

stock on the farm at a valuation. But in the submission which was adjusted for the purpose of valuing the stock a special clause was inserted entitling the tenant to discount at the rate of 2½ per cent. on making immediate payment. At first sight it seems not unreasonable that the landlord, who allowed discount at the beginning of the lease, should in turn be allowed it at the close. But another and perhaps a sounder view is, that as at the commencement of the lease a special clause had to be inserted to enable the tenant to obtain the benefit of discount, the reasonable inference from the absence of any such stipulation in the lease and contract of submission at the end of the lease is that the tenant did not contract on the footing that a similar stipulation should apply in the landlord's favour to the valuation at the termination of the lease.

Therefore, although I think the question is one of some difficulty, I am not prepared to alter the Lord Ordinary's interlocutor.

The LORD JUSTICE-CLERK was absent.

The Court adhered.

Counsel for the Pursuer—C. K. Mackenzie—Chree. Agents—J. K. & W. P. Lindsay, W.S.

Counsel for the Defender—W. Campbell, Q.C.—Aitken. Agents—Hamilton, Kinneir, & Beatson, W.S.

Wednesday, January 31.

SECOND DIVISION.

[Lord Low, Ordinary.]

CRAIG'S TRUSTEE *v.*
LORD MALCOLM.

Compensation—Contract—Stipulations in Mutual Contract—Lease—Bankruptcy of Tenant.

A lease for nineteen years from Whitsunday 1893 contained a clause providing that the proprietor or incoming tenant should take from the outgoing tenant the sheep stock according to the mode of valuation customary in the country.

There was a mutual break in the lease at Whitsunday 1898. Of this the tenant took advantage. His estates were sequestrated on 3rd May 1898, and a trustee was appointed on 10th June.

Thereafter the trustee called upon the proprietor to take over the sheep stock on the farm under the clause in the lease. A minute of submission was entered into, and the stock was valued in terms thereof.

Held that the landlord was entitled to set off against the amount at which the sheep stock was valued arrears of rent incurred during the currency of the lease.

John Craig became the tenant in the farm of Balliemore, Lochgilphead, belonging to Lord Malcolm of Poltalloch, under a lease for nineteen years from Whitsunday 1893. Section 17 of the articles of set applicable to the estate of Poltalloch, which formed part of the lease, provided that "the proprietor or incoming tenants shall take from the outgoing tenants the sheep stock according to the mode of valuation customary in the country." Section 33 provided that there should be a mutual break under the lease at Whitsunday 1898.

Mr Craig took advantage of the break, and terminated the lease at Whitsunday 1898. On 3rd May 1898 his estates were sequestrated, and on 10th June John Fleming M'Laren was appointed trustee on the sequestrated estates.

The trustee called upon Lord Malcolm to take over the sheep stock on the farm under section 17 of the articles of set, and in order to fix the value a reference was entered into between them by minute of submission dated 7th and 9th of June, in which both parties agreed that the price or value determined should be payable as at Whitsunday (old style) 1898. According to the prices fixed by the arbiter the value of the stock found on the farm amounted to £392, 10s. 5d.

Thereafter Lord Malcolm claimed right to set off against that sum arrears of rent due by Mr Craig under the lease amounting to £442, 0s. 3d. of principal and £26, 3s. of interest.

Mr M'Laren as trustee refused to admit this claim, and raised an action against Lord Malcolm for £400, or such other sum as should be ascertained after all the stragglers had come in to be the value and price of the sheep stock on the farm of Balliemore taken over by the defender from the pursuer by valuation, with interest at 5 per cent. per annum from 28th May 1898.

On 17th June 1899 the Lord Ordinary (Low) assailed the defender from the conclusions of the summons.

Note.—"Mr Craig, the trustee in whose bankruptcy is pursuer in this action, was the defender's tenant in Balliemore under a lease for nineteen years from Whitsunday 1893. There was a mutual break in the lease at Whitsunday 1898, of which the tenant took advantage. His estates were sequestrated under the Bankruptcy Acts on 3rd May 1898, and the pursuer was appointed trustee upon 10th June of that year.

"By the 17th section of the articles of set applicable to the estate of Poltalloch, which formed part of the lease, it was provided that 'the proprietor or incoming tenants shall take from the outgoing tenants the sheep stock according to the mode of valuation customary in the country.'

"The pursuer, founding upon that section, called upon the defender to take over the sheep stock, and accordingly arbiters were nominated and the stock valued.

"The pursuer has brought this action for the purpose of enforcing payment of the sum at which the sheep stock was

valued, and the defender claims right to set off against that sum arrears of rent which were incurred during the currency of the lease.

"The pursuer argued that this was a case of balancing accounts in bankruptcy, and that as the arrears of rent were incurred prior to sequestration, and the price of the sheep stock was not fixed until after that date, the one could not be set off against the other.

"I am of opinion that this is not a question of balancing accounts in bankruptcy, but of the law of contract.

"It was in the interest of the bankrupt estate that the sheep should be valued as a stock that was to remain upon the farm, because sheep are of greater value if they are to remain upon a farm to which they have been accustomed than if they are to be sold in the market off the farm. But the pursuer could only obtain a valuation of the sheep on the former footing by founding upon the clause of the lease which I have quoted. Now a person can only enforce a contract if he is able and willing himself to perform the contract. It therefore seems to me that the pursuer in founding upon and enforcing the clause of the lease which I have quoted rendered himself liable for the arrears of rent.

"I am therefore of opinion that the defender is entitled to set off the arrears of rent against the price of the sheep."

The pursuer reclaimed, and argued—He as trustee had never adopted the lease. He under the sequestration had become vested in the sheep stock. In discharge of his duty of realising the trust-estate to the best advantage he had thought it better to sell to the landlord according to the mode specified in the lease. But that gave the landlord no title to claim against ordinary creditors any preference to the price for arrears of rent—*M'Gavin v. Sturrock's Trustee*, February 27, 1891, 18 R. 576; *Stewart v. Rose*, February 2, 1816; *Hume's Decisions*, 229; *Maclean's Trustee v. Maclean of Coll's Trustee*, November 21, 1850, 13 D. 90. Besides, in the minute of submission there was a direct contract on the part of the defender to pay the price at *Whitsunday 1898*. The contracts were not concurrent, and compensation could not be pleaded.

Argued for defender—The pursuer in enforcing the sale of the stock to the landlord in terms of section 17 of the articles of set had rendered himself liable for the arrears of rent. The defender was not claiming any right of preference in the bankrupt proceedings, but only the fulfilment of the bargain contained in the lease, which had necessarily been adopted by the trustee in founding on a section of it—*Davidson's Trustees v. Urquhart*, May 26, 1892, 19 R. 808; *Smith v. Harrison & Company's Trustee*, December 22, 1893, 21 R. 330; *Jaffray's Trustee v. Milne*, February 26, 1897, 24 R. 602. The context of terms of the minute of submission showed that it was not an independent contract, but merely a mode of expiscating the contract under the lease.

At advising—

LORD JUSTICE-CLERK—The question in this case is whether the trustee on the estate of a tenant of Lord Malcolm of Poltalloch, who has called on Lord Malcolm as landlord to take over the sheep stock on the bankrupt farm in terms of the conditions of lease, can resist the claim of the landlord to set off against the price the debt due to him under the lease for rent still unpaid. The Lord Ordinary has decided in Lord Malcolm's favour, and I think rightly. The trustee's claim being based on the stipulations of the lease, he cannot successfully insist on stipulations favourable to the interest of the bankrupt estate and repudiate the liability under the lease. Except under the lease he has no power to demand the taking-over of the sheep stock, which is a stipulation in the interest of the tenancy, and taking this advantage of the terms of the lease as for the tenant's side he cannot resist the landlord taking advantage of the stipulations of the same contract. The contract must bind him who founds on it against the other contracting party.

I would move your Lordships to affirm the judgment of the Lord Ordinary.

LORD YOUNG concurred.

LORD TRAYNER—I agree with the Lord Ordinary and have nothing to add to what his Lordship has said.

LORD MONCREIFF—I am of opinion that the interlocutor is right. The peculiarity of the case is that the pursuer by invoking the lease and insisting on the defender taking over the bankrupt's stock in terms of the 17th article of the estate regulations has enabled the defender to plead compensation in respect of arrears of rent.

I assume that the pursuer was entitled to remove the stock and sell it to whomsoever he pleased, or to leave it and sell it to the incoming tenant. But instead of doing so he insisted on the landlord taking the stock, which under the lease the landlord was bound to do. He thus appealed to the contract, and having done so he cannot enforce the claim which he has thus obtained against the landlord without satisfying or giving credit for the landlord's counter claims under the same contract. It may be that by his action he has made a bad bargain for the bankrupt estate, but that does not affect the legal question.

The point is shortly stated, but I think it is quite clear.

The Court adhered.

Counsel for Pursuer—Salvesen, Q.C.—A. S. D. Thomson. Agents—Gill & Pringle, W.S.

Counsel for Defender—Kincaid Mac-kenzie—Chree. Agents—C. & A. Steuart, W.S.