affidavit that his mind was only directed to his right to security regarding the counterclaim after the security for costs had been lodged and all friendly negotiations had terminated. (His Lordship considered the facts and came to the conclusion that the applicant had not waived his right).

Mr. *Greenberg's* second ground of opposition is that the claim in reconvention is not *bona fide*, and is not likely to succeed. There is much to be said for this contention too.

(His Lordship considered the merits of the counterclaim, and proceeded). I am not prepared to say that the counterclaim is not *bona fide*. The applicant is therefore entitled to ask for security for his counterclaim, and as Mr. *Taylor* asks for security for £250 only, I shall order security for that amount to be given.

As to the costs of this application, Mr. *Taylor* asks for the costs, but if ever there was a case where costs should be costs in the cause, this is one, and I shall make an order accordingly.

Applicant's Attorneys: *Steytler, Grimmer & Murray;* Respondents' Attorneys: *Davis & Allingham.*

[G. W.]

COHEN'S TRUSTEE v. RIFKIND AND CUMES.

1914. *August* 6, 12. MASON, J.

Insolvency.—Law 13 *of* 1895, *sec.* 59.—*Trustee.*—Locus standi.

Landlord and tenant.—Insolvency of tenant.—Rent.—Payment in advance.—Cancellation of lease.—Damages.—Proof in insolvency.—Waiver of proof.

A trustee of an insolvent estate, directed by the creditors to take legal proceedings, is a "person interested" within the meaning of sec. 59 of Law 13 of 1895.

Where a tenant has paid rent in advance, and thereafter, during the term of the lease, the landlord cancels the lease for just cause or the tenant quits the leased premises without just cause, the tenant is entitled to recover from the landlord moneys the latter may have received from reletting the premises; the landlord can claim damages only from the tenant for breach of contract, and not rent for the unexpired period of the lease.

A tenant became insolvent during the term of the lease, and the landlord proved in the insolvency for rent for a period prior and subsequent to the insolvency.

Thereafter the landlord cancelled the lease, which cancellation was accepted by the tenant's trustee, who delivered up possession of the leased premises. *Held,* that the cancellation by the landlord amounted to a withdrawal or modification of the proof of debt, and that the trustee's acceptance of the cancellation could not be construed into an agreement that the landlord should obtain the same rent as if he had not cancelled and as if the estate had remained in possession of the premises.

Application under section 59 of the Insolvency Law (Law 13 of 1895), calling on the respondents to show cause why their proof of debt should not be amended. The respondents had filed a proof of debt for the sum of £727 17s., for £680 of which amount they claimed a preference on the ground that it was for arrear rent. The applicant claimed that this amount should be reduced to £270 18s., being the rent for a period during which the insolvent was in possession of certain leased premises, and that the concurrent claim, £47 17s., should be increased by the amount of any damages the respondents might be able to prove they had sustained by reason of any breach by the insolvent of the conditions of the lease. The facts appear fully from the judgment.

R. Feetham, for the applicant, moved in terms of the petition.

Manfred Nathan, for the respondents: I take the preliminary points, (1) that the applicant has no *locus standi;* a trustee is not a "person interested" within section 59 of the Insolvency Law. (2) The section only applies to an appeal and not to an amendment.

Feetham: On the preliminary points, a trustee has been held, under the corresponding section of the Cape Insolvent Ordinance; sec. 27 of Ordinance 6 of 1843, to have *locus standi,* in the following cases; *In re Brink* (1 R. 305); *In re Barson* (1 R. 369); *Brink's Trustees* v. *Munnik* (1 R. 362); *Elliott* v. *Taylor* (6 S.C. 2).

On the merits: A landlord cannot at once eject a tenant and also claim as "rent" the rent for the future. Voet (19, 2, 22), says the landlord has only the right to claim the difference between the rent agreed on and such rent as he receives from another tenant *i.e.,* damages. See *Van der Merwe* v. *Liquidators of the African Agricultural and Finance Corporation Limited* (1905, T.S. 610); Maasdorp (Vol. III, p. 211), and Wille (*Landlord and Tenant,* p. 333).

[MASON, J.: And also on page 340 of the same book under "Rent paid in advance without beneficial occupation."]

A claim for damages cannot be preferent, but only concurrent.

Nathan, in reply: The sole question is whether the rent was in

arrear on May 1st. On the insolvency, four months' rent became due, and therefore on May 1st the rent was due and was in arrear after that date.

[MASON, J.: But the insolvency only occurred after May 1st.]

A tenant cannot recover rent paid in advance in circumstances such as the present: *Schoen* v. *Cutting* (1904, T.H. 87). In *Wiley* v. *Mundich & Co.* (12 C.T.R. 829), a debtor was held not entitled to reclaim interest paid in advance under a bond, where he had paid off the whole of the bond. See also *Voet* (19, 2, 22).

[MASON, J.: Can a landlord claim rent paid in advance and also cancellation of the lease?]

I admit that as to future rent I could only claim damages, but I say that here the whole £680 was in arrear. See *Voet* (19, 2, 27), and *Hughes* v. *Levy* (1907, T.S. 276).

Cur. adv. vult.

Postea (August 12).

MASON, J.: The insolvent held certain premises at Krugersdorp from the respondents under a lease for two years dating from 1st January, 1913, at a rental of £150 per month for the first year and £170 a month for the second year, payable four-monthly in advance on the first day of the month, either in cash or by approved promissory note payable sixty days after the first day of the four months.

The lessors were entitled to cancel the lease upon any breach by the lessee or upon the surrender or final sequestration of his estate as insolvent.

The four months' rent due on the first of May last, £680, was not paid; the insolvent was also indebted to the respondents in certain other sums for sanitary fees and other items the balance of which amounted to £47 17s.

The provisional sequestration of the insolvent's estate was granted on May 4th and the final order on May 7th, 1914.

At the second meeting of creditors on May 29th, 1914, the respondents proved a debt of £727 17s., of which £680 was claimed to be preferent. The applicant was thereupon elected sole trustee.

On 12th June last the respondents notified the trustee that they had cancelled the lease by reason of the insolvent's breach of contract, and required him to vacate the premises by the 15th of the month. The trustee replied next day that he accepted the notice

of the cancellation and would vacate as soon as he could get the stock removed.

The premises were handed back to the landlords on the 18th June, 1914, and by letter dated the same day the trustee called upon the respondents to amend their proof of debt so as to meet the situation which had arisen through the cancellation, contending that their claim for rent should be reduced to £270 18s., being the sum due for the period May 1st to June 18th, and that for any other sum they were only entitled to damages to be added to their concurrent claim of £47 17s.

The respondents' claim to be entitled to a preference for the full four months' rent due on 1st May, notwithstanding the cancellation.

The trustee therefore applies to the Court for the amendment of the proof of debt in accordance with his contention. His action in taking legal advice has been sanctioned by the creditors who have authorized him to deal with the matter.

Two preliminary questions arise, first whether the trustee has any *locus standi* in the matter, and second whether an application of this nature is the proper procedure to adopt to obtain the relief sought.

The application was founded mainly upon section 59 of the Insolvency Law, which allows every person interested to appeal to the Court against the decision of the presiding officer as to the admission or rejection of any debt; the respondent maintains that the trustee is not a person interested in terms of this section.

Assuming that this section does apply to the present application, I have to decide whether a trustee authorised by creditors is not a person interested and thus capable of invoking the intervention of the Court.

In the case of *In re Brink* (1 Roscoe 305), HODGES, C.J., expressed the opinion that, under an exactly similar section, in the Cape Insolvent Ordinance, No. 6, 1843, the words, "any party interested," included the trustees in the insolvency, while BELL, J. considered that similar words in section 110, corresponding to section 117 of the Transvaal Law, did not constitute the trustee an interested party. But there is a long series of decisions in which trustees have moved to expunge proofs of debt under sections corresponding to No. 59 in our Insolvency Law of 1895.

In *Trustees of Brink* v. *Munnik* (1 Roscoe 362), it was held that it was competent for the trustees to bring an action, instead of

proceeding in the first instance by motion, to set aside a proof of debt.

The Cape Supreme Court, in *Re Barson* (1 Roscoe 369), held that the trustee could not alter or expunge of his own motion debts proved before the Master, but must bring the matter before the Court under section 27 of the Insolvent Ordinance, which corresponds with section 59 of the Transvaal Law.

The right of the trustee to sue has never to my knowledge been rejected, but there are very many cases in which he has appeared before the Court in proceedings to expunge proofs of debt. I refer to some of them, namely:—*Trustees of Leigh* v. *Leigh* (1 S.C. 75); *Brink's Trustee* v. *Munnik* (5 Searle 209); *Meredith's Trustee* v. *Randall* (5 E.D.C. 215); and *Nicholson's Trustee* v. *North* (19 E.D.C. 253).

It seems to me that a trustee directed by creditors to take legal proceedings is a party interested within the language of the section, but to my mind it is very doubtful whether an application of this nature really comes under section 59.

No objection could be taken to the debt as it was proved; the rent was due and judgment could have been obtained for it. The real question is whether what has subsequently happened has altered the position of the creditor, so that he is not entitled to the benefit of his claim as proved.

It seems to me that the trustee may well under section 92 take the direction of the creditors in a matter of this kind, and a direction to apply to the Court is not one which comes within the prohibition contained in section 93.

It is quite true that the creditor against whom proceedings are taken may perhaps become liable directly or indirectly for part of the cost of those proceedings, but that applies to many legal proceedings under the Insolvency Law.

As to the question whether the trustee's right course would have been to frame his liquidation account in accordance with his view of the position, that might be correct if it were only a preference claim which was in issue; but the trustee contends that, with the exception of the £47 17s., and of the £270 18s. rent from May 1st to June 18th, the balance of any claim which the respondents may have consists of damages, and therefore it is a question not merely of priority, but also of the amount which the creditors are entitled to.

In *De Klerk* v. *Zeeman* (13 S.C. 181), DE VILLIERS, C.J. stated that in insolvency, claims for damages should be substantiated by action, and not admitted by ordinary proof. The same opinion is expressed in *African Agricultural and Finance Corporation* v. *Van der Merwe* (1905, T.S. 537).

So far, therefore, as the title of the trustee to apply to the Court and the method of procedure are concerned, no valid objection does in my opinion exist.

The main question for decision is whether a landlord, who is entitled to payment of rent in advance and also to cancel the lease upon a breach or upon insolvency, can recover rent for the period after the cancellation.

It will be convenient to consider the matter on the assumption that there has been no insolvency. The respondents were entitled to cancel this lease for non-payment of the £47 17s. before the 1st May, 1914, and for the non-payment of the £680 on the 11th May, 1914. Could they have cancelled the lease and re-taken possession, and at the same time have got judgment for these two amounts?

Clause 15 of the lease provides that, upon the contingencies referred to, "The lessors shall have the right and be entitled (but shall not be bound to) cancel this lease, without prejudice to their right to claim any payments herein provided for, or to claim all or any arrear rent or damages for breach of contract." The prior portion of the clause shows that the word payments does not refer to rent, but apparently to matters of the nature of sanitary fees, rates, etc. The recovery of rent for a period during which the landlord had re-entered upon possession of the premises seems to me to amount to a penalty or damages, and not to be recovery of the four-monthly rent which is expressed in terms of the lease to be for the use and occupation of the premises.

The right reserved, therefore, to claim all or any arrear rent, notwithstanding cancellation, may in my opinion be fairly considered to apply to rent due for past occupation. This view is supported by the provisions of Roman-Dutch law with reference to the position of a tenant who has paid rent in advance and has quitted the premises before the end of the stipulated term without just cause. The right of a tenant to recover rent so paid in advance, where owing to no fault of his own he has not had occupation of the leased premises, does not seem open to question (*Digest*, 19, 2, 19 (6) (10); *Hughes* v. *Levy*, 1907, T.S. 276).

But, where the tenant has quitted the premises without cause, or

the lease has been cancelled for his default, his rights and liabilities are more open to question. Voet (19, 2, 22) and Wesel (*De Merc. Remissione*, 1, 19), both state that such a tenant should, to the extent by which the landlord has benefited by a reletting during the period of the lease, be relieved from liability in respect of rent for the whole period of the lease, and that liability Voet, in the latter part of the section quoted, restricts to payment of rent due and the furnishing of security for future rent.

Wesel indeed (*D.M.R.* 1, 20), expresses the opinion that a landlord who has received rent in advance is under no obligation to refund to a tenant quitting without cause any moneys he may have received from reletting, but Voet (19, 2, 22), dissents from this view, and asks why a tenant who is in arrear with his payments should receive the benefit of such a refund, whilst the man who has paid promptly or perhaps voluntarily in advance should be penalised. The principle on which, according to Voet (12, 7, 1), the action *sine causa* is given to a tenant who has paid in advance and owing to the destruction of the premises has not had use and occupation, seems to me to apply whether his quitting them is or is not due to his own fault. On the part of the landlord the consideration is placing the premises at the disposal of the tenant; when he resumes possession by reletting, the consideration ceases then to exist so far as the new rent is equivalent to the former rent.

How close is the connection between use and occupation and the obligation to pay rent is shown by the position of the tenant who has paid rent in advance in respect of property which has been subsequently sold.

Such a tenant is bound if he wishes to continue his lease to pay rent over again from the date of sale to the purchaser, although he has recourse against his original landlord for repayment of any rent thus twice paid.

The decisions which are cited in Maasdorp's *Institutes* (vol. 3, p. 218), and Wille's *Landlord and Tenant* (p. 223), do not apparently deal with the case where rent was paid in advance in terms of the original lease, but neither Voet (19, 2, 19), nor Schorer (*Notes on Grotius*, 3, 19, 16, No. 398), in referring to the subject draw any distinction between a contractual and a voluntary payment in advance. Nor does it seem in principle to make any difference as regards the three parties whether it is under the original lease or under a subsequent agreement that the first landlord receives his rent in advance.

The case of *Wiley* v. *Mundich & Co.* (12 C.T.R. 829), was cited in opposition to Voet. There a debtor paid six months' interest in advance in terms of the bond, and shortly afterwards paid off the bond. The bond was payable on three months' notice from either side. The debtor claimed a refund of interest on the same basis as if he had given three months' notice. There was no evidence that the mortgagee had re-loaned the money. It was held that he was under no obligation to refund, as no bargain of any sort was made. Voet (12, 7, 1), was cited, but there was no reference to Voet (19, 2, 22). I am not satisfied that leases in this respect stand on the same footing as loans of money; the tenant is bound to keep the property during the lease, the borrower can insist on having the bond cancelled if he pays off the bond and all future interest.

The decision in *Schoen* v. *Cutting* (1904, T.H. 87), which was also relied on for the respondents, does not in my opinion apply, because there the payment of rent in advance was specially stipulated for as the price of a concession by the landlord, and in contemplation of the lease terminating before the stipulated period.

If Voet correctly states the law, the respondents, assuming no insolvency to have intervened, could have been called on to account for any rents received by them between June 18th and August 31st, if the full four months' rent had been actually paid; whilst they could not recover by action in respect of the period subsequent to June 18th anything but damages.

Now what was the effect of the respondents proving in the estate for the whole of their claim, including rent up to the end of August? The case of *Van der Merwe* v. *African Agricultural and Finance Corporation Limited* (1905, T.S. 610), seems decisive on the point; INNES, C.J., laid down that, where the landlord who had the right of cancellation, proved in the insolvency, so as to take advantage of the machinery of the statute, his action assumed the existence of the lease and was inconsistent with a cancellation.

The respondents, therefore, by their proof abandoned their right to cancel the lease either for non-payment of rent or by reason of the sequestration of the estate; and the trustee was entitled, if he chose, to decline to comply with the notice to quit, or to recognise the cancellation of the 12th June, 1914.

The notification of the cancellation of the lease amounts, in my opinion, to a withdrawal or modification of the proof which so long as it stood unaltered prevented a cancellation.

It is unnecessary to discuss the question whether the respondents were entitled to withdraw their proof under the circumstances because the trustee raised no objection to the cancellation.

An agreement by the trustee that the respondents should obtain the same rent as if they had never cancelled, and as if the estate had remained in possession, cannot be inferred from the trustee's acceptance of the cancellation. And the respondents are not entitled to plead that they were misled because the trustees's attitude was made known to them by letter dated the same day as they received possession again.

To sum up, the respondents in my judgment would not have been entitled to claim rent after June 18th, if there had been no insolvency, and neither the insolvency nor the correspondence between the parties gave them any such right.

The respondents' proof must, therefore, be amended by reducing the claim for rent from £680 to £270 18s., being the exact proportion of rent for the forty-nine days of the quarter up to 18th June, 1914, the concurrent claim for £47 17s. remaining unaltered.

This order will be without prejudice to any claim the respondents may have for damages, and without prejudice to the respondents withdrawing their proof of debt and filing an amended one at their own expense if they desire to do so, but subject of course to any liability which as proving creditors they may have already incurred. See *Cressey & Others* v. *Haarhoff's Trustees* (12 S.C. 123).

The respondents must pay the costs of the application.

Applicant's Attorneys: *Lance & Hoyle;* Respondents' Attorney: *S. Raphaely.*

[G. W.]