

fide Payment. A dealer in farm produce was in the habit for many years of purchasing from the proprietor's factor or factor's clerk, and paying the price to them. The factor was dismissed, the dismissal being intimated to the dealer. The proprietor suing the dealer for a balance of price of cheese, dealer assoilzied as having *bona fide* paid the money to the clerk before intimation of the dismissal.

Colonel M'Douall of Logan brought this action in the Sheriff-Court of Wigtownshire against Alexander Brown, dealer in dairy produce, for a sum of £55, as the balance of the price of cheese sold by the pursuer to the defender in October 1861. The principal questions were (1) whether a certain sum of £50 had been paid by the defender to Davidson, clerk to M'Culloch, the pursuer's factor; and (2) whether that was a good payment as against the pursuer.

The Sheriff (HECTOR), adhering in substance to the interlocutor of his substitute (RHIND), held it proved that for many years prior to 1861 the pursuer had M'Culloch in his service as factor, and Davidson as factor's head-clerk, and had under their management a home farm on his estate; that the factor and Davidson had power and were in use to sell the farm produce and receive the price, and had frequent dealings in that way with the defender; that in December 1861 the pursuer wrote to the defender intimating that he had parted with his factor, M'Culloch, and asking direct remittances on account of any cheese that might be purchased; that some time prior to that date, viz., in October 1861, and while the factor and his clerk were still acting for the pursuer, the defender purchased directly from Davidson two parcels of cheese; that on 8th October the defender admittedly paid £50 to account; that on 8th November 1861 the £50 in dispute was paid to Davidson by the defender in respect of said sale, and that the sale having been made by Davidson, and the defender having in *bona fide* made the payment of 8th November in respect thereof, the payment was effectual in a question between the pursuer and the defender.

The pursuer advocated.

CLARK and MACDONALD for advocator.

WATSON and GUTHRIE for respondent.

The first question was not disputed; on the second question the Court adhered, holding that as Davidson had sold the cheese in question, and had for many years been in the habit of buying and selling for M'Douall, the justice of the case required that if the money had not been accounted for by Davidson, and if M'Douall had not received the money (which was not proved), the loss must fall, not on Brown, but on the pursuer, who had not publicly disowned the factor's acting on his behalf.

Agents for Advocator—Tods, Murray, & Jamieson, W.S.

Agent for Respondents—D. J. Macbrair, S.S.C.

Saturday, October 24.

FIRST DIVISION.

DAVIDSON (WOOD'S TRUSTEE) v. BOYD.

Bankrupt—Landlord and Tenant—Urban Tenement—Rent—Forehand Payment—Bona fides. A party being sequestrated on 9th November 1867, the trustee on his estate claimed pay-

ment from the tenant of a house belonging to the bankrupt of the half-year's rent due at Martinmas 1867 for the preceding half-year. The tenant had admittedly and *bona fide* pre-paid the said rent to the proprietor on 29th October previous. Claim *repelled*, and held that the trustee's claim was measured by the claim of the bankrupt, who in a question with the tenant was bound by the admitted payment.

Andrew Davidson, trustee on the sequestrated estate of James Wood, brick manufacturer in Perth, who was sequestrated on 9th November 1867, sued Mrs Boyd for the rent of a dwelling-house belonging to the pursuer, for the half-year from Whitsunday to Martinmas 1867.

The defence was that, on 29th October 1867, the defender paid to Wood the rent and feu.

The pursuer admitted the payment, but answered that, Wood's estate having been sequestrated on 9th November, the payment, being a prepayment before the term, was bad in law, and could not prevent his claim as trustee for the creditors.

The Sheriff-substitute (BARCLAY) pronounced this interlocutor:—"Finds that the said rent became due and payable at the term of Martinmas last, being the 11th day of November 1867; and that the defender paid Wood, the proprietor and landlord, the said rent on 29th October previous to that term: Finds that the estates of Wood were sequestrated under the Bankrupt Acts on 9th November thereafter, and thereby all his estate was carried to his creditors, now represented by the pursuer as trustee under the sequestration; and farther, the said sequestration operated as an arrestment of all sums then current, due and payable to the bankrupt: Therefore, and though there is every ground for holding the payment of rent as made in the best of faith, nevertheless the same, as a payment in anticipation of the term, is bad in law, and therefore the pursuer under his title is entitled to recover the rent becoming due and payable subsequent to the date of the sequestration of Wood, the landlord: Therefore decerns in terms of the summons, with the statutory amount of costs."

In his note the Sheriff-substitute referred to Stair 1, 18, 3; Bankton 1, 24-26; Erskine 3, 4, 4; Wilson, M., 10, 022.

The Sheriff (TAIT) reversed, and assoilzied the defender, holding that the authorities relied on by the Sheriff-substitute applied only to tenants of land and not to tenants of houses.

The trustee reclaimed.

FRASER for reclaimer.

CLARK and ADAM for respondent.

At advising—

LORD KINLOCH—The question in this case relates to the half-year's rent (amounting to £43) due by the respondent, Mrs Waddell Boyd, as tenant of a dwelling-house in Perth. The rent was payable at Martinmas 1867. On 29th October previous she paid the amount, and it is not disputed, in good faith, to her landlord, Mr Wood. On the 9th November, two days before the rent fell due, the estates of Mr Wood were sequestrated under the bankrupt statute. Mr Davidson, the trustee in the sequestration, now claims payment from Mrs Boyd a second time, on the ground that the payment made by her anterior to the term of payment cannot avail to discharge the claim in a question with him as trustee in the sequestration.

The Sheriff-substitute, Mr Barclay, has given effect to this demand by the trustee, thinking him-

self compelled to do so, by a rule of law, of which, at the same time, he more than doubts the policy. The Sheriff, Mr Tait, has come to an opposite conclusion, and has assuozied from the claim.

I am of opinion that the last judgment, that of the Sheriff, is the sound one, and ought to be affirmed. But I rest my conclusion on somewhat different grounds from those of the learned Sheriff. I cannot draw the distinction which he does between the rent of land and that of houses. Neither am I prepared to consider the period when the rent, as it is said, vests—whatever that period may be—as of conclusive importance in the case. I adopt another, and somewhat simpler, ground of judgment, which I shall now briefly explain.

Undoubtedly there is a rule of law by which, in certain circumstances, payment of rent made anterior to the term of payment, is held not to discharge the tenant. Whatever may be said as to the policy of this rule, its existence cannot be disputed. It is more difficult to fix satisfactorily the precise persons in whose favour the rule operates, and who are entitled to take advantage of it, to exact a second payment. Purchasers and donatories have been declared to be so entitled; and creditors are somewhat vaguely stated to have the same right. An arresting creditor of the landlord was found in one case to be entitled to exact a second payment. I am not quite satisfied that there is sufficient authority to lay down the rule as absolutely fixed in this last-mentioned case.

But the present is not the case of an individual purchaser or individual creditor. It is the case of a trustee in a sequestration claiming for behoof of the general body of creditors. A distinction has been drawn in the law between such a case and that of a simple purchaser, adjudger, or creditor. In the well-known case of *Gordon v. Cheyne*, and several others of a similar description, it was ruled that in regard to incorporeal rights, the trustee could only take the right *tantum et tale*, as it existed in the person of the bankrupt; and was liable to those equities which might not have affected a purchaser or special assignee. The principle of the case of *Gordon v. Cheyne* has been affirmed in subsequent cases; and I consider it to be now a fixed principle of our law. There is much good reason for distinguishing the case of a special contract made by the bankrupt with a person transacting with him in good faith whilst in the ordinary administration of his affairs, and the case of creditors at large realising the bankrupt estate in a general process of winding-up.

In the present case, I view the right sought to be enforced by the trustee, as a proper personal right arising out of contract. The right in which the trustee insists against Mrs Boyd, is the right accruing to the bankrupt under his contract of lease with that lady. This is a right under contract, and nothing else. A lease is in truth a personal contract, although vested by statute with certain of the qualities of a real right. It was anxiously pressed on us that the case was one of heritable right: the trustee being the successor of the bankrupt in the heritable property, as a special purchaser or adjudger might be. It would by no means necessarily affect the application of the principle, that an heritable property was in issue: for it may conceivably be applicable to an heritable right, where the right is merely personal, and the faith of the records is not concerned. But I think it is a misapprehension of the true question at issue, to suppose that it is a question of heritable right. There

is no competing claim made either in the character of owner or creditor against the heritable property. The question is simply between the trustee and Mrs Boyd; the latter of whom is sued by the former to make payment of the rent stipulated by her contract with the bankrupt. I am of opinion that the trustee sues this claim simply in the bankrupt's right: and can only prosecute the claim to the extent and effect to which the bankrupt himself could enforce it. If I am right in this view, there is an end of the controversy: for clearly, in any question between Mrs Boyd and the bankrupt, effect must be given to the payment made by Mrs Boyd.

It appears to me that this is the simple and sound view on which the Sheriff's judgment should be affirmed: and I think it one to which the rule which disallows payments of rent made anterior to the term of payment cannot be effectually opposed. There is no authority to be found applying that rule to the benefit of creditors in a sequestration acting through the general trustee. I am, therefore, entirely free to consider the case on principle. I think in sound principle the trustee must be held to possess no higher right against Mrs Boyd than belonged to the bankrupt: and this, which I think the strictly legal view of the case, is also, I think, the only one consistent with equity and fair-dealing.

The other judges concurred.

Agent for Reclaimer—J. Galletly, S.S.C.

Agents for Respondent—J. & C. Steuart, W.S.

Saturday, October 24.

DUNCAN v. BROWN.

(*Ante*, vol. v, 734.)

Expenses—Jury-Trial—Reparation—Slander. In an action of damages for slander the jury returned a verdict for the pursuer, with 1s. of damages. Pursuer held entitled to expenses.

This was an action of damages for defamation, in which the pursuer concluded for £2000. The slander was contained in a letter addressed by the defender, who was a creditor on the pursuer's sequestrated estate, to the trustee on that estate, with reference to the rejection by the trustee of the defender's claim. The case was tried before the Lord President and a jury in July last, and considerable evidence was led affecting the moral character of the pursuer. The jury, however, returned a unanimous verdict for the pursuer, and assessed the damages at 1s.

J. C. SMITH for the pursuer now moved the Court to apply the verdict, and find the pursuer entitled to expenses.

MARIE for the defender objected to expenses being awarded, on the ground that the pursuer had asked £2000 of damages, and the jury found him entitled to only 1s., and that the reason why the jury had awarded such a small sum must have been the impression created in their minds by the evidence led before them as to the immoral life led for some time by the pursuer. At all events, he submitted, that if expenses were found due they should be subject to considerable modification.

At advising—

LORD PRESIDENT—As I tried this case I may mention the impression I have formed of it. It was a very unpleasant case. No doubt Mr Duncan's habits and mode of life were anything but creditable to him, but that is no justification for anyone