Friday, February 27.

SECOND DIVISION.

[Lord Kyllachy, Ordinary.

M'GAVIN *v.* STURROCK AND ANOTHER.

Lease — Security over Crop in Tenant's Possession—Bankruptcy—Preference.

By a lease of a farm for nineteen years from 1859, excluding assignees and creditors, it was provided that "in case the tenant shall become bankrupt . . . the lease shall in the option of the proprietor be *ipso facto* null and void, and shall come to an end at the first term of Martinmas thereafter," and that "the rent payable for the last crop of the lease shall be exigible by the proprietor previous to the removal of any part of said crop from the ground." From 1878 the tenant remained in possession from year to year by tacit relocation, and on 28th August 1890 his estates were sequestrated. He remained, however, in possession, and his trustee in bankruptcy managed the farm until Martinmas, and recovered the crop. Upon 1st October the landlord served notices upon both of them to quit the farm at said term.

In an action at the instance of the landlord to have the trustee in bankruptcy interdicted from selling the last crop until he had paid or found security for the rent payable for the same, it was *held* that the trustee had not adopted the lease, and that the landlord had secured no preference for his debt as against other creditors.

By lease dated 22nd and 27th October 1858 Robert M'Gavin of Ballumbie, Forfarshire, and others, as trustees of the late William M'Gavin, let to Charles Sturrock, farmer, the farm of Ballumbie for nineteen years with entry at Martinmas 1859.

The lease, which excluded assignees, creditors, and those acting for behoof of creditors, and under which the rent was payable in equal moieties at two terms in the year—Candlemas and Lammas—after reaping, for the crop and year preceding, provided, *inter alia*, that "in case the tenant shall become bankrupt or insolvent at any time during the lease, it is hereby provided that his creditors shall not be entitled in any way to interfere with the lands hereby let by appointing a manager or otherwise, nor shall the tenant himself be entitled to continue in the possession of the farm, but the lease shall, in the option of the proprietor, be *ipso facto* null and void, and shall come to an end at the first term of Martinmas thereafter, unless the bankruptcy shall previously be brought to an end by a judicial discharge or judicial composition." It further provided that "the rent payable for the last crop of the lease shall be exigible by the proprietors previous to the removal of any part of said crop from the ground, the tenant having it in his option either to pay the rent in advance on getting an abatement of interest at the rate of 4 per cent. per annum, corresponding to the period between the time of actual advance and the stipulated terms of payment, or otherwise before removing any part of the crop, to find security to the satisfaction of the proprietors or their factor, for the regular payment of the said rent."

The term of endurance of said lease came to an end at Martinmas 1878, but Sturrock continued in possession of the farm from year to year by tacit relocation down to 28th August 1890, when his estates were sequestrated, an abatement of rent having been made in 1887. Thomas Martin Dodds, auctioneer, Dundee, was on 9th September 1890 duly elected trustee in the sequestration, and thereafter entered upon the duties of his office.

The landlord brought an action of suspension and interdict against the tenant and his trustee in bankruptcy to have them interdicted from removing from the lands of the farm any part of the crop of the year 1890, whether still growing on the lands or already reaped or gathered and stored thereon until payment should have been made to him of the rent for the crop and year 1890, or security found for the same.

The complainer pleaded—"In respect of the above-recited provisions of the said lease, and of the bankruptcy of the said Charles Sturrock, the complainer, in the circumstances condescended on, is entitled to interdict as craved."

The respondents pleaded—"(1) In the circumstances the respondent Charles Sturrock does not hold the farm under the lease founded on. (3) There is nothing in the said lease, even were it relevant and binding, nor in the circumstances of the case, which can entitle the complainer to prohibit the respondent the said Thomas Martin Dodds, as trustee in the sequestration, from recovering and realising the estate of the bankrupt, or to warrant the conclusions of this process." Interim interdict was granted.

The parties by joint-minute admitted—"That the grain crop was cut and harvested between the 3rd September and 11th day of October 1890. That the hay had all been secured prior to the date of the sequestration. That the potatoes which had been planted between 21st April and 17th May 1890 were lifted btween 14th October and 1st November 1890. That the turnips were sown out between the 24th May and 25th June 1890. That between the date of sequestration and 5th November 1890 there were 32 milch cows kept on the farm, and that these were fed partly on grass . . . and partly on turnips, for which purpose about one acre of the turnip break was lifted. That the complainer by said special agreement conferred upon the respondents the privilege of leaving the grain crop in stack and the potatoes pitted on the farm until 1st February 1891, and the grain and potatoes were sold with this privilege. That the turnips unconsumed were sold in

the ground, to be lifted and removed at buyer's option before 1st April 1891. That Mr Sturrock remained in personal occupation of the dwelling-house until 22nd November 1890, and that from the date of his appointment till the waygoing sale all farm operations necessary were performed under the orders and control of Mr Dodds, as trustee under the sequestration. That prior to 1st October 1890 the trustee, Mr Dodds, indicated his intention to quit the farm at Martinmas 1890. That of date 1st October 1890 the complainer served upon both respondents notices to quit the said farm at the term of Martinmas 1890." The parties also agreed by joint-minute that interim interdict should be recalled, and the trustee in bankruptcy allowed to realise the crop at present upon the said farm on condition that the proceeds of said crop should be applied, *primo loco*, in payment to the complainer of the rent should it be found that he had right to prevent the removal of said crop until said rent was either paid or secured.

Upon 7th January 1891 the Lord Ordinary (KYLLACHY) pronounced the following interlocutor:—"Finds that, apart from the arrangement contained in the said joint-minute, the complainer had right to prevent the removal of the crop (other than hay) from the farm of Ballumbie until the rent of the current year was either paid or secured: Finds that as the said arrangement has been or is in course of being carried out, it is not now necessary to grant interdict in terms of the prayer; but in respect of the said joint-minute, Finds that the respondents are bound to apply the proceeds of the said crop, other than the hay, *primo loco*, in payment of the said rent as the amount of the same shall be determined in due course in the sequestration: Finds the complainer entitled to expenses: *Quoad ultra* continues the cause, and grants leave to reclaim.

"*Opinion.*—This case of *M'Gavin* v. *Sturrock* raises a very important question, as I view it, in the law of landlord and tenant. The facts of the case have now been ascertained by the joint-minute of admissions which the parties have adjusted in order to avoid a proof, and the question which I have to decide is, whether upon the facts as thus ascertained the complainer, as the landlord of this farm, had right on the bankruptcy of the tenant, and the consequent termination of the tenancy, to retain as against the tenant's creditors the last or waygoing crop until payment of the rent due for that last year's possession.

"The lease under which the tenant held began at Martinmas 1859, and expired at Martinmas 1878, but I see no reason to doubt that at the date of his sequestration, which occurred in August 1890, the tenant continued to possess under the terms and conditions of that lease. It is true that in 1887 the rent was reduced, or at least that a temporary abatement was then granted, but there is no evidence, and indeed I think no sufficient averment, of any new and independent contract of lease, and although of course the original lease ceased to be current for the purposes of the Hypothec Abolition Act of 1880 from Martinmas 1878 onwards, I see no reason to doubt that in so far as its provisions were applicable to a yearly tenancy they continued to regulate the rights of parties down to the sequestration. . . .

"Taking therefore the conditions of the tenancy as still fixed by the lease of 1858, what has to be noted is, that the entry and ish were both at Martinmas; that the rent was payable half-yearly at Candlemas and Lammas after reaping; that in the case of the tenant's bankruptcy the lease was in the opinion of the proprietor to become *ipso facto* null and void, and to come to an end at the first term of Martinmas thereafter, and that with reference to the last or waygoing crop it was specially provided —[*Here follows provisions given above*]—It should be added that assignees, legal and conventional, and in particular creditors, were excluded, at least without the written consent of the landlord. These are the conditions of the lease so far as important.

"The tenant was sequestrated on 28th August 1890, the respondent being appointed interim factor of the same date, and being appointed and confirmed trustee on the 9th September. At the date of the sequestration the hay crop of the year had been cut and secured. The corn crop was uncut. It was subsequently cut and harvested between 3rd September and 11th October. The potatoes which had been planted in April and May were still in the ground. They were subsequently lifted between 14th October and 1st November. The turnips which had been sown between 24th May and 25th June were to the extent of an acre or thereby lifted and consumed between date of the sequestration and Martinmas. The remainder of the turnip crop remained on the ground and were sold at the waygoing sale after mentioned, to be lifted and removed at buyer's option up to the 1st April 1891.

"The present suspension was brought on 24th September and interim interdict was granted, but on 20th October the interim interdict was recalled and the note passed in pursuance of the agreement printed at the end of the record, by which the respondent was permitted to realise the waygoing crop in the same manner as if the interdict had not been granted, he being bound to apply the proceeds, *primo loco*, in payment of the complainer's rent in the event of the complainer being found to have had right to prevent the removal of the crop from the farm until said rent was paid. On 1st October the landlord served upon the tenant and on the trustee notices to quit the farm at Martinmas, the trustee having it appears previously intimated his intention to quit the farm at that term. . . .

"In these circumstances, two pleas are maintained by the complainer. He says, first, that in respect of the clause in the lease already quoted, there was constituted a security for his rent by way of retention over the whole waygoing crop, effectua against both the tenant and his creditors

And he says, second, that in any view the non-removal of the crop until the rent was paid was a stipulation of the lease good as against the tenant, and that the trustee in the present case has so acted as to adopt the lease and render himself liable in its prestations.

"I confess I have had difficulty in seeing how—in the state of the facts with which I have to deal—the first of these pleas can be maintained. The waygoing crop here was reaped and reduced into the tenant's possession during the period of his tenancy. It was not as if the lease had terminated at Whitsunday, and the bargain had been that the tenant, while having right to return and reap the crop then on the ground, should yet do so under the condition that he should first pay the rent. It may be that even against creditors that condition would be effectual. I shall have to consider that presently. But the ish of the lease here was Martinmas, and even in the event of bankruptcy the irritancy was only to take effect at Martinmas, by which term, as I have said, the crop was reaped. The question is therefore the same as if it had arisen not with respect to the waygoing crop, but with respect, for example, to some other crop during the lease which was sought to be poinded and carried off by a poinding creditor. And I am not able to hold that a landlord who has let his lands on an agricultural lease retains such a posssession of the subject as enables him to set up by contract a right of retention over the fruits of the subject. At any rate, such right if maintainable on principle must, I think, be held to have been taken away by the statutory abolition of the law of hypothec. I do not overlook what was urged in argument, that in various respects the law still recognises the landlord's right to qualify by paction the tenant's right in the produce of the farm. That is certainly true with respect, *e.g.*, to the straw of all crops except the last, and with respect also to the dung made with such straw. It perhaps also is true with respect to the straw of the waygoing crop. And it may even be that it is so with respect to the waygoing crop as a whole if and when the tenant gets the first crop under his lease free, and the last crop is stipulated to become the property of the landlord on the principle of steelbow—Rankine on Leases, 256 and 369; *Dun* v. *Johnston*, Hume, 451; *Stewart* v. *Rose*, Hume, 229. These, however, are, in my opinion, special cases involving special principles which are here inapplicable. The condition here is not one which affects the proper cultivation of the farm. Neither is it a question of defining or limiting the tenant's property in the fruits of the farm. On the contrary, the tenant's property in this waygoing crop is assumed; and the attempt is not to limit the tenant's right of property, but to create a security over it by way of retention. It appears to me that these are differences which take this case outside the category of the cases I have referred to.

"But this brings one to the second of the complainer's pleas, viz., that the trustee has here adopted the lease so as to become bound by all its provisions. Now certainly it is very difficult to say that taking the lease as a yearly lease terminating at Martinmas there is any benefit which the trustee could have taken under it which he has not taken. Indeed, if the bankruptcy had occurred, say at Whitsunday, and the trustee had done for six months what he did for nearly three, I do not at present see how there could have been any doubt as to his liability for the year's rent and fulfilment of the other prestations of the lease. But the question arises in this way, and it appears to me to be a rather delicate question. The trustee was entitled, without adopting the lease, to do all that was necessary to realise to reasonable advantage the moveable property of the bankrupt, including the stock, crop, &c., upon the farm at the date of the sequestration; and what he says is that he had no longer or further possession, and took no further benefit from the lease than was reasonably necessary for that realisation. And what I have really to decide is, whether this was so, or whether, on the other hand, the trustee took or is now claiming benefit from the lease which he could not have had if he had renounced or caused the bankrupt to renounce and cede possession to the landlord at or immediately after the sequestration.

"Now, I think it is clear enough upon the joint-minute that the tenant's possession up to Martinmas was the trustee's possession, and that whatever was done in the way of carrying on the farm was done by the trustee. I further think that a part at least of the farming operations as set forth in the joint-minute—and particularly the continued pasturing of the cattle from 28th August up to 5th November—went somewhat beyond what was necessary for mere realisation. I confess, however, I should have felt, if that was all, that that was a somewhat narrow ground for a judgment in favour of the complainer. But there is another element in the trustee's action which appears to me to make it unnecessary to consider this somewhat narrow point, and that is, that the trustee is here claiming an immunity from the stipulation in the lease as to the non-removal of the waygoing crop before payment of the rent—which immunity, in my opinion, he could not have claimed but for his continued possession up to Martinmas, and his consequent ability to reap the crop before the landlord obtained possession.

"It must be considered that except under the lease neither the bankrupt nor his trustee had right to possess the farm for a day. They had right, no doubt, after quitting possession to return when the crops were ripe and to reap them. And they were entitled to such possession as might be necessary for that purpose. But to continue in possession from August to November so as to exclude the landlord was, I think, to exercise a right under the lease. Now, had that right not been exercised — had the trustee immediately renounced the lease and ceded possession

to the landlord—what would have been the result? The crop, it will be observed, was for the most part not only uncut but unripe. Even the corn crop did not begin to be cut till the 3rd September. The landlord therefore entering in the beginning of September would have had undoubted possession of the uncut crop. And I see no reason in principle why, having obtained such possession, he should not have been at liberty to put in force his stipulated right of retention for the rent, if indeed he did not possess such right apart from stipulation altogether. The case would really have been the same as the case I supposed a little ago—of a Whitsunday ish, and a stipulation for a lien over the crop then on the ground for the rent of the year. Or the position would have been on principle the same as if the landlord had obtained a decree of irritancy and ejection proceeding on a clause of irritancy which gave him right to retain or appropriate the crops then on the ground. It is no doubt true that according to the maxim *messis sementem sequitur* the tenant has presumably a right of property in the growing crops which he has sown, but I know no authority for holding that the operation of that maxim may not be conventionally qualified—I mean by stipulations in the lease. At all events, I know of no authority adverse to the constitution by paction of a security by way of lien or retention over such portion of a waygoing crop as may remain unreaped at the tenant's ish, and may pass into the landlord's possession in that event. The only cases quoted on the subject appear to be—*Elder* v. *Allen*, 11 Sh. 902, and *Moncreiff* v. *Hay*, 5 D. 249. So far as they go they are favourable to the complainer.

"But this being so, it follows that by the possession which he retained under the lease the trustee here was enabled to do a great deal more than merely realise. His possession enabled him to get the crops of the year ripened and reaped and reduced to possession so as to exclude the landlord's possession and defeat the landlord's security for his rent. It appears to me that in these circumstances the trustee must be held to have adopted the lease which was current at the date of the sequestration, and so to be liable for the year's rent, and disabled from removing the waygoing crop (other than the hay) until the rent of the year is paid."

The tenant and his trustee in bankruptcy reclaimed.

Argued for reclaimers—1. The tenant was not holding under the old lease at all but under a new lease from year to year, without any special conditions, by virtue of tacit relocation and the Agricultural Holdings (Scotland) Act 1883 (46 and 47 Vict. c. 62) secs. 28 and 42. The clause relied on by the complainer, which referred to the last or waygoing crop, was not applicable to a lease from year to year. 2. The trustee had not adopted the lease. He had merely discharged the duties of management imposed upon him by the Bankruptcy Act—*Kirkland* v. *Caddell*, March 9, 1838, 16 Sh. 860 (p. 881). 3. Unless the trustee had adopted the lease, the complainer had no case, as the Lord Ordinary had found. This was an attempt on the landlord's part to revive the repealed law of hypothec, and to obtain security over goods while in their owner's possession. The complainer had failed to make out any ground for his alleged preference—*Earl of Hopetoun* v. *Wight*, July 10, 1863, 1 Macph. 1097.

Argued for complainer—1. The clause founded on the lease remained good. The last crop in a lease continued by tacit relocation was the crop after notice had been given. The trustee could only take possession of the bankrupt's assets *tantum et tale*. He entered into possession under the lease *sub conditione*. The last crop meant in the case of bankruptcy the crop on the ground. 2. But here, as the Lord Ordinary had found, the trustee had not merely entered upon a course of management under the Bankruptcy Act but had adopted the lease—the parties admitted that the tenant did not remove from the dwelling house till Martinmas—and accordingly was bound by its terms—*Elder* v. *Allen*, July 5. 1833, 11 Sh. 902; *Moncreiff* v. *Hay*, December 6, 1842, 5 D. 249.

At advising—

LORD YOUNG—[*After narrating the facts of the case*]—Under the special stipulation in the lease as to the rent payable for the last crop the landlord maintains that his claim for that rent is a preferable debt in the sequestration to the extent of the value of that crop. He also maintains that he has sufficient support for the preference claimed in the fact that the trustee in bankruptcy, being free to adopt or reject the lease, elected to adopt it and that in consequence this claim and demand are good against him, although in other circumstances they might possibly not have been so.

The Lord Ordinary in his note states the grounds upon which he is against the landlord on his first contention, but in his favour on his second. He is of opinion that the covenant in the lease for security over the last crop is not a good covenant against third parties, and therefore not available against the trustee in bankruptcy and the creditors whom he represents, but he is of opinion that the trustee in bankruptcy, being put to his election, and having elected to adopt the lease with this clause in it, thereby made the covenant good against him.

I agree with the Lord Ordinary on the first point, and differ from him on the second. Perhaps it might be sufficient for me to refer to the grounds which the Lord Ordinary has himself stated on the first point. They are in substance these—a security over the goods of a debtor cannot be acquired while they remain in the debtor's possession by a simple contract not followed by delivery of the goods over which the security is sought to be constituted. I think that proposition is undoubtedly sound in general, and is sufficient for determining the question in the present case. The land-

lord is indeed exactly in the position of an ordinary creditor for a debt—his debt being the rent. Before the change of the law in 1880, the landlord, as creditor for the rent, was in a very favourable position as compared with other creditors, for he was allowed to have security over his tenant's property although retained in the debtor's possession. That was known as the landlord's hypothec. Indeed the law went so far in his favour that even after the property had been transferred from the tenant he could follow it into the hands of a *bona fide* third party. That law was repealed by the Act of 1880, so that the landlord thereafter came to be for his debt of rent in the same position as other creditors. By this covenant, therefore, the landlord here was in no different or more favourable position than any other creditor of the bankrupt to whom he had given by words merely security over the crop of 1890. The tenant could have given security over that crop by handing over the possession of it, but not otherwise.

On the second question, as I have said, I differ from the Lord Ordinary. His opinion is based upon this, that the trustee in bankruptcy was put to his election in the month of September. I am of opinion that he was put to no election. It was his statutory duty to realise the debtor's estate, to ingather it, and make it available for his debts. The crop of 1890 was at the date of the bankruptcy and sequestration his—the tenant's—property. He may have been under contracts and covenants with respect to it. These must be dealt with as the law prescribes, but the crop was his property and by sequestration passed to the trustee by force of statute, he being of course bound to implement contracts binding as against third parties. I think that there was no election in the matter, that the trustee did no more than realise the estate, and that he would have failed in his duty if he had acted otherwise than he did or had failed to act as he did.

It appears to me that the Lord Ordinary by his answer to the second question virtually negatives his answer to the first, because if that covenant was not good, how is it consistent to say that the trustee could not get the goods for the creditors without making it good? The second view is repugnant to the opinion expressed and acted upon on the first point.

I have said enough to show my grounds for differing from the Lord Ordinary on the second point. I think the landlord cannot be preferred upon it any more than on the first point, and my opinion is therefore adverse to the landlord's claim. I am for recalling the interlocutor of the Lord Ordinary.

LORD RUTHERFURD CLARK—On the first question I agree with the Lord Ordinary, and I do not think I need say more, because I am satisfied with the reasons given by him. Upon the second question I differ from his Lordship. I do not think the trustee in bankruptcy has adopted the lease, or has done anything more than realise the property of the bankrupt.

LORD TRAYNER—I agree with the Lord Ordinary in thinking that the clause in the lease referred to on record, which provides that the rent payable for the last crop should be seizable before the crop was removed from the ground, is one which cannot be enforced as against creditors, being merely, at least in effect, an attempt to create a security over moveables in the possession of the debtor. Taking that view of the legal effect of the clause, it is unnecessary to consider whether, having regard to the terms in which it is expressed, the clause (as was argued by the trustee) is inapplicable to a lease for one year, which this lease had come to be at the date of the tenant's sequestration. But I am unable to concur in the view of the Lord Ordinary in respect of which he has pronounced the judgment reclaimed against, that the trustee in the sequestration has adopted the lease and thereby become bound for payment of the rent. The lease came to an end by the bankruptcy of the tenant, who, however, by the express terms of the lease was entitled to remain in possession of the farm until the term of Martinmas thereafter. Until that time arrived, the tenant, or his trustee as vested in his right, was entitled to remain on the farm to the effect of reaping, securing, and removing the crop. The trustee did nothing more. He took possession of the farm only to the effect and for the purpose of ingathering and realising the bankrupt estate, not as for the bankrupt, but as for his creditors. His doing so did not, in my opinion, infer any liability for the rent, for which the complainer must rank on the sequestrated estate.

The LORD JUSTICE-CLERK concurred.

The Court pronounced the following interlocutor:—

> "Find that at the date of the sequestration the crop of 1890 was the property of the tenant, and by the sequestration passed to his trustee in bankruptcy, who is entitled to realise the same for behoof of the creditors in the sequestration: Therefore recal the interlocutor reclaimed against, repel the reasons of suspension and interdict." . . .

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