bondholder was entitled to have the balance remaining after payment of the first debt and expenses consigned in bank undiminished by further payments. I agree that consignation has not been made in terms of the statute, and if a heritable creditor is so foolish as to pay an account which he is not under legal obligation to pay, he cannot pass it on as a charge against the second bondholder.

LORD KINNEAR—I agree with your Lordships. I think that a law-agent's right in his client's title-deeds is in principle a right of retention, depending on possession. It follows that the right is determined by the loss of possession. But I think the present case may be determined on the grounds on which the Lord Ordinary has decided it. The first bondholder has sold the subject of her security and is called upon to account to a second bondholder for the surplus of the price received, and the only question is, what portion of that price the first bondholder is entitled to deduct before paying over the surplus? She has deducted the sum of £96, 9s. 5d., being the amount of an account due by the borrower to his law-agent, and that deduction is objected to. I think with the Lord Ordinary that if she was under no legal obligation to make this payment she cannot deduct it from the surplus, and I think that in this case she was under no obligation. In my opinion the law-agent's right of retention had come to an end when the titles were delivered to the purchaser and the price paid to the first bondholder; but in addition to that it is common ground between the parties that the law-agent in this instance was acting both for the borrower and the lender, and so could not act in any way to the prejudice of his own client's rights. Here then the law-agent had no rights against the first bondholder, for even while his right of retention over the title-deeds lasted he could not have pleaded it against her, so as to prevent her selling for payment of her debt. But since she has sold and obtained the money she must account to postponed creditors, and in that accounting she can make no deductions except such as are enumerated in section 122 of the Act of 1868. I do not think it necessary to consider the question raised by Mr Macfarlane whether the necessity for getting rid of a law-agent's lien would in any case justify a deduction of the account of such law-agent's account as an "encumbrance" in the sense of the statute, which it was necessary to clear away before a sale could be effected. However that may be, the defender was under no such necessity, because the law-agent could not have interposed any kind of obstacle to a sale and did not attempt to do so. There was no encumbrance therefore to affect the defender, and it follows that she can have nothing on that ground to deduct. I therefore agree with the Lord Ordinary, and am for adhering to his interlocutor on the grounds that he has stated.

LORD ADAM was absent.

The Court adhered.

Counsel for the Pursuer and Respondent — Macfarlane, K.C. — Cullen. Agents—Tawse & Bonar, W.S.

Counsel for the Defender and Reclaimer —C. N. Johnston, K.C.—Morison. Agents —Somerville & Watson, S.S.C.

Wednesday, March 9.

SECOND DIVISION.

[Lord Low, Ordinary.

FORBES' TRUSTEE *v.* OGILVY.

Compensation—Bankruptcy—Lease—Decree of Removing—Sequestration of Tenant—Right of Landlord to Set off Arrears of Rent Against Sum Due for Crop, Manure, &c.

By a lease for 19 years from Martinmas 1885 a tenant bound himself to leave to the landlord the waygoing crop, the quantity to be ascertained by arbitration and the price to be fixed according to the fiars' prices for the year, and also the dung on the farm and the turnip crop at a valuation to be made by the arbiters.

On 12th June 1902 the landlord obtained decree of removing against the tenant and decree of payment for arrears of rent. On 14th June the tenant's estates were sequestrated, and a trustee was appointed on the 30th.

By letter dated 7th August the landlord elected to take over the waygoing crop, &c., and to deal with the trustee as regards all valuations. An agreement dated 21st August was entered into between the landlord and the trustee which narrated the foregoing provisions of the lease, reserved the question as to the right of the landlord to retain any portion of the prices of the valuations on account of rents, and contained a nomination of arbiters to ascertain the quantity of the way-going crop and to value the dung and turnips.

Held (1) that the agreement in the lease relative to the sale of the waygoing crop, dung, and turnips, was a personal contract which did not confer on the landlord any real right in these subjects; (2) that the trustee had not adopted the lease; (3) that the sale of the waygoing crop, &c., was not in implement of the provisions of the lease, but was an independent contract between the landlord and the trustee; and therefore (4) that the landlord had no right to set off arrears of rent against the price.

In April 1903 George Robertson, as trustee on the sequestrated estate of Arthur Forbes, farmer, Mains of Murthill, Tannadice, raised an action against Major John Andrew Wedderburn Ogilvy of Ruthven for £538, 3s. 6d.

The following statement of the facts giving rise to the action is taken from the

opinion of the Lord Ordinary (Low)—"The pursuer is the trustee upon the sequestrated estate of Arthur Forbes, who was tenant of a farm belonging to the defender under a lease for nineteen years from Martinmas 1885.

"On 12th June 1902 the defender obtained decree of removing against Forbes, and decree for payment of arrears of rent to the amount of £307.

"Forbes' estates were sequestrated under the Bankruptcy Acts on 14th July 1902, and the pursuer was confirmed as trustee on the 30th of that month.

"There was a clause in the lease whereby the tenant bound himself and his heirs and successors to leave to the proprietor the last or waygoing crop (with a small exception), the quantity to be ascertained by arbitration while the crop was on the ground, and the price to be fixed according to the highest fiars' prices of the county. The tenant also bound himself and his foresaids to leave to the proprietor at the term of his removal the dung on the farm and the turnip crop (except so much as the tenant required to feed his cattle) at a valuation to be made by the arbiters.

"By letter dated 7th August 1902 the defender's law agents intimated to the pursuer that the defender 'elects to take over the waygoing corn crop, &c., and to deal with the trustee as regards all the valuations.'

"Thereafter an agreement was concluded between the pursuer and the defender, conform to minute of agreement dated 21st August 1902.

"The agreement first narrates the clause in the lease to which I have referred, and then it proceeds—'And whereas the said George Robertson, as trustee foresaid, has raised the question as to the right of the landlord to retain any portion of the prices of the said valuations on account of rents in consequence of the estates of the said Arthur Forbes being sequestrated, it has been, and is hereby agreed, that the carrying through of this agreement and valuation shall not in any way affect the rights of parties thereto, the question meantime being left open for future decision.'

"The agreement then contained a nomination of arbiters to ascertain the quantity of the grain crop, and to value the dung and turnips.

"The arbiters have now made their valuations, and the amount brought out by them is £538, payment of which the pursuer demands in this action. The defender claims to be entitled to set off against the sum sued for the arrears of rent for which he obtained decree, and the half-year's rent due at Martinmas 1902. It was not contended that any distinction can be drawn between the arrears of rent for which decree was obtained prior to the sequestration and the rent for the half-year current when sequestration was awarded."

On 13th November 1903 the Lord Ordinary repelled the defences and decerned against the defender in terms of the conclusions of the summons.

Note.—[*After stating the facts as above narrated*]—"The question therefore to be determined is that which was reserved for future decision in the minute of agreement.

"I shall in the first place consider what the rights of parties were apart from the minute of agreement. I think (1) that the obligation of the tenant to leave to the landlord the corn crop, dung, and turnips, was of a personal nature only, and imported no real right in favour of the landlord—*Stewart* v. *Rose*, Hume, 229; *MacGregor* v. *Hunter*, 13 D. 90; *Hart*, 5 S.L.T. No. 225; (2) that the remedy of the landlord in the event of failure on the part of the tenant to implement the obligation would have been to claim damages; and (3) that the corn, dung, and turnips were the property of the tenant and passed to his trustee.

"If these views are sound, then the pursuer was entitled to realise the crop to the best advantage, leaving the defender to rank upon the sequestrated estate as a creditor for his rent, and it may be to claim damages for breach of the obligation in the lease.

"But then it was argued for the defender that the minute of agreement was a practical adoption of the lease by the pursuer, because the clause in the lease was narrated as if it was binding upon him as representing the tenant, and what was done in the agreement was simply to appoint arbiters to carry out the provisions of the lease. It was further argued that the only question reserved was whether in these circumstances the defender could set off the arrears of rent against the value of the crop, and that it was plain that he could do so, because the pursuer could not claim payment of the value of the crop under the lease and at the same time refuse payment of the rent due under the lease.

"I think that that conclusion would be well founded if the pursuer in fact adopted the lease, or recognised the obligation in question as binding upon him. But I do not think that he did so. The minute of agreement is perhaps not so clearly expressed as it might have been, but when it is read in view of the circumstances under which it was entered into it seems to me that its meaning is plain enough. As I have pointed out, the pursuer was not bound to sell the crop and dung which had vested in him to the defender, but by the agreement he agreed to do so (as being, I suppose, a convenient way of realising the bankrupt estate). It was, however, expressly provided in the agreement that 'this agreement and valuation shall not in any way affect the rights of parties,' and the question which was reserved was, whether the pursuer having agreed (although he was not bound to do so) to sell the subjects to the defender at a price to be ascertained in the manner specified in the lease, the defender was entitled to set off arrears of rent against the price?

"I think that that question must be answered in the negative. The defender maintains that he can set off the rent against the price, because it is the price of crops and dung which were sold to him

pursuant upon the obligation in the lease. The position which he takes up, in short, is that this is a case of counter obligations under the lease, and that he is not bound to carry out his obligation to pay the price unless the pursuer, as representing the tenant, fulfils his obligation to pay the rent. It is clear, however, that the foundation of that argument fails if, as I think was the case, the sale of the crop to the defender, and the consequent obligation upon him to pay the price, arose not under the lease at all but under the separate agreement which he made with the pursuer.

"I shall therefore give decree for the sum sued for."

The defender reclaimed, and argued—He concurred in the law laid down in the cases quoted by the Lord Ordinary. But this was different from these in two respects—(1) The case was brought to an end not by the bankruptcy of the tenant but by a decree of removing, and (2) there was a clause in the lease expressly providing for the circumstances that had occurred. Under the lease the landlord was the only person who was entitled to take over the crop. He was the only possible customer to whom the trustee could sell. The obligations both on landlord and tenant were from the same contract, and the trustee was in no better position than his constituent—*Jaffray's Trustee* v. *Milne*, February 19, 1897, 24 R. 602, 34 S.L.R. 401.

Argued for the pursuer and respondent—The conclusion arrived at by the Lord Ordinary was sound on the authority of the decisions quoted by him and admitted as correct by the appellant. The trustees had never adopted the lease, and did not hold under it, but by virtue of the bankruptcy, and the agreement with the landlord in express terms kept this matter open—*Jaffray's Trustees, supra*, was not an authority, as in that case there was no bankruptcy.

At advising—

LORD JUSTICE-CLERK — I agree with the view of the Lord Ordinary that the obligation of the tenant to leave the corn crop, dung, and turnips, on the land was an agreement of a personal nature only, and that the landlord by that agreement obtained no real right. I think it is plain that where there is such an agreement the remedy of the landlord, in the event of the tenant not carrying out his contract, is a remedy by damages for breach, these things being the property of the tenant, and if he has to ask for sequestration or is sequestrated at the instance of his creditors fall to his trustee to be administered as part of the bankrupt's estate.

As regards the terms of the minute of agreement by which the pursuer sold the crop, &c., to the defender, it bears on its face that it is not to "affect the rights of parties," the question of right to retain the rent as against the price being reserved. I entirely agree with the Lord Ordinary that the argument of the defender to the effect that the obligation to pay the price is conditional on the pursuer as representing the tenant paying the rent is unfounded. The sale was not under the lease but under the separate agreement. The trustee gave up no right that he had, but only sold for a price what he had a right to realise, and that could in no way elevate the rights of the defender as landlord above what they were apart from the sale. I would move your Lordships to adhere to the Lord Ordinary's interlocutor.

LORD TRAYNER—I have no doubt that the judgment of the Lord Ordinary is right. The lease between the defender and the bankrupt contained an obligation on the latter to leave at the termination of the lease the waygoing crop, and some other things on the farm to the landlord or the incoming tenant at a price to be fixed as there provided. This obligation conferred no right of property in the subjects on the landlord, which right remained intact in the bankrupt at the date of his sequestration. The right to the waygoing crop, &c., accordingly passed to the pursuer by virtue of his act and warrant, and unburdened by the bankrupt's obligation which the pursuer as trustee for creditors was neither bound to undertake nor fulfil. If through the non-performance of his obligation by the tenant the defender has suffered damage, he has of course his claim for that, and may rank for it on the bankrupt's estate. But in the circumstances that is the only right he has.

The pursuer, who might have sold the crop, &c., to any purchaser he pleased, sold it to the defender at a price fixed by arbitration, for which price he now asks decree. The defence is that the defender is entitled to plead in compensation of that demand the rent due by the bankrupt, and in support thereof he refers to the case of *Jaffray's Trustee*. But that case is clearly distinguishable from the present. It was there held that debts equally liquid, and both arising out of the same contract, could be pleaded in compensation. Here the debts do not arise out of the same contract, for the defender's claim arises out of the contract of lease between him and the bankrupt, while the pursuer's claim arose out of a contract of sale between the pursuer and defender not connected with the lease at all. To answer this obvious difficulty in the way of his maintaining the plea of compensation the defender submits that under the agreement made by him with the pursuer in August 1902 there was a virtual adoption of the lease by the pursuer, and that he is therefore bound by its terms. This is I think untenable. In the first place, it would have been difficult for the pursuer to adopt a lease which had been terminated by the defender a month before the tenant's sequestration. But apart from that, the terms of the agreement preclude the view of its purport and effect for which the defender argues. The agreement expressly reserves for "future decision" the question now raised, and therefore reserves all the pleas of parties in reference to it. The one purpose of the agreement was to have the price fixed which the defender was to pay for the "valuates" (as they are called)

his plea of compensation was not sustained. As that plea has now been in my opinion properly repelled the pursuer is entitled to decree.

The Lord Justice-Clerk read the following opinion of Lord Moncreiff, who was present at the hearing but not at the advising:—

LORD MONCREIFF—The Lord Ordinary's judgment is clearly right. The first thing is to ascertain what were the legal rights of parties apart from the agreement between the trustee and the landlord. These are correctly stated by the Lord Ordinary on the second page of his note. On the sequestration of the tenant on 14th July 1902 and the appointment of the trustee, right to the crop, dung, straw, &c., which were the personal property of the tenant, passed to the trustee under his act and warrant. Over these the landlord had no security, and before the sequestration any poinding creditor could have attached them. On the bankruptcy of the tenant the landlord had no right to plead compensation in respect of the obligations in the lease. The cases referred to by the Lord Ordinary establish this, and in addition reference may be made to *Macgregor* (*MacLean's Trustees*), 13 D. 90, contrasted with *Davidson's Trustees*, 19 R. 808, 29 S.L.R. 664. In the latter case the landlord had obtained possession of the crop, &c., before the tenant's sequestration.

The recent case of *Jaffray's Trustee* v. *Milne*, 24 R. 602, 34 S.L.R. 401, does not conflict with this view, because there was no sequestration in that case. The tenant's trustee was acting under a voluntary trust.

The landlord having by his own act terminated the lease as at Martinmas 1902, before the sequestration of the tenant, there was no room for the trustee adopting it. The only question therefore is whether the trustee abandoned or waived his right, to the effect of enabling the landlord to plead compensation, by entering into the minute of agreement dated 21st and 28th August 1902, It is impossible, in my opinion, to construe that agreement as establishing any such waiver, because on its face it is expressly stated that the trustee disputes the landlord's right to retain any portion of the prices of the valuations on account of rents, and the agreement bears:—"It has been and is hereby agreed that the carrying through of this agreement and valuation shall not in any way affect the rights of parties thereto, the question meantime being left an open one for future decision."

I am therefore for affirming the interlocutor.

LORD YOUNG was absent.

LORD ADAM, who had not heard the case but was present at the advising in order to make a quorum, gave no opinion.

The Court adhered.

Counsel for Pursuer and Respondent—Dundas, K.C. (The Solicitor-General)—Hunter. Agents—Gordon, Falconer, & Fairweather, W.S.

Counsel for Defender and Reclaimer—Rankine, K.C.—Cullen. Agents—Mackenzie & Black, W.S.

Thursday, March 10.

SECOND DIVISION.

[Lord Low, Ordinary.

MACKAY *v.* MACKAY'S TRUSTEES.

Aliment—Liability for Aliment—Claim against Father-in-Law by Daughter-in-Law Deserted by her Husband.

Held (*aff.* judgment of Lord Low) that a father-in-law is not bound to aliment his daughter-in-law who is deserted by her husband.

Reid v. *Reid*, February 15, 1897, 4 S.L.T. 395, *approved.*

MRS JANE SPEER MONTGOMERIE or MACKAY raised the present action against the trustees of her deceased father-in-law Peter Mackay, slater, Greenock, seeking to recover aliment from the defenders.

The pursuer averred that her husband Daniel Mackay, sometime master slater in Greenock, who was the son of the deceased Peter Mackay, had got into financial difficulties in 1902, had turned her out of his house, and had gone abroad. She further averred that her husband had never made or had the means of making any payment of aliment to her; that he was resident in New Zealand, and was in indigent circumstances, and had received various remittances from the defenders towards his support. The nature of the pursuer's averments is further disclosed in the opinion of the Lord Ordinary *infra.*

The defenders pleaded—"(1) The pursuer's averments are irrelevant and insufficient to support the conclusions of the summons."

On 8th December 1903 the Lord Ordinary (LOW) sustained the first plea-in-law for the defenders and dismissed the action.

Opinion.—"In this action the pursuer claims aliment at the rate of £50 a-year from the testamentary trustees of the deceased Peter Mackay, who was her father-in-law. The pursuer's husband Daniel Mackay, who is about thirty-three years of age, appears to have carried on business as a master slater in Greenock until early in 1902, when his affairs became embarrassed, and he granted a trust-deed for creditors. He thereafter went to New Zealand. The pursuer avers that her husband had turned her out of his house, that he did not communicate with her before going abroad, and that since he went abroad he has contributed nothing to her support. She further avers that he is incapable of steady work owing to his dissipated habits. The pursuer is living with her father. She says that the latter