

‘gitimus et propinquior hæres’ of his father. Lord Pitmilley repelled the reasons of reduction, and assoilzied General Kerr; and to this interlocutor the Court adhered on the 16th November 1819, and 11th March 1820,\* and modified the expenses to £1521 : 8 : 6. Against these interlocutors, and also against the decree of absolvitor in 1811, the appellant James Duke of Roxburghe having entered an appeal on the above grounds, the House of Lords found, that ‘in this case, in which it has been insisted on the part of the respondent, among other matters, that the appellant is barred by the plea of res judicata, that it is not necessary to determine whether he is so barred; but assuming that he is not so barred, the several interlocutors complained of ought to be affirmed: It is therefore ordered and adjudged, that the interlocutors complained of be accordingly affirmed.’

May 24. 1822.

*Appellant's Authorities.*—(2.)—Geddes, Feb. 25. 1796, (12641); Haddington's Collection, Vol. I. No. 636.—(3.)—1592, cap. 11; 1. Craig, 14. 14; Mack. Crim. Law, p. 93; Ferguson's Reports, 364.

*Respondent's Authorities.*—(2.)—2. Craig, 7. 7; 2. Mack. 294; 2. Bank. 3. 42; 2. Ersk. 3. 35; King, Nov. 15. 1682, (12523); Keble, Dec. 4. 1804, (14314);—(3.)—1600, c. 20; 1. Stair, p. 445; Crawford, Feb. 25. 1642, (12639.)

SPOTTISWOODE and ROBERTSON,—J. RICHARDSON,—Solicitors.

(Ap. Ca. No. 22.)

CHARLES FERRIER and Others, LYELL's Trustees, Appellants.—

No. 36.

*Gifford—Clerk—Jameson.*

JAMES HECTOR, Respondent.—*Cranstoun—Vere.*

*Trust—Mutual Contract.*—A tenant having entered into an agreement with his landlord to renounce his lease at a particular period in consideration of a certain sum, and the landlord having prior to that period become bankrupt, and conveyed his estates to trustees—Held, (reversing the judgment of the Court of Session,)—1.—That the tenant had no right to insist that the trustees should accept of the renunciation, and pay the stipulated price, but that he was bound to elect either to retain his lease, or rank as an ordinary creditor under the trust for the price;—and,—2.—That there were not sufficient circumstances alleged to infer an adoption of the agreement by the trustees, so as to bind them to implement it specifically, either officially or personally.

May 24. 1822.

1ST DIVISION.  
Lord Alloway.

In 1787 Robert Davidson obtained a lease of the farm of Fernieflat, part of the estate of Kinneff, for the lifetime of the tenant in possession, at the yearly rent of £276 : 5 : 6. This lease Davidson assigned to Hector, who took possession; and some years

\* Not reported.

May 24. 1822. thereafter Lyell, the proprietor of Kinneff, entered into an agreement, dated in July 1800, with Hector, by which, 'in consideration of the renunciation to be executed by the said James Hector of his lease of Fernieflat,' Lyell agreed to pay him 'the sum of £10,000 sterling, by equal instalments, at Whitsunday 1817, Martinmas 1817, and Whitsunday 1818, with interest on each instalment from each term's payment, and penalty, agreeably to law.' On the other part, Hector bound and obliged himself, upon payment or satisfactory security being given to him for the aforesaid sum, to execute a valid renunciation of the present subsisting lease of Fernieflat, &c. in favour of the said George Lyell, &c. whereby the said James Hector shall become bound to remove himself and subtenants from the said farm at Martinmas 1816.' Hector also bound himself to follow in the meanwhile a particular course of cultivation, and to give certain advantages to an incoming tenant; and by a separate letter he stated, that, 'I shall, on satisfactory security, delay the half of each instalment for six months after each term of payment, you paying interest on the sum not paid; and on granting heritable security for the £10,000, or such part as may be due, I shall execute in your favour a renunciation of the lease, in terms of our agreement.'

In October thereafter, Lyell's affairs becoming embarrassed, and while he was arranging as to conveying his estates to trustees, Hector executed an inhibition against his whole heritable property, but in the following month of March it was restricted to the estates of Kinneff and Largie. In April 1811 Lyell made a trust-deed in favour of the appellants, for behoof of themselves and his other creditors, by which, after narrating the various debts due by him, (several of which were heritably secured,) he conveyed his estates to these trustees, 'for and to the use and behoof of my creditors before named, and of any others my just and lawful creditors here omitted, whom the said trustees shall assume into the benefit of this disposition.' The trustees were empowered to sell the lands, and apply the price in payment of the debts; but it was declared that they should have no power to prefer any one creditor to another, or to affect the legal rights acquired by them by diligence or otherwise. The trustees immediately took possession, were infeft on the 30th December 1815, managed the estates as the sole and exclusive proprietors, and Hector followed the course of cultivation prescribed by the terms of the agreement. In 1813, 1814, and 1815, the trustees repeatedly advertised the lands of Kinneff for sale, and among other advantages they stated, that 'on the principal farm (viz.

‘ that of Fernieflat) there is a most commodious and substantial  
 ‘ steading, and offices of every description, containing thrashing  
 ‘ machinery of great power ; and the tenant has, at a very con-  
 ‘ siderable expense; made an addition to the dwelling-house, so  
 ‘ as to render it capable of accommodating a gentleman’s family.  
 ‘ The lease of this farm expires in the year 1816, and the tenant  
 ‘ is restricted to a beneficial mode of cropping ; so that a pur-  
 ‘ chaser could then enter to the dwelling-house, and a tenant to  
 ‘ the farm, under very favourable circumstances.’

May 24. 1822.

Having been unsuccessful in selling the lands, the trustees after-  
 wards advertised the farm to be let, stating that the term of entry  
 was to be at Martinmas 1816. In this they were also unsuccessful;  
 and when that period arrived, Hector, under form of protest, de-  
 clared that he was ready to renounce the lease, and required pay-  
 ment or security from the trustees in terms of the agreement. This  
 being rejected, Hector brought an action against Lyell and them,  
 both personally and officially, concluding that they should, in one  
 or other of these characters, be ordained ‘ to receive and accept a  
 ‘ renunciation of the lease of the said lands from the pursuer, and  
 ‘ thereupon to deliver to him a bond, with sufficient caution or  
 ‘ other satisfactory security, for the payment of the foresaid sum  
 ‘ of £10,000 sterling at the terms specified in the said agreement,  
 ‘ with interest ;’—‘ or otherwise, in case the said defenders shall  
 ‘ fail to accept the said renunciation, and accept the premises as  
 ‘ aforesaid,’ then they ought to be ordained ‘ to make payment  
 ‘ to the pursuer of the sum of £15,000 sterling,’ as the damages  
 sustained by such failure.

In support of the conclusions against the trustees, Hector con-  
 tended, that, by their conduct, they had homologated and adopt-  
 ed the contract which had been made with Lyell ; and that they  
 were equally as much bound as he was to implement it. To this  
 it was answered, 1. That they had not acted in such a manner as  
 to have adopted the contract, either as trustees or personally ;—  
 that, in order to make this out, it was necessary, not merely to  
 infer such an adoption by facts and circumstances, but to show a  
 clear and distinct consent to do so ;—that the advertisements and  
 other acts were done in the performance of their duty to the other  
 creditors ; and that they were entitled to advertise the farm, in  
 order to ascertain its value. 2. That the contract merely gave  
 Hector a personal claim against Lyell for the £10,000, and that  
 he was not entitled to demand from the trust-estate full payment  
 of that sum, in preference to the other creditors ; and that, by the  
 terms of the trust, they were prohibited from giving any creditor  
 a preference. Thereafter the trustees raised an action before the

May 24. 1822. Sheriff of Kincardineshire, concluding against Hector for payment of the rents subsequent to May 1816; which he resisted on a plea of retention. This defence being repelled by the Sheriff, in respect that the sums claimed by him were not yet payable, he brought an advocacy, which was conjoined with the action against the trustees. The Lord Ordinary, on advising a condescence and answers in the latter action, and after holding that the contract was binding on Lyell, pronounced an interlocutor finding, — ‘ 1. That as this contract was found effectual against Mr. Lyell by the interlocutor of 11th December 1816, so it must also be effectual against Mr. Lyell’s trustees, as his trust-deed was executed long after that period, and his trustees cannot be in a better situation than himself, but that these defenders can only be liable qua trustees, and are not personally liable for implement of the contract;—2. That if the trustees, as acting for Mr. Lyell and the creditors, take the benefit of that contract by selling the lands, as free of the pursuer’s lease, or in any other manner taking the benefit thereof, they must implement the agreement to the pursuer, and pay the price of the lease;—3. That the circumstances condescended on by the pursuer are not sufficient to bind these defenders, and the creditors for whom they act, to implement the agreement as to the lease, or to pay the price thereof, reserving to the pursuer his right of retaining the lease until the conditions of the agreement shall be implemented, or of securing the price of it by the inhibition he has used, or by any other mode he shall consider as effectual, and to all persons interested their defences, as accords; and therefore assoilzied the trustees from all personal conclusions against them.’

In relation to the advocacy of the action for rents, the Lord Ordinary found, ‘ That as the landlord stands indebted to the tenant, by a liquid ground of debt, to a much greater amount than the rents in question, he is entitled, in a question with Mr. Lyell’s trustees, to retain his rents in extinction of that debt which was contracted prior to the trust; and in respect that it is in the power of any of the heritable creditors who held heritable rights prior to the obligation granted by Lyell, and the inhibition following thereon, to take possession of the estate by mails and duties, and thereby to secure not only the interest, but the principal sums due to them, and that no appearance has been made in this case but by the trustees acting under a voluntary trust executed by Lyell himself long subsequent to the obligation granted by Lyell to Hector, and inhibition following thereon; and therefore sustained the claim of retention made by Hector.’

May 24. 1822.

Hector having reclaimed against the former of these interlocutors, and the trustees and an heritable creditor against the latter, the Court, on the 28th June 1819,\* altered, and found ‘ it sufficiently established that the defenders, Mr. Lyell’s trustees, did, by their acts and proceedings, assume the agreement libelled on as beneficial to the trust-estate, and the objects of the trust-deed in their favour; and that the said defenders qua trustees, and the estate and effects under their management, are therefore liable and answerable for specific implement of the said agreement;’ and decerned accordingly, with expenses; but refused the petition for the trustees and the heritable creditors, ‘ in respect the lawful rights and claims of all the heritable creditors are expressly reserved in the interlocutor reclaimed against, and are open to be proponed in due and competent form of law.’

Thereafter the estates of Lyell were sequestrated in terms of the bankrupt act; and Ferrier having been appointed trustee, he and the other voluntary trustees entered an appeal to the House of Lords, who found, ‘ That it was not sufficiently established that the appellants, trustees of the said George Lyell, did, by their acts and proceedings, adopt and assume the agreement libelled as beneficial to the trust-estate, and the objects of the trust-deed in their favour; and that the said appellants qua trustees, and the estate and effects under their management, are not liable and answerable for specific implement of the said agreement: And it is ordered and adjudged, that the interlocutors complained of, so far as the same are inconsistent with this finding, and especially so far as the same decern against the said appellants, qua trustees, for specific implement in terms of the libel, accordingly, and so far as the said interlocutors find them liable to the pursuers in the expenses of process, and all directions consequent thereupon, be reversed: And it is declared and adjudged, that the respondent could only demand implement of the said agreement against the said appellants, as trustees as aforesaid, according to the terms of the said trust-deed, without preference to any other creditor of the said George Lyell entitled to the benefit of such deed, and according to the terms of the said agreement: And it is further declared and adjudged, that the respondent is bound to elect either to perform the said agreement specifically on his part, and seek for implement thereof on the part of the said George Lyell as a creditor of the said George Lyell, according to the terms of the trust-deed, or to retain the benefit of his lease, and demand damages for non-

\* Not reported.

July 5. 1822.

‘ performance on the part of the said George Lyell, in such manner as he shall be advised : And it is further ordered, that the cause be remitted back to the Court of Session, to review generally the interlocutors complained of, so far as the same are not hereby reversed or altered, and to do therein as shall be just, having special regard to this judgment.’

*Appellant's Authorities.*—(1.)—4. Dow, 341 ; 1. Espinasse, 233 ; 7. East. 335 ; 3. Campbell, 340.

J. CAMPBELL,—C. BERRY,—Solicitors.

(*Ap. Ca. No. 23.*)

No. 37.

THOMAS ARROL and Others, (JAMES SPADEN'S Trustees,) Appellants.—*Cranstoun—Fullerton.*

WALTER SPADEN, Respondent.—*Cockburn—More.*

*Recompense—Legacy.*—Circumstances in which it was held, (reversing the judgment of the Court of Session,)—1.—That there was no sufficient evidence of a claim made against the trustees of a defunct for recompense on account of labour, over and above wages paid during the life of the deceased ;—and,—2.—Affirming the judgment, that a legacy bequeathed by the defunct to the party so claiming recompense could not be imputed in extinction pro tanto of such claim, even if it had been duly established.

July 5. 1822.

2<sup>D</sup> DIVISION.  
Lord Pitmilley.

THE late James Spaden, builder in Edinburgh, was in the practice, from 1801, of employing Walter Spaden as his foreman or manager. In September 1808 James died, leaving a trust-deed in favour of Arrol, his mother, and others, by which he conveyed to them his whole effects, real and personal, for the purpose, ‘ Primo, To make payment, out of the first and readiest of my said means and estate, of all my just and lawful debts and funeral charges, and expense of management under the trust. Secundo, My said trustees, &c. shall proceed as soon as possible to convert my personal property into cash, and apply the same to payment of my debts as aforesaid ; and if the proceeds shall prove insufficient for that purpose, to sell and dispose of my heritable property, &c. Tertio, I hereby declare the said Mrs. Elizabeth Tulloch otherwise Spaden, my mother, to be my residuary disponee and legatary to my whole means and estate, heritable and moveable, after payment of my debts as aforesaid ; but under the burden always of the sum of £300 sterling to be paid to Walter Spaden, builder in Edinburgh, at the first term of Whitsunday or Martinmas after her the said Mrs. Elizabeth Tulloch's decease.’

Soon after the death of James Spaden, Walter claimed from