[*3d May* 1841.]

Lieutenant Colonel JOHN GORDON of Cluny, Appellant.[1] (No. 8.)

[*Sir W. Follett — James Anderson.*]

JOHN GRAHAM and JAMES GRAHAM, Respondents.

[*Lord Advocate (Rutherfurd) — Biggs Andrews.*]

Bill of Exceptions — Landlord and Tenant — Sequestration — Assignation. — (1.) At the trial of an issue,—Whether the defender wrongfully failed to relieve the pursuers crop and stock from sequestration, by which it was then attached?—the Judge directed the jury in point of law, that "the tenders of the arrears of rent having been made by "the pursuers agent, in terms of his letters of the 18th "and 24th of May 1838, and the sequestration not having "been withdrawn until the 28th of that month, the said "sequestration ought to have been withdrawn after these "offers, and more especially after that of the 24th of "May; and that the defender was in law responsible to "the pursuers for not withdrawing the sequestration, "quoad the sums contained in these tenders." The defender excepted to this direction: The Court of Session, without concurring in the opinion in point of law so stated to the jury, disallowed the bill of exceptions on the ground that, in the special circumstances of the case, the direction was right. Judgment of the Court of Session, disallowing the bill of exceptions, reversed, and cause remitted back, to allow the bill of exceptions and grant a new trial.

(2.) Per LORD CHANCELLOR.—The only matter raised by the exception was the abstract question of law, and the Court

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[1] Fac. Coll., 2d and 9th Feb. 1841.

could not travel out of the exception. The circumstances were exclusively for the consideration of the jury.

(3.) Question raised,—Whether a landlord is bound to assign to the agent of his tenant, whose crop was under sequestration, his right of hypothec, on the agent tendering payment of the rent?

1st Division.

Jury Cause.

Judge at Trial, The Lord President.

Statement.

THE appellant let part of his lands in Mid Lothian to the respondents upon a nineteen years tack, the entry being at November 1832. The lease contained a stipulation as to the houses and fences being put in a tenantable condition by the appellant.

At 12th August 1837 certain arrears of rent were due by the respondents, to secure payment of which, and of the rent from Martinmas 1836 to Martinmas 1837, payable at Candlemas and Lammas 1838, the appellant then applied to the sheriff for sequestration of the respondents crop and stock. Sequestration was awarded.

Some correspondence afterwards took place betwixt the parties and their agents, and among others a letter, dated 28th August 1837, was written by Mr. John Gray, the appellant's agent, to Mr. Maurice Lothian, the agent for the respondents, in these terms:—"Captain "Duguid, factor for Colonel Gordon, came to town "from Aberdeenshire on Saturday night, and he is now "with me. Captain Duguid does not approve of your "proposal on the part of Messrs. Grahams, and he "cannot consent to the sale going on as advertised; "but he is quite willing to accept of your guarantee to "pay the arrears of rent, on caution being also found "to pay the current year's rent when due, and Colonel "Gordon is quite willing to grant an assignation to the "act of sequestration, either to you or to any other

" person who pays the rent and finds caution, and then " the roup may proceed. I shall expect your answer " in the course of to-day, as Captain Duguid proposes " to leave town this evening."

Payments to account of the rent were soon after made.

On the 14th May 1838 the Sheriff, upon the application of the appellant, granted warrant to sell sufficient to pay a balance of rent due at Candlemas preceding; and on the 16th an advertisement was issued of a sale of the respondents effects, to take place on the 23d May 1838. Upon the 18th May 1838, Mr. Lothian wrote to Mr. Gray in these terms:—" Dear Sir,—Stop the " roup in Gordon v. Grahams; and, since we can't do " better, I will advance the arrears and expenses myself, " on your client granting an assignation, or giving me " an obligation to grant one at my expense. My as- " signation not to compete with the landlord's right for " the balance of the year's rent, of which the above " arrears form a part. Yours, &c."

Mr. Gray answered the above on the 23d, thus: — " I mentioned to you that I had sent a copy of the state " and expenses which I handed you to Colonel Gordon; " and on calling upon him, he stated that there was a " larger balance of rent due than was contained in the " state; for that by the lease the tenants had become " bound to pay 6*l.* per acre for each acre they cropped " on the farm different from the stipulations in the " lease, and that the tenants had miscropped several " acres in the year 1837, as could be shown by a " measurement of Mr. Knox; and the tenants were " bound by the lease to pay 6*l.* per acre of additional " rent for each of these acres; and that he also looked " to the tenants for payment of all the extrajudicial ex-

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" pense incurred by them, and of which I handed you " a copy.

" I wrote Colonel Gordon that I would make a " demand upon you for the additional rent, and for " payment of the extrajudicial expenses; and if refused, " that it appeared to me necessary to present a supple- " mentary petition of sequestration to the sheriff for " the foresaid additional rent, in terms of the lease, and " also to claim the extrajudicial expenses from your " clients. They have a double of the lease, which you " can get from them. In the meanwhile, I annex a " copy of the clause in the lease regarding the additional " rent. I shall be glad to hear from you in answer."

On the 24th May 1838 Mr. Lothian wrote to Mr. Gray thus:—" I have received your extraordinary " letter of yesterday, and sent it to Messrs. Graham for " information to answer it. In the meantime I have " tendered you the whole money for which you have " taken warrant to roup, and you declined it, only " taking my obligation to pay it. I have now to repeat " that I am ready to pay that money to you, or your " client Lieutenant Colonel Gordon, on a receipt " acknowledging that the money is paid by me, and " binding your client to grant to me, at my expense, an " assignation in the terms mentioned in my said obliga- " tion, of which (as I wrote it in your chambers) I have " no copy. I will thank you to send me a copy of it. " I have only to add, that if the money above referred " to be not accepted by you, I will lodge a minute in " my own name in the existing process of sequestration, " and consign the money with the Clerk of Court at " your client's expense."

Upon the 28th May 1838 the appellant accepted

payment of the balance of rent and interest tendered, and granted a receipt in these terms:—" Edinburgh, " 28th May 1838.—Received from Maurice Lothian, " Esquire, solicitor, 64*l.* 10*s.* 3*d.*, with 1*l.* 0*s.* 3*d.* of " interest thereon, being the balance of rent of the farm " of Egypt, payable at Candlemas last, and interest " thereon, for which a warrant to roup was taken " against Messrs. Graham, the tenants, in a process of " sequestration at my instance, reserving any further " claims competent to me for additional rent on account " of part of the lands, being, as I am informed, cropped " differently from the stipulations of the lease, and for " all expenses incurred by me in regard to the recovery " of the rents for which said sequestration was used, " and reserving to the tenants their defences against " such claims; and I engage to grant to Mr. Lothian, " at his expense, an assignation of said sums now paid " to me, and of the proceedings at my instance under " the said sequestration, to the end he may operate his " payment from Messrs. Graham, but so as not to com- " pete with any claims competent to me as landlord.

" (Signed) JOHN GORDON."

On the 31st May 1838 the respondents raised an action of damages against the appellant, founding on his alleged failure to implement a condition in the lease as to putting the houses and fences in proper repair, as well as on the proceedings in the sequestration, and concluding, among other things, for 500*l.* as damages for the loss they had sustained from the conduct of the appellant, " and from his having refused or delayed to " perform the obligations incumbent upon him, and " in consequence of the oppressive and unjustifiable " measures adopted by him."

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Statement.

The parties went to trial on the following issues:—

" It being admitted that under the lease, of which " No. 3. of process is a copy, the pursuers became " tenants of the farm of Egypt, the property of the " defender, for the period of 19 years, from the 22d day " of November 1832:

" Whether the defender wrongfully failed to put the " houses and fences on said farm in tenantable and " fencible condition, in terms of the said lease, to the " loss, injury, and damage of the pursuers?

" Whether, on or about the 12th day of August 1837, " the defender obtained from the sheriff of Edinburgh " a sequestration of all or any part of the crop and " stock of the pursuers on the said farm; and whether, " on or about the 23d of May 1838, the defender " wrongfully failed to relieve the pursuers said crop " and stock from the said sequestration, to the loss, " injury, and damage of the pursuers?"

The following verdict was returned:—" At Edin- " burgh, the 13th day of July, 1840 years, before the " Right Honourable the Lord President, compeared the " said pursuers and the said defender, by their respec- " tive counsel and agents, and a jury having been " impannelled and sworn to try the said issues be- " tween the said parties, say, upon their oath, that in " respect of the matters proven before them, they find " for the pursuers on both issues, and assess the da- " mages at 475*l*."

The following exceptions were taken by the counsel for the appellant to the direction of the Lord President at the trial:

" First exception.—That thereafter the said Lord " President, in addressing the jury, declined and

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" omitted to direct the jury, in point of law, that the " obligation on the landlord, in the clause of the lease " referred to in said issue, to put the houses and " buildings in tenantable condition, did not require " to be implemented within the same time as the " obligation as to the fences.

" Second exception.—And that the said Lord Pre- " sident did direct the said jury, in point of law, as to " the second issue, that tenders of the arrears of rent " having been made by Mr. Maurice Lothian, in terms " of his letters of the 18th and 24th of May 1838; and " the sequestration not having been withdrawn until the " 28th of that month, the said sequestration ought to " have been withdrawn after these offers, and more " especially after that of the 24th of May; and that the " defender was in law responsible to the pursuer for " not withdrawing the sequestration, quoad the sums " contained in these tenders."

The bill of exceptions having been discussed before the judges of the First Division, their Lordships pronounced the following interlocutors:

Judgment of Court, 2d Feb. 1841.

" The Lords having heard counsel for the parties, " disallow this bill of exceptions; find the defender " liable to the pursuers in the expenses incurred by " them in the discussion on the bill of exceptions, and " remit to the auditor to tax the account thereof, and " to report.

Judgment of Court, 9th Feb. 1841.

" The Lords apply the verdict of the jury, and de- " cern ad interim for the sum of 475*l.* found due by " the jury; further find the pursuers entitled to the " expenses of the jury trial, remit to the auditor to tax " the same and to report; and remit the case to the

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"Lord Ordinary, to dispose of the other conclusions of "the libel."

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The defender appealed.

Appellant's Argument.

Appellant.—Of the two exceptions, it would be sufficient, for the present, to consider the one applicable to the second issue.

Instead of submitting to the jury the question of fact, whether the appellant had wrongfully failed to relieve the respondents of the sequestration, the judge had directed the jury, in point of law, that the appellant was bound, after the two letters of the 18th and 24th May, to withdraw the sequestration. Now, in the first place, the obligation to withdraw the sequestration was not raised by the terms of the issue; and the effect of the misdirection cannot be got over, as proposed by the Court[1], by assuming that the jury understood the term "withdraw" to mean in this instance the same as "relieve." Such a mode of supporting a direction had been shown to be wrong, by the reversal, in this House, in the Cromarty case (Horne v. M'Kenzie[2]), where the Court were satisfied, upon the explanation of the presiding judge, that the term "prevalence" used by him to the jury was meant as equivalent to "predominance." But, secondly, the sequestration was not withdrawn on the 28th; it still subsisted for the then current term's rent. Further, the landlord was not required by Mr. Lothian, in the two letters referred to, to "withdraw" the sequestration;

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[1] See Lord Mackenzie's opinion in rep. in Fac. Coll.

[2] M'L. & Rob. App. 977.

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and although he had, without having the current term's rent provided for. Whether the landlord was bound to assign his right of hypothec and sequestration was a question not raised by the issue or direction; and although it had, the landlord would not have been so bound.[1] And so the Court held; for their Lordships declined concurring in the general proposition in law assumed to have been laid down by the Lord President, Lord Mackenzie stating that he doubted, as a general proposition, whether a landlord is bound to grant an assignation even to the agent of the tenant, and that it was unnecessary to decide that point, "as there are specialties in this "case sufficient to show that the direction was well "founded;" and Lord Fullerton reserved his opinion on the general point, but thought the direction might be supported on the special circumstances of the case. Thus the direction was made to rest on grounds differing from the ground submitted to the jury, and this of itself was fatal to the direction. Further, even if "relieve" had been the word used, there was no evidence that the appellant was bound to relieve from the sequestration. He was merely asked to stop the roup, which was done; and there was a tender of rent, on granting an assignation to a third party, which the appellant was not bound to do.

Appellant's Argument.

Respondents.—This exception proceeds upon the most hypercritical construction of a very obvious direction upon a simple enough point. The Lord President

Respondents Argument.

[1] Tod v. Montgomerie, 10th February 1743, Mor. 6,228; Kilk. 273; Hunter, on Landlord and Tenant, 701.

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Respondents Argument.

laid down no abstract proposition in law, and none such was necessary to be stated. The law stated was the law of this particular case as arising out of the documentary evidence and admitted facts laid before the jury. Among other evidence before them was Gray's letter of the 28th August 1837, which contained a distinct undertaking by the appellant to grant an assignation upon Lothian paying the rent; and tenders of the rent on these terms are afterwards made—at first refused and delayed to be accepted—but finally accepted by the appellant. Thus the sequestration had for days been continued, after it might have been taken off, to the extent and in the way in which it was on the 28th. In the plain and obvious meaning in which the judge used and the jury understood the term, the sequestration was on the 28th, to a certain extent, withdrawn, and so the crop and stock relieved, after some days wrongful delay. Thus the case was not sent to the jury upon the two letters alone of the 18th and 24th May; and no part of the evidence was withheld from their consideration. The Court accordingly, in holding the direction to be right upon the special circumstances, never conceived that any part of the case had been withdrawn from the province of the jury. The Court went on the facts.

[*Lord Chancellor.*—But suppose so; should it not have been a question for the jury, whether the landlord was bound or had come under an obligation to relieve? The letter of 28th August is not founded on by the Lord President.] All this was before the jury, upon the facts proved in evidence or admitted.

[*Lord Chancellor.*—The jury could not so understand it; certainly I do not so understand it. There is no

contract in evidence, and it was not so put. Then upon the law it does not seem that the landlord is bound to assign his sequestration.]

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The Lord Advocate prayed the judgment of the House as to the first exception.

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Respondents Argument.

Lord Chancellor. — Sir William Follett, have you any thing to address to the House upon the first exception? The House will not call for any reply upon the second exception.

Sir William Follett. —The appellant has no interest in having a judgment on the first exception. The verdict being erroneous in respect of the misdirection on the second issue, the judgment appealed against must be entirely reversed, and there must be a new trial on both issues.

Ld. Chancellor's Speech.

LORD CHANCELLOR.—My Lords, this case is comprised within a very small compass. The respondents were tenants of the appellant under a lease. The rent having fallen into arrear, the appellant applied to the sheriff, and obtained a sequestration of the crop and stocking on the farm. On the 18th of May 1838 Mr. Lothian, the agent for the respondents, wrote this letter to Mr. Gray, the agent for the appellant: "Stop "the roup in Gordon v. Grahams; and, since we can't "do better, I will advance the arrears and expenses "myself, on your client granting me an assignation, or "giving me an obligation to grant one at my expense. "My assignation not to compete with the landlord's "right for the balance of the year's rent, of which the "above arrears form a part." The meaning of this proposal is, not that the tenants should pay the rent, but that Lothian, the agent, should pay the amount of the

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rent due, and take an assignment of the sequestration for his own security. This offer was not accepted; for, on the 23d of May, the landlord's agent wrote a letter declining to accept it. The reasons for this refusal are immaterial to the disposal of the question before your Lordships, as presented by the bill of exceptions.

Then comes this letter of the 24th of May, from Mr. Lothian to Mr. Gray: "I have received your "extraordinary letter of yesterday, and sent it to "Messrs. Graham for information to answer it. In "the meantime I have tendered you the whole money "for which you have taken warrant to roup, and "you declined it, only taking my obligation to pay "it. I have now to repeat I am ready to pay that "money to you, or your client Lieutenant Colonel "Gordon, on a receipt acknowledging that the money "is paid by me, and binding your client to grant "to me, at my expense, an assignation in the terms "mentioned in my said obligation, of which, as I "wrote it in your chambers, I have no copy. I will "thank you to send me a copy of it. I have only to "add, that if the money above referred to be not "accepted by you, I will lodge a minute in my own "name in the existing process of sequestration, and "consign the money with the Clerk of Court at your "client's expense." It does not appear that any answer was written to this letter, but an arrangement seems to have been made by the 28th of May, on which day the money was paid, and a receipt granted by Colonel Gordon (in the terms quoted) containing an obligation to assign the sequestration to a certain effect.

This having become the subject of a suit in the

Court of Session by the tenants against the landlord, complaining that they ought to be relieved from the effect of the sequestration, and raising another question, which it is not necessary now to discuss, as to the repairs, the Court of Session directed two issues. The issue applicable to the exception now under consideration was, "Whether, on or about the 12th day of "August 1837, the defender obtained from the sheriff "of Edinburgh a sequestration of all or any part of "the crop and stock of the pursuers on the said farm; "and whether, on or about the 23d of May 1838, the "defender wrongfully failed to relieve the pursuers "said crop and stock from the said sequestration, to "the loss, injury, and damage of the pursuers." One would suppose, from reading this issue, that the case set up was that, on the 23d of May, the appellant was under an obligation to relieve the respondents from the effect of the sequestration.

On the trial of the issues the Lord President, who presided at the trial (as it appears from the second exception), directed the jury in these terms: "The "Lord President did direct the said jury, in point of "law, as to the second issue, that tenders of the "arrears of rent having been made by Mr. Maurice "Lothian, in terms of his letters of the 18th and "24th of May 1838, and the sequestration not having "been withdrawn until the 28th of that month, the "said sequestration ought to have been withdrawn "after these offers, and more especially after that of "the 24th of May; and that the defender was, in law, "responsible to the pursuer for not withdrawing the "sequestration, quoad the sums contained in these "tenders."

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No one can mistake the effect of his language. It contains a distinct exposition of that which is intended to be laid down by the Lord President, in point of law, that the tender contained in the two letters of the 18th and 24th of May imposed an obligation in law on the landlord to withdraw the sequestration; that the landlord, having a sequestration against the tenants, on any one saying, "I will pay the arrears of rent, "provided you will grant to me an assignation of the "sequestration," the landlord was bound, by the law of Scotland, to accept that offer. If that be so, the opinion expressed by the learned judge who presided would be correct; but if otherwise, it would be exceptionable. It does not appear to me that the language of the letter is open to any ambiguity or doubt, but that it proceeds to express the only terms on which the agent of the respondent, Mr. Lothian, required the sequestration to be withdrawn; there was no payment of rent quà rent, but an offer to pay the same sum on the sequestration being assigned. Whether the word "withdraw" had a different meaning from the word "relieve" is immaterial, with reference to the opinion delivered to the jury by the learned judge, for the bill of exceptions must stand or fall by the legal effect of that which was laid down at the trial. It will not do to support the direction of the learned judge on other grounds or other facts, for the learned judge tells the jury that the effect of those two letters amounts in law to an obligation on the landlord to comply with this requirement of the letters.

But when the bill of exceptions came on for discussion in the Court of Session, that Court does not profess to support the law as propounded in the Lord President's

opinion; the judges do not say that it is right, or that it is wrong, but they find in other parts of the case, and in the evidence before the jury, and on a consideration of the whole of the merits of the case on which the jury have come to a decision, grounds for supporting the opinion so delivered by the learned Judge. Lord Mackenzie, followed by Lord Gillies and Lord Fullerton, founded their opinions, not on those two letters which were the foundation of the Lord President's opinion delivered to the jury, but they begin with the letter of the 28th of August 1837, which the learned Judge who presided at the trial had not in the slightest degree adverted to. It is unnecessary therefore to look at that letter to see what it contained, or whether it could amount to a contract to be carried into effect in 1838, with reference to the then state of the case. That letter does not appear to have been alluded to in the summing up, the learned Judge does not put it upon that; and the question is, whether the law he lays down to the jury is correct, —not whether the conclusion might be ultimately the same or not, but whether that which he lays down in stating the grounds of his opinion is correct in point of law. I do not find that the learned Judges express any opinion in favour of that which was laid down, which induces me to look further to see whether it can be so supported. The matter of fact appears to have been withdrawn entirely from the consideration of the jury, they having been told by the learned Judge, that in point of law, after receiving those two letters, the landlord was bound to withdraw the sequestration, or to relieve the tenants from the effect of it; and if that was correct, the jury had nothing to do but to assess

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the damages. They were told that these letters had raised that responsibility, when, in my opinion, there was nothing in these letters to raise that liability. There appears evidently to have been a mistake; the matter is not disposed of by the Court upon the grounds on which it is put by the learned Judge, that those two letters so promulgated to the jury amounted to an obligation, resting on those two letters alone, binding the landlord to withdraw the sequestration, or to relieve the tenants from the effect of it. In consequence it appears to me, that the interlocutors must be reversed, and the bill of exceptions allowed; and the case must be sent back to the Court of Session to do that which is just.

Judgment.

The House of Lords ordered and adjudged, That the said interlocutors complained of in the said appeal be and the same are hereby reversed: And it is declared, That the bill of exceptions ought to be allowed in respect of the second exception stated therein: And it is further ordered, That, with this declaration, the cause be remitted back to the Court of Session in Scotland, to proceed further therein as shall be just and consistent with this declaration, direction, and judgment.

BRUNDRETT, RANDALL, SIMMONS, and BROWN — G. & T. WEBSTER, Solicitors.