

Friday, March 17.

FIRST DIVISION.

[Lord Low, Ordinary.]

SCOTT-CHISHOLME v. CAMPBELL'S
TRUSTEE.

*Landlord and Tenant—Rent—What is
Punctual Payment?*

A landlord agreed to allow the testamentary trustees of a deceased tenant, who were carrying on his farm, an abatement of £107 on arrears of rent due by the tenant at the date of his death, reserving the right to claim the £107 in the event of the subsequent rents not being "punctually" paid. The estates of the tenant were thereafter sequestrated, and the trustees refused to pay the half-year's rent due at Candlemas 1892, on the ground that they were not personally liable therefor, and that the landlord was only entitled to a ranking in the tenant's sequestration. On 20th July 1892 the landlord obtained decree against the trustees for the rent; the trustees then paid the amount with interest.

Held (rev. Lord Low, and diss. Lord Kinnear) that the rent had not been "punctually" paid, and therefore that the landlord was entitled to rank on the estates of the deceased tenant for the foresaid sum of £107.

Landlord and Tenant—Lease—Renunciation of Lease—Claim for the Amount of an Abatement Allowed on Past Rents on the Condition that Subsequent Rents should be Punctually Paid.

In 1890 a landlord agreed to allow the testamentary trustees of a deceased tenant, who were carrying on his farm, an abatement of £107 on arrears of rent due by the tenant at the date of his death, reserving the right to claim the £107 in the event of the subsequent rents not being punctually paid. In December 1891 the landlord and the trustees entered into an agreement which provided that the trustees should renounce the lease at Whitsunday 1892, and that all the stipulations in the lease, in so far as not already fulfilled or altered by the agreement, should be implemented as if the lease had naturally expired at Whitsunday 1892. The tenant's estates were subsequently sequestrated and the trustees failed to make punctual payment of the rent falling due at Candlemas 1892.

Held (diss. Lord Kinnear) that the landlord's right to claim the sum of £107 had not been discharged by the agreement of December 1891, and that he was entitled to rank for that sum on the tenant's sequestrated estates.

Robert Campbell was tenant of the farms of Whitehaugh and Whitehaughmuir, belonging to Major Scott-Chisholme of Stirches, in the county of Roxburgh, under

leases for fourteen years from 1883 at the respective yearly rents of £510 and £50, payable half-yearly at Candlemas and Lammas. Campbell died on 11th April 1890, and his testamentary trustees took possession of and carried on the farms. At the date of Campbell's death there were arrears of rent due by him to his landlord, amounting, along with the half-year's rent to fall due at Lammas 1890, to £622, 9s. 10d. On 4th July the landlord's agents wrote to Campbell's trustees offering to grant an abatement of 10 per cent. from the rent for the two years ending at Lammas 1890, being £107 in all, "but these on the understanding and condition that the balance of £515, 9s. 10d. be paid to us within one month after Lammas 1890, and reserving right to claim the said sum of £107 in the event of the rents falling due after Lammas 1890 not being punctually paid." This offer was accepted by Campbell's trustees, and they subsequently paid the sum of £515, 9s. 10d. in two instalments, £400 on 1st September 1890, and £115, 9s. 10d. on 29th September. In acknowledging receipt of the latter payment the agents of the landlord granted a receipt for "£115, 9s. 10d., being the balance of rents due for the farms of Whitehaugh and Whitehaughmuir at Lammas last, after allowing therefrom an abatement of £107, as per our letter of 24th July last, and subject to the condition and reservation therein expressed." The rents due at Candlemas and Lammas 1891 were also punctually paid.

In December 1891 an agreement was entered into between the landlord and the trustees whereby it was agreed that the trustees should renounce the leases as at Whitsunday 1892 as regards the houses and grass, and the separation of the crop of 1892 as regards the land under crop. Article 3 of the agreement provided that "all the stipulations in the said leases, in so far as not already fulfilled or altered by this agreement, shall be implemented and given effect to by both parties respectively in the same way and manner as if the said leases had naturally expired at Whitsunday next."

The estates of Robert Campbell were subsequently sequestrated under the Bankruptcy Acts, and when the rents payable at Candlemas 1892 became due, the trustees declined to pay them on the ground that they were not personally liable for the rents, and that the landlord could only claim a ranking on Campbell's sequestrated estates. The landlord accordingly in April 1892 brought an action against the trustees for declarator that they were liable as trustees and as individuals to make payment of the rents due at Candlemas and Lammas 1892, and for decree against them for the rents due at Candlemas with interest, and on 20th July 1892 Lord Kyllachy gave decree in terms of the conclusions of the summons. This judgment was acquiesced in by the trustees, and the Candlemas rents were then paid, and the Lammas rents were also paid when they fell due.

The landlord thereafter claimed to rank

upon Campbell's sequestrated estate for the £107 mentioned in his agents' letter of 24th July 1890, on the ground that the rents due at Candlemas 1892 had not been punctually paid, but this claim was rejected by the trustee in the sequestration, and the landlord appealed against the trustee's deliverance.

On 18th February 1893 the Lord Ordinary (Low) dismissed the appeal, and affirmed the deliverance of the trustee.

"*Opinion.*—It seems to me that the circumstances under which the half-year's rent falling due at Candlemas 1892 was not paid punctually at that term do not disclose a case of non-punctual payment, such as was contemplated and provided for in the letter of 24th July 1892.

"That letter was the result of negotiations between the landlord and the trustees in regard to the conditions upon which the latter might give up or carry on the lease. In order to induce them to carry on the lease, the landlord agreed to abate £107 from the total amount of rent due as at Lammas 1890, upon condition that the trustees thereafter paid the rent punctually. If they did not do so, the landlord reserved right to claim the £107. What the parties contemplated was the trustees carrying on the lease until its termination in 1897, and the landlord's offer appears to me to have just amounted to this, that he would forego his claim to the £107, on condition that the rent was not again allowed to fall into arrear. The expression 'punctually paid' must, I think, be construed in a reasonable sense. For example, if the trustees had continued to carry on the lease to the end, but had on one occasion paid the rent a day or two after the term, I do not think that the landlord could have claimed the £107. In short, I am of opinion that it would be a question of circumstances whether or not some delay in payment of a half-year's rent was failure in punctual payment within the meaning of the letter.

"Now the trustees found that it was impossible for them to carry on the lease until its termination, and the landlord agreed to a renunciation upon terms which appear to have been very favourable to him. Up to the date of the renunciation the trustees had admittedly punctually paid the rent, but at Candlemas 1892 they had no trust funds out of which to make payment, and they did not admit that they were personally liable. If they were personally liable they were able to pay, and when their personal liability was established they did pay, with interest upon the half-year's rent which was past due. Although the contention of the trustees was held to be wrong, I do not think that the position which they took up was vexatious or frivolous, or merely urged for the purpose of delay. The question of their personal liability was a serious question for them, and I am not surprised that they took the judgment of the Court upon it. When it was decided that they were liable, the rent, as I have said, was paid, with interest at 5 per cent. The landlord therefore was put into as good a position as if the Candlemas rent had been paid on the term day.

"The result is, that after the date of the letter of July 1890 down to the termination of the tenancy the landlord got his rents in full. There were no arrears, and on the occasion on which there was a delay in payment owing to the question which had arisen, he obtained interest upon the rent for the period during which it was in arrear.

"In these circumstances I am of opinion that the landlord cannot claim the £107, and therefore I shall refuse the appeal and sustain the deliverance."

The landlord reclaimed, and argued—Under the letter of 24th July 1890 the abatement allowed on the rents in arrear was made conditional on the future rents being paid "punctually." That condition had not been purified, for the rents due at Candlemas 1892 were not paid until July 1892, and only after a decree had been obtained for the amount. Such payment could not be called "punctual" payment, and accordingly the landlord had a right to claim from his tenant's estate the amount of the abatement he had conditionally allowed from the past-due rents. It was no answer to the landlord's claim to say that the failure to pay had been due to the fault of the trustees. Nor was that claim discharged by the agreement of December 1891, for it was saved by the provisions of the third article of that agreement.

Argued for the respondent—In not paying the Candlemas rent at once the trustees had no doubt acted on a mistaken idea of their obligations, but it could not be said that they had acted unreasonably, and they had paid the sum due with interest as soon as they were convinced that they were legally bound to pay. The word "punctually" was open to construction, and in the circumstances of the present case the Lord Ordinary was right in holding that the condition in the letter of 24th July 1890 had been duly observed. Further, the relations of parties had been put on a new footing by the agreement of December 1891. The result of that agreement was that all claims *hinc inde* not reserved thereby were mutually discharged, and this claim was not specially reserved by the agreement—*Lyons v. Anderson*, June 25, 1886, 13 R. 1020; *Walker's Trustees v. Manson, &c.*, July 17, 1886, 13 R. 1198. If it were held that the trustees had failed to pay punctually, the failure was then due to their fault, and the interests of the trust-estate could not be prejudiced thereby.

At advising—

LORD PRESIDENT—I cannot agree with the Lord Ordinary. This is a claim for a portion of a year's rent which, admittedly, has not been paid. The claim is made against the original debtor in the lease, viz., the estate of the tenant, and unless the original debtor is discharged this is a good claim. Now, by way of proving discharge there is produced a receipt dated 30th September 1890, and that acknowledges having received the sum of £115, 9s. 10d., being the balance of rents due at Lammas

last, "after allowing therefrom an abatement of £107, as per our letter to Messrs Purdom of 24th July last, and subject to the condition and reservation therein expressed." Therefore the claim is not absolutely discharged, but only conditionally discharged, and for the condition we have to look to the letter mentioned in the receipt and dated 24th July 1890. In that letter it appears that this landlord agreed to take the undertaking of the trustees of the deceased tenant that they would pay the rents, and that he would give an abatement of the sum in question with this condition, "reserving right to claim the sum of £107 in the event of the rents falling due after Lammas 1890 not being punctually paid."

Now, I hold that in order to show that the present claim is not a good claim by the landlord for which he can rank against the original debtor's estate, it must be shown that punctual payment was made of the rent falling due at the term mentioned. In order to find out when the rent fell due, we of course turn to the lease, and it is admitted that Candlemas, which is the 2nd February, was the date when the rent in question fell due. Was it punctually paid? Well, in the first place, it was not paid on 2nd February, punctually or otherwise; and it was not, in truth, paid until after the 20th July of that year. Now, that is an interval of more than five months, and unless there was some explanation of, or some mode of evading or eliding, the word "punctually," I confess I do not see that the condition can be said to be purified. I hold that the word "punctually" is, in its proper and primary sense, occurring in this contract, a word of time; and therefore it is not a question of whether the rent was faithfully or honourably paid, but whether it was punctually paid—that is, paid at the time.

When we look at the circumstances it appears that the explanation of the delay is this. This gentleman gave his remission upon the ground that he was getting the guarantee of these trustees that they would see him paid, and when he asked payment they denied their liability; and accordingly left him exactly as if he had to face a dead man's estate with no living creditors. I cannot say I find in the circumstances which led to this delay, anything which could form a justification of the delay, even assuming we were in a question of moral conduct and not in a question of time. I think it cannot be said in any sense of the word "punctual," that paying on 24th July was punctual payment of a rent due on the 2nd of February.

As regards the discharge, I do not think it really advances the argument or this reclaiming-note at all. There is in it no discharge of what according to existing agreement had yet to be paid. The third head provides—"All the stipulations in the said leases, in so far as not already fulfilled or altered by this agreement, shall be implemented or given effect to by both parties respectively in the same way and manner as if the said lease had naturally

expired at Whitsunday next." The stipulation for full payment of this term's rent had not been fulfilled, it had not been altered by the agreement, and if the lease had expired at the ensuing Whitsunday this claim would have been unquestionably good. If I am right in holding that this rent was not paid "punctually," then the landlord's position was entirely reserved to him by the third head of the agreement of December 1891.

LORD ADAM concurred.

LORD M'LAREN—I agree. I have always understood that where trustees take up a lease or in any way continue the obligations of the ancestor, they do not thereby discharge the ancestor's estate, but in order that his estate should be discharged, it would be necessary that there should be an express agreement to that effect. But the result of the trustees continuing the ancestor's contract is that they superadd their personal obligation to the liability of the estate which already exists. In fact, in all the cases which have occurred regarding questions of liability of trustees, it has been assumed as indisputable that to the extent of the value of the ancestor's estate, the claim is a good one, and that necessarily implies that the testator's estate, in whosoever's hands it may be for administration, is liable for his contracts. Of course, if in accepting the testamentary trustees as tenants Mr Chisholme had discharged the sequestrated estate, that would have raised a different question. The result of my construction of the point last argued, however, is that there has been no discharge of the sequestrated estate, and the only other question is whether in the circumstances the whole amount of the rent stipulated in the lease is due, or whether in the state of the facts the landlord is bound to be content with the rent *minus* the abatement as to which the condition in the agreement was made. That depends on the meaning to be attached to the stipulation depending upon the debt being "punctually" paid. I agree with what your Lordship has said that this in its primary meaning is a word relating to time. I think the difference between a stipulation that an abatement is to be given if the rent is punctually paid, and a stipulation that an abatement shall be given if the rent is paid at the "time," is only this, that the word "punctually" is a little more elastic and would cover the case of rent paid within a few days after it is due or as soon as it is demanded. But what really happened was that the trustees resisted payment, maintaining that they were not liable for the debt due, and the action went on to decree, and we have the Lord Ordinary's judgment here explaining the ground on which he held that the trustees were liable. To say that the trustees have made punctual payment because they have paid after decree and under the threat of personal diligence, really seems to me to amount to depriving this condition of all meaning. I do not see what is the use of it if it applies in a case like the present. I therefore come to the

opinion without difficulty that the case contemplated has not occurred, that the condition has not been fulfilled, and therefore that the proprietor is entitled to make a claim against the estate for the balance of his rent.

LORD KINNEAR—I have more difficulty than your Lordships. I entirely agree that the landlord had a legal right to claim payment of his rent from the estate of his deceased tenant. It was not reasonably maintained that the tenant's estate had been discharged. On the other two points I have more difficulty, and my difficulty has not been entirely solved by the opinions which have just been delivered. On the first point, as to whether or not payment was made "punctually," I am very much disposed to agree with the Lord Ordinary for the reasons he has stated. On the second point I am disposed to hold that there was a discharge of all past obligations. During the currency of the lease the landlord agreed to grant an abatement on past rents which were in arrear, on condition that the rent should be punctually paid in the remaining years of the lease. The lease, however, did not come to a natural end, but parties entered into a new arrangement whereby it was agreed that the tenants should renounce the lease as at the following Whitsunday. It seems to me that this renunciation must be looked to for the purpose of settling all the rights of parties *hinc inde*. If I put the same construction on the third article of the agreement as your Lordship, I should agree that the landlord's claim was not discharged, but I cannot put that construction upon it. The clause provides that all the stipulations in the lease, in so far as not already fulfilled or altered by the agreement, should be implemented in the same way and manner as if the leases had expired naturally at the following Whitsunday. It reserves nothing except the rights of parties for the remainder of the leases. It follows that it was necessary that the rent should be paid at the following Candlemas in full, according to the stipulations in the leases, but I do not read any stipulation for past rents due at Lammas 1890. I am therefore disposed to hold that the contract of renunciation put an end to any claim by the landlord for past-due rents.

The Court recalled the interlocutor of the Lord Ordinary, sustained the appeal, recalled the deliverance of the trustee, and remitted to him to rank the appellant in terms of his claim.

Counsel for the Appellant—Craigie.
Agent—Frank M. H. Young, Solicitor.

Counsel for the Respondent—Salvesen.
Agents—Mackenzie & Kermack, W.S.

Wednesday, March 15.

SECOND DIVISION.

[Sheriff of Lanarkshire.

JOHN MUIR WOOD & COMPANY v.
G. & J. BURNS.

Reparation—Common Carriers—Limitation of Liability—Negligence of Servants—Special Contract.

A firm in Glasgow bought from an Organ Company in London an organ which was lying in the stores of the Midland Railway Company at Liverpool. The sellers instructed the railway company to deliver the same to a shipping company whose steamers plied between Liverpool and Glasgow, in order that it might be conveyed to Glasgow. A carter in the employment of the railway company took the organ to the steamer and delivered it to the receiving clerk, who signed the delivery-order and wrote "owner's risk" above his name. The shipping company's sailing-bills, which were known to the railway company, *inter alia*, stipulated that the owners of the vessels were not to be liable for any damage that might occur to goods at or after landing, or which might be occasioned thereto by the negligence or error of persons in the ship's service. The organ was carried to Glasgow, and while in course of being discharged fell back into the hold, either by accident or through the negligence of persons in the ship's service, and was smashed to pieces. *Held (diss. Lord Young)* that the shipping company were not liable in damages for the injury done to the organ.

In December 1891 John Muir Wood & Company, piano and music sellers, Glasgow, bought from the Bell Organ and Piano Company, London, an organ at the price of £73, 12s. 6d. The Bell Organ and Piano Company had a number of such organs in the hands of Messrs Pellow & Company, their agents in Liverpool, who, their own warehouse being full, kept them in store in the warehouse of the Midland Railway Company at Liverpool.

On 10th December Messrs Pellow & Company received instructions from the sellers of the organ to forward the organ to the purchasers by steamer to Glasgow. Messrs Pellow & Company thereupon instructed the Midland Railway Company to place the organ on board one of the steamers of G. & J. Burns, shipowners, Glasgow, plying between Liverpool and Glasgow. The organ was taken by one of the carters of the railway company to one of the said steamers called "Bear," and placed on board. There was no bill of lading, but there was a printed delivery-sheet. The clerk of G. & J. Burns, on receiving the organ from the carter, wrote "owner's risk" on the delivery-sheet, and signed his name below these words. He also stamped some illegible words on the back of the