and they all were domiciled in England. No appointment of tutors or curators was made to the legatees under the trust-disposition and settlement, and no provision was made for payment to their parents or guardians of the principal of the legacies, or of the income thereof, or for the accumulation of the income during the minority of the legatees.

Application was made to the trustees by the fathers of the legatees to have the income accruing on the legacies paid over to them on behalf of their children. The trustees were willing to do so, but having been advised that by the law of England the fathers could not grant a discharge for the legacies, and being in doubt as to their power to pay over the income, presented a petition to the Court of Session, with the consent of the parents, and of the first two legatees themselves, craving the Court "to authorise, direct, and appoint" the trustees to pay over to the respective parents of the legatees the income of their legacies up to such time as they should attain majority.

The Court, on 17th June 1896, remitted to Mr J. C. Couper, W.S., "to inquire and report as to the regularity of the proceedings, and the reasons for the proposed authority to pay income."

Mr Couper reported that considering the financial position of the parents it might be to the interest of the legatees to employ the income of their bequests in their education and maintenance. He suggested, however, that as the interests of the parents and children might be antagonistic, it would be well to apply the income through a *factor loco tutoris* appointed to the pupils, and a *curator bonis* to the minor.

The petitioner argued that the Court, in exercise of its *nobile officium*, might authorise the trustees to make this payment to the parents, or that at any rate it might appoint a judicial factor. As he would be an officer of the Court they would practically be paying the money into Court.

LORD PRESIDENT—This seems to be a case of overdriving the *nobile officium* of the Court. The inherent difficulty is that no one is in a position to give a valid discharge of payment, and no decree of ours can supply that defect.

LORD ADAM—The question is whether we can authorise the trustees to pay money belonging to infants without obtaining a discharge. I think we can not.

LORD M'LAREN—I express no opinion on the question whether without an order the trustees would be entitled to pay the legacies to the minor children. I should imagine that if the money was paid for their benefit it would be unlikely that their action would ever be questioned. We cannot enter into that question, but if the trustees have not power to make such payment, we certainly cannot give it to them.

LORD KINNEAR—The statement of the trustees is that the legatees, or those who may ultimately be found entitled to these sums, are according to the law of their own domicile infants, incapable of granting a discharge, and they have no legal guardians capable of giving one binding on them and their heirs. The trustees say they are not in a position to make payment to the legatees themselves, or anyone on their behalf, because they can get no valid discharge. That shows that we have no power to supply a defect which makes it impossible for them to proceed upon their own responsibility.

The Court refused the petition.

Counsel for the Petitioners—Brodie Innes. Agents—Dove, Lockhart, & Smart, S.S.C.

Saturday, October 24.

FIRST DIVISION.

[Lord Stormonth Darling, Ordinary.

MONCREIFFE *v.* FERGUSON.

Bankruptcy — Voluntary Trust-Deed for Creditors—Assignation of Lease to Trustee for Purpose of Carrying out the Trust—Personal Liability of Trustee for Rent.

The tenant of a farm under a lease excluding "all assignees, whether legal or voluntary, and all sub-tenants and trustees, or managers for behoof of creditors," executed a trust-deed for behoof of creditors, in which he assigned to the trustee his whole estate, including the lease of the farm, with full power to enter on and manage the farm till the natural expiry of the lease. The trustee applied to the proprietor for his accession to the trust-deed and consent to the assignation, which were granted on condition that the trustee should execute a renunciation of the lease as from the next term of Martinmas, and this renunciation was executed. The trustee entered upon the management of the farm and ingathered the crop for the year.

Held that the trustee's possession of the farm was that of a tenant under the lease, and that accordingly he was personally liable for the rent of the year during which he was in possession.

This was an action at the instance of Sir Robert Drummond Moncreiffe, proprietor of the farm of Hilton, Perthshire, against William Scott Ferguson, farmer, concluding for payment of the sum of £380, being a year's rent of the farm up to Martinmas 1895.

The original tenant of the farm of Hilton was Mr Thomas Richmond, under a lease from the pursuer dated July 1886. The endurance of the lease was for three years from Martinmas 1886, and from year to year thereafter until it should be terminated by one year's written notice. The lease excluded "all assignees, whether legal or voluntary, and all sub-tenants or trustees, or managers for behoof of creditors." It further provided that in the event of the

tenant becoming bankrupt or executing a trust-deed for creditors the pursuer should have the option of declaring the lease null and void at the ensuing Martinmas. The rent was £480 per annum. By subsequent agreement dated in June and July 1889 the parties agreed to prolong the lease, so that it should be construed as if the period of endurance had been ten years, and the date of termination Martinmas 1896, and the rent was reduced to £380.

Mr Richmond on 13th May 1895 executed a trust-deed for behoof of his creditors in favour of the defender, to whom he disponed and assigned his whole estate, heritable and moveable, including his lease of the farm, with power in particular to take charge of and manage the farm with the stock and cropping thereon, purchasing and selling from time to time such live stock as might be necessary for the proper management of the farm, and to carry on the lease until the natural expiry thereof, or to renounce and give it up at such time as he should consider expedient. Application was made to the pursuer for his accession to the trust-deed and consent to the assignation of the lease, and these were given by a document dated 20th May 1895 on the footing "that the lease may be renounced by Mr Ferguson as from Martinmas next, and a formal renunciation delivered within three weeks from this date." Subsequently on 29th June 1895 the defender executed a renunciation of the lease in favour of the pursuer. The defender entered into possession of the farm, and continued in possession of it till Martinmas 1895. He managed and cultivated the farm during that time and reaped the crop of the year.

The pursuer maintained that the defender as assignee aforesaid was liable to pay the whole rent of the year 1895, and on his declining to admit liability raised the present action.

The defender maintained that the pursuer having acceded to the trust-deed and intimated a claim thereunder, including the sum sued for, was bound to rank on the estate as an ordinary creditor.

He pleaded—"(4) No benefit under the lease having been assigned to the defender or the trust-estate, and the pursuer having consented to the assignation only conditionally for the limited purpose of enabling the defender to execute the trust by realising the stock and crop of 1895, the pursuer is not entitled to found on said assignation as inferring personal liability against the defender."

The Lord Ordinary (STORMONTH DARLING) on 17th June 1896 decerned against the defender in terms of the conclusions of the summons.

Opinion.—"Questions of difficulty have sometimes arisen (as in the case of *M'Gavin* v. *Sturrock's Trustees*, 18 R. 576) where it was necessary to gather from the conduct of parties whether a trustee for creditors had adopted the lease of a farm so as to render himself personally liable for its prestations.

"Here the question of adoption or non-adoption is to be solved not by conduct but by documents, and the material documents are (1) the trust-deed in favour of the defender dated 13th May 1895; (2) the accession by the pursuer dated 20th May 1895; and (3) the renunciation by the defender dated 29th June 1895. The combined effect of these writings is that the lease was assigned to the defender as at 13th May 1895, that the pursuer consented to the assignation on condition that the defender renounced the lease as at the term of Martinmas following, and that the defender did so renounce, expressly reserving to the pursuer his whole rights and claims under the lease, so far as applicable to the tenancy down to that term.

"The defender had full possession under the deeds for six months. His acts of possession are fully detailed in the joint-minute, No. 20 of process, and they probably amounted to nothing more than what was necessary for working and reaping the crop of 1895, with a view of realising and distributing the estate among the creditors. It is probably also true that if there had also been no consent by the landlord, and no renunciation by the trustee, the same results could have been achieved, because by the terms of the lease the landlord could not have exercised his option of terminating the tenancy till Martinmas 1895, and, in the meantime, he could not have prevented the tenant continuing in possession and managing for the trustee.

"But the parties chose to arrange matters differently. The assignation in the trust-deed was validated by the landlord's consent. The trustee thereupon became himself the tenant, and in that capacity he renounced the lease. I cannot doubt, therefore, that he became personally liable for the rent payable during the period of his possession.

"It was argued for the defender that if so, he must also be liable for arrears of rent. That is a claim which may sometimes be made against a trustee who adopts a lease, but a landlord by his conduct may very easily waive it, and here it is not made. Certainly, what I am deciding by no means implies that it could be successfully made in the present case."

The defender reclaimed, and argued—Personal liability was not created by the mere assignation to a trustee, and the only question was whether he had adopted the lease as a tenant. All that had been done by the defender was quite consistent with the view that he had merely occupied the farm for the purpose of realisation, and not as a tenant, and had accordingly not rendered himself personally liable for the prestations of the lease. If the deeds here could be read consistently with the decision in *M'Gavin* v. *Sturrock's Trustees*, Feb. 27, 1891, 18 R. 576, then the present case was ruled by that decision, there being no actings on the part of the defender such as would constitute an adoption of the lease. Nor were the deeds inconsistent with this view. The pursuer had consented to the assignation, not in order to receive the defender as an assignee of a continuing contract—the terms of the accession expressly excluding such an idea—but merely

to confirm his title to get a valid renunciation, which was the only thing the defender could not do without the pursuer's aid. The pursuer did not thereby give any consideration such as would induce the defender to increase the extent of his liability, since it was to the pursuer's interest to get back the farm so as to be able to re-let it, and accordingly the defender could not be held, either by receiving the consent and accession or by executing the deed of renunciation, to have rendered himself personally liable. — *Kirkland* v. *Sharpe*, March 1, 1833, 6 W. & S. 340, at 351. And yet if the Lord Ordinary were right, the defender would have rendered himself liable for arrears of rent as well as for the rent for the current year. — *Dundas* v. *Morison*, Dec. 4, 1857, 20 D. 225; Ersk. ii. 6, 34; *Ross* v. *Monteith*, Feb. 15, 1786, M. 15,290. Such a claim could not be made, and was not made here, and the defender having done nothing which showed he had absolutely adopted the lease, could not be held liable.—*Kirkland* v. *Cadell*, March 9, 1838, 16 S. 860; *Munro* v. *Fraser*. Dec. 11, 1858. 21 D. 103; *Strathmore's Trustees* v. *Kirkcaldy*, June 21, 1853, 15 D. 752.

Argued for respondent—The cases quoted for the defender were those of a trustee in a sequestration, with statutory rights and duties. Here there was a trustee deriving his rights from a voluntary trust deed, with a deed of accession by the landlord, and of renunciation by himself, and the question must be decided by these deeds. The result of the deeds was to make the defender a tenant. The trust deed had been conceived, not with a view of instant renunciation by the defender, but of his carrying on the lease to its natural termination, and accordingly the question really was more, what were the powers of the defender, than what he actually did.

By the deed of accession the pursuer had given up an actual right, viz., that of suing the tenant for breach of contract in giving up the lease, and had validated the assignation. The defender had possession under these deeds, and had the full benefit of the crop for the year, so there was no hardship in holding him personally liable.

The fact that the pursuer had not sued for arrears did not deprive him of the right to sue for the year's rent.

At advising—

LORD ADAM—[*After narrating the facts*] —It is clear that the assignation of the lease and power of management conferred on the defender were not valid without the consent of the pursuer. But by the document dated 20th May 1895 the pursuer acceded to the trust deed and consented to the assignation of the lease of Hilton therein contained —the accession and consent being on the footing that the lease should be renounced by the defender as from Martinmas then next. Subsequently on 29th June 1895 the defender executed a renunciation of the lease of the farm in favour of the pursuer.

The defender entered into possession of the farm and continued in possession of it until Martinmas 1895. He managed and cultivated the farm during that time, and he reaped the crop of the year.

It appears to me to be clear, on the face of the documents to which I have referred, that he did so as tenant under the assignation granted in his favour by Mr Richmond and consented to by the pursuer.

But it is said by the defender that that was not the character in which he possessed the farm. He avers that in point of fact the pursuer never consented to any beneficial assignation of the lease, but only agreed to the occupation of the farm by the defender till Martinmas 1895 in order that the defender might realise the stock and wind up the tenancy, and that in administering the farm he has done nothing beyond realising the crop of the year 1895 and stock in terms of the trust deed.

It may be, as the Lord Ordinary says, that the defender might have done substantially all that he did towards realising the crop and stock without becoming actual tenant of the farm. I do not know how that may be, but if that was all that was intended it is not easy to understand why the transaction should have taken the form which it did, or why the pursuer's consent to the assignation of the lease in the defender's favour should have been sought and obtained—and the renunciation of the lease by him as tenant stipulated for. I think it is clear that his possession of the farm was under the assigned lease.

It is true that the pursuer acceded to the trust, but it does not follow from that that he was entitled only to a dividend on the rent of the farm for crop and year 1895. If I am right in what I have before said, that rent was not a debt of Mr Richmond's, but was due by the defender himself as tenant of the farm for that period.

I am therefore of opinion that the interlocutor of the Lord Ordinary should be adhered to.

The LORD PRESIDENT, LORD M'LAREN, and LORD KINNEAR concurred.

The Court adhered.

Counsel for the Pursuer—Sym—Macfarlane. Agents—Lindsay, Howe, & Co.. W.S.

Counsel for the Defender—W. C. Smith —C. K. Mackenzie. Agents—Hope, Todd, & Kirk, W.S.

Tuesday, October 27.

FIRST DIVISION.

[Lord Pearson, Ordinary.

G. & W. RIDDELL *v.* GALBRAITH.

Bankruptcy — Recal of Sequestration — Account of Concurring Creditor—Bankruptcy (Scotland) Act 1856 (19 *and* 20 *Vict. cap.* 79), *sec.* 21.

Sequestration was awarded by the Sheriff on a petition in which the concurring creditor had produced an affidavit and relative account in which all