

Counsel for the Appellants—The Dean of Faculty (Asher, Q.C.,—Cripps, Q.C. Agents—A. & W. Beveridge, for Millar, Robson, & M'Lean, W.S.

Counsel for the Respondents—The Lord Advocate (Graham Murray, Q.C.)—Coward, Q.C. Agent—John Kennedy, for J. Gordon Mason, S.S.C.

Monday, November 28.

(Before Lord Watson, in the Chair, and Lords Shand and Davey).

MESS v. HAY (SIME'S TRUSTEE).

(Ante January 18, 1898, 35 S.L.R. 372, and 25 R. 398.)

*Bankruptcy—Trust for Creditors—Possession—Pledge—Right of Private Trustee to Preferential Ranking in Subsequent Sequestration.*

A, the tenant of a farm, under a lease which expired at Martinmas 1896, granted, in July 1895, a conveyance of his whole estate, consisting of his right as tenant and the stock and crop of his farm, to B, "as trustee and in trust, and as my commissioner," with power to enter into possession thereof for the purpose (1) of managing the farm, and (2) of paying the truster's debts out of the surplus assets after payment of an allowance to the truster and remuneration to himself.

None of A's creditors acceded to this deed, and his estates were sequestrated in July 1896. B claimed to be ranked preferably in the sequestration for sums expended by him in seed and labour for crop 1896 and other expenditure, and for his remuneration, but the trustee disallowed the claim to a preference.

In an appeal B averred on record in general terms "that he accepted the trust created by the said trust-deed and commission, and in virtue thereof immediately entered into possession and management of the whole estate and effects of the bankrupt, and continued to possess and manage the same down to the date of the sequestration." It was not disputed, however, that during the whole period of B's management the bankrupt, in compliance with the terms of his lease, remained in the personal occupation of the lands and farm steading, no application having been made to the landlord for a transference of the lease, and that at the date of the sequestration the whole crops of the year 1896 were *partes soli*.

Held (*aff.* the judgment of the Second Division) that the appellant had not relevantly averred possession exclusive of that of the bankrupt, such as to give him a security for his outlays and remuneration upon the estate.

*Bankruptcy—Recompense—Factor's Claim for Outlay on Farm.*

A, the tenant of a farm, under a lease which expired at Martinmas 1896, exe-

cuted in July 1895 a trust-conveyance of his whole estate to B, with full power to enter into possession of and manage the farm. B, without obtaining a transference of the lease from the landlord, or effective possession of the stock and crop of 1896, expended the sums required for the seed and labour of that crop.

B's estates were sequestrated in 1896, while the crop of that year was *partes soli*, and B claimed that he had a preferential claim upon the proceeds of the crop of 1896.

The House of Lords (*aff.* the judgment of the Second Division) *sustained* the trustees' deliverance disallowing the claim for a preference.

The case is reported *ante, ut supra*.

Mr Mess appealed to the House of Lords.

At delivering judgment—

LORD WATSON—This appeal is taken in the bankruptcy of Alexander Sime, tenant of the farm of Moncur, in the parish of Longforgan and county of Perth, under a lease which expired at Martinmas 1896. Sequestration was awarded on 10th July 1896, the date of the first deliverance being the 2nd July 1896; and the respondent Alexander Hay, was duly appointed trustee. Accordingly from and after the 2nd July 1896 the whole moveable estate of the bankrupt became vested in the respondent, subject to such preferable rights and securities as were held by creditors.

By a trust-deed executed on the 26th day of July 1895 Alexander Sime conveyed his whole estate, heritable and moveable, to the appellant John Mess, chartered accountant in Dundee, "as trustee and in trust and as my commissioner (but hereinafter called trustee) for the uses, ends, and purposes after specified." Full power was given to the appellant to enter upon and take possession of the estate conveyed, and to do everything which the bankrupt could have done before granting the conveyance. The leading purposes of the deed were (1) that the appellant should manage the farm of Moncur, its cultivation and stocking, the lease, and to sell and convert into money the whole of the stock, crop, and implements, as he might think fit; (2) that he either until the expiry of the lease, if deemed advisable, or until renunciation of should have power to realise the truster's estate, both heritable and moveable, on such conditions and at such prices as he might think proper; (3) that he should have power to sue and defend actions at law, or other proceedings for recovery of or in relation to the estate; (4) that he should pay out of the first and readiest of the estate and effects, rents, wages, and other preferable claims, and also expenses, including an allowance to the truster, and a reasonable gratification to himself; and (5) that the appellant should, as soon as convenient, out of the remainder of the trust-estate and effects, pay the debts of the whole just and lawful creditors of the

truster, or, in the event of the remainder being inadequate for that purpose, to call for claims, and on these being lodged, to divide the funds according to a scheme prepared by him. The sixth, seventh, and eighth purposes deal with the right of creditors who may accede to the trust. By the ninth purpose the appellant was authorised to borrow money by cheque or from banks, or in any way he might think right. The remaining purposes related to questions of final accounting between the appellant and Mr Sime or his representatives.

The deed confers two separate appointments on the appellant, the one being that of factor or commissioner for the grantor, and the other that of trustee for the creditors of the grantor. By the terms of his lease of the farm of Moncur all assignees of the bankrupt, whether legal or voluntary, were excluded, as were sub-tenants, unless with the consent of the proprietor, as also "all creditors or trustees or others acting for creditors." In the absence of the proprietor's consent, which was not obtained, the assignment of his lease by the bankrupt to the appellant was inefficacious, and gave the appellant no right to possess the farm of Moncur or any part of it. On the record it is not disputed that during the period which elapsed between the execution of the trust-deed and the issue of sequestration, the appellant acted in the management of the farm, sold and received the proceeds of crop, and made payment on account of taxes and rent, and also for labour, manure, and seed. No creditor of the bankrupt acceded to the trust, and there was therefore no beneficiary whom the appellant represented as trustee.

The appellant on the 10th March 1897 lodged an affidavit and claim in the sequestration for a balance of £898, 16s. 7d. as due in respect of his actings and intromissions under the trust-deed in the management of the farm of Moncur. He affirmed that at the date of the sequestration he held the whole estate falling under it, in security and for payment of his advances, expenses, and remuneration as trustee; and he claimed to be ranked preferably and *primo loco* upon the whole estate to the effect of receiving payment of the full amount of his debt. And in virtue of his having paid for the seed and labour of sowing and caring for the crop of 1896, he specially claimed "to be preferred to the whole funds arising from the realisation of that crop, or to such part of the said funds as may be necessary for the purpose of recouping the deponent his expenses, advances, and remuneration."

The respondent, on the 24th June 1897, made a deliverance by which he rejected the claim to the extent of (1) £52, 8s. 4d., being law expenses incurred after the date of sequestration; (2) £12, 0s. 11d., expenses which had been paid by the proprietor of Moncur; and (3) £56, 16s. 8d. as an overcharge of remuneration claimed by the appellant. Under deduction of these items the respondent admitted the balance of £775, 11s. 4d. to an ordinary ranking. He rejected the claim for a preference, on the ground that the appellant had never held

the sequestrated estate in security, and that any payment made by him for seed and labour for crop of 1896 did not entitle him to a preferable ranking.

An appeal against that deliverance was taken to the Court of Session, where by order of the Lord Ordinary (Pearson) a record was made up and closed upon condescendence and answers. After hearing parties the Lord Ordinary, by interlocutor dated 14th December 1897, (1) found that the averments of the appellant were not relevant to sustain the preference claimed by him in the sequestration, and sustained the respondents' deliverance in so far as it rejected said preference; (2) affirmed said deliverance in so far as it disallowed law expenses, and the sum of £12, 10s. paid by the proprietor of Moncur; with regard to the sum of £58, 16s. being the proportion of the appellants' remuneration disallowed by the respondent, before further answer remitted to the Accountant of Court to inquire into the whole claim of the appellant for remuneration and to report thereon, reserved all questions of expenses, and granted leave to reclaim.

Upon a reclaiming-note by the present appellant, the Second Division of the Court, Lord Young dissenting, adhered to the interlocutor of the Lord Ordinary, and found the appellant liable in expenses since its date.

A twofold question is involved in the terms of the interlocutor appealed from—(1) whether the appellant is creditor of the bankrupt for the full amount which he claims; and (2) whether the debt due to the appellant is, to any and what extent, a preferable charge upon the sequestrated estate? and the second of these questions is the more important, and is the only one which was seriously argued at the bar of the House.

The judgments appealed from both affirm that the appellant is an ordinary creditor of the bankrupt for the sum of £775, 11s. 4d., being the balance due upon his intromission and management of the crop and stocking of the farm of Moncur, the expenditure of the appellant upon rent, taxes, and other necessary payments being to that extent in excess of his receipts. The bankrupt was possessed of no heritable estate, with the exception of his interest in the lease of Moncur, which was not carried to or vested in the appellant by the trust-deed of 26th July 1895. The whole moveable estate of the bankrupt, including everything which had been conveyed by the trust-deed, became absolutely vested by force of statute in the respondent from the 2nd July 1896, the date of the first deliverance in the sequestration, subject only to such right of security or preference as the appellant might be able to make good in the sequestration. The immediate effect of the sequestration was to revoke any authority which the appellant might derive from the trust-deed, and he had no longer any power to act in the administration, either on behalf of the bankrupt or his creditors. No reason has been averred or shown why the appellant should, after that date, have

employed and incurred expenses to law-agents, and, in my opinion, these expenses have been rightly disallowed by the Courts below.

The question remains, whether the sum which has been found due to the appellant, as increased by any addition which may be made thereto by the Court, on considering the report of the Accountant, to whom the matter of the appellants' remuneration has been remitted, ought to form a first and preferable charge as claimed upon the whole estate and funds included in the sequestration. The appellant maintained that at the date when the sequestration took effect and his possession was superseded by the statutory title of the respondent, he had actual possession in security of his claims, and exclusive of any possession by the bankrupt, of the whole moveable estate which has now passed to the respondent as trustee in the sequestration. That aspect of the case appears to have been chiefly pressed in argument before the Court of Session, and the judgments both of the Lord Ordinary and the Division went upon the ground that the appellant had not in his record stated facts and circumstances sufficient or relevant to infer that he had obtained such possession of the estate as would sustain a right in security. In this House an alternative plea, said to be equitable, was argued on behalf of the appellant and will be noticed hereafter.

It is not matter of controversy that by the law of Scotland, in order to constitute a valid pledge of moveables, there must be delivery of them to the pledgee to the effect of vesting him with possession independent of the possession or control of the pledgor. Their joint possession will not suffice to create a right of security in the pledgee. There may be cases in which so far as pleading is concerned it is sufficient to allege possession in general terms, but there are others in which it is essential to a relevant averment of the pledgee's possession to set forth facts and circumstances from which the exclusive possession is matter of natural or necessary inference. When the moveables forming or intended to form the subject of the security are stored in the premises of the pledgor, a simple averment of possession by the pledgee would be insufficient, but an allegation that these goods had been placed in a particular room or chamber, that the door had then been locked and the key delivered to the pledgee so as to give him the exclusive custody and control of them, would be equivalent to an assertion of actual possession, and would be admitted to probation.

The appellant on record (Stat. 2) alleges in general terms that he "accepted the trust created by the said trust-deed and commission, and in virtue thereof immediately entered into the possession and management of the whole estates and effects of the said Alexander Sime, and continued to possess and manage the same down to the sequestration of the estates of the said Alexander Sime as before mentioned." He explains, with some minute-

ness in Stat. 8, his various acts in the cultivation and management of the farm of Moncur, and the payments made by him on account of rent and other charges, but these averments throw no light upon the character of his possession, if any, of the growing crops, farm, stocking, and other articles which passed to the respondent as trustee under Sime's sequestration.

There are many circumstances in this case which, in my opinion, required that additional information should have been given by the appellant, if consistent with fact, in order to disclose exclusive possession by him of such a character as to raise a real right of security. It is not disputed that during the whole period of the appellants' management, Alexander Sime, in compliance with the terms of his lease, remained in the personal occupation of the lands and steading which constituted his farm, and at the date of his sequestration the whole crops of the year 1896 were *partes soli*. It is idle to speculate by what possible devices, if any, exclusive possession, such as the law of Scotland requires, could have been transferred to a gentleman resident in Dundee of furniture in the house at Moncur occupied by the bankrupt, of horses, cattle, or implements in his steading or on the farm, or of crops which were actually growing upon the land which was occupied by the bankrupt. There is no averment that any such devices were resorted to for the purpose of vesting the appellant with the exclusive possession of one or other of these things.

The position which the appellant held as factor for the bankrupt gave him ample authority to deal with the crops and stocking in the manner he alleges so long as his commission lasted, but did not give him any possession, exclusive of the bankrupt, which could sustain a right of security. Whether upon his receipt of money realised by the sale of crops or stocking the appellant became entitled to retain it until he was relieved of advances made by him to pay rent and other charges, is a question which does not arise in the circumstances of this case, and need not therefore be discussed.

For the reasons indicated I am of opinion, with the Lord Ordinary and the majority of the learned Judges of the Second Division, that the averments made by the appellant in support of his claim, upon the ground that he held at the date of the sequestration a real security over the sequestered effects, are not relevant.

The only point which remains to be considered is the second and alternative claim presented for the appellant, which was confined to the crops of the farm of Moncur for the year 1896, these constituting the greater part of the estate falling under the sequestration. The claim is formulated in the appellant's second plea-in-law, to the effect that "the appellant having paid all expenditure connected with the crop of 1896, and cultivated and sown the same, is entitled to be recouped out of and from the proceeds of the said crop." The plea was rested, in the argument for the appellant,

upon the doctrine of recompense, which is an intelligible principle of Scotch law, although in my opinion it is not applicable to the circumstances of the present case, and also upon the ground that the appellant was in equity entitled to recover as a charge upon the proceeds of the crop of 1896 his outlays for seed and labour. Assuming that the appellant, under his contract of management with the bankrupt, had not sufficient possession to support a right in security, in which case only the alternative plea is necessary, his legal claim was for a simple contract-debt due to him by his constituent the bankrupt. To that extent his claim has been sustained. It is of no materiality that he may, as he alleges, have erroneously supposed that he had a right which in reality he never possessed. I am unable to conceive upon what principle the insolvency of his constituent should enlarge his right and give him a preference in competition with other creditors.

I am therefore of opinion that the interlocutors appealed from ought to be affirmed, and the appeal dismissed with costs. The case must be remitted to the Court of Session in order that the amount of the appellant's remuneration may be fixed and the expenses of process prior to the 14th December 1897 disposed of.

LORD SHAND—I am also of opinion that the deliverance of the trustee on the sequestrated estate of the bankrupt Sime, and the judgments of the Lord Ordinary and of the Second Division, are sound and ought to be affirmed. The appellant is of course entitled to a ranking for the sum of £775, 11s. 4d. as an ordinary creditor of the bankrupt, as the balance due on his intromissions as commissioner or as trustee acting under the deed granted by the bankrupt of 26th July 1895, to which my noble and learned friend has fully referred; but an entirely different question arises under the appellant's claim to rank on the bankrupt estate as a preferable creditor.

The appellant was not at any time himself tenant of the farm. For obvious reasons he did not intimate the assignation of the lease which the bankrupt granted to the landlord, for the lease excluded assignees and trustees acting for creditors, unless with the consent of the landlord, which the appellant knew he could not obtain. In what he did the appellant acted on the employment of the bankrupt and as his agent or commissioner, although he was called "trustee" in the deed. He had no authority from the bankrupt's creditors to act for them, for the creditors were not asked to accede to any trust, and even the existence of any trust was not intimated to them. If he had taken the precaution of getting the creditors to adopt and accede to the trust his right might have been very different.

The sole question in the case, then, is whether when bankruptcy arose on the 2nd July 1896 the appellant had any preferable right or security over the bankrupt's estate to which the trustee in the seques-

tration was bound to give effect. There is no deed in existence constituting such a right or security. Had the appellant, then, such possession of any part of the estate stipulated for and obtained as a security for his advances as to give him a preference over the other creditors? I agree with my noble and learned friend that there was no such possession, and that the possession of the appellant was all along that of the bankrupt by his authorised agent or commissioner, and not possession excluding that of the bankrupt.

As to recompense, the ground of judgment of the learned Judge who differed in opinion in the Second Division of the Court, I can see no room for giving effect to the appellant's argument. It seems to me that in making the outlays he did, and in seeing to the application of the money he advanced, the appellant having no such possession of the crop, stocking, and moveables on the farm as excluded the possession of the bankrupt, was simply lending money and giving his services to the bankrupt under the arrangement that he should be factor or commissioner for the bankrupt, appointed by the deed of 26th July 1895, and that this being so he has no ground for a claim of recompense against the general creditors. His position is not indeed different in substance from creditors who have lent money or sent goods to a bankrupt, of which the general creditors take the benefit on bankruptcy. There is no room for the suggestion that there was exclusive possession on a title which gave the appellant ground to believe that he had a claim against anyone but the bankrupt for whom and on whose authority he was acting, and so there is no room for a claim on the ground of recompense.

LORD DAVEY—I have had an opportunity of seeing the judgment which has been delivered by my noble and learned friend Lord Watson, and I so entirely agree with the reasons which he has given and the conclusion which he has come to that I do not find it necessary to add anything.

Appeal *dismissed* with costs.

Counsel for the Appellant—Balfour, Q.C.—Edmund Robertson, Q.C. Agents—W. Robertson & Co., for J. & D. Smith Clark, W.S.

Counsel for the Respondent—Asher, Q.C.—J. D. Sym—Dumas. Agents—A. & W. Beveridge, for Carmichael & Miller, W.S.