Latta*, the observation of Lord Westbury was made in reference to a state of the fact in which a trustee claimed an assignation on payment, not of the debt due, but of 7s. 6d. in the pound of that debt. The assignation was offered by the creditor if his whole debt was paid; the argument was, that the debtor could not, on payment of 7s. 6d. in the pound, have asked an assignation; and a trustee could not exercise a privilege in reference to a partial payment. I do not think that this objection is good.

The creditor farther pleads that he has a second debt and security, and that the assignation of his right to the first security will prejudice his remedies under that security. Had that security been held by the creditor anterior to the sequestration, I should have been disposed to think the objection valid. It would present some difficulty if the acquisition had been made subsequent to the sequestration. It seems to me to present none at all, seeing that it was acquired after the application was made for entry into possession, and simultaneously with an order for condescendence. It is, I think, impossible for us to hold that a party can plead against a demand judicially made—a prejudice arising from the voluntary acquisition of the debt, in reference to which debt so acquired prejudice is averred pending the litigation. The only prejudice which he can plead as to this debt, and the circumstances of its acquisition, seem to me to exclude all equity in reference to it. To the equitable demand of the trustee he must show counter-equity, and if all the equity which he can urge is the effect to be produced upon a debt to which he had no right until the judicial demand for an assignation was made and actually under discussion, I cannot see

that he presents any case for our equitable interference. I do not think that he can be heard to plead prejudice to a right only acquired plainly for the very object of raising the plea. I therefore agree with the Lord Ordinary, with whose views, as expressed in his note, I generally concur.

The other Judges concurred.

The interlocutor of the Lord Ordinary was accordingly adhered to.

Agents for Reclaimer—Hagart & Burn Murdoch, W.S.

Agents for Respondents—Murdoch, Boyd, & Co., W.S.

Thursday, June 13.

FIRST DIVISION.

FRASER v. YOUNGER & SON.

Reparation — Culpa — Unfenced Machinery — New Trial — Bill of Exceptions. Motion for new trial, on the ground that the verdict was against evidence, refused. Bill of Exceptions sustained, on the ground that the first direction excepted to was ambiguous, and the second unsound.

In this case, in which Mrs Margaret Fraser, widow of James Fraser, provision dealer and cow-feeder in Alloa, was pursuer, and George Younger & Sons, brewers in Alloa, were defenders, the following issue was sent to a jury in April 1867:—

“Whether the pursuer's daughter, Ann, died in consequence of injuries sustained on or about the 10th of April 1866, from an unfenced shaft in the mash-house of the defenders' brewery at Alloa, through the fault of the defenders, to the loss, injury, and damage of the pursuer?”

Damages laid at £1000.

The jury unanimously returned a verdict for the defenders. The pursuer moved for a rule on the defenders to show cause why the verdict should not be set aside as contrary to evidence, and also presented a bill of exceptions to the judge's charge.

The presiding judge (KINLOCH) had charged the jury, *inter alia*—(1) That if they were satisfied on the evidence that Ann Fraser ought not to have been in the mash-house of the defenders on the occasion in question, the defenders were entitled to a verdict. (2) That the act of the servants of the defenders in allowing the deceased Ann Fraser to come within the mash-house would not affect the defenders if the jury were satisfied on the evidence that their doing so was in contravention of a direct order of the defenders. To these directions the pursuer had excepted at the trial.

FRASER and J. C. SMITH for pursuer.

GIFFORD and JOHN HUNTER for defenders.

On the motion for a rule, the Court held that there was no ground for granting it on the footing that the verdict was against the evidence, whatever might be said as to the law. Supposing no law had been laid down, or that the law laid down were sound, the Court were all of opinion that the verdict was fully justified by the evidence, and that the evidence led to this, that the girl killed did, by her own fault and recklessness, contribute to her own destruction.

On the bill of exceptions.

LORD PRESIDENT—In this case it is necessary, in the first place, as it is in considering any bill of