

mony use and wont, there was no direct evidence that the right of pasturage existed at the date of the valuation in 1630. In these circumstances, the common agent contended that the right of pasturage in the commonty in question could not be held to have been included in the valuation of 1630, and, therefore, that that valuation could not be held to apply to the specific share of the commonty since allocated to the lands. The Lord Ordinary (MURE) gave effect to this contention, founding mainly on the absence of any mention of vicarage teind in the valuation.

His Lordship added the following note:—"In this case the valuation of the teinds preceded the division of the commonty, and it is pretty clear that the principal lands of Lathro, to which the 17 acres in question are now attached as a *surrogatum* for the right of commonty in Gallowhill, were the lands valued in the decree of valuation. In these respects, therefore, two of the requisites which are assumed in the decision in the case of *Plummer*, December 11th 1867, to be essential to entitle a party to maintain that a valuation of principal teinds includes a valuation of accessories, so as to embrace lands which were afterwards assigned to the heritor as a *surrogatum* for those accessories, have been complied with. But, in other respects, the case is, in the opinion of the Lord Ordinary, ruled by the decision in the *Locality of Orwell*, March 8th 1867, relied on by the respondent.

"(1) The earliest title produced is dated in 1755, upwards of 120 years after the valuation. There is, therefore, no direct evidence to show that, at the date of the valuation, the commonty of Gallowhill was attached to the lands of Lathro, and was not acquired subsequent to 1630. But (2) assuming that difficulty to be got over, the valuation in the present case does not, it is thought, afford any conclusive evidence that the right of commonty was included in the valuation. For there is no express valuation of vicarage teinds, which those of the commonty must have been, nor any valuation in money, from which it may be inferred that the right of pasturage in the commonty was valued. The valuation was exclusively in victual, as in the case of *Orwell*, viz., 'one chaldier victual, half bear half meal;' and it is limited to the lands of Lathro, without any mention of right of commonty, or of parts and pertinents. The valuation, no doubt, bears that the lands are worth 'of yearly rent in stock and teind one chaldier victual, half bear half meal.' But a valuation, though in stock and teind, when in rental bolls, does not, in the opinion of the Lord Ordinary, of itself necessarily imply a valuation of vicarage teinds, as a victual valuation is in the general case held to apply only to parsonage teinds; and the Lord Ordinary feels it the more necessary to act on this view in the present case, because the valuation shows that when vicarage teinds were valued they are expressly mentioned. Thus the lands of Claslachie are stated to be 'worth of yearly rent in stock and teind two chaldiers meal, and pays four pounds Scots of vicarage;' and there are other instances in this valuation (No. 202 and 314 of process) in which vicarage teinds are expressly mentioned. The *onus*, therefore, being on the objector of making out that the right of commonty was valued, the Lord Ordinary has been unable to find grounds sufficient to warrant him in giving effect to the objections, and in holding that the Common Agent was wrong in localing on the objector for the 17 acres of the common of Gallowhill, which

were allotted to the lands of Lathro in 1793 as a *surrogatum* for the right of pasturage in the commonty."

The heritor reclaimed.

LEE and GLOAG for him.

GORDON, Q.C., and ADAM in answer.

Their Lordships held that the whole question in these cases is whether it is proved in point of fact that at the date of the valuation the principal lands valued had attached to them rights or interests in the commonty about which the question arises. If there was an existing interest in a commonty it is then to be presumed that the fruits of that interest went to swell the valuation, and when the commonty comes to be divided the specific share allocated in lieu of the formerly existing interest must be held a valued subject. But the nature of the valuation here, and the state of the titles of the heritors, made it impossible in this case to hold that the heritor had proved the fact upon which his case depended.

Agents for the Heritor—Murray & Hunt, W.S.

Agent for the Common Agent—William Montgomery, W.S.

WASON v. GOUDIE.

Relevancy—Appropriation of Debtor's Goods—Fraud.

Statements which held relevant to infer that by fraudulent appropriation of a debtor's goods a party had made himself liable for a debt due on a trade account.

In this case the pursuer sued the defender for a trade account of £24, 2s., being the price of goods furnished and delivered by the pursuer to Duncan M'Farlane, grocer in Calmonell. The pursuer made, *inter alia*, the following statements:—

"2. In or about the month of June 1864, the said Duncan M'Farlane, being in embarrassed circumstances and considerably under the power of the defender, entered into certain arrangements with him, the precise nature of which is to the pursuer unknown, but, *inter alia*, to the effect that the defender should take possession of the whole stock-in-trade, shop-fittings, and effects belonging to, and pay the debts owing by him. The defender took possession of the said Duncan M'Farlane's stock, effects, and debts, and undertook and agreed to pay the debts due by the said Duncan M'Farlane, and, *inter alia*, the debt sued for. The paper, No. 26 of process, made out at the time by Mr MacLimont, Girvan, as the defender's agent, shows the state of M'Farlane's insolvency as then recognised by the defender.

"3. In or about the month of June 1864, the said Duncan M'Farlane being then in insolvent circumstances, the defender collusively, illegally, wrongfully, and fraudulently, intromitted with, took possession of, and appropriated to his own use, the whole book debts and stock-in-trade, consisting of grocery goods, shop-fittings, and others belonging to the said Duncan M'Farlane, to the value of about £600, and thereby wrongfully and illegally deprived the pursuer of the means of duly recovering payment of the account sued for from the said Duncan M'Farlane. The entries on p. 202 of the defender's book, No. 29, show that he took back into his stock goods of M'Farlane's to the value of £53, 12s. 10d., and realized on other stock sold upwards of £50 further, besides disposing of another part of M'Farlane's stock for a sum of £75, 15s. 2d."

The Sheriff-Substitute (ROBISON) found the

action relevant, but the Sheriff (N. C. CAMPBELL) altered, and pronounced the following interlocutor:—"Edinburgh, 22d September 1866. The Sheriff having heard parties' procurators upon the defender's appeal from the interlocutor of 31st July last, and considered the Closed Record, productions, and whole process, recalls the said interlocutor, and finds that the debt sued for is a trade account, which is alleged to have been incurred to the pursuer by Duncan Macfarlane, grocer in Calmonell: Finds that payment of this account is sought to be recovered from Mr Goudie, the defender, 1st, in respect of a contract under which it is alleged that the defender had undertaken and agreed to pay the same; and 2d, in respect of the defender having collusively, illegally, wrongfully, and fraudulently taken possession of the said Duncan Macfarlane's whole book debts and stock-in-trade while he was in a state of insolvency: Finds that the first of these grounds of action is supported by relevant averments, but in regard to the second of these grounds of action, finds that the statements on record are not relevant or sufficient to support the same, and remits the cause to the Sheriff-substitute to proceed therein as to him may seem just.

"Note—Duncan Macfarlane is the primary debtor in the amount of the account for which the action was raised. It was to him that the furnishings contained in the account were made.

"Now there are two grounds upon which the pursuer seeks to make the defender Goudie answerable for the amount of this account. The first of them is, that Macfarlane, being in embarrassed circumstances, entered into certain arrangements with the defender to the effect that the defender should take possession of the whole stock-in-trade, shop-fittings, and effects belonging to Macfarlane, and pay all the debts owing by him; and, in particular, that the defender took possession of Macfarlane's effects, and agreed to pay the debt in question.

"Now, if this statement be true, the defender Goudie did no wrong. He agreed, for an inadequate consideration, to pay the pursuer and Macfarlane's other creditors the whole amount of their debts, which Macfarlane was not able himself to pay. He, a solvent man, stepped into the shoes of an insolvent man, and undertook the insolvent's obligations; and the pursuer raises this action for the purpose, in the first place, of enforcing the contract made between Macfarlane and the defender on his behalf. So far the Sheriff is disposed to think that the pursuer's case is relevant.

"But there is another ground on which he sues, which is thus expressed in the second plea in law, viz., 'the defender having illegally, fraudulently, and collusively taken possession of the whole stock, debts, and effects of Macfarlane, the pursuer's debtor, while in insolvent circumstances, is bound either to restore such stock, debts, and effects, that the pursuer may suit action and diligence thereon for recovery of his debt; or, failing such restoration, is liable in payment of the amount due to the pursuer, with interest and expenses.' This second ground of action is not, in the opinion of the Sheriff, relevantly supported by the statements on record, 1st, because the pursuer has distinctly averred, as already mentioned, a case of contract which seems to exclude fraud; 2d, because, when fraud is founded on, very specific averments are required in regard to the nature of the fraud, and, because the pursuer has given no specification of any substantive act or acts that the defender did

amounting to fraud; and 3d, because there is no specification in any part of the summons or record of the book debts, stock, and effects which the pursuer asks the Sheriff to ordain the defender to restore, or place in the hands of the clerk of court.

"How, it may be asked, can an effective decree be pronounced, ordaining book debts, stock, and effects generally, without any specification, to be restored or placed in the hands of the Sheriff-clerk? How, in particular, are book debts to be placed in his hands? And how is the Sheriff to ascertain whether all the book debts, and all the stock-in-trade and effects referred to, have actually been placed in his hands, when there is a total want of specification of the particular things to be placed there? Or, supposing nothing to be restored, how are the unspecified and unenumerated things to be valued, in order to the value being placed in the hands of the clerk of court? And if there be no means within the four corners of the record enabling the Sheriff to make an effectual decree for the restoration of any particular thing, it is clear that the Sheriff cannot grant the subordinate conclusion, viz., to ordain the defender to make payment of the sum sued for on the ground of the alleged fraud, for it is only in the event of a decree being pronounced for replacing Macfarlane's stock, &c., and that decree not being implemented, that payment of the debt on the ground of the fraud is sought.

"The Sheriff has therefore held that there is no relevant case for replacement of Macfarlane's stock, or payment in lieu of replacement.

"It will now be for the pursuer to say whether he means to go to proof on the alleged contract, or what he means to do."

The case was afterwards advocated by the pursuer after judgment upon a proof. The question before the Court was the relevancy of article 3 of the pursuer's condescendence.

MACLEAN for advocator.

PATERSON for respondent.

At advising—

LORD JUSTICE-CLERK—The summons in this case concludes against the respondent Mr Goudie for payment of a debt due to the advocator (the pursuer in the Inferior Court) by a person named M'Farlane, at one time a grocer in Colmonell, in Ayrshire. The action, in so far as regards this conclusion of payment, is rested upon two grounds—one an actual undertaking or agreement to pay the advocator's debt under an alleged arrangement between the respondent and M'Farlane; the other, in consequence of an alleged collusive and fraudulent transmission, by which the respondent is said to have appropriated the stock belonging and debts due to M'Farlane when M'Farlane was in insolvent circumstances, whereby he deprived the pursuer of the means of recovering his debt. There is a conclusion, on the assumption of the state of the fact last alleged, to the effect that the respondent should replace in the hands of the clerk of court the stock-in-trade illegally intruded, or its value, to the effect that the pursuer may have action and diligence for recovery of the account.

The statements on which the advocator sought to have judgment were embodied in two articles of the condescendence—one affirming an agreement, the other alleging the illegal transmission. In cond. 2 the pursuer says—[reads.]

The averment of an agreement is denied by the respondent in absolute terms.

The 3d article of the condescendence is as follows:—[reads.]

The Sheriff-substitute held the averments in both articles relevant, and allowed a proof of both. The Sheriff differed as to the relevancy of the 3d, and disallowed any proof except in reference to the agreement stated in No. 2. A proof has been led, and judgment given as to the proof, but we are asked to consider whether the Sheriff did right in holding the statement in the 3d article irrelevant.

Had the 3d article stood alone, and the only demand preferred in the action been for payment of the pursuer's debt, as the legal inference from the facts alleged, I think that it scarcely admits of question that the case presented is relevant. What is represented is this, that one party takes possession of the entire stock and estate of an insolvent trader collusively and fraudulently, and appropriates it in its entirety to his own use, leaving nothing from which his creditors can operate payment of their debts. Surely such a transaction cannot be represented as legitimate. There is the element, in the first place, of insolvency; of an appropriation, in the next, of the entire property of the insolvent trader; and there is, further, the exclusion of any supposed innocent appropriation by the affirmation that the act of appropriation proceeded from collusion between the party taking and the party giving possession, and was fraudulent—that is, done with bad intention. I should be sorry to think that a transaction of such a nature could be upheld as illegal, or that it could be affirmed that creditors of insolvent debtors in Scotland should be deprived of their just rights by such a simple and easy arrangement.

That they must have a remedy against such an act seems plain, and the two remedies sought seem to me to present alternatives fairly calculated to meet the evil, unless the arm of the law is to be wholly paralysed in the vindication of the just rights of creditors.

The leading view of the Sheriff was, that the statement of the alleged contract to pay, contained in the 2d article of the condescendence, vitiated the statement in the 3d; and that, the statement being assumed as true, no wrong was done. He regarded the case as one presented in all its aspects as one in which it must be held as true that there was a special contract in the advocator's favour.

The case, as I regard it, was really presented in article 3 in an alternative view. The advocator, in his 2d condescendence, professes ignorance of the details of the arrangements entered into, but avers an agreement to pay his debt. The 3d article, as I understand it, proceeds upon the footing not that there was an agreement, but that there was not. The gravamen is, and the substantive averment to support the second *medium concludendi* was, that the respondent appropriated the estate, leaving the advocator in such a position that he could not recover his debt. Can I hold that the pursuer really meant to say, in libelling this 3d article of the condescendence, that the respondent was under personal obligation to pay the debt? It is a question as to what is really meant by the advocator, and it would be absurd, I think, to hold him as affirming in the same breath the existence of the contract and the gross fraud by which he was deprived of the power of recovering his debt by an appropriation of his debtor's estate. The reasonable and fair reading is,—there was a contract. I ask judgment on that footing; if there was no contract, there was such an irregular and illegal transaction as to warrant me

to recover the debt or get a replacement of the property.

We do not in this country, any more than elsewhere, hold alternative pleading incompetent; and had the words 'or otherwise' preceded the 3d condescendence, I do not see how anything could have been urged against the relevancy. If the true meaning of the statement is to present an alternative view, shall we, on the narrow ground of an omission fully to express what was truly meant, withhold a remedy against what law considers a fraud?

As to the alleged necessity for further specification of the fraud, which is the second ground, I confess I see no palpable defect of statement. Insolvency,—appropriation of the insolvent's estate,—the necessary deprivation of a power on the part of his creditors to operate payment of their debts, and that done collusively and fraudulently,—seems sufficient.

As to the 3d reason, it applies to the alternative conclusion. It is not necessary to go into the question if, as I think, there is a case laid for the remedy of payment, but I can only say I do not share in the views of the Sheriff as to the extrication of the conclusion, or as to the necessity of a special condescendence in the outset of a case of a partner's share of effects taken by a fraudulent arrangement in wholesale from possession of an insolvent.

The other Judges concurred.

Agent for Advocator—Wm. Miller, S.S.C.

Agents for Respondent—M'Ewen & Carment, W.S.

Friday, March 12.

FIRST DIVISION.

CITY OF GLASGOW BANK v. DALL AND

OTHERS.

Multiplepinding — Relevancy — Riding Interest.

Three parties, general creditors of the common debtor, claimed right to a sum which had been consigned by him in this country in name of the claimants, for behoof of the party having best right thereto. *Held*, altering the judgment of the Lord Ordinary, that the claim of one of the parties was not irrelevant, in respect his claim was not a riding interest, but, like the others, that of an ordinary creditor of the common debtor.

This was an action to ascertain the right to a consigned sum, being the price of certain tweed goods sold in Australia by Mr Halliburton, wool broker there, and which price, after being brought to this country and deposited in bank, was claimed by three parties, viz., Messrs James Mitchell & Company, Willans, Overbury, & Company, and Mr Dall, as trustee on the sequestrated estate of Mr George Chisholm.

Mitchell & Company maintained that they had in the year 1864 sold the goods in question to Mr Chisholm, as the agent and representative in this country of Mr Halliburton, and that, the price of these goods being still unpaid, Mitchell & Company, as creditors of Halliburton, were entitled to be preferred to the consigned sum, being the fund *in medio*, or, at all events, were entitled to a share of it along with the other creditors of Halliburton. Willans, Overbury, & Co. claimed the fund in virtue of an alleged right of pledge or hypothec, which they