tees are now in right of. It is quite true that a more dubious part of the case is introduced by the statement that the defender was employed by Messrs Cameron & Allan as their liquidator, and that that afforded him free access to Brown's trustees' papers, and that he misused these papers which he had access to. It may or may not be that that is a good ground of action, as adding more damages to the claim; but this is not the proper time to dissociate things which in statement are much interwoven. I have no doubt the Judge who tries the case will have his attention called to the difference in quality of these averments, and will be able to dissociate them, if in his opinion one should be good and the other bad, but on that question I pronounce no opinion at all.

I think the case should go to trial, and I am for adhering to the Lord Ordinary's interlocutor.

Lord M'Laren — I concur in all that your Lordship has said, both as to the propriety of the amendment which the Lord Ordinary has allowed and as to the relevancy. I will only add that I think there are strong reasons for considering that the power of amendment given to the Judge or the Court under the Court of Session Act is, I will not say a discretionary power, but a power to be exercised according to the personal judgment of the Judge or Court before whom the question may arise. My reason for saying so is partly this, that the power is to be exercised at any stage of the case, and in another part of the Act it is provided that, even in the course of a jury trial, the record and issues may be amended so as to enable the Court and jury to decide the true question in dispute. Now, it can hardly be supposed that a power which is to be exercised by a Judge in the progress of a trial is one that was intended to be subject to review on the question whether there was a proper case for the application of the statutory power. As review is not excluded, we must hold that if a legal question should arise—a question involving construction of the statutory power—that may be taken to review, as has been done in this case. But in my judgment there is here no case of construction of the statute, but only a question whether the Lord Ordinary rightly applied the power given in the statute for the purpose of removing a difficulty in the statement of the case, or making the pursuer's case more clear. Even if I differed with the Lord Ordinary—which I do not—I should not be prepared to interfere with his judgment in such a matter.

Lord Adam and Lord Kinnear concurred.

The Court adhered.

Counsel for Pursuers—Sol.-Gen. Dickson, Q.C.—Salvesen. Agents—John C. Brodie & Sons, W.S.

Counsel for Reclaimer — A. Jameson — J. Wilson. Agent—Robert Stewart, S.S.C.

*Friday, July* 16.

## FIRST DIVISION.

[Lord Stormonth Darling, Ordinary.

## TAIT (BUTTERCASE AND GEDDIE'S TRUSTEE) *v.* GEDDIE.

*Lease — Irritancy — Exercise of Option by Landlord—Damages for Breach of Contract.*

An agricultural lease, of which the terms excluded assignees, contained a declaration that, in the event of either of the joint tenants granting a trust-deed for behoof of creditors, the lease should, in the option of the landlord, become *ipso facto* null and void.

Before the expiry of the lease the tenants executed a trust-deed for behoof of creditors, and the trustee declined to take up the lease. One of the tenants was subsequently sequestrated. The other, however, intimated to the landlord his intention of continuing the tenancy under the lease; and the landlord refused to accept him as tenant.

*Held* that a claim by the landlord to rank on the trust-estate for damages, representing future rents under the lease, was invalid in respect (1) that, apart from the declaration in the lease, the tenant had a right to carry on the lease·(2) that the landlord had exercised his option under the declaration in the lease, and (3) that consequently the lease had been brought to an end by the act, not of the tenants, but of the landlord.

*Young* v. *Gerard*, Dec. 23, 1863, 6 D. 347; *Walker's Trustees* v. *Manson*, July 17, 1886, 13 R. 1198; and *Bidoulac* v. *Sinclair's Trustee*, Nov. 29, 1889, 17 R. 144, *followed.*

*Bankruptcy — Voluntary Trust-Deed for Creditors — Liability of Trustee in respect of Payment of Invalid Claim.*

Where a trustee, appointed under a voluntary trust-deed for behoof of creditors, had out of surplus assets satisfied a claim on the trust-estate which was subsequently determined by the Court to be invalid, *held* that he must make good the sum so paid by him in respect (1) that he paid the claim in full knowledge that one of the trusters strongly objected thereto, and (2) that he paid it so precipitately as to give no opportunity to the objecting truster to interpel him.

*Expenses — Bankruptcy — Trust-Deed for Creditors—Personal Liability of Trustee for Expenses.*

A trustee under a voluntary trust-deed for behoof of creditors, satisfied a claim on the trust-estate in spite of the strong opposition of one of the trusters, without testing its validity in a court of law.

In an action subsequently raised by

the objecting truster, the trustee, instead of being a mere stakeholder, was necessarily compelled to take up the position of the claimant whose claim he had precipitately paid, and failed to make good his contention that the claim was valid.

*Held* that the trustee was personally liable in the expenses of the action.

In 1893 Charles Barrington Balfour of Balgonie let the farm of Lochty for a period of thirty years at a rent of £108 per annum to Thomas Buttercase and James Geddie "jointly, and their respective heirs, but expressly excluding sub-tenants and assignees, legal or conventional," without the landlord's permission in writing. The lease contained a clause providing and declaring that "if at any time during the currency hereof the tenants or either of them shall have become notour bankrupt, or should their estate and effects, or any portions thereof, have become sequestrated or conveyed in trust for behoof of their creditors or attached by their legal diligence, then this lease shall, in the option of the landlord, become *ipso facto* null and void, and the landlord shall be entitled to apply to the Sheriff of the county, or any competent authority, for a warrant of summary ejection."

On 1st April 1895 Buttercase and Geddie executed a trust-deed for behoof of their creditors in favour of John Scott Tait, C.A., Edinburgh. By the terms of the said trust-deed the trustee was empowered to "compound, transact and agree" any question or differences that might arise between him and any other person or persons, touching the execution of the trust-deed.

Mr Tait accepted office, intimated to the landlord that he did not propose to take up the lease, and realised the estates conveyed to him by the trust-deed. After paying all debts, including arrears of rent, there remained a surplus of about £800.

On 5th July 1895 Mr Buttercase's estates were sequestrated, and Mr Tait was appointed trustee thereon.

On 2nd July 1895, Mr Balfour, the landlord, lodged a claim with Mr Tait for £1061 as damages for breach of contract on the part of the tenants, representing the capitalised value of future rents. On 22nd August 1895 Mr Tait issued a deliverance sustaining the landlord's claim to the extent of £384, 15s. 5d., and on the 23rd August he paid the landlord's agents that sum.

In these circumstances an action of multiplepoinding was raised by Mr Geddie, which Mr Tait, pursuer and nominal raiser, pleaded was incompetent, there being no double distress. The Court repelled that plea, but found no expenses due to or by either party.

In the condescendence of the fund *in medio* lodged by him, Mr Tait took credit for the above-mentioned sum of £384 odds, and Mr Geddie objected to the condescendence in so far as Mr Tait took credit for that amount, and in so far as he deducted from Geddie's share of the fund *in medio* any portion of the expenses incurred in maintaining his unsuccessful plea to the competency of the multiplepoinding.

The objector pleaded—"(1) The trustee is not entitled to credit for the said payment of £384, 15s. 5d., in respect that (first) the claim at the instance of the landlord was wholly unfounded, the objector being able and willing to perform the tenant's part of the contract of lease; (second) the said payment was wrongfully made by the trustee in breach of the agreement between him and the objector's agent; and (third) the said payment was wrongfully made by the trustee in breach of his duty as trustee. (2) The trustee is not entitled, as in a question with the objector, to take credit for any portion of the expenses incurred by him in unsuccessfully resisting the action of multiplepoinding."

Mr Tait lodged answers to these objections and pleaded—"(2) The objection to the payment of the sum of £384, 15s. 5d. to Mr Balfour should be repelled, in respect that (first) the claim at Mr Balfour's instance was well founded to the extent to which it was sustained by the trustee; and (second) the said claim was paid by the trustee in *bona fide* on the advice of counsel and in exercise of the power conferred upon the trustee by the trust-deed to compound, transact, and agree or submit and refer questions or differences. (3) The expenses incurred by the trustee in the action of multiplepoinding having been so incurred in consequence of irrelevant averments made by the real raiser, reflecting on the conduct of the trustee, the objection to such expenses forming a charge on the fund in the hands of the trustee should be repelled."

A proof before answer having been allowed, it appeared that sundry negotiations took place with regard to the lease in July and August between the trustee, the agent for Mr Geddie, and the agents for the landlord. Immediately prior to the lodging of the landlord's claim with Mr Tait, counsel's opinion was taken thereon, to the effect that the trustee was bound to recognise and rank the landlord's claim for damages. Counsel added—"I have not had submitted to me any statement of the actings of the landlord and the trustee with respect to the lease, but I assume that the landlord did not exercise the power of annulling the lease given in the contract in the event of the execution of a trust-deed by the tenant." On 31st July Mr Tait intimated to Messrs Strathern & Blair, W.S., the landlord's agents, that Mr Geddie was prepared to carry out the lease of Lochty farm, and he added, "unless the landlord objects to his doing so, it seems to me the only way out of the difficulty." To this letter Messrs Strathern & Blair made no reply. On 21st August Mr Tait had an interview with Mr Thomas White, S.S.C., agent for Mr Geddie, the particulars as to which were thus stated by Mr Tait in his evidence—"With regard to the letter of 21st August 1895, which Mr White afterwards sent to the landlord, he expressed the view that it was desirable to try the

landlord's agent again, and I said, 'By all means try him.' Then Mr White said, 'What will we say to him?' I said he could easily put it in shape, and he began to draft the letter. He hadn't gone very far when he said he had a difficulty about the thing, or something to that effect. I then said, 'I don't think there is much difficulty; it is a very simple matter. I will dictate it;' and I proceeded to do so. He cut in twice before I got the sentence finished. (Q) The first portion of the letter is to the following effect—'As agent of Mr Geddie, I hereby intimate that he is prepared to adopt the lease of Lochty farm, granted by Mr Charles B. Balfour of Balgonie in favour of Mr Buttercase and him as individuals, and I shall be obliged by your letting me know before Friday at noon whether your client is prepared to accept Mr Geddie's obligation in full of the whole obligations in the lease;' does that fairly represent the words that you dictated?—(A) That is just what I had in my mind. I called a halt there. Anything put in the letter about a multiplepoinding was added by Mr White afterwards. When I got a copy of the letter subsequently, I saw that that was not what I had agreed to. After I had finished dictating, Mr White brought up the question of the multiplepoinding. I told him I had nothing to do with his multiplepoinding. I said the proper thing was to have an interdict interpelling me from dealing with the landlord's claim. I told him that I would proceed to issue a deliverance on the landlord's claim. I cannot say whether I did so before or after the first paragraph of the letter was drafted. I told him emphatically that I intended to deal with the landlord's claim—I mean by issuing my deliverance in the ordinary way. I did not know whether Mr White intended to add any sentence to the letter when I left the meeting. I received a copy of the letter from him. (Q) Did you receive it the same day or next day?—(A) I am under the impression that I got it next morning, but I may be wrong. I am now shown the letter to me by Mr White, dated 21st August 1895. It was received in the afternoon of that day, and I dealt with it the following day by letter dated 22nd August. I had not undertaken to reject the landlord's claim. I had already paid the first and second dividends on the other creditors' claims, but I still kept the landlord off for Mr Geddie's benefit. I had no other claims to dispose of at that time except the landlord's and a small claim of a party named Nimmo. After replying to Mr White I had a call on the following day, the 22nd, from Mr Murray, of Messrs Strathern & Blair. I think Mr Murray is the head clerk in their office. I had seen him previously in connection with the matter. He called upon me specially with regard to the landlord's claim. He told me that they had received a letter from Mr White, of date 21st August, and he was mentioning the purport of it to me but I told him I was aware of it. (Q) Did you ask Mr Murray whether the landlord had replied to it?—(A) I think he volunteered the statement that they did not intend to reply to it; I don't think I asked. He made it very plain that the landlord did not intend replying to the letter. I asked him whether the landlord intended to accept Mr Geddie, and he said, 'Certainly not.' He had told me before that the landlord was not prepared to accept Mr Geddie's obligation in full of the obligations under the lease. He was very emphatic in saying that the landlord would not accept him. Mr Murray asked me on the same occasion what I meant by all the delay in not issuing the deliverance. I was quite clear, by the call of Mr Murray, that the landlord's agents would not accept Mr Geddie. I certainly did not in any way regard myself as tied down not to dispose of the landlord's claim. Having learned that that was to be the attitude of the landlord and his agents, I sat down at once to prepare the deliverance. I saw that there was no hope of the landlord taking Geddie, and that I must send out my deliverance."

Mr Robert Strathern, W.S., deponed—"I was perfectly satisfied that Mr Geddie hadn't the means, even if he had the capacity, to carry on the farm . . . I did not make any answer to the letter of 21st August 1895, because I had advised Mr White before that I could not advise the landlord to accept Mr Geddie, and I did not think it necessary to repeat what I had already said. *Cross-examined.*—I repudiated all idea of accepting Mr Geddie in any form whatever."

Alfred Alexander Murray, managing clerk to Messrs Strathern & Blair, deponed—"I told Mr Tait that Mr Balfour was not prepared to accept Mr Geddie's obligation. . . . It was made perfectly clear by me to Mr Tait that the landlord would have nothing to do with Mr Geddie, and I insisted on having the landlord's claim disposed of."

On 16th February 1897 the Lord Ordinary (Stormonth Darling) sustained objection No. 1, repelled objection No. 2, appointed the pursuer and nominal raiser to correct the condescendence of the fund *in medio* in accordance with the interlocutor, found the pursuer and nominal raiser liable to the objector in the expenses connected with the said objections to the extent of five-sixths of the taxed amount thereof, and granted leave to reclaim.

*Opinion.*— . . . "My opinion is that the claim of damages was bad in law. Such a claim can only be made in respect of abandonment of the lease by the tenant. If a landlord either exercises his option to bring the lease to an end or accepts a renunciation by the tenant without reserving his right to damages, his claim is barred—*Walker's Trustees* v. *Manson*, 13 R. 1198. The claim only holds where the abandonment is the voluntary act of the tenant, as in *Bidoulac* v. *Sinclair's Trustees*, 17 R. 144.

"Now, where was the abandonment in this case? The mere execution of the trust-deed in April 1895 did not constitute abandonment. The lease was not thereby

assigned, because it was not assignable without the landlord's consent, and the landlord never consented. Neither did the sequestration of Buttercase constitute abandonment, for according to the well-known *dictum* of Mr Bell (Com. i, 76)—"Bankruptcy does not of itself annul a lease. The tenant, though bankrupt, may still continue in the possession, provided he pay the rent regularly and perform the other stipulations of the contract. All that the landlord is entitled to do in case of his tenant's failure to pay the rent is to have recourse to the hypothec and the proceedings prescribed in the Act of Sederunt 1756.' If, therefore, both Buttercase and Geddie had desired to carry on the farm, the landlord could not have prevented them except by exercising his option under the lease. But even if the action of the trustee is to be taken as a practical abandonment on the part of Buttercase, it does not follow that Geddie, the solvent joint tenant, was thereby ousted from possession. That is, so far as I can judge, precisely the point that was decided in the case of *Young* v. *Gerard*, 6 D. 347. The lease there was in favour of two joint tenants and their respective heirs and successors, with an exclusion of assignees and sub-tenants, and an option to the landlord to bring the lease to an end in case of bankruptcy just as here. One of the tenants died, the other became bankrupt and executed a renunciation of the lease. The representatives of the deceased tenant claimed to remain in possession of the subjects, and the landlord attempted to remove them, pleading, *inter alia*, that the lease being a joint lease in which he was entitled to have two solvent tenants, it came to an end by the bankruptcy of either tenant. But the Inner House, affirming Lord Wood, rejected that plea, and held that the right of the solvent tenant was not irritated by the bankruptcy and renunciation of the other. The only difference between the two cases is that the option here being a stronger one, the landlord, if he had chosen, could undoubtedly have brought the lease to an end because of the execution of the trust-deed though both Geddie and the firm were solvent, while the landlord in *Gerard's* case could only do so in case of bankruptcy. But the decision is directly in point as regards the effect of Buttercase's bankruptcy on the rights of Geddie. The higher option of the landlord in this case is of no moment, because the validity of his claim of damages rests on the theory that he did not exercise his option.

"There is one other argument which I ought to notice. It was said that the lease, though taken in favour of two persons jointly without mention of any partnership, was truly a partnership asset. In point of fact it had been so treated, and rights may thereby have arisen as between the tenants themselves. If Geddie had been allowed to carry on, Buttercase's creditors might perhaps have had a claim to share in the profits, if any, unless Geddie had made some arrangement with them. But I am at a loss to see how that could enlarge or affect rights of the landlord. His rights were defined by the written contract. If the lease had been taken to the firm, or to the partners as trustees for the firm, the dissolution of the firm by the bankruptcy of one of the partners would have brought the lease to an end without any action on the part of the landlord, though it by no means follows that in such a case the landlord would be entitled to claim damages for abandonment. But that is on the principle that when the firm is dissolved there is no longer a tenant. When the tenants are individuals they remain tenants notwithstanding the dissolution of the firm. I was referred to two cases (*Aitken's Trustees* v. *Waddell*, 8 S. 753; and *M'Whannell* v. *Dobie*, 8 S. 914), where leases for the purposes of a partnership had been taken to individuals without mention of the firm, and yet it was held that the leases must be exposed to sale on the dissolution (or non-formation) of the partnership. But these were cases *inter socios* in which the landlord was not called, and indeed had no interest, because in one of them the lease was taken expressly to assignees, and in the other the subject was urban. Accordingly these cases can have no possible bearing on the right of a landlord to claim damages for abandonment.

"I look in vain for any evidence of abandonment by Geddie, who must, I think, be held to have been turned out by the landlord. If so no damages were due, and objection 1 must be sustained.

"Objection 2 stands, I think, in a different position. It claims that the trustee shall pay, either out of Buttercase's share of the surplus assets of the firm, or out of his own pocket, the expenses which he incurred in unsuccessfully pleading that the present action of multiplepoinding was incompetent, because there was no double distress. It is significant that their Lordships of the First Division, in repelling that plea, withheld expenses from the successful party, on the ground, as I am informed, that the record contained charges of bad faith against the nominal raiser, which for his own vindication he was entitled to answer. Even if that were not so, I should say that a trustee, whom the makers of a trust have themselves selected, has a very considerable latitude in stating untenable pleas at the expense of the trust. I therefore repel objection 2.

"I need hardly add that although I have felt bound to sustain objection 1, I have done so without the remotest idea of impugning the good faith of the trustee. I think he acted rather precipitately, and on a mistaken view of the law, but I do not question his good faith for a moment, and the charges to that effect in my judgment ought never to have been made."

The pursuer and nominal raiser reclaimed, and argued—(1) The landlord's claim was good. The lease was a firm lease, though it was taken in the name of the individual partners. The obligation under the lease was an obligation of the firm, and the surplus in Mr Tait's hands was a surplus belonging to the firm. That surplus, before being divided between the partners, must first be applied to meeting the claim of

damages that arose to the landlord in consequence of the failure of the firm to implement the contract of lease. *Young* v. *Gerard*, Dec. 23, 1843, 6 D. 347, raised a pure question between landlord and tenant. The present case depended not so much on the landlord's rights as on the relations of the estates of the individual partners and of the firm *inter se.* (2) Even assuming that the landlord's claim was bad, the trustee was entitled to take credit for the sum paid. Under the trust-deed he had full power to compromise and transact, and he had the same power at common law. He had effected a compromise, thereby reducing the landlord's claim by a very large amount. A trustee was the judge of the validity of claims, and it was his duty to adjudicate himself, and not to engage in litigation, whenever a beneficiary objected to his satisfying any claim against the estate—*Mackenzie's Trustees* v. *Sutherland*, Jan. 10, 1895, 22 R. 233, *per* Lord M'Laren at p. 236; *Forshaw* v. *Higginson*, 8 Mac. and G. 827. The Lord Ordinary had completely exonerated the trustee from any imputation of *mala fides.* (3) The Lord Ordinary was right as regards the expenses of the preliminary stages of the action.

Argued for the objector—(1) The landlord's claim was bad. The lease was a lease to individuals, not to a firm. Geddie had therefore a right to continue in the tenancy of the farm though Buttercase renounced the lease, unless the landlord exercised his option under the contract—*Young* v. *Gerard, ut sup.* He had exercised his option, and therefore he was not entitled to damages—*Walker's Trustees* v. *Manson*, July 17, 1886, 13 R. 1198; *Bidoulac* v. *Sinclair's Trustee*, Nov. 29, 1889, 17 R. 144. (2) If the landlord's claim was bad, Mr Tait must be held personally liable. He knew that Geddie strongly objected to that claim being satisfied. He had dictated a letter on 21st August, intimating to the landlord's agents that Geddie proposed to continue the lease; yet on the 22nd he had issued his deliverance, and on the 23rd he had actually paid the money. He gave Mr Geddie no opportunity of preventing such a payment being made. His proper course would have been to let the question be determined by the court of law between the landlord and Geddie, and to adopt a neutral attitude. (3) Geddie had been completely justified in raising the action of multiplepoinding, and therefore no part of the trustee's expenses should come out of his share of the surplus.

At advising—

LORD KINNEAR—The Lord Ordinary has sustained the first objection of Mr Geddie to the fund *in medio*, and the facts upon which that objection arises are very simple. [*His Lordship here stated the facts, and proceeded*]—It is in these circumstances that the objection is stated to Mr Tait taking credit for the sum paid by him to Mr Balfour in respect of future rents. The arrears of bygone rent were paid in full, and that was perfectly right. The only question is, whether the trustee is entitled to credit for the sum paid for future claims.

That raises two questions—first, whether Mr Balfour had a good claim for the sum in question, and secondly, whether, if he had not, Mr Tait is liable to make good the amount.

In considering the first question I do not think it necessary to inquire whether the lease was or was not an asset of the firm. [*His Lordship here quoted from the lease*]. As between landlord and tenant, therefore, it is a lease in favour of two joint tenants and their respective heirs and successors, and not of a firm, or the trustees of a firm. That is the position with which we start.

Nor do I think it necessary to inquire whether the lease was renounced by Mr Buttercase or by anybody on his behalf in such circumstances as would have given the landlord a claim of damages against him if he had been sole tenant. I think it follows from the decision in *Young* that the renunciation of Buttercase, or his abandonment of the lease, could not determine the right of his co-tenant Geddie, and if Geddie was still entitled to possession of the farm, and was ready to perform the tenant's part of the contract of lease, the renunciation of Buttercase, assuming it to have been finally and completely made, could found no claim of damages against Geddie, and no claim which could prejudice his interest in the surplus of the trust-estate.

On the other hand, if Geddie himself had failed or refused to perform his contract, it may be assumed that the renunciation of both tenants would afford a sufficient ground for the landlord's claim of damages. The question, therefore, is whether it was the act of the landlord or of Geddie which put an end to the lease. It is to be kept in view that the lease contained a clause providing that if the tenants or either of them should become notour bankrupt, or if their estates should be sequestrated or conveyed in trust for behoof of their creditors, the lease should, in the option of the landlord, be *ipso facto* null and void. Now, the event occurred upon which the landlord was entitled to irritate the lease, and therefore it could only be carried on as a lease between him and Geddie, if Geddie was prepared to perform his part of the contract and if the landlord chose to waive his right to put the lease to an end.

There was a great deal of negotiation between the agents of the various parties, and a great deal of discussion as to the position into which the lease had been brought in consequence of the trust-deed; and the result of the whole matter was that though Mr Geddie was at one time desirous of renouncing the lease and actually proposed to do so, the landlord did not accept that proposal, and long before the termination of the negotiations, Mr Geddie, or his agent on his behalf, had assumed the perfectly distinct position that he was not going to renounce, but on the contrary to carry on the lease. The result of the whole matter could not be put more clearly than it is by Mr Tait in his evidence, where he speaks to the meeting at which a letter to

Mr Balfour was drafted on behalf of Mr Geddie in these terms:—"I hereby intimate that he is prepared to adopt the lease of Lochty farm." [*His Lordship then referred to the portion of Mr Tait's evidence quoted above, and continued*]—That statement is quite borne out by the correspondence and by the evidence of Mr Murray and Mr Strathern. Indeed, Mr Strathern makes it clear enough that he had considered the question whether Mr Geddie would be a desirable tenant for the farm or not, and that he was not prepared to advise his client to accept Mr Geddie as sole tenant.

Now, it must be borne in mind that the landlord was in a position to say, "I will bring the lease to an end." He refused his consent, without which Geddie could not have gone on, and therefore it appears to me quite clear that he exercised his right to determine the lease. If the question had been open, I should have been disposed to think that a landlord cannot reject in so peremptory a way the application of a tenant to continue in the lease, and at the same time bring an action of damages against his tenant for refusing to perform the obligations of the lease. But the law is quite clearly settled by the case of *Walker's Trustees*, which is confirmed by the manner in which the question was treated in the subsequent case of *Sinclair's Trustees.* I take it, therefore, to be settled law, that if the landlord himself puts an end to a lease by exercising a right reserved in the contract, he cannot claim damages for the loss he has sustained by its premature termination, because he is not entitled to damages for loss resulting from his own act and not from the failure of the tenant.

If that be so, the trustee here has paid money belonging to the trusters to a person who had no claim to it whatever, and the second question arises, whether in accounting with his trusters he is entitled to take credit for the money so paid. I think he is not, and I am of opinion with the Lord Ordinary that that claim cannot be stated as a good claim so as to reduce Mr Geddie's share of the surplus of the trust-estate. I agree with the Lord Ordinary that there is no room for questioning the good faith and honesty of the trustee, and the Court must always be alive to the hardship of enforcing against an honest trustee a claim which must result in his becoming personally liable to make good money which he has paid away in good faith. But then his trust was to pay to the true creditors of Geddie and Buttercase and no others, and if he has paid the truster's money to a person not entitled to receive it, it is no answer to say that he was under an error in law; and that appears to me to be the only answer that can be made with any plausibility. It is true that the trust gave him power to compromise and to transact claims, and it was argued that he was protected by that provision. But it seems to me quite plain that there was no element of transaction or compromise about this matter at all. No doubt the trustee reduced the amount of the claim very considerably. But that was not by way of compromise or transaction, and if the landlord had not been content to accept Mr Tait's deliverance upon that subject, there was nothing—no transaction—to prevent him from enforcing his demand to the fullest extent. It was simply a reduction of Mr Balfour's estimate of damages. The whole contention that the deliverance of the trustee was a compromise, and is therefore defensible, is, I think, made an end of by his own evidence. "I admitted the claim," he says, "and proceeded to adjust it."

Is the trustee then entitled to take credit for the payment on any other ground? I think there might be circumstances in which a trustee might well be in a position to claim as against persons interested in the trust that payment of a claim in error was justifiable, on the ground either of some concession made by them or of some failure or neglect on their part to bring before him the true nature of the objection to the claim erroneously paid. But it is quite out of the question to suggest that we have such a state of matters here. The trustee knew perfectly well that Mr Geddie and his agent objected to the validity of the landlord's claim, and they not only objected, but they pressed upon him that it should be tried judicially. Mr Tait did not think the process suggested an expedient or desirable kind of action to bring, but that is of very little consequence. The material point is that Mr Geddie desired that the validity of the landlord's claim should be determined in a court of law. I think, therefore, that, in view of his knowledge of that fact, Mr Tait's action was precipitate. He received Mr White's letter on the 21st. On the 22nd he was informed by Mr Balfour's agent that Mr Balfour would not accept Mr Geddie. On the same day he proceeded to decide the matter by sustaining Mr Balfour's claim, and on the 23rd he gave effect to his decision by paying the money. Unless, therefore, he can show that the landlord's claim was good in law, he is not entitled to take credit for that payment. In the ordinary course of business I should have thought the proper thing to do was to intimate to Mr Geddie's agent that he had sustained the claim to a certain extent and that within a certain time he proposed to make payment unless interpelled. Instead of doing that, he decides on the 22nd, and pays the money on the 23rd, without giving time to Mr Geddie to interpose. I think that by so doing he took upon himself the risk of being unable to establish the validity of the claim. I fail to see that there is any very great hardship inflicted upon a trustee by requiring that, if he pays away the trust money in such circumstances as to make it impossible that the objections of the parties interested, whom he knows to object, should be determined, he must be held to have taken the responsibility of a final decision upon himself, and must stand or fall according as he can justify that decision or not.

I agree with the Lord Ordinary in attaching no weight to the evidence as to a supposed agreement between Mr Tait and the objector not to issue any deliverance; and,

generally, I am of opinion, upon the ground I have stated, that his Lordship has disposed rightly of this objection.

There is a second objection, which the Lord Ordinary has repelled, to the effect that the expenses incurred by Mr Tait in an earlier stage of this action should fall upon himself personally or upon his constituents' share of the trust-estate. I think that question must be held to have been decided when judgment was given at that stage of the case, and that we cannot entertain any question as to expenses disposed of by previous interlocutor.

On the whole matter, I am of opinion that we should adhere to his Lordship's interlocutor.

The LORD PRESIDENT and LORD ADAM concurred.

LORD M'LAREN was absent.

On the question of expenses, the pursuer and nominal raiser argued that he should not be found personally liable. The question determined in this action was one on which it would have been necessary in any event to get a judicial decision, and if the trustee had raised an action before paying the landlord's claim to enable the landlord and Geddie to fight it out, he would have been entitled to his expenses out of the trust-estate.

LORD KINNEAR — Two points which require consideration are raised by Mr Johnston's motion. The first is as regards the question of the proof. I think with the Lord Ordinary that some proof was necessary. Our judgment has proceeded upon it, and I am not prepared to say that we can blame one party more than the other for any excessive length. Therefore I think that we cannot give effect to Mr Johnston's objection on that point.

As to the other, it is perfectly true that by the course proceedings have taken Mr Tait, if found liable in expenses in the terms proposed by Mr Campbell, will have an expense thrown on him which in ordinary circumstances he would not have been called upon to bear, because he would not have been required to pay the expenses of the litigation required to determine the question between the landlord and tenant. But that unfortunately is due to his own precipitate action. If he was only a stakeholder, and if before paying the money he had taken care to see that the rights of parties were judicially determined, he would not have incurred any expense, because the landlord must either have given up his claim or paid his opponent's costs if he litigated unsuccessfully. But then it is just part of the error which we have found in the course of procedure, that the trustee is forced to take up Mr Balfour's claim, and he cannot maintain it except under the ordinary condition of paying expenses if he fails.

The LORD PRESIDENT and LORD ADAM concurred.

The Court adhered to the interlocutor of the Lord Ordinary, "with this variation, that they find the pursuer and nominal raiser personally liable to the objector James Geddie in the expenses found due to the said objector by the said interlocutor; find the pursuer and nominal raiser personally liable to the said objector in expenses since the date of said interlocutor; and find that the pursuer and nominal raiser is not entitled to charge his own expenses against the objector's share of the fund *in medio*, reserving to the pursuer and nominal raiser all right of relief competent to him with reference to the said expenses and the expenses hereinbefore decerned for, other than against the objector and his share of the fund *in medio*."

Counsel for the Pursuer and Nominal Raiser — H. Johnston — Cook. Agents — Graham, Johnston, & Fleming, W.S.

Counsel for the Defender and Objector — Dundas — W. Campbell. Agent — Thomas White, S.S.C.

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*Tuesday, February* 16.

## SECOND DIVISION.

[Lord Pearson, Ordinary.

## HENRY THOMSON & COMPANY *v.* DAILLY.

*Reparation — Measure of Damages — Substantial Damages Granted where No Specific Damage Proved—Expense of Detecting Fraud—Tender.*

In an action of declarator and interdict and for £500 damages against a public-house keeper for fraudulently selling as whisky manufactured or blended by the pursuers, whisky not so manufactured or blended, the defender admitted that his object in doing this was to discourage the sale of the pursuers' whisky, upon which his profit was less than on other whiskies.

*Held* that, although no specific damage was proved, it was a legitimate inference that the defender's fraudulent conduct, which was intended to have that effect, had caused substantial injury to the pursuers' trade, and accordingly the Court (altering the judgment of the Lord Ordinary) *assessed* the damage to the pursuers at £100.

*Opinion reserved*—Whether in estimating the amount of damages the sum necessarily expended by the pursuers in detecting the fraud should be taken into account.

*Opinion reserved*—Whether an offer of a sum by the defender to the pursuers, accompanied by declaration that the pursuers' case was unfounded and untrue, could be regarded as a judicial tender in dealing with the question of expenses.

In February 1896 Henry Thomson & Company, wholesale Irish whisky merchants, Newry, Ireland, raised an action against Daniel Dailly junior, wine and spirit merchant, Dundee, concluding for (1) declarator that the defender was not entitled to sell or offer for sale, by himself or others acting under or for him, as whisky manufac-